ORDINANCES & REGULATIONS

Ordinances & Regulations: Injunctions

Ware v. Polk County,
918 So. 2d 977 (Fla. 2d Dist. App. 2005)

When an individual has constructed a structure without obtaining a required permit, use of the structure may be enjoined until the required permit is obtained.

FACTS AND PROCEDURAL HISTORY

In 2003, Paul Ware purchased by tax deed three lots in a Polk County subdivision, and began construction of a structure on the lots without benefit of a building permit, as required by the Polk County Land Development Code (Code). Polk County Land Dev. Code (Fla.) § 110(B) (2003). A code investigator from the County notified Ware that he was violating the Code and instructed him to correct the violation by obtaining a building permit. Ware did not obtain the permit and was then required to appear before the Polk County Code Enforcement Board (Board). The Board determined that Ware was in violation of the Code and issued an order giving him thirty days to obtain a building permit, after which, the County would impose a fine of $250 per day. Ware never complied with the order. The County subsequently imposed a lien on the property.

Ware filed a complaint challenging the lien, and the County moved for summary judgment and a temporary injunction to enjoin Ware from utilizing the building until he obtained a permit. The trial court granted summary judgment in favor of the County, but ruled that the County improperly requested a temporary injunction. Both Ware and the County appealed.

ANALYSIS

The Second District Court of Appeal dismissed Ware's appeal of the summary judgment in favor of the County, noting that it was not a final order and, therefore, not appealable. The court then turned to the County's cross-appeal of the denial of the County's request for a temporary injunction.

To qualify for a temporary injunction, a party must show that (1) it will suffer irreparable harm if the judgment is not entered; (2) there is no other adequate legal remedy; (3) the party seeking the injunction has a legal right to the relief; and (4) public interest will be served by the injunction. *Randolph v. Antioch Farms Feed & Grain Corp.*, 903 So. 2d 384, 385 (Fla. 2d Dist. App. 2005). When a governmental entity pursues a temporary injunction to enforce one of its police powers, element (1) is presumed, and element (2) is ignored. *Metro Dade County v. O'Brien*, 660 So. 2d 364, 365 (Fla. 3d Dist. App. 1995). Because regulation of building construction is one of a county's police powers, the County satisfied the first two elements of the criteria for an injunction. The court noted that the County also satisfied the third element because the County had a clear legal right to seek injunctive relief. The trial court had reasoned that the County had no legal right to relief because it had failed in its initial complaint to request that Ware be prohibited from using the building until he obtained the permit. However, the Second District noted that a "wherefore clause" included in the County's motion specifically requested that Ware "not utilize the structure until it meets Building's requirements." *Ware*, 918 So. 2d at 979.

Finally, the court stated that the County satisfied the last element of the test because public interest is served when a county ensures that residents comply with local ordinances and requirements. Thus, the Second District reversed and remanded the case for entry of a temporary injunction against Ware, prohibiting him from utilizing the structure until the appropriate permit was obtained.

SIGNIFICANCE

Ware indicates that when a landowner fails to obtain a required building permit, a county can enjoin the landowner from utilizing the structure despite the fact that the building is complete. However, it is important for the government to include this request in its motion requesting relief.

RESEARCH REFERENCES

- 29 Fla. Jur. 2d *Injunctions* § 52 (Westlaw database updated Jan. 2006).

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 37 (Westlaw database updated Jan. 2006).

Traci McKee

Ordinances & Regulations: State Preemption

City of Kissimmee v. Florida Retail Federation, Inc.,
915 So. 2d 205 (Fla. 5th Dist. App. 2005)

A local ordinance that does not directly conflict with a state statute is presumed constitutional even if the local ordinance is more stringent than the related statute.

FACTS AND PROCEDURAL HISTORY

In 2002, the City of Kissimmee enacted a shopping cart retention ordinance. The ordinance required businesses with more than twenty shopping carts to install and maintain a shopping cart retention system to prevent carts from being removed from the premises. The ordinance provided penalties for businesses that failed to install or maintain an approved retention system. The Florida Retail Federation (Federation) sought declaratory and injunctive relief, alleging that the ordinance unconstitutionally conflicted with Section 506.5131 of the Florida Statutes. This statute prohibited the assessment of fines or costs against owners of shopping centers if the shopping carts were found on public property. The Federation contended that the installation of a retention system amounted to a "cost" that was prohibited by the statute. The trial court held that the ordinance was unconstitutional, and the City appealed.

ANALYSIS

While Article VIII, Section 2(b) of the Florida Constitution authorizes municipal governments to enact local ordinances that are not inconsistent with general law, a local government may not enact an ordinance that is in direct conflict with a state statute. *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1020 (Fla. 2d Dist. App. 2005). When the ordinance is not in direct conflict with the state statute, a presumption in favor of constitutionality applies. *Lowe v. Broward County*, 766 So. 2d 1199,

1203 (Fla. 4th Dist. App. 2000). The Federation argued that Kissimmee's ordinance violated the intent of Section 506.5131 of the Florida Statutes, by indirectly imposing a cost on shopping cart owners. The Fifth District noted that Section 506.5131 applied only to businesses whose shopping carts were found on public property. In contrast, the cart retention ordinance applied to all businesses with twenty or more shopping carts regardless of whether the carts made their way to public property. Additionally, the court noted that the ordinance did not impose a fine for carts found on public property, but rather, any fine would be for failure to implement the retention plan.

The court also drew a distinction between encouraging businesses to keep carts on their property and fining businesses for failing to retrieve carts from public property. Because the ordinance did not directly conflict with the statute, the Fifth District upheld the ordinance.

SIGNIFICANCE

This case illustrates the strength of the presumption in favor of the constitutionality of a local ordinance that is not in direct conflict with a state statute. The case reaffirms the broad home rule powers afforded local governments to regulate in areas not specifically preempted by state statute.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties & Municipal Corporations* § 187 (2005).

Shannon A. Treadway

Ordinances & Regulations: State Preemption

Florida Home Builders Association v. St. Johns County,
914 So. 2d 1035 (Fla. 5th Dist. App. 2005)

Notwithstanding an older state law authorizing counties to mandate the licensing of specialty contractors, a local ordinance requiring specialty contractors to obtain state or local licenses is superseded by a newer state law exempting certain specialty contractors from such licensing requirements, even when the local

ordinance was adopted prior to the newer statutory provision. When a local ordinance conflicts with a state law, the state law controls. Additionally, when two state laws conflict, recent laws control older laws, and specific laws control general laws.

FACTS AND PROCEDURAL HISTORY

The Florida Home Builders Association (HBA) sought to temporarily enjoin the enforcement of a St. Johns County ordinance that required specialty contractors to obtain licenses. This ordinance, adopted in 1976, required all specialty contractors to be licensed by the State or the County.

St. Johns County argued that it was authorized by Section 489.131(4) of the Florida Statutes to regulate specialty contractors. Section 489.131(4) provides that nothing in Chapter 489 of the Florida Statutes was intended to preclude any local regulation adopted prior to October 1, 1979, that regulated "the type of work required to be performed by a specialty contractor." Fla. Stat. § 489.131(4) (2005).

In 1993, the Florida Legislature adopted Section 489.113(2), prohibiting any contractor from engaging in the contracting business in Florida unless the contractor was certified or registered. An exception was incorporated into the statute for those whose work would not require a license under Section 489.105(3)(d)–(o) of the Florida Statutes, including specialty contractors. However, Section 489.113(2) also stated that the Section did not affect the application of local construction licensing ordinances.

Section 489.117(4)(e), on the other hand, stated that contractors who perform "specialty contracting services for the construction, remodeling, repair, or improvement of single-family residences" could do so "without obtaining a local professional license," provided they were properly supervised by a certified licensed contractor. Fla. Stat. § 489.117(4)(e) (2005).

The circuit court denied the HBA's request for an injunction, holding that the County's 1976 ordinance superseded Section 489.117(4)(e) because the ordinance was in place before Section 489.117(4)(e) was enacted by the Legislature. The HBA appealed.

ANALYSIS

A statute that addresses an issue in specific terms will supersede a statute covering the same issue in a general manner.

Maggio v. Fla. Dept. of Lab. & Empl. Sec., 899 So. 2d 1074, 1079 (Fla. 2005). Furthermore, when two state statutes conflict, the later statement of legislative intent, either temporally or in a statutory order, will prevail. *S.S.M. v. State*, 898 So. 2d 84, 85 (Fla. 5th Dist. App. 2004). The Fifth District Court of Appeal determined that because Section 489.117(4)(e) followed Section 489.113(2) and was more specific in its criteria, it controlled the licensing of specialty contractors. Additionally, the Fifth District rejected the County's argument that Section 489.131(4) authorized application of its 1976 ordinance. The court noted that Section 489.131(4) dealt with the regulation work "performed" rather than the licensing of specialty contractors. The absence of any specific language referencing licensing indicated that this Section was intended to address the actual work performed by specialty contractors, and not licensing criteria. Although the court held that Section 489.117(4)(e) controlled, it was unable to determine if the contractors fell into the specialty contractor exception. Thus, it affirmed the temporary injunction, but remanded the case to the circuit court to determine whether the contractors fell within the exception.

SIGNIFICANCE

Counties are free to enact ordinances requiring contractors to be licensed, as long as the ordinances do not conflict with state law. When there is a conflict, the state law will prevail, unless a specific exception is enumerated in the statute.

RESEARCH REFERENCE

- 8 Fla. Jur. 2d *Businesses and Occupations* § 218 (Westlaw database updated Jan. 2006).

Brian Edward Smith

Ordinances & Regulations: State Preemption

J-II Investments, Inc. v. Leon County,
908 So. 2d 1140 (Fla. 1st Dist. App. 2005)

A statute that prohibits a county from adopting an ordinance to restrict or regulate farming activity on agricultural land does

not preclude the enforcement of existing regulations unless stated within the statute.

FACTS AND PROCEDURAL HISTORY

A Leon County environmental compliance officer placed a stop work order on J-II Investments' property after detecting what he believed to be unpermitted development activities. Leon County regulations required that a company acquire a permit prior to any development activity. The County sought temporary and permanent injunctive relief to prevent the owners from continuing development activities without a permit. J-II Investments contended that because it was engaged in agricultural activity, the County lacked the authority to require a permit for its actions. The trial court entered summary judgment in favor of the County.

ANALYSIS

The Agricultural Lands and Practices Act (ALPA), Section 163.3162 of the Florida Statutes, provides that counties may not "adopt any ordinance, resolution, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation." Fla. Stat. § 163.3162(4) (2004). In this case, Leon County was seeking to enforce an existing regulation rather than adopt new standards for agricultural development. The First District Court of Appeal determined that ALPA prevented counties from "adopting" new ordinances related to agriculture, and reasoned that ALPA should not be construed to prohibit enforcement of pre-existing county regulations because the Legislature did not include the word "enforce" in the statute. If the Legislature had intended to prohibit enforcement, it could have included the term "enforce" in the statutory language. The court concluded that it could not impute legislative intent to prohibit enforcement of pre-existing ordinances restricting agricultural activities because the Legislature clearly differentiated such intent by the inclusion of the word "enforce" in other statutes. *See e.g.* Fla. Stat. § 163.3162(4) (2004); § 163.3174(a) (2004); § 403.7063 (2004). In this case, the County did not adopt an ordinance to limit agricultural activities; rather, it attempted to enforce a previously enacted ordinance. Because the County had the authority to enforce

agricultural ordinances, the First District affirmed the entry of summary judgment.

SIGNIFICANCE

This case interprets the statutory implications of ALPA that prevent counties from adopting new ordinances that limit agricultural activities. By interpreting the plain meaning of the statute, the court concluded ALPA does not prohibit counties from enforcing previously enacted regulations. Thus, counties maintain the right to enforce all regulations on agricultural activities that were in place before the enactment of ALPA.

RESEARCH REFERENCES

- 83 Am. Jur. 2d *Zoning and Planning* § 309 (Westlaw database updated May 2005).
- 2A Fla. Jur. 2d *Agriculture and Crops* § 1 (Westlaw database updated July 2005).

Hugh D. Higgins

Ordinances & Regulations: State Preemption

Phantom of Clearwater, Inc. v. Pinellas County,
894 So. 2d 1011 (Fla. 2d Dist. App. 2005)

If the Legislature does not expressly or impliedly preempt regulation of an issue, a county may enact its own regulations, so long as the regulations do not directly conflict with state law. In the event that part of the regulation directly conflicts with state law, then the court can sever that part of the regulation, leaving the rest intact, provided the severance does not negate the overall intent of the regulation.

FACTS AND PROCEDURAL HISTORY

Pinellas County adopted an ordinance that required businesses that sell fireworks to obtain a permit to do so. Pinellas County Code (Fla.) § 62-89 (2005). Prior to the effective date of the ordinance, Phantom of Clearwater, a fireworks vendor, sought a temporary injunction and declaratory action, alleging that the ordinance was facially unconstitutional because Chapter 791 of

the Florida Statutes preempted the ordinance. In the alternative, Phantom argued that the ordinance conflicted with Chapter 791, also making the ordinance unconstitutional.

The trial court denied Phantom's motion for a temporary injunction, holding that the ordinance was not preempted by and did not conflict with Chapter 791.

ANALYSIS

For express preemption, a statute must contain clear language stating that the Legislature intended to preempt a field of regulation. *Hillsborough County v. Fla. Rest. Assn.*, 603 So. 2d 587, 590 (Fla. 2d Dist. App. 1992). Courts will find implied preemption when language of the statute "is so pervasive as to evidence an intent to preempt" and public policy supports preemption. *Tallahassee Meml. Regl. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st Dist. App. 1996).

Chapter 791 regulates the use and sale of fireworks. The Chapter contains language indicating that it shall be applied uniformly statewide and that local law enforcement officials are responsible for its enforcement. Fla. Stat. § 791.001 (2005). However, while the statute regulates the use and sale of fireworks, it does not regulate businesses selling fireworks.

The Second District Court of Appeal stated that Chapter 791 does not imply legislative intent to preempt the regulation of the sale of fireworks because the Legislature specifically gave local governments the power to enforce the statute. The court also noted that the scheme of Chapter 791 is not pervasive, nor is there a public policy reason to presume preemption in the absence of an express provision to that end. The lack of express or implied legislative intent to preempt the field of fireworks regulation led the court to hold that a local government may enact ordinances regulating businesses that sell fireworks so long as the regulations do not directly conflict with Chapter 791.

Next, the court analyzed Phantom's alternative argument that the ordinance was in direct conflict with Chapter 791. An ordinance is in direct conflict with a state statute when complying with one provision causes a violation of the other. *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661, 664 (Fla. 3d Dist. App. 1976). While an ordinance imposing additional requirements is not in direct conflict with a state statute, one that

imposes additional criminal penalties is. The court found that the ordinance prescribed a penalty that was in addition to the statutorily provided penalties. This additional penalty caused the ordinance to be in direct conflict with Chapter 791. However, the ordinance also contained a severability clause that allowed a court to separate the conflicting provision from the rest of the ordinance. While a court does not have to recognize the severability clause, the Second District determined that it was possible to omit the sentence without changing the intent or purpose of the ordinance. *State v. Champe*, 373 So. 2d 874, 880 (Fla. 1978); *State ex rel. Boyd v. Green*, 355 So. 2d 789, 794 (Fla. 1978). Therefore, the court held the ordinance could coexist with Chapter 791 with the exception of the several penalty provision.

SIGNIFICANCE

This case affirms that counties are free to enact ordinances that do not directly conflict with state laws. If there is a conflict, when possible, a court will only sever the part of the ordinance that is in direct conflict with state law, leaving the remainder enforceable.

RESEARCH REFERENCE

- 56 Am. Jur. 2d *Municipal Corporations, Counties, and Other Political Subdivisions* § 393 (2000 & Supp. 2005).

Frances Shefter