Coates' Canons Blog: Outdoor Advertising: Winning the Preemption Game

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UPDATE September 2013: Legislation adopted by the 2013 General Assembly extends state law preemption to existing outdoor advertising signs that conform to state rules and local ordinances. Section 8(b) ofS.L. 2013 – 413 adds a new G.S. 136-131.2 to provide as follows:

> **§ 136-131.2.Modernization of outdoor advertising devices.**

No municipality, county, local or regional zoning authority, or other political subdivision shall, without the payment of just compensation as provided for in G.S.136-131.1, regulate or prohibit the repair or reconstruction of any outdoor advertising for which there is in effect a valid permit issued by the Department of Transportation so long as the square footage of its advertising surface area is not increased. As used in this section, reconstruction includes the changing of an existing multipole outdoor advertising structure to a new monopole structure.

Outdoor advertising owners along federal and state primary highways will not only be able to rebuild old signs and consolidate them. In addition, this language may well open the door to allowing them to replace traditional advertising displays with digital billboards. Note that local governments will not, in the absence of payment, to regulate this process.

Have your NCAA basketball tournament picks got you down? Is it too difficult to pick winners? Too many upsets and your predictions too uncertain? Well, I have pretty much a sure bet for you, a no-brainer, a slam dunk. In a head-to-head matchup between a state law and a local regulation, put your money on the state law. In the case of inconsistency between a North Carolina state law and a city or county regulation, the law of Tar Heel state government will prevail. What is it? It's preemption.

Many major program initiatives involve a role for cities and counties, for the state, and for the federal government. The relationships among the three levels of government may involve authorizing, prohibiting, providing incentives, directing, funding, reviewing, enforcing, jointly deciding, and delegating. These relationships differ from one program to another in innumerable ways. Legislators may certainly spell out clearly their preemptive intent with respect to these relationships in the legislation establishing an initiative, but surprisingly often don't. Local governments may be left to guess the scope of their permissible role. (See Shea Denning's 2010 blog concerning preemption in connection with traffic offenses here.)

A statute, administrative rule, or regulatory program adopted by a governmental unit is preempted if it is inconsistent with a statute, administrative rule, or regulatory program adopted by a higher level of government (a unit with superior legal authority). Fortunately the common-law principles for preemption are codified in the North Carolina General Statutes at G.S. 160A-174. There at least a half-dozen of them, but today let's consider just two.

- G.S. 160A-174(b)(5) provides that an ordinance is inconsistent with state or federal law if the ordinance "purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." In such a case an ordinance provision may be preempted even though there is no provision in state or federal law that directly addresses the identical matter. This is the "OCCUPANCY-OF-THE-FIELD" rule.
- G.S. 160A-174(b)(2) provides that an ordinance is inconsistent with state or federal law if the ordinance "makes unlawful an act, omission, or condition which is expressly made lawful by State or federal law." I call this the "LOCAL-NULLIFICATON" rule.

In perhaps no other field of North Carolina law has the matter of state-local preemption been litigated more frequently than

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with respect to the regulation of outdoor advertising. The Outdoor Advertising Act (G.S. 136-126 et seq.) was enacted in 1967 to ensure that North Carolina met federal standards for controlling billboards along its Interstate and Federal-aid Primary Highways Systems and that the state continued to receive a full allocation of federal highway funds. Among other things, the Act delegated authority to the North Carolina Department of Transportation (NCDOT) to adopt rules enforcing federal standards along these federal highway corridors.

In 1982 the Outdoor Advertising Act was amended to add G.S. 136-131.1. The statute essentially eliminated the ability of local governments to amortize signs made nonconforming by local ordinance by requiring them to pay "just compensation" whenever local action resulted in the "removal" of a nonconforming sign. This provision set the stage for a series of sign industry suits attacking local sign regulations on grounds that North Carolina's regulatory program, as administered by NCDOT, preempted all local regulation because it "occupied the field." According to these arguments, the law provided no room for local ordinances to regulate outdoor advertising along federal corridors; the state program effectively excluded local regulation.

These arguments, however, were repeatedly rejected in a series of cases. In Pine AOA Media v. Jackson County, 146 N.C. App. 470, 554 S.E.2d 657 (2001), the North Carolina Court of Appeals allowed Jackson County to apply a sign moratorium to a sign that was illegal under state law, even though the statute (G.S. 136-134) provided a period within which a violation of the state rules could be cured. Then the court in Lamar Outdoor Advertising v. City of Hendersonville, 155 N.C. App. 516, 573 S.E.2d 637 (2002), rejected this preemption theory again in allowing the city to enforce a rule that a sign owner could repair a damaged billboard only if it cost no more than 60% of the replacement cost of the sign. The court pointed out that the definition of "state law" in the Act included regulations adopted by a "political subdivision of the state." Indeed, NCDOT rules declared that conforming signs, in order to be rebuilt, could not conflict with local ordinances. Soon thereafter, the state's outdoor advertising control program was found not to occupy the field to the exclusion of local governments in both Morris Communications Corp. v. Bd. of Adjust. for City of Gastonia, 159 N.C. App. 598, 583 S.E.2d 419 (2003), *appeal dismissed*, 357 N.C. 658, *reh'g denied*, 358 N.C. 155 (2004) and Lamar OCI South Corp. v. Stanly County Bd. of Adjust., 186 N.C. App. 44, 650 S.E.2d 37 (2007), *aff'd in part and disc. rev. improvidently allowed in part*, 362 N.C. 670, 669 S.E.2d 322 (2008).

This series of setbacks caused the outdoor advertising industry to change both litigation tactics and legal theories. Over a decade ago the industry began an effort to have NCDOT rules rewritten and expanded to suit their interests and to set the stage for preemption arguments invoking the "local nullification" rule. Recall that a local ordinance provision may not nullify or prohibit what a state law (including NCDOT rules) expressly allows. In the 2003 Gastonia case cited above the zoning ordinance was interpreted by the zoning administrator to disallow any part of a nonconforming "sign structure" from being replaced. A sign company finally won a North Carolina appellate case by arguing that the Gastonia regulation was inconsistent with (and thus preempted by) a NCDOT rule that allowed the replacement of a "structural member."

This victory emboldened the industry to use the local nullification rule in other cases where a state rule expressly permitted a very specific activity. By the time of the Stanly County case mentioned above, DOT rules had been amended to include an obscure provision defining the "sign location/site" for any sign subject to NCDOT rules. The "site" of any sign (including nonconforming signs) was defined to include any area within 1/100th of a mile of the original sign location. Other rules implied that even a nonconforming sign could be moved anywhere behind the right-of-way line within a radius of up to 52.8 feet. In contrast the Stanly County zoning ordinance prohibited a nonconforming sign from being replaced or moved except to bring the sign into complete conformity with the county's ordinance. The Court of Appeals ruled that the county ordinance rule was preempted under the local-nullification rule (G.S. 160A-174(b)(5)), and the North Carolina Supreme Court affirmed on this issue.

More recent attempts to ensure that the Outdoor Advertising Act preempts key features of local regulation are evident in Senate Bill 183, currently being considered in this year's General Assembly. Section 4 of the bill amends the Act expressly to authorize the establishment of automatic changeable facing signs ("digital signs"), if certain location and dimensional requirements are met. Despite the longstanding power of local governments to set higher standards for new signs, the proposed language of the Act providing that these signs "shall" be allowed suggests that any local regulation that purports to prohibit such signs will violate the local-nullification rule. Other forms of state preemption are evidenced in the bill as well.

The future promises a number of rematches between state authority and local regulations. It may not always be easy to tell when a local government regulation is inconsistent with state law. But when it is possible to tell, you will want to place

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your bets on and make your picks in favor of the state.

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