OHIO

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Ohio constitution establishes home rule for counties that adopt charters. Only two—Cuyahoga (which contains Cleveland) and Summit (which includes Akron)—of the state's eighty-eight counties have adopted charters.[1] Municipal home rule is much more widespread.

Ohio Constitution

- Art. X, § 3. Framing, adopting, and amending county charter; referendum.

The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality).

[1] *See* County Comm'rs Ass'n of Ohio, Charter Government, available at https://www.ccao.org/charter-government (last visited Mar. 20, 2017).

- Art. XVIII, §3. Municipal powers of local self-government.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

HOME RULE STRUCTURE

Before 1912, Ohio's municipalities were mere instruments of the state legislature with only those powers conferred upon them specifically or by implication. By enactment of the 1912 amendment of Art. XVIII §3 (the "Home Rule Amendment"), the people of Ohio emancipated their municipalities from legislative bondage.[2] The Amendment grants municipal corporations two types of authority: the power of local self-government and the power to adopt and enforce local police, sanitary, and other similar regulations that are not in conflict with general laws of the state of Ohio. Included in "the power of local self-government" is the power to determine the compensation of employees and "the power of the purse."[3] In theory, local enactments that relate to "the power of local self-government" are immune to preemption, whereas those that are premised on the police power may be overruled if in conflict with *general* state laws.[4] When preemption is permissible, a state statute takes precedence when there is a conflict between the statute and the local ordinance or charter provision, including instances of implied preemption.[5] The Ohio Supreme Court has ruled inconsistently on whether supplemental or additional local regulation conflicts with a statute regulating the same type of conduct.[6]

Charter counties are empowered to choose their own form of government. Unlike in Florida, however, even charter counties may not overrule the ordinances of municipalities within them. State statutes circumscribe the powers of the 86 of 88 counties that do not have charters.[7]

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[2] DiBella v. Village of Ontario, 212 N.E.2d 679, 680 (Ohio 1965).
[3] City of Twinsburg v. State Employment Relations Bd., 530 N.E.2d 26, 29 (Ohio 1988) ("There is simply no more fundamental power of local self-government than the power of the purse."), *overruled on other grounds by* City of Rocky River v. State Employment Relations Bd., 539 N.E.2d 103 (Ohio 1989).
[4] *Twinsburg*, 530 N.E.2d at 28.
[5] *See*, *e.g.*, Am. Financial Servs. Assn. v. Cleveland, 858 N.E.2d 776, 784-85 (Ohio 2006) (finding conflict between Cleveland predatory lending ordinance and Ohio state law regulating mortgages).
[6] *Compare id.* at 786 (holding that Cleveland's regulation of predatory lending practices conflicted with the state's regulation of the conduct because it "regulate[d] the making of a loan authorized by the General Assembly,"), *with* Cincinnati v. Baskin, 859 N.E.2d 514, 519 (Ohio 2006) (holding that a local ban on semiautomatic weapons which was more restrictive than the statute did not conflict).
[7] State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Ct. Bd. of Commrs., 926 N.E.2d 600, 605 (Ohio 2010) (noting that the "concept of home rule . . . applies expressly only to municipalities, not to county governments").

As noted above, when a municipal ordinance or charter provision is an exercise of "the power of local self-government," it is presumptively immune from preemption by state legislation. The Ohio Supreme Court has defined "the power of local self-government" to be that which "relate[s] 'solely to the government and administration of the internal affairs of the municipality,'"[8] as well as the power to impose a municipal income tax.[9] While frequently defining this power in dicta, it is not clear that the Ohio courts have ever sustained a local ordinance or charter provision over conflicting state law on this basis. In the one instance in which the Ohio Supreme Court found a local provision to qualify as a matter of "self-government"—residency requirements for municipal employees—a majority of the court held that a separate, unrelated provision of the state constitution empowered the legislature to override the local law.[10]

Aside from matters of self-government, local "police, sanitary, and other similar regulations" can be preempted if in conflict with "general laws." The Ohio Supreme Court uses a four-part test to determine whether a statute is a general law:

> A statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.[11]

With respect to factor (1), the courts analyze the potentially preemptive statute in the context of other supplemental and complementary statutes and regulations.[12] A comprehensive enactment "need not regulate every aspect of disputed conduct" nor must it be "exhaustive."[13] At the same time, the lack of any statewide regulation of an issue may be a reason why a law fails this prong of the general test.[14]

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[8] Marich v. Bob Bennett Constr. Co., 880 N.E.2d 906, 914 (Ohio 2008) (quoting Beachwood v. Cuyahoga Cty. Bd. of Elections, 148 N.E.2d 921, 923 (Ohio 1958)). *See also id.* at 923 ("[L]egislation . . . falls within the area of local self-government [i]f the result affects only the municipality itself, with no extra-territorial effects . . . .").
[9] Gesler v. City of Worthington Income Tax Bd. of Appeals, 3 N.E.3d 1177, 1179 (Ohio 2013).
[10] Lima v. State, 909 N.E.2d 616, 621 (Ohio 2009) (holding that state legislature acted pursuant to Art. II, § 34 of constitution, which authorizes the General Assembly to enact laws "providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power"). In dissent, two justices would have held that municipal residency requirements were a matter of local self-government that the legislature could not overrule. *Id.* at 628 (Lanzinger, J., dissenting).
[11] Canton v. State, 766 N.E.2d 963, 968 (Ohio 2002).
[12] *See* Cleveland v. State, 942 N.E.2d 370, 375 (Ohio 2010) (holding that a statute which provided that only federal or state regulations can limit an Ohioan's right to bear arms was "part of a comprensive statewide legislative enactment…[because] [t]here are a host of state and federal laws regulation firearms.").
[13] *Id.* at 376.
[14] *E.g.*, *Canton*, 766 N.E.2d at 968 (finding state law regulating local zoning failed this prong because state lacked a comprehensive zoning scheme).

With respect to factor (2), "[t]here is no requirement that a statute must be devoid of exceptions to remain statewide and comprehensive in effect."[15] Additionally, "mere differences in the [local] interpretation and application of the statutory language are not enough to prevent a statute from applying to all parts of the state and operating uniformly throughout it."[16]

The Ohio courts have been somewhat inconsistent in applying factor (3). In some cases, the courts have held that the statutory withdrawal of all local regulatory authority over a certain subject violates this provision.[17] In others, such as when the state preempted local firearms regulation, the court has been more forgiving of aggressive state preemption of a field.[18] In that case, the court noted while applying the first factor that "[t]here are a host of state and federal laws regulating firearms," so perhaps the court did not view the preemptive law as creating a regulatory vacuum.[19]

Finally, with respect to factor (4), the rulings are also inconsistent. In an appellate opinion invalidating the state preemption of Cleveland's ban of trans fats, the court held that the state law did not meet this criterion because it imposed no rules regarding food nutrition and content.[20] In the firearms case, by contrast, the court again took a more forgiving approach to this factor.[21]

In sum, the case law in Ohio is quite inconsistent, but it at least provides a lifeline to cities seeking judicial protection against state preemption. Ironically, the original case solidifying the state judiciary's approach to general laws in the context of preemption arguably invalidated a state law designed to promote affordable housing and reduce exclusionary zoning.[22] Subsequent lower court decisions, however, have used the reasoning to uphold more progressive policies enacted by Cleveland against state preemption.[23]

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[15] *Marich*, 880 N.E.2d at 913.
[16] *Id.* at 914.
[17] *E.g.*, Cleveland v. State, 5 N.E.3d 644, 649 (Ohio 2014) (holding that a state statutory provision prohibited municipal licensing, regulation, or registering of tow companies violated third prong of *Canton*'s test for general law); Cleveland v. State, 989 N.E.2d 1072, 1083 (Ohio Ct. App. 2013) (invalidating state law that preempted Cleveland trans fat ban in part because it "curtail[ed] the city's police powers in this area").
[18] Cleveland v. State, 942 N.E.2d 370, 377 (Ohio 2010) (finding that state withdrawal of local power to regulate firearms did not violate this prong of *Canton* test).
[19] *Id.* at 375.
[20] *Cleveland*, 989 N.E.2d at 1083.
[21] *Cleveland*, 942 N.E.2d at 377.
[22] *Canton*, 766 N.E.2d at 159 (Pfeifer, J., dissenting) (arguing that invalidated state law was "an attempt to increase the stock of affordable housing in the state").
[23] *E.g.*, *Cleveland*, 989 N.E.2d at 1083 (trans fat ban); *see also* Cleveland v. State, No. CV-16-868008, slip op. at 4 (Ohio Ct. Common Pleas Jan. 30, 2017) (upholding city ordinance requiring city residency of certain city contractors despite state statute purporting to preempt).