

IN THE COUNTY COURT, FOURTH JUDICIAL
CIRCUIT, IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 16-2011-IN-015903

CITATION NO.: EGP-0019

CITY OF JACKSONVILLE, a political
Subdivision of the State of Florida,

Plaintiff,

v.

CALVIN SMITH D/B/A
SMITTY'S INTERNET BAR,

Defendant.

_____/

**ORDER DENYING MOTION TO DISMISS AND
FINDING THE JACKSONVILLE ORDINANCE CODE CONSTITUTIONAL**

This cause came on to be heard on the Defendant's Motion to Dismiss and Request for the Court to Issue an Order Finding the Jacksonville Municipal Ordinance Unconstitutional and the Plaintiff, City of Jacksonville's Response to Defendant's Motion to Dismiss and the Court being fully advised finds that the Defendant's attorney and Counsel for the Plaintiff, the City, appeared at the February 15, 2012 hearing for Oral Argument. Therefore, the Court makes the following findings:

1. On August 26, 2011, the City of Jacksonville Regulatory Compliance Coordinator, Mel Cook, issued a Citation to the Defendant, Calvin Smith d/b/a Smitty's Internet Bar, for operating an electronic gaming device without a permit in violation of Section 156.104, Ordinance Code.

2. Defendant seeks a dismissal from this Court asserting that Section 156.104, Ordinance Code, is impliedly preempted by Sections 849.0935 and 849.094, Florida Statutes. Specifically, Defendant states that Section 156.04, Ordinance Code is implicitly preempted by Florida Statutes Section 849.0935 and 849.094 because the comprehensive scheme for regulation of game promotional sweepstakes evidence the legislature's intent to preempt this field of law.

3. The City asserts that Chapter 156, Ordinance Code, seeks to regulate certain electronic gaming equipment not already regulated by the State of Florida. The Court agrees with the City.

4. Compliance with Chapter 156, Ordinance Code, does not cause the operator to violate Florida Statutes. To explain, Section 849.094, Florida Statutes, involves a broad regulation of prohibited actions on the "operators" as it relates to any and all "game promotions." The language prohibits the "operator" from "rigging" or "failing to award prizes" or "print[ing]false, deceptive or misleading...literature..." or "require[ing] a [conditional]... entry fee, payment or proof of purchase..." Section 849.094, Florida Statutes, also requires the operator, in certain situations, to "...file...a copy of the rules and regulations...establish a trust account...obtain a surety bond...", which is not inconsistent with the requirements of Chapter 156, Ordinance Code.

5. Comparatively, however, Chapter 156, Ordinance Code, seeks to regulate game promotions in connection with the use of an electronic device. In addition, the City requires the Defendant to obtain the required permit to operate the electronic gaming equipment. The statute does not address the use of electronic devices. Because the statute is silent on the

regulation of electronic gaming devices, the Jacksonville Ordinance Code does not prevent the operator from complying with the state statute, and therefore, no conflict exists between the local ordinance and the state regulation. See Phantom of Brevard, Inc. v. Brevard County, 3 So.3d 309 (Fla. 2009) where the Supreme Court stated the following:

There are two ways that a county ordinance can be inconsistent with state law and therefore unconstitutional. First, a county cannot legislate in a field if the subject area has been preempted to the State. See Phantom of Brevard at 314 *citing City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006)...Second, in a field where both the State and local government can legislate concurrently, a county cannot enact an ordinance that directly conflicts with a state statute. See Id. citing Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc., 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

6. Chapter 156, Ordinance Code does not conflict with either Sections 849.0935 or 849.094, Florida Statutes. For example, the sections do not address drawings by electronic devices as provided in Chapter 156, Ordinance Code. Therefore, the local ordinance does not conflict with Section 849.0935, Florida Statutes. See M&H Profit, Inc. v. City of Panama City, 28 So.3d 71 (Fla. 1 DCA 2010)(Held that an interpretation of state statutes which would impede the ability of local government to protect the health and welfare of its citizens should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action.) See also Pinellas County v. City of Largo, 964 So. 2d 847, 853-54 (Fla. 2d DCA 2007)(rejecting the use of implied preemption where the State legislation was not so pervasive as to evidence an intent to be the sole regulator).

7. The decision in Browning v. Sarasota Alliance for Fair Elections, 968 So.2d 637 (Fla. 2d DCA 2007) cited by the Defendant, as support, is inapplicable to this matter. In that case, Sarasota County sought to amend its charter by inserting language that required

mandatory, independent and random audits to be conducted by a nonpartisan auditing firm for election ballots. The appellate court held that such language conflicted with the Florida Election Code, stating:

As set forth throughout, the Election Code contains detailed provisions covering every aspect of the electoral process. The Election Code's ten chapters and 125 pages establish a detailed and comprehensive statutory scheme for the regulation of elections in Florida, thereby evidencing the legislature's intent to preempt the field of elections law, ...See Browning, 968 So.2d at 646.

8. In contrast, Sections 894.0935 and 894.094 do not compare in length or substance to the Election Code. See Id. The Florida Election Code, as stated in Browning, has an intended purpose "to obtain and maintain uniformity in the interpretation and implementation of the election laws" throughout Florida's 67 counties and Florida's 67 Supervisors of Elections. Browning, 968 So.2d at 646. The Florida legislature did not express the same intent in drafting Sections 894.0935 and 894.094. Moreover, Sections 894.0935 and 894.094, Florida Statutes, consist of two pages of law primarily addressing operator conduct, and drawings by chance.

It is hereby **ORDERED** and **ADJUDGED** the following:

- a. Defendant's Motion to Dismiss is **DENIED**.
- b. The Court finds that the Jacksonville Ordinance Code is constitutional.
- c. The parties shall coordinate, and request a mutual hearing date on the underlying violation.

Done and ordered in Chambers in Jacksonville, Duval County, Florida, this 4 day of ~~March~~^{April}, 2012.

JOHN A. MORAN

HONORABLE JOHN A. MORAN
COUNTY JUDGE

copies to:

Cherry Shaw, Assistant General Counsel
Office of General Counsel
117 W. Duval Street
Jacksonville, Florida 32202

James Lewis, Esq.
Suite 200, 200 SE 6th Street
Ft. Lauderdale, FL 33301