

IN THE EIGHTH JUDICIAL CIRCUIT COURT
IN AND FOR ALACHUA COUNTY, FLORIDA
APPELLATE DIVISION

ALACHUA COUNTY, a charter county
and political subdivision of the State of Florida,
Appellant,



v.

Case No.: 01-2020-AP-0002
LT No.: 01-2019-IN-000247

WILLIAM SCHAUS,
Appellee.

ORDER ON APPEAL

HON. DAVID P. KREIDER, Circuit Judge
HON. JAMES P. NILON, Circuit Judge
HON. CRAIG C. DETHOMASIS, Circuit Judge

An Appeal from the Alachua County Court, Judge Kristine Van Vorst
For Appellant: Corbin F. Hanson, Esq., Senior Asst. County Attorney
For Appellee: Jesse Smith, Esq.

2020 SEP 30 AM 11:06
J. J. JESS SMITH, ESQ.
CLERK OF COURTS
ALACHUA COUNTY, FL
FILED
ORDER

PER CURIAM.

Appellant seeks review of an order declaring that an Alachua County ordinance¹ is unconstitutional, preempted by Florida statutes, and in conflict with Florida statutes. Pure questions of law, such as the constitutionality of a law, are reviewed de novo. *Putnam Cmty.*

¹ Alachua County Code Sec. 114.09. - Nighttime airboat curfew.

- (a) The most appropriate solution to the disturbance of sleep, peace, and welfare of residents caused by the excessive noise generated by airboats is to impose a nighttime curfew on airboats.
- (b) Therefore:

- (1) No person shall operate an airboat in Alachua County between 7:00 p.m. and 7:00 a.m., with exceptions for government airboats operated in the line of duty by authorized personnel, and private airboats authorized by law enforcement personnel during specific emergency incidents.
- (2) Airboat means a vessel that is powered by an internal combustion engine with an airplane-type propeller mounted above the stern, used to push air across a set of rudders. Operate means to be in command of, or in physical control of, an airboat.
- (3) This section shall be enforced by any code enforcement officer of Alachua County or any duly authorized law enforcement officer having authority through any enforcement mechanism authorized in the Alachua County Code, including but not limited to injunction, code violation, civil action or misdemeanor violation.
- (4) As established in section 24.16, a first violation shall carry a Class IV penalty and subsequent violations shall carry Class V penalties for each violation.

(Res. No. 2010-113, § 1(Exh. A), 11-23-10; Ord. No. 2018-20, § 1, 9-25-18)

Med. Ctr. v. Florida Birth-Related Neurological Injury Comp. Ass'n, 204 So.3d 598, 601 (Fla. 1st DCA 2016).

Constitutionality

Appellant argues that the trial court erred by concluding that the Nighttime Airboat Curfew Ordinance impacted a fundamental right (i.e. use and enjoyment of the Public Trust) and, therefore, was subject to strict scrutiny analysis. We agree. “Assuming that the right to navigation is a constitutional right in the sense in which [the parties] use the term, this does not automatically make it a *fundamental* right meriting strict scrutiny.” *Murphy v. Department of Natural Resources*, 837 F.Supp. 1217, 1220 (S.D. Fla. 1993). Other uses of the Public Trust, such as fishing, have similarly been held not to be a fundamental right. *Lane v. Chiles*, 698 So.2d 260, 263 (Fla. 1997). Therefore, it was error to declare the Ordinance unconstitutional under a strict scrutiny analysis.

As this Court finds the remaining issues dispositive, we decline to consider whether the Ordinance passes constitutional muster under a rational basis test.

Preemption

“Counties in Florida are given broad authority to enact ordinances...The legislature can preempt that authority and may do so either expressly or by implication.” *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005). Appellee has conceded that the Ordinance is not expressly preempted by any statute.

“Implied preemption should be found to exist only in cases where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.” *Tallahassee Memorial Regional Medical Center v. Tallahassee Medical Center*, 681 So.2d 826, 831 (Fla. 1st

DCA 1996). “The scope of the preemption should also be limited to the specific area where the Legislature has expressed their will to be the sole regulator.” *Id.*

The Florida Legislature implicitly expressed their will to be the sole regulator of vessel engine noise through statutes such as § 327.391, Fla. Stat. (“Airboats regulated”) and § 327.65, Fla. Stat. (“Muffling Devices”). Of particular significance is § 327.65(2)(a), Fla. Stat., which states:

Any county wishing to impose additional noise pollution and exhaust regulations on vessels may, pursuant to s. 327.60(2), adopt by county ordinance the following regulations:

1. No person shall operate or give permission for the operation of any vessel on the waters of any county or on a specified portion of the waters of any county, including the Florida Intracoastal Waterway, which has adopted the provisions of this section in such a manner as to exceed the following sound levels at a distance of 50 feet from the vessel: for all vessels, a maximum sound level of 90 dB A.
2. Any person who refuses to submit to a sound level test when requested to do so by a law enforcement officer is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

While this statute allows localities to impose additional noise pollution and exhaust regulations, it specifies the exact language they must use. “Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another.” *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla. 1996). By stating which regulations can be adopted by county ordinance, it implies that counties cannot adopt any other ordinances concerning noise pollution regulation. The Nighttime Airboat Curfew Ordinance at issue does not conform to the language set forth in § 327.65(2)(a), Fla. Stat.

Appellant argues that the Ordinance is not preempted because it regulates airboat operation, not noise pollution, and does not set a different maximum sound level as the one proscribed in § 327.65(2)(a)(1), Fla. Stat. Given that the stated purpose of the Ordinance is to protect “the disturbance of sleep, peace, and welfare of residents caused by the excessive noise generated by airboats,” we find that Appellant’s argument is disingenuous. The stated purpose

and practical effect of the Ordinance is to set a maximum sound level of 0 dB A from 7PM to 7AM for airboats. Therefore, the Ordinance intrudes on this specific area where the Legislature has expressed their will to be the sole regulator and is preempted by state law.

Conflict

“[I]f an area of law is not preempted by the state law, then a city can pass ordinances concurrently on subjects regulated by state statute. But an ordinance, which is inferior to a state statute, cannot forbid what the statute expressly licenses, authorizes or requires. Nor may it authorize what the statute forbids.”³ *F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d at 584–85.

As discussed in the previous section, the Ordinance imposes a stricter noise pollution standard for airboats than that expressly allowed by § 327.65, Fla. Stat. Therefore, the full Ordinance is in conflict with state law.

Additionally, § 327.60(2)(e), Fla. Stat. prohibits adoption of any ordinance or local regulation that discriminates against airboats, unless it is adopted by a two-thirds vote of the governing body enacting such ordinance. By limiting the curfew to airboats, the Ordinance unquestionably discriminates against airboats.

The governing body of Alachua County is the five-member board of county commissioners. *Alachua County Code* Sec. 2.2(A). The Ordinance was adopted and enacted by the Commission by a vote of 4-0, which is above the two-thirds threshold required for an ordinance discriminating against airboats. The enactment of the Ordinance complies with the plain language of § 327.60(2)(e), Fla. Stat.

However, there was a second vote by the Commission in 2018 which modified Alachua County Code Sec. 114.09(b)(3)-(4), the enforcement clauses of the Ordinance. If an

extraordinary majority is required by Florida Statutes, the affirmative vote of an extraordinary majority of the full Commission is required, *whether all members are present or not*. See Alachua County Rules of Procedure for Meetings, Section VII(E). The vote to modify Alachua County Code Sec. 114.09(b)(3)-(4) was approved by a vote of 3-1. 3 votes out of 5 is only 60%, which is below the two-thirds required by § 327.60(2)(e). Therefore, Alachua County Code Sec. 114.09(b)(3)-(4) are in conflict with state law.

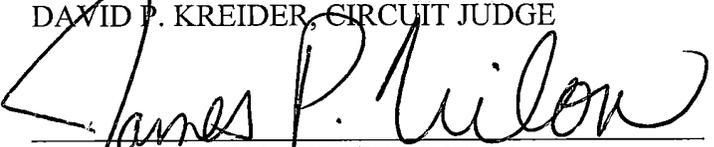
Conclusion

The Nighttime Airboat Curfew Ordinance is invalid because it is impliedly preempted by and in conflict with state law. Accordingly, the order of dismissal is **AFFIRMED**.

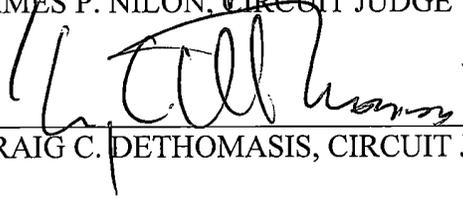
DONE AND ORDERED in Alachua County, Florida, on September 29, 2020.



DAVID P. KREIDER, CIRCUIT JUDGE



JAMES P. NILON, CIRCUIT JUDGE



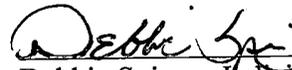
CRAIG C. DETHOMASIS, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing was furnished on September 29, 2020 to:

Corbin F. Hanson, Esq.
cfhanson@alachuacounty.us
cwilson@alachuacounty.us
CAO@alachuacounty.us

Jesse Smith, Esq.
Jesse@putclientsfirst.com


Debbie Spivey, Judicial Assistant