

MEMORANDUM

FROM: Mary Catherine Roper, Deputy Legal Director, ACLU of Pennsylvania
DATE: May 15, 2018
RE: Legality of creating a municipal summary offense for possession of marijuana in Allentown, PA

In 2015, we offered our opinion on the legality, under Pennsylvania law, of a proposal by the City of Pittsburgh to create a local civil penalty for possession of small amounts of marijuana, similar to the 2014 ordinance passed in the City of Philadelphia. We concluded that Pittsburgh had the authority to adopt such an ordinance so long as the ordinance did not attempt to preclude the application of state penalties for the possession of marijuana. I am attaching that memorandum, which we believe is still an accurate statement of the law.

The purpose of today's memorandum is to address the argument made by the District Attorney of Lehigh County, James B. Martin, that Allentown's creation of a municipal summary offense for possession of marijuana would be preempted by Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act ("Controlled Substance Act" or "the Act"). 35 P.S. § 780-101 et seq. We respectfully disagree.

Attorney Martin argues that such an ordinance would be preempted as an attempt to "alter the penalties" set forth in the Act; that it would create an "obstacle to the execution of the full purposes and objectives" of the Act; and that the Act demands uniform application and therefore precludes any additional regulation of drug possession. None of these arguments bars the creation of a municipal offense of marijuana possession with a lesser grading than the Act.

Our primary authority for our conclusion is the recent Pennsylvania Supreme Court decision – not referenced by Attorney Martin – upholding the authority of the City of Philadelphia to enact local controls on drug paraphernalia. *See Holt's Cigar Co. v. City of Philadelphia*, 608 Pa. 146 (2011). That case did strike down part of Philadelphia's law: a provision that made it unlawful to sell items that could be used either legally or illegally near a school, without regard to whether the seller had reason to believe the items would be used illegally. The Court explained that state law forbade the selling of these so-called "dual use" items only when the seller had reason to believe they would be used illegally. The Court therefore found an "irreconcilable conflict" between the two enactments because the local ordinance would forbid behavior that the state law was carefully crafted to allow. *Id.* at 164-65.

We refer to the *Holt's Cigar* decision both because it has this detailed explanation of what it means for a local ordinance to have an "irreconcilable" conflict with the Act, and because it holds, contrary to Attorney Martin's argument, that the Act does not prohibit local regulation of controlled substances in the absence of such a conflict.

Specifically, the Supreme Court, in *Holt's Cigar*, rejected the argument that the Controlled Substance Act prohibits local regulation in order to create uniformity in the regulation of controlled substances – a concept known in the law as "field" preemption: "[T]he General Assembly's intent was not to occupy the entire field with the Act; rather, it was to allow

consistent local ordinances relating to the possession, sale, or use of drug paraphernalia. The question before us is whether the challenged ordinance is consistent or irreconcilably conflicts with the Act.” *Holt’s Cigar*, 608 Pa. at 163-164. The Court was analyzing a regulation concerning drug paraphernalia, not one about drug possession, but the Act doesn’t say anything about requiring uniformity in laws regarding drug possession. The provision that Attorney Martin references comes from the model law that formed the basis of the Pa. Controlled Substance Act. That model law was created, as it says, “to make uniform the law with respect to the subject of this act **among those states** which enact similar legislation.” 35 P.S. § 780-141 (emphasis added). The Pennsylvania Supreme Court did not pay any attention to that provision in *Holt’s Cigar* and no court has ever held that it prohibits local regulation.

In fact, it would be extraordinary for any court to hold that the Controlled Substances Act bars local regulation of controlled substances. The concept of “field” preemption is quite disfavored, and our Supreme Court has observed again and again that it almost never applies field preemption, “affirming” in case after case “the stringency of our preemption precedent by noting that, as of that writing, we had found preemption only in the areas of alcoholic beverages, anthracite strip mining, and banking.” *Nutter v. Dougherty*, 595 Pa. 340, 361-362 (2007) (citing *Mars Emergency Med. Servs. v. Township of Adams*, 559 Pa. 309, 740 A.2d 193, 195 (Pa. 1999)). See also *Hoffman Mining Co. v. Zoning Hearing Bd.*, 612 Pa. 598, 609-610 (2011); *Fross v. County of Allegheny*, 610 Pa. 421, 436 (2011); *Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel*, 575 Pa. 479, 489-490 (2003); *Council of Middletown Township v. Benham*, 514 Pa. 176, 182 (1987).

The proper standard for determining whether Allentown’s proposed ordinance “irreconcilably conflicts” with the Controlled Substances Act is, instead, the standard applied by the Supreme Court in *Holt’s Cigar*:

[I]t has long been the established general rule, in determining whether a conflict exists between a general and local law, that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, **a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable.**

Holt’s Cigar, 608 Pa. at 154 (internal citation omitted, emphasis added). One thing that is crystal clear from the *Holt’s Cigar* decision is that creating a local law with a different penalty is not an irreconcilable conflict, as long as the local law does not permit what the Act forbids or forbid what the Act permits: “Our focus is directed toward the particular conduct proscribed by the Act and by the ordinance; **the nature or severity of the penalties imposed is not determinative** and does not eliminate the conflict arising from the discrepancy with respect to mens rea for a particular course of proscribed conduct.” *Id.* at 165 (emphasis added).

For these reasons, we believe that the analysis we set forth in our 2015 memorandum remains applicable, and that a local ordinance creating a summary offense for possession of marijuana is allowed under Pennsylvania law.