# Alcoholic Beverage Regulation and Local Governments

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New York State Liquor Authority

# 2006 N.Y. AG LEXIS 4

Office of the Attorney General of the State of New York

2006 N.Y. Op. (Inf.) Att'y Gen. 2;

**Reporter**
2006 N.Y. AG LEXIS 4 *; 2006 N.Y. Op. (Inf.) Att'y Gen. 2;;

## Informal Opinion No. 2006-2; INFORMAL OPINION

February 15, 2006

## Core Terms

alcoholic beverage, local law, preempt, state law, municipal, regulatory scheme, home rule, underage, local legislation, vending machine, consume, obscene, tobacco, ban

## Syllabus

**[*1]**

N.Y. CONST. Art. IX, § 2(c)(10); PENAL LAW §§ 260.20(2), *260.21(1)*; ALCOHOLIC BEVERAGE CONTROL LAW §§ 65(1), 65(5), 65-a, 65-b(2)(a),(b), 65-c, 65-d, 79-c(l), 99-f, 100(2-a), (2-b), 106(17), 126(2); GENERAL OBLIGATIONS LAW §§ 11-100(1), 398-C, 399-d; MUNICIPAL HOME RULE LAW § 10(1)(ii)(a)(12); TAX LAW § 480-a; PUBLIC HEALTH LAW Art. 13-E; CH. 799, 1992 N.Y. LAWS 4202; *PUBLIC HEALTH LAW §§ 1399-aa - 1399-mm*.

Enactment of "teen party host" local law is not preempted by state law.

**Request By:** Michael L. Klein

Town Attorney

Town of Ramapo

237 Route 59

Suffern, New York 10901

**Opinion By:** KATHRYN SHEINGOLD, Assistant Solicitor General, In Charge of Opinions

## Opinion

You have requested an opinion regarding the authority of the Town to enact **[*2]** a local law that would prohibit any person over 16 years of age from hosting a party at a premises under his or her control where five or more minors

(meaning any person under 21 years of age) are present and alcohol is being consumed by any minor. The penalty for violating the local law would be a fine ranging from $ 250 to $ 1000. You have explained that the purpose of the proposed local law is to prevent underage drinking. You have asked whether the local law is preempted by state law.

The Legislature has enacted a number of statutes generally restricting access to alcoholic beverages by underage individuals. Several of these provisions are directed towards persons other than the underage drinker: a person is prohibited from giving, selling, or causing to be given or sold any alcoholic beverage to a person less than 21 years old, [1] *Penal Law § 260.20(2)*; see also *Alcoholic Beverage Control Law § 65(1)* (prohibiting selling, delivering, or giving away, or causing or permitting or procuring to be sold, delivered, or given away any alcoholic beverage to any person actually or apparently under the age **[*3]** of 21 years); and from misrepresenting the age of a person under the age of 21 years for the purpose of inducing the sale of any alcoholic beverage to such person, *Alcoholic Beverage Control Law § 65-a*. Moreover, a person who knowingly causes the intoxication or impairment of ability of a person under the age of 21 years by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for that minor may be civilly liable to a third party who is injured by reason of that intoxication. [2] *General Obligations Law § 11-100(1)*. Related provisions of the Alcoholic Beverage Control Law direct that an entity licensed to sell alcoholic beverages may accept as written evidence of age only certain types of documentation. [3] *Alcoholic Beverage Control Law § 65-b(2)(b)*. Licensees also must conspicuously display a notice regarding the illegality of the sale or giving of alcoholic beverages to persons under the age of 21 years and of the presentation of identification that is false, fraudulent, or not that of the presenter for the purpose of purchasing or **[*4]** attempting to purchase alcoholic beverages. Id. § 65-d.

Other statutes are directed towards the underage persons themselves: an underage person is prohibited from presenting or offering to a licensee under the Alcoholic Beverage Control Law any written evidence of age that is false, fraudulent, or not actually his or her own for the purpose of purchasing or attempting to purchase any alcoholic beverage, *Alcoholic Beverage Control Law § 65-b(2)(a)*; and from possessing any alcoholic beverage with the intent to consume it, id. § 65-c. **[*6]** [4]

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[1] The exceptions to this prohibition are (1) the parent or guardian of a person under the age of 21 years or (2) a person who gives an alcoholic beverage to a person under the age of 21 years who is a student in a curriculum licensed by the State Education Department and who is required to taste or imbibe alcoholic beverages in courses that are part of the required curriculum; the alcoholic beverages must be used only for instructional purposes during classes. *Penal Law § 260.20(2)*; see also *Alcoholic Beverage Control Law § 65(5)*. The Town's proposed law appears to recognize the parent-child exception, as it does not apply to "conduct between a minor child and his or her parent or guardian." Proposed Ramapo Teen Party Local Law § 2(B). Moreover, the "teen party host" prohibition applies "except as otherwise permitted by law." Id. § 2(A).

[2] The supplier of the alcoholic beverage must have had knowledge or reasonable cause to believe that the drinker was under the age of 21 years. *General Obligations Law § 11-100(1)*.

[3] A licensee may accept only (1) a valid driver's license or non-driver identification card issued by the Commissioner of Motor Vehicles, the federal government, any United States territory, commonwealth or possession, the District of Columbia, a state government within the United States, or a provincial government of the dominion of Canada, (2) a valid passport issued by the United States government or any other country, or (3) an identification card issued by the armed forces of the United States. *Alcoholic Beverage Control Law § 65-b(2)(b)*.

[4] Also restricted are the entrance onto business premises on which alcoholic beverages are sold or given away, ***Penal Law § 260.21(1)***; see also *General Business Law §§ 398-c* and *399-d*; the ability to place an order for an out-of-state direct shipment of wine, *Alcoholic Beverage Control Law § 79-c(l)*; access to alcoholic beverages through vending machines in hotel rooms, id. § 106(17); and employment by establishments dealing with alcoholic beverages, id. §§ 99-f, 100(2-a) and (2-b), 126(2).

The Town's proposed local law is directed towards a third group of persons: a host providing access to premises under his or her control, whether or not he or she is supplying or consuming alcoholic beverages. [5] As explained below, we are of the opinion that the State has not preempted this type of local legislation.

**[*7]**

**ANALYSIS**

A town has broad power to enact local laws pursuant to the law of municipal home rule, including those relating to the safety, health, and well-being of persons within the town. [6] See *N.Y. Constitution article IX, § 2(c)(10)*; *Municipal Home Rule Law § 10(1)(ii)(a)(12)*. The town may adopt these local laws pursuant to its home rule power as long as they are "not inconsistent with the provisions of the constitution or not inconsistent with any general law" [7] and "except to the extent that the legislature shall restrict the adoption of such a local law. " *Municipal Home Rule Law § 10 (1)(ii)*.

The preemption doctrine constitutes a fundamental limitation on home rule powers. *Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377 (1989).* Where the Legislature has expressed an intent to preempt a field of regulation, a municipality may not legislate in that field absent clear and specific authorization. *Robin v. Incorporated Village of Hempstead, 30 N.Y.2d 347, 350-51 (1972).* This limitation "embodies the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern." *Albany Area Builders, 74 N.Y.2d at 377,* quoting *Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 497 (1977).* Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's interest, even if the terms of the local law do not directly conflict with a state statute. Id. at 377. Such laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding **[*9]** policy concerns. *Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91, 97 (1987).* The mere fact, however, that the state law and the proposed local law would touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area. *Id. at 99.*

The Legislature's intent to preempt a field of regulation need not be express, but may be implied from the nature of the subject matter being regulated and the purpose and scope of the state legislative scheme, including the need for statewide uniformity in a given area. *Albany Area Builders, 74 N.Y.2d at 377.* Typically, courts have relied upon an expression of policy or the presence of a comprehensive and detailed regulatory scheme to find that an area of law has been preempted. [8] See *Consolidated Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105 (1983).*

As discussed above, under state law, a person under 21 years may not present false identification for the purpose of purchasing alcoholic beverages, nor may he or she possess an alcoholic beverage with the intent to consume it. *Alcoholic Beverage Control Law §§ 65-b(2)(a)*, *65-c*. No person, except a person who fits within a statutory exception, may provide an alcoholic beverage to a person under the age of 21 years, nor may any person misrepresent the age of a person under the age of 21 years for the purpose of inducing a sale of an alcoholic beverage to that person. *Penal Law § 260.20(2)*; *Alcoholic Beverage Control Law §§ 65(1)* and *65-a*. Supplying a minor with

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[5] A "host" under the proposed local law may well simultaneously fall into one of the other groups, either by providing alcoholic beverages to persons under the age of 21 years, or by him- or herself being a person under the age of 21 years who possesses an alcoholic beverage with the intent to consume it.

[6] You have indicated that the proposed local law would serve this purpose.

[7] See Op. Att'y Gen. (Inf.) No. 86-74 (a municipality may not enact a local law banning consumption of alcoholic beverages in public or private places by anyone under the age of 21 years because it would be inconsistent with state law) .

[8] We note that the Alcoholic Beverage Control Law has been held to be preemptive with respect to the "field of regulation of establishments which sell alcoholic beverages. " ***People v. De Jesus, 54 N.Y.2d 465, 467 (1981).*** The Town's proposed law appears to fall outside the scope of that field of preemption, as it does not apply to "any location or place regulated by the New York State Liquor Authority." Proposed Ramapo Teen Party Local Law § 2(C).

alcoholic beverages may render a person civilly liable to a third party injured as a result the minor's intoxication. *General Obligations Law § 11-100(1)*. We are of the opinion that this regulatory scheme does not preempt a local law of the type proposed by the Town.

With respect to access **[*11]** to alcoholic beverages by underage persons, the state statutes do not include an express statement of preemption. Moreover, none of them include a statement of policy indicating an intent to preempt local regulation or an expression of need for uniform control of access to alcoholic beverages by minors.

The more difficult question is whether the statutes constitute a comprehensive and detailed regulatory scheme indicating that the Legislature has "evinced its desire to preclude the possibility of local regulation, " *Jancyn, 71 N.Y.2d at 98.* On balance, we believe that they do not. Rather, we believe that the state legislation is "not so broad in scope or so detailed as to require a determination" that it has superseded all local legislation. *Id. at 99.* We are of the opinion that the regulatory scheme is comparable to others that have been found by New York courts to have no preemptive effect. See, e.g., id. (state scheme regulating the sale and use of certain sewer system cleaning additives in Suffolk and Nassau Counties not sufficiently broad in scope or detailed as to require conclusion of preemption where **[*12]** only certain toxic chemicals were banned, the Commissioner of Environmental Conservation was not vested with exclusive jurisdiction, and no direct controls at local level were imposed); *People v. Judiz, 38 N.Y.2d 529 (1976)* (state law prohibiting possession of toy gun with intent to use it unlawfully against another did not preempt local law prohibiting possession of toy guns resembling in specific ways real guns); *Zorn v. Howe, 276 A.D.2d 51, 54* (3d Dep't 2000) (state law governing eviction from leased premises because of illegal business activity conducted on premises did not preempt local law establishing illegal drug use and possession as basis for eviction; "the mere fact that the Legislature chose to address illegal business activity . . . in no way evidences an intent to preclude a municipality from exercising its municipal home rule power by similarly addressing illegal private activities"); *People v. Ortiz, 125 Misc. 2d 318, 329* (state law regulating weapons did not preempt local law proscribing possession or carrying of knives with blades at least four inches long without a lawful **[*13]** purpose; "silence by the State on a particular issue should not be interpreted as an expression of intent to preempt" ); but see *Matter of Penny Lane/East Hampton, Inc. v. County of Suffolk, 191 A.D.2d 19* (2d Dep't 1993) (Penal Law provisions dealing with obscenity preempted local law prohibiting display of obscene materials where state law established complete ban on obscene material and on dissemination to minors of obscene materials, provided for the seizure and destruction of obscene materials, and established criminal penalties for the public display of offensive sexual materials); *Dougal v. County of Suffolk, 102 A.D.2d 531* (2d Dep't 1984) (State enacted comprehensive and detailed regulatory scheme in the field of drug-related paraphernalia and thus preempted local law regulating the sale of certain merchandise characterized as drug paraphernalia; legislative scheme included total ban on sale of drug-related paraphernalia, prescribing criminal and civil penalties for selling or offering to sell such items, authority for the commencement of injunctive actions by local officials against violators, and authority for the **[*14]** destruction of specified items seized, as well as detailed instructions concerning the procedures to be employed locally in implementing the ban), aff'd, *65 N.Y.2d 668 (1985).*

We find particularly instructive the decisions in *Vatore v. Commissioner of Consumer Affairs, 154 Misc. 2d 149 (N.Y. Sup. Ct. 1992),* rev'd, *192 A.D.2d 520* (2d Dep't 1993), rev'd, *83 N.Y.2d 645 (1994),* in which state laws regulating access to tobacco products by minors were ultimately held not to preempt local legislation in the field. At issue in Vatore was a New York City law prohibiting the siting of tobacco-product vending machines in public places other than taverns. *83 N.Y.2d at 647.* The purpose of the local law was to reduce the access of minors to tobacco products. Id. The local law was challenged, in part on the ground that it was preempted by state law. *Id. at 648.* In support of this argument, the plaintiffs cited four state statutes, including *Penal Law § 260.20*, [9] prohibiting **[*15]** the sale of tobacco to a person under 18 years. [10] *Id. at 648 n.1; 154 Misc. 2d at 152.* Supreme Court concluded that the

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[9] The plaintiffs also cited *Tax Law § 480-a*, requiring the registration of dealers and vending machines with the State Department of Taxation and Finance; ***General Business Law § 399-e***, requiring the posting of a notice on the machine regarding the prohibition of the sale of cigarettes to minors; and Public Health Law article 13-E, regulating smoking indoors in buildings open to the public. *154 Misc. 2d at 152.*

[10] This provision was subsequently recodified at ***Penal Law § 260.21***.

Legislature had not adopted a comprehensive scheme of regulation that preempted the local law. *154 Misc. 2d at 152.* In 1992, while an appeal of the Supreme Court's decision was pending, the State enacted the *Adolescent Tobacco-Use Prevention Act. 83 N.Y.2d at 648.* Based on this enactment, the Appellate Division found that the local law was preempted and thus invalid. *192 A.D.2d at 521.* The Appellate Division agreed, however, with Supreme Court that, prior to the 1992 enactment, the local law had not been preempted. Id.

The Court of Appeals addressed only the issue of whether the local law was preempted by the Adolescent Tobacco-Use Prevention Act, [11] and held that it was not. *83 N.Y.2d at 647, 650.* The Act did not express any general preemptive intent. *Id. at 649.* Moreover, the Court found absent from the Act any expression of need for uniform statewide control of tobacco-product vending machines. *Id. at 650.* The Court also concluded that the statutory scheme was not so "broad and detailed in scope as to require a determination that it has precluded all local regulation in the area, particularly where, as here, the local law would only further the State's policy interests." Id.

As the Court of Appeals found in Vatore with respect to the Adolescent Tobacco-Use Prevention Act, we have found no expression of need for uniform statewide control in the legislation regulating access to alcoholic beverages by minors. Moreover, like the Court of Appeals in Vatore, we believe that the regulatory scheme is not so broad and detailed so as to require the conclusion that the Legislation has precluded local regulation in the area. Indeed, the state regulatory scheme with respect to access to alcoholic beverages by minors is similar to that determined by Supreme Court and affirmed by the Appellate Division not to be preemptive in Vatore. It regulates and prohibits particular behavior of specified individuals but does not constitute a comprehensive scheme regulating all aspects of access to alcoholic beverages by minors, and it is silent with respect to providing access to private premises on which alcohol is available. Because we believe the legislative scheme contains no clear indication of an intent to preclude local legislation in the field of access to alcoholic beverages by minors, we are of the opinion that local legislation of the type proposed by the **[*18]** Town is not preempted by state law.

The Attorney General issues formal opinions only to officers and departments of state government. Thus, this is an informal opinion rendered to assist you in advising the municipality you represent.

**Load Date:** 2014-07-14

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[11] The Act regulates the distribution of tobacco products without charge or by vending machine; requires the posting of notices announcing the illegality of selling tobacco products to minors; and provides procedures for the enforcement at the local level of the provisions of the Act. Act of Aug. 7, 1992, ch. 799, 1992 N.Y. Laws 4202 (codified as amended at ***Public Health Law §§ 1399-aa*** - ***1399-mm***).

# DJL Rest. Corp. v. City of New York

Court of Appeals of New York

February 15, 2001, Argued ; March 29, 2001, Decided

No Number in Original

**Reporter**
96 N.Y.2d 91 *; 749 N.E.2d 186 **; 725 N.Y.S.2d 622 ***; 2001 N.Y. LEXIS 944 ****

DJL Restaurant Corp., Doing Business as Shenanigans, et al., Appellants, v. City of New York et al., Respondents.

**Prior History: [****1]** Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 13, 2000, which affirmed an order and judgment (one paper) of the Supreme Court (Stephen G. Crane, J.), entered in New York County, converting a motion by defendants to dismiss the complaint into a motion for summary judgment for a declaration in favor of defendants, granting the motion, and declaring that application of the Amended Zoning Resolution of the City of New York to plaintiffs, licensees of the New York State Liquor Authority, is not barred by the doctrine of ***preemption*** as a matter of law.

*DJL Rest. Corp. v City of New York, 271 AD2d 275*, affirmed.

**Disposition:** Affirmed.

## Core Terms

zoning, local law, establishments, ***Municipal***, ***preempted***, adult, local government, Alcoholic, alcoholic ***beverage***, regulating, City's, adult entertainment, ordinance, state statute, liquor

## Case Summary

**Procedural Posture**
Plaintiffs adult establishments appealed an order of the Appellate Division (New York), upholding a grant of summary judgment in favor of the defendant city, contending that the New York City, N.Y., Amended Zoning Resol. § 12-10 was ***preempted*** by the New York Alcoholic ***Beverage*** Control (ABC) Law.

**Overview**

Adult establishments sued the city seeking a declaratory judgment that the ABC law ***preempted*** § 12-10. The trial court granted summary judgment to the city and the appellate court affirmed. The establishments appealed as of right pursuant to *N.Y. C.P.L.R. 5601(b)(1)* to the Court of Appeals of New York. After reviewing the ABC law and § 12-10, the Court of Appeals held that § 12-10 was a local law of general application. Because its thrust was zoning and not the regulation of ***alcohol***, § 12-10 applied across the board to all adult establishments, whether they sold alcoholic ***beverages*** or not. Section 12-10 was directed at alleviating the secondary effects of adult establishments, and any impact on those that happened to sell alcoholic ***beverages*** was merely incidental to the city's land use scheme.

**Outcome**
The order upholding the grant of summary judgment was affirmed.

## LexisNexis® Headnotes

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

*HN1*[] **Local Governments, Duties & Powers**

In general, local governments have only the lawmaking powers the legislature confers on them. Zoning is an

exercise of that power.

Governments > Local Governments > Duties & Powers

**HN2** **Local Governments, Duties & Powers**

See N.Y. Const. art. IX, § 2(c)(ii).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

**HN3** **Local Governments, Duties & Powers**

The New York ***Municipal*** Home Rule Law specifically gives a municipality, such as the City of New York, the power to enact local laws for the protection and enhancement of its physical and visual environment and for the government, protection, order, conduct, safety, health, and well-being of persons or property therein. N.Y. ***Mun.*** Home Rule Law § 10(1)(ii)(a)(11)-(12). In keeping with N.Y. Const. art. IX, however, the ***Municipal*** Home Rule Law prohibits a city from adopting local laws inconsistent with the state constitution or any general law of the state. N.Y. ***Mun.*** Home Rule Law § 10(1)(ii).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

**HN4** **Local Governments, Duties & Powers**

See N.Y. ***Mun.*** Home Rule Law § 2(5).

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

Governments > State & Territorial
Governments > Relations With Governments

**HN5** **Local Governments, Duties & Powers**

N.Y. ***Mun.*** Home Rule Law § 11 expressly prohibits local governments from legislating on various subjects.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Governments > Local Governments > Ordinances & Regulations

Environmental Law > Land Use & Zoning > Constitutional Limits

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

**HN6** **Zoning, Constitutional Limits**

N.Y. ***Mun.*** Home Rule Law § 10(6) explicitly authorizes cities to adopt, amend, and repeal zoning regulations. Thus, the constitutional and statutory scheme authorizes the City of New York to adopt zoning resolutions, as long as the action is consistent with the state constitution and state statutes.

Constitutional Law > Supremacy Clause > General Overview

Governments > State & Territorial
Governments > Relations With Governments

**HN7** **Constitutional Law, Supremacy Clause**

Local laws that conflict with state statutes are ***preempted***.

Governments > Local Governments > Duties & Powers

Governments > State & Territorial
Governments > Legislatures

Governments > State & Territorial
Governments > Relations With Governments

**HN8** **Local Governments, Duties & Powers**

State ***preemption*** occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a state statute and second, when a local government legislates in a field for which the state legislature has assumed full regulatory responsibility. The New York State Legislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication.

Administrative Law > Separation of Powers > Legislative Controls > Implicit Delegation of Authority

Governments > State & Territorial
Governments > Legislatures

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

Governments > State & Territorial
Governments > Relations With Governments

**HN9** **Legislative Controls, Implicit Delegation of Authority**

An implied intent to ***preempt*** may be found in a declaration of state policy by the state legislature or from the fact that the legislature has enacted a comprehensive and detailed regulatory scheme in a particular area. In that event, a local government is precluded from legislating on the same subject matter unless it has received clear and explicit authority to the contrary. More specifically, a local law regulating the same subject matter is deemed inconsistent with the state's overriding interests because it either (1) prohibits conduct which the state law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe, or (2) imposes additional restrictions on rights granted by state law.

Banking Law > Consumer Protection > State Law > General Overview

Constitutional Law > Supremacy Clause > General Overview

**HN10** **Consumer Protection, State Law**

It is well settled that the New York Alcoholic ***Beverage*** Control Law impliedly ***preempts*** its field.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > General Overview

**HN11** **Zoning, Ordinances**

The New York City Amended Zoning Resolution requires a minimum of 500 feet between an adult establishment and a school or place of worship, while the New York Alcoholic ***Beverage*** Control Law requires only 200 feet. New York City, N.Y. Zoning Resol. §§ 32-01(b), 42-01(b), with *N.Y. Alco. Bev. Cont. Law § 64(7)(a)*.

Governments > Local Governments > Ordinances & Regulations

**HN12** **Local Governments, Ordinances & Regulations**

The New York Alcoholic ***Beverage*** Control Law has its own provisions governing nudity in licensed premises. *N.Y. Alco. Bev. Cont. Law § 106(6-a)*.

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial
Governments > Legislatures

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Legislation > Interpretation

Governments > State & Territorial
Governments > Relations With Governments

**HN13** **Alcohol Related Offenses, Distribution & Sale**

The New York State Legislature enacted the New York Alcoholic ***Beverage*** Control (ABC) Law to promote temperance in the consumption of alcoholic ***beverages*** and to advance respect for the law. In carrying out its objectives, the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor.

Governments > Legislation > Interpretation

Real Property Law > Zoning > General Overview

Governments > Local Governments > Ordinances & Regulations

**HN14** **Legislation, Interpretation**

***Alcohol*** is not land. The control of ***alcohol*** involves considerations very different from the use of land. Indeed, the New York Alcoholic ***Beverage*** Control Law and the New York City A mended Zoning Resolution are directed at completely distinct subject matters.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Real Property Law > Zoning > General Overview

**HN15** **Zoning, Ordinances**

One of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.

Governments > Legislation > Interpretation

Real Property Law > Zoning > General Overview

**HN16** **Legislation, Interpretation**

The purpose of a ***municipal*** zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally.

Real Property Law > Zoning > General Overview

**HN17** **Real Property Law, Zoning**

By regulating land use, a zoning ordinance inevitably exerts an incidental control over any of the particular uses or business that may be allowed in some districts but not others. Nevertheless separate levels of regulatory oversight can coexist.

Governments > State & Territorial
Governments > Relations With Governments

**HN18** **State & Territorial Governments, Relations With Governments**

State statutes do not necessarily ***preempt*** local laws having only tangential impact on the state's interests.

Banking Law > Consumer Protection > State Law > General Overview

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial
Governments > Relations With Governments

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Local Governments > Ordinances & Regulations

**HN19** **Consumer Protection, State Law**

Local laws of general application--which are aimed at legitimate concerns of a local government--will not be ***preempted*** if their enforcement only incidentally

infringes on a ***preempted*** field. Thus, an establishment selling alcoholic ***beverages*** will not be exempt from a local law requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Governments > Local Governments > Ordinances & Regulations

***HN20***[] **Zoning, Comprehensive Plans**

The New York City, N.Y., Amended Zoning Resol. § 12-10 applies not to the regulation of ***alcohol***, but to the locales of adult establishments irrespective of whether they dispense alcoholic ***beverages***.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

***HN21***[] **Zoning, Comprehensive Plans**

A municipality has a legitimate, legally grounded interest in regulating development within its borders.

## Headnotes/Syllabus

**Headnotes**

***Municipal*** Corporations - Zoning - Regulation of "Adult Establishments" - No Conflict with Alcoholic ***Beverage*** Control Law

The Amended Zoning Resolution (AZR) of New York City, to the extent that it regulates the location of "adult establishments," does not conflict with and, thus, is not ***preempted*** by the Alcoholic ***Beverage*** Control (ABC) Law. The AZR is a local law of general application. Because its thrust is zoning and not the regulation of ***alcohol***, it applies across the board to all adult establishments, whether they sell alcoholic ***beverages*** or not. Further, the AZR is directed at alleviating the secondary effects of adult establishments, and any impact on those that happen to sell alcoholic ***beverages*** is merely incidental to the City's land use scheme. While the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor, the AZR applies not to the regulation of ***alcohol*** but to the locales of adult establishments, irrespective of whether they dispense alcoholic ***beverages***.

**Counsel:** *Zane & Rudofsky,* New York City (*Edward S. Rudofsky* and *Arlene H. Schechter* of counsel), for appellants. I. Application of the anti-adult entertainment amendments to the Zoning Resolution of the City of New York to State Liquor Authority-regulated adult liquor licensees featuring adult entertainment is barred by the doctrine of ***preemption***. ( *California v LaRue, 409 US 109*; *New York State Liq. Auth. v Bellanca, 452 US 714*; **[****2]** *Matter of 17 Cameron St. Rest. Corp. v New York State Liq. Auth., 48 NY2d 509*; *Seagram & Sons v Hostetter, 16 NY2d 47, 384 US 35*; *People v De Jesus, 54 NY2d 465*; *Matter of Ames v Smoot, 98 AD2d 216*; *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 133 Misc 2d 206, 141 AD2d 468, 74 NY2d 761*; *Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372*; *Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441*; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*.) II. Topless dancing in liquor licensed premises is a constitutionally protected and harmless form of entertainment exclusively regulated by the State with "community input" pursuant to *Alcoholic **Beverage** Control Law § 64*. ( *Matter of Beal Props. v State Liq. Auth., 45 AD2d 906, 37 NY2d 861*; *Salem Inn v Frank, 364 F Supp 478, 501 F2d 18*, *mod sub nom. Doran v Salem Inn, 422 US 922*; *Salem Inn v Frank, 522 F2d 1045*; *Jay-Jay Cabaret v State of New York, 164 Misc 2d 673, 215 AD2d 172, 87 NY2d 802, 918*; **[****3]** *Tunick v Safir, 209 F3d 67*; *Crane Neck Assn. v New York City/Long Is. County Servs. Group, 61 NY2d 154*.)

*Michael D. Hess, Corporation Counsel* of New York City (*Julian L. Kalkstein* and *Larry A. Sonnenshein* of counsel), for respondents. The New York City Zoning Law adult establishment amendments are not ***preempted*** by the *New York State Alcoholic **Beverage** Control Law. ( People v De Jesus, 54 NY2d 465*; *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d 761*; *Stringfellow's of N. Y. v City of New York, 91 NY2d 382*; *Buzzetti v City of New York, 140 F3d 134*; *Hickerson v City of New York, 146 F3d 99*; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*; *Matter of Town of Islip v Caviglia, 73 NY2d 544*; *Good Humor Corp. v City of New York, 290 NY 312*; *Pomeranz v City of New York, 1 Misc 2d 486, 7 AD2d 752*; *People v*

*Hardy, 47 NY2d 500*.)

**Judges:** ROSENBLATT, J. Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK, WESLEY **[****4]** and GRAFFEO concur.

**Opinion by:** ROSENBLATT

## Opinion

**[*93] [**188] [***623]** Rosenblatt, J.

In 1995, the New York City Council approved an amendment to the City's Zoning Resolution to regulate the location of "adult establishments." Plaintiffs are adult establishments licensed to dispense alcoholic ***beverages***. [1] They contend that the Amended Zoning Resolution conflicts with and is therefore ***preempted*** by the Alcoholic ***Beverage*** Control Law. We disagree.

I.

In the mid-1960s, the adult entertainment industry in New York City began experiencing significant growth. This trend continued and by the early 1990s there were hundreds of such establishments located throughout the City. In 1993, the New York City Department of City Planning **[****5]** commissioned its study on the impact of this industry on the quality of urban life (*see generally, Stringfellow's of N. Y. v City of New York, 91 NY2d 382, 392-394)*. The City concluded that adult establishments produced adverse **[***624]** secondary effects such as increased crime rates, reduced property values, neighborhood deterioration and inappropriate exposure of children to sexually oriented environments (*see,* 1994 Dept of City Planning Report on Adult Entertainment Study; *see also, City of New York v Stringfellow's of N. Y., 96 NY2d 51* [decided today]).

After conducting public hearings and amassing an extensive legislative record, in 1995 the City amended its Zoning Resolution to combat the problem and improve **[**189]** the quality of urban life (*see,* NY City Amended Zoning Resolution ["AZR"] § 12-10 ["Adult establishment"]). Among other provisions, the AZR requires that adult establishments be confined to the City's manufacturing and high density commercial zoning districts (*see,* NY City Amended Zoning Resolution § 32-01 [b]; § 42-01 [b]).

Plaintiffs sued the City, seeking a declaratory judgment that the **[****6]** Alcoholic ***Beverage*** Control Law ("ABC Law") ***preempts*** the AZR. In lieu of answering, the City moved to dismiss. Supreme Court treated the City's motion as one for summary judgment and granted it. Plaintiffs appealed and the Appellate Division **[*94]** affirmed. Plaintiffs appeal to this Court as of right (*see, CPLR 5601 [b] [1]*), and we now affirm.

II.

We begin by reviewing the relationship between the State and its local governmental units in connection with their respective exercise of legislative power. We have noted that ***HN1***[] in general, local governments "have only the lawmaking powers the Legislature confers on them" ( *Kamhi v Town of Yorktown, 74 NY2d 423, 427*; *see also, People v De Jesus, 54 NY2d 465, 468)*. Zoning is an exercise of that power (*see, Trustees of Union Coll. v Members of Schenectady City Council, 91 NY2d 161, 165*; *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals, 69 NY2d 406, 412)*. **[****7]** *Article IX, § 2 (c) (ii) of the New York State Constitution* provides that ***HN2***[] "every local government shall have power to adopt and amend local laws *not inconsistent* with the provisions of this constitution or any general law … except to the extent that the legislature shall restrict the adoption of such a local law" (emphasis added).

To implement article IX, the Legislature enacted the ***Municipal*** Home Rule Law (*see generally, Kamhi v Town of Yorktown, 74 NY2d, at 428-429*, *supra;* Analysis of the ***Municipal*** Home Rule Law, Mem of Office for Local Government, reprinted in McKinney's Cons Laws of NY, Book 35C, at XV). ***HN3***[] It specifically gives a municipality, such as the City of New York, the power to enact local laws for the "protection and enhancement of its physical and visual environment" and for the "government, protection, order, conduct, safety, health and well-being of persons or property therein" (*see, **Municipal** Home Rule Law § 10 [1] [ii] [a] [11]-[12]*). In keeping with article **[****8]** IX, however, the ***Municipal*** Home Rule Law prohibits the City from adopting local laws inconsistent with the State Constitution or any general law of the State (*see,*

[1] Plaintiffs are DJL Restaurant Corp., doing business as "Shenanigans," WESJOE Restaurant Corp., doing business as "New York Dolls" and 320 West 45th St. Restaurant Inc., doing business as "Private Eyes." All feature adult entertainment in the form of topless dancing.

***Municipal*** *Home Rule Law § 10 [1] [ii]*). [2]

**[***625]** *Section 10 (6)* of the Statute of Local Governments ***HN6***[] **[****9]** explicitly authorizes cities to "adopt, amend and repeal zoning regulations." Thus, this constitutional and statutory scheme authorizes the City to adopt zoning resolutions, as long as they are **[*95]** consistent with the State Constitution and State statutes. ***HN7***[] Local laws that conflict with State statutes are ***preempted*** (*see, Matter of Ardizzone v Elliott, 75 NY2d 150, 155*; **[**190]** *Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 96)*.

Broadly speaking, ***HN8***[] State ***preemption*** occurs in one of two ways--first, when a local government adopts a law that directly conflicts with a State statute (*see, e.g., Consolidated Edison Co. v Town of Red Hook, 60 NY2d 99, 107)* and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility (*see, e.g., New York State Club Assn. v City of New York, 69 NY2d 211, 217*, *affd* *487 US 1*). The State Legislature may expressly **[****10]** articulate its intent to occupy a field, [3] but it need not. It may also do so by implication.

***HN9***[] An implied intent to ***preempt*** may be found in a "declaration of State policy by the State Legislature … or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (*see, Consolidated Edison Co. v Town of Red Hook, 60 NY2d, at 105*, *supra; see also, Robin v Incorporated Vil. of Hempstead, 30 NY2d 347, 350)*. In that event, a local government is "precluded from legislating on the same subject matter unless it has received 'clear **[****11]** and explicit' authority to the contrary" (*see, People v De Jesus, 54 NY2d, at 469*, *supra* [quoting *Robin v Incorporated Vil. of Hempstead, 30 NY2d, at 350-351*, *supra*]). More specifically, "a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe … or (2) imposes additional restrictions on rights granted by State law" ( *Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d, at 97*, *supra*).

***HN10***[] It is now well settled that the State's ABC Law impliedly ***preempts*** its field (*see, Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d 761, 762-763*; *People v De Jesus, 54 NY2d, at 469*, *supra*).

Accordingly, plaintiffs argue that the City's AZR makes impermissible inroads in a ***preempted*** field. They contend that **[*96]** the AZR conflicts with the ABC Law in several important respects. They note, for example, that **[****12]** ***HN11***[] the ABC Law has its own provisions governing nudity in licensed premises (*see, Alcoholic* ***Beverage*** *Control Law § 106 [6-a]*). **[***626]** They also point out that ***HN12***[] the AZR requires a minimum of 500 feet between an adult establishment and a school or place of worship, while the ABC Law requires only 200 feet (*compare,* NY City Amended Zoning Resolution § 32-01[b]; § 42-01 [b], *with Alcoholic* ***Beverage*** *Control Law § 64 [7] [a]*). Thus, plaintiffs argue, owing to these and similar points of conflict the AZR is unenforceable against them.

The City, on the other hand, contends that the AZR is a local law of general **[**191]** application. Because its thrust is zoning and not the regulation of ***alcohol***, the AZR applies across the board to all adult establishments whether they sell alcoholic ***beverages*** or not. The City also emphasizes that the AZR is directed at alleviating the secondary effects of adult establishments, and any impact on those that happen to sell alcoholic **[****13]** ***beverages*** is merely incidental to the City's land use scheme. We agree with the City.

***HN13***[] The Legislature enacted the ABC Law to promote temperance in the consumption of alcoholic ***beverages*** and to advance "respect for [the] law" (*see, Alcoholic* ***Beverage*** *Control Law § 2*). In carrying out its objectives, the ABC Law ***preempts*** its field by comprehensively regulating virtually all aspects of the sale and distribution of liquor (*see, Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 74 NY2d, at 762-763*, *supra; People v De Jesus, 54 NY2d, at 469*, *supra; see generally,* New York State Moreland Commission Reports on the Alcoholic ***Beverage*** Control Law). ***HN14***[] ***Alcohol***,

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[2] ***HN4***[] The ***Municipal*** Home Rule Law defines a "general law" as a "state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages" ( ***Municipal*** *Home Rule Law § 2 [5]*). ***HN5***[] *Section 11 of the* ***Municipal*** *Home Rule Law* also expressly prohibits local governments from legislating on various subjects.

[3] *See e.g., Environmental Conservation Law § 23-2703 (2)* (stating that "this title shall supersede all … local laws relating to the extractive mining industry"); *see generally, Matter of Gernatt Asphalt Prods. v Town of Sardinia (87 NY2d 668, 680-683)*.

however, is not land. Indeed, the ABC Law and the AZR are directed at completely distinct activities.

HN15[] One of the most significant functions of a local **[****14]** government is to foster productive land use within its borders by enacting zoning ordinances (*see generally,* 1 Anderson, American Law of Zoning § 2.16 [Young 4th ed]; 6-A McQuillin, ***Municipal*** Corporations §§ 24.123.20, 24.123.30, 24.123.40 [3d rev ed]; Crocca, Annotation, *Validity of Ordinances Restricting Location of "Adult Entertainment" or Sex-Oriented Businesses,* 10 ALR5th 538). In Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126, 131), we held that HN16[] the "purpose of a ***municipal*** zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally." The AZR does just **[*97]** that, and stands in contrast to laws that regulate alcoholic ***beverages***.

To be sure, HN17[] by regulating land use a zoning ordinance "*inevitably exerts an incidental control* over any of the particular uses or businesses which … may be allowed in some districts but not in others" **[****15]** ( Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d, at 131, *supra* [emphasis added]; *see also,* Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d, at 681-682, *supra*). Nevertheless, as we have observed, "separate levels of regulatory oversight can coexist" (*see,* Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d 500, 507). HN18[] State statutes do not necessarily ***preempt*** local laws having only "tangential" impact on the State's interests (*see, id., at 506*). HN19[] Local laws of general application--which are aimed at legitimate concerns of a local government--will not be ***preempted*** if their enforcement only incidentally infringes on a ***preempted*** field (*see, Matter of Lansdown Entertainment* **[***627]** Corp. v New York City Dept. of Consumer Affairs, 74 NY2d, at 763, *supra; Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d, at 506, supra*). Thus, as we stated in *People v* **[****16]** *De Jesus,* an establishment selling alcoholic ***beverages*** would not be exempt from a local law "requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness" (54 NY2d, at 471, *supra*). We recognized of course that there are limits to the reach of local law, and held **[**192]** that the ABC Law ***preempted*** a provision of the Rochester ***Municipal*** Code because that local law dealt "solely with the actions of patrons of establishments which sell alcoholic ***beverages***." (54 NY2d, at 471.) [4] The AZR, however, does nothing of the sort. To the contrary, HN20[] it applies not to the regulation of ***alcohol***, but to the *locales* of adult establishments irrespective of whether they dispense alcoholic ***beverages***. In short, plaintiffs come under both regulatory schemes because they simultaneously engage in two distinct activities, each involving an independent realm of governance.

**[****17]** In *Incorporated Vil. of Nyack v Daytop Vil.* (78 NY2d, at 508, *supra*) we held that HN21[] the Village of Nyack had "a legitimate, legally grounded interest in regulating development within its borders." This principle applies here. A liquor licensee wishing to provide adult entertainment must do so in a location authorized **[*98]** by the AZR--not because it is selling liquor, but because it is providing adult entertainment. Conversely, if an adult establishment wishes to sell liquor, it must obtain a liquor license and comply with the ABC Law. That the ABC Law and the AZR have some overlapping requirements is merely peripheral and involves no more than what we described in *Frew Run* as a zoning ordinance's inevitable exertion of some incidental control over a particular business.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Graffeo concur.

Order affirmed, with costs.

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[4] There are instances in which a zoning ordinance could conflict with a State law, as for example, where the Mental Hygiene Law expressly limits a municipality's zoning authority (*see,* Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d, at 506-507, *supra* [comparing Mental Hygiene Law art 19 with Mental Hygiene Law, art 41, § 41.34]). That of course is not the case before us.

# Lansdown Entertainment Corp. v. New York City Dep't of Consumer Affairs

Court of Appeals of New York

June 6, 1989, Argued ; July 11, 1989, Decided

No Number in Original

**Reporter**
74 N.Y.2d 761 *; 543 N.E.2d 725 **; 545 N.Y.S.2d 82 ***; 1989 N.Y. LEXIS 885 ****

In the Matter of Lansdown Entertainment Corporation, Doing Business as The Limelight, Respondent, v. New York City Department of Consumer Affairs et al., Appellants

**Prior History: [****1]** Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 30, 1988, which modified, on the law, and, as modified, affirmed an order and judgment (one paper) of the Supreme Court (David B. Saxe, J.), entered in New York County, which declared that respondents have failed to demonstrate that the purpose of Administrative Code of the City of New York § B32-303.0 is to regulate subject matter within the locality's police power and that the ordinance only incidentally infringes on the sale of liquor, declared that section B32-303.0 is an improper intrusion into an area within the exclusive province of the State, renders illegal what is specifically allowed by State law and is thereby invalid, enjoined respondents from enforcing section B32-303.0, and annulled a determination of respondents prohibiting petitioner to remain open to the public after the hour of 4:00 a.m. and requiring petitioner to pay a fine of $ 100. The modification consisted of (1) vacating that part of the order and judgment holding that section B32-303.0 is invalid, enjoining enforcement of the ordinance, (2) declaring **[****2]** that such ordinance is inapplicable to establishments which are also licensed pursuant to the State Alcoholic ***Beverage*** Control Law to sell liquor at retail for consumption on premises and that section B32-303.0 (renum *§ 20-367*) is otherwise valid, and (3) enjoining respondents from enforcing that section of the Administrative Code against such establishments.

*Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs, 141 AD2d 468*.

**Disposition:** Order affirmed, with costs, in a memorandum.

## Core Terms

local law, Alcoholic, alcoholic ***beverage***, ***preempted***, establishments, regulation, ordinance, consumption, licensed, premises, Cabaret, consume, patrons

## Case Summary

**Procedural Posture**
Appellant, New York City Department of Consumer Affairs (City), sought review of a decision of the Appellate Division of the Supreme Court in the First Judicial Department (New York), which enjoined it from enforcement of New York, N.Y. Admin. Code § B32-303.0 (Cabaret Law) and from imposition of a fine upon respondent discotheque.

**Overview**

The discotheque contended that the Cabaret Law was ***preempted*** by *N.Y. Alco. Bev. Cont. Law § 106* (state law) because the cabaret law conflicted with state law concerning the hours during which it was permitted to sell ***alcohol***. The City contended that the Cabaret Law was enforceable because it was a statute of general application in that its object was to maintain the peace. The court agreed with the discotheque's contention, finding that the ***preemption*** rule was applicable because the Cabaret Law applied to local establishments that were also licensed by the state. The court ruled that the ***preemption*** doctrine applied although the Cabaret Law was not explicitly directed at the sale of ***alcohol*** because the Cabaret Law nevertheless rendered illegal the consumption of

***alcohol*** during the time allowed by the state law.

**Outcome**
The court affirmed the judgment of the lower court. The court held that the Cabaret Law was ***preempted*** because it concerned the same subject matter of hours of operation, distribution, or consumption of ***alcohol*** as a state statute.

## LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

Torts > ... > Types of Negligence Actions > ***Alcohol*** Providers > General Overview

***HN1***[] **Criminal Offenses, Alcohol Related Offenses**

The Alcoholic ***Beverage*** Control Law is preemptive of local law because the regulatory system is both comprehensive and detailed.

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

Governments > Local Governments > Ordinances & Regulations

Torts > ... > Types of Negligence Actions > ***Alcohol*** Providers > General Overview

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

***HN2***[] **Alcohol Related Offenses, Distribution & Sale**

Establishments selling alcoholic ***beverages*** are not exempt from local laws of general application.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

***HN3***[] **Jurisdiction, Subject Matter Jurisdiction**

Even where the local goal does not conflict with state legislative objectives, the locality must still tailor its ordinance to ensure that its impact upon the ***preempted*** field is merely incidental.

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

***HN4***[] **Local Governments, Ordinances & Regulations**

The ***preemption*** doctrine does not turn on semantics. Rather, the direct consequences of a local ordinance should be examined to ensure that it does not render illegal what is specifically allowed by state law.

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Relations With Governments

***HN5***[] **Local Governments, Ordinances & Regulations**

Where a state law indicates a purpose to occupy an entire field of regulation, local regulations are ***preempted*** regardless of whether their terms conflict with provisions of the state statute or only duplicate them.

## Headnotes/Syllabus

**Headnotes**

**IIntoxicating Liquors -- State *Preemption* of Regulatory Field -- Closing Hours of New York City Cabaret**

*Administrative Code of the City of New York § 20-367* (formerly § B32-303.0), which requires licensed cabarets to close between the hours of 4:00 a.m. and 8:00 a.m., is ***preempted*** by *Alcoholic **Beverage** Control Law § 106 (5) (b)*, which permits patrons of premises licensed by the State to sell alcoholic ***beverages*** for on-premises consumption to continue to consume alcoholic ***beverages*** upon such premises until 4:30 a.m., although both laws prohibit the sale of ***alcohol*** past 4:00 a.m., since there is a conflict between the two laws and the State regulatory system is both comprehensive and detailed. Although the State law does not exempt licensed establishments from local laws of general application, *section 20-367* does not qualify as such a local law since its legislative history does not indicate a specific intent to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods; rather, the local law merely mirrored the State law. Moreover, even if the local law was adopted for the asserted purpose, there is still a head-on collision between the State law and the ordinance as the latter is applied to establishments licensed by the State, and since the State has ***preempted*** any local regulation concerning the subject matter of hours of operation, distribution or consumption, local laws which concern the same subject matter must give way to the State law.

**Counsel:** *Peter L. Zimroth, Corporation Counsel (Julian L. Kalkstein* and *Larry A. Sonnenshein* of counsel), for appellants.

*James M. Felix* and *Stephen E. Powers* for respondent.

**Judges:** Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock, Jr., concur; Judge Bellacosa dissents and votes to reverse in an opinion.

## Opinion

**[*762] [***82] [**725] OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be affirmed, with costs.

Petitioner operates the Limelight, a popular discotheque, which is licensed as a "cabaret" by respondent New York City Department of Consumer Affairs pursuant to subchapter **[****3]** 20 of chapter 2 of title 20 of the Administrative Code of the City of New York (the Cabaret Law). The Limelight is also licensed to sell liquor for consumption **[***83]** on its premises pursuant to the New York **[**726]** State Alcoholic ***Beverage*** Control Law (*Alcoholic **Beverage** Control Law § 106*). The Cabaret Law requires licensed cabarets to close between the hours of 4:00 a.m. and 8:00 a.m. (Administrative Code of City of New York § B32-303.0 [renum *§ 20-367*]). The applicable State law prohibits the sale of ***alcohol*** after 4:00 a.m., but permits patrons to continue to consume alcoholic ***beverages*** upon the premises until 4:30 a.m. (*Alcoholic **Beverage** Control Law § 106 [5] [b]*). Although both laws prohibit the sale of ***alcohol*** past 4:00 a.m., the State law thus permits patrons to remain on the premises consuming ***alcohol*** until 4:30 a.m., while the Cabaret Law does not. Relying on this conflict, petitioner maintains that this provision of the Cabaret Law is ***preempted*** by the State law. We agree.

In *People v De Jesus (54 NY2d 465)* this court held that ***HN1***[↑] the Alcoholic ***Beverage*** Control Law is preemptive of local law **[*763]** because the regulatory system is both "comprehensive **[****4]** and detailed" *( id., at 469)*. Consequently, we held that a Rochester City ordinance prohibiting persons from patronizing an establishment selling alcoholic ***beverages*** after 2:00 a.m. was ***preempted*** by the State law because "by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law" *( id., at 472)*.

In *De Jesus*, however, we noted that ***HN2***[↑] establishments selling alcoholic ***beverages*** are not exempt from local laws of general application. Such laws are principally aimed at legitimate concerns of local government and do not directly affect the field ***preempted*** by the State law. For example, laws "requiring smoke alarms in all business premises, or * * * forbidding dumping of refuse on city sidewalks, or * * * prohibiting disorderliness at any 'place of public resort'" *( People v De Jesus, 54 NY2d 465, 471*, *supra*, citing *People v Hardy, 47 NY2d 500*), would not be ***preempted*** if their enforcement incidentally infringed on the State Alcoholic ***Beverage*** Control Law.

Relying on this exception to the **[****5]** ***preemption*** rule, respondent argues that section B32-303.0 of the Administrative Code is a statute of general application because it is founded upon a legitimate exercise of local police power in that it seeks to maintain the peace, comfort and decency of residential neighborhoods by controlling noise and traffic. Additionally, respondent maintains that this ordinance is not ***preempted*** because it does not explicitly regulate the sale of ***alcohol*** as did the regulation in *De Jesus*. These contentions are without merit.

As Supreme Court concluded, the legislative history of the City ordinance does not "indicate a specific intent * * * to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods." Rather, "historical analysis indicates that for most of its life, the local law merely mirrored the State law." (*133 Misc 2d 206, 210*.) In fact, there is a dearth of legislative history to support respondent's claim.

Nevertheless, even assuming that this local ordinance was adopted for the claimed purpose, this conclusion would not alone be sufficient to surmount the ***preemption*** hurdle. ***HN3***[⬆] Even where the local goal does not conflict with State **[****6]** legislative objectives, the locality must still tailor its ordinance to ensure **[*764]** that its impact upon the ***preempted*** field is merely incidental. Compelling a business licensed by the State Liquor Authority to close at a time at which customers are otherwise permitted to remain on the premises and consume alcoholic ***beverages*** directly regulates subject matter within the exclusive jurisdiction of the State *(see, People v De Jesus, 54 NY2d 465, 470, n 3, supra)*. In this regard, there is a head-on collision between the City ordinance as it is applied to establishments also licensed by the State. Since the State has ***preempted*** any local regulation concerning **[***84]** the subject matter of hours of operation, **[**727]** distribution, or consumption, local laws which concern the same subject matter must give way to the State law *(see, Dougal v County of Suffolk, 102 AD2d 531, 532-533*, *affd 65 NY2d 668*; *Robin v Incorporated Vil. of Hempstead, 30 NY2d 347, 350-351)*.

That the City ordinance is not explicitly directed at the sale or consumption of alcoholic ***beverages*** is of no consequence since application of ***HN4***[⬆] the ***preemption*** doctrine does not turn on semantics. **[****7]** Rather, the direct consequences of a local ordinance should be examined to ensure that it does not "render illegal what is specifically allowed by State law" *( People v De Jesus, 54 NY2d 465, 472, supra; see, e.g., Wholesale Laundry Bd. of Trade v City of New York, 12 NY2d 998*, *affg 17 AD2d 327*).

The suggestion raised in the dissenting opinion that the State Alcoholic ***Beverage*** Control Law ***preempts*** only those local laws which pertain to the sale and distribution of ***alcohol***, as opposed to the consumption of ***alcohol***, ignores both the plain wording of the State law at issue (*Alcoholic **Beverage** Control Law § 106 [5] [b]* ["Nor shall any person be permitted to *consume* any alcoholic ***beverages*** upon any such premises"; emphasis supplied]), as well as this court's decision in *De Jesus (see, People v De Jesus, supra, at 470, n 3*; *see also, id., at 472* [Gabrielli, J., dissenting] [the State has ***preempted*** the field "'for the purpose of fostering and promoting temperance in (the public's) *consumption* and respect for and obedience to law'"; emphasis supplied]). In addition, the argument that the local law is not inconsistent with the State statute (dissenting **[****8]** opn, at 766) is founded on the view that the local law does not prohibit "an act which has been *specifically permitted* by State law." *(Id., at 767* [emphasis supplied].) To the contrary, the State law specifically allows patrons to remain on the premises consuming ***alcohol*** until 4:30 a.m., while the local law does not. This is not a tiny overlap *(see, id.)*, but a direct **[*765]** conflict. ***HN5***[⬆] Where a State law indicates a purpose to occupy an entire field of regulation, as exists under the Alcoholic ***Beverage*** Control Law, local regulations are ***preempted*** regardless of whether their terms conflict with provisions of the State statute or only duplicate them *(see, Consolidated Edison Co. v Town of Red Hook, 60 NY2d 99, 106-107*; *People v De Jesus, 54 NY2d 465, 468-469*, *supra; Dougal v County of Suffolk, 102 AD2d 531, 532-533*, *affd 65 NY2d 668*, *supra)*. If a local ordinance which merely duplicates a State law is ***preempted***, assuredly a local law which conflicts with the State law must also be ***preempted***.

**Dissent by:** BELLACOSA

## Dissent

Bellacosa, J. (dissenting). I disagree that the City of New York's local legislative effort to close all cabarets, dance halls **[****9]** and catering establishments for four hours, between 4:00 a.m. and 8:00 a.m., is ***preempted*** by the State Alcoholic ***Beverage*** Control Law.

No one challenges the New York State Alcoholic

***Beverage*** Control Board's comprehensive authority to regulate the sale and distribution of alcoholic ***beverages***. That State law overrides any local legislation which would purport to regulate the sale and distribution of ***alcohol***. Thus, if the purpose or effect of Administrative Code of the City of New York § B32-303.0 were to regulate the hours of *sale* of alcoholic ***beverages***, it would be invalid and unenforceable *( People v De Jesus, 54 NY2d 465, 472)*. But that is not what this local law does in the context of local governments' prerogatives to enact local laws of general application which are aimed at other legitimate concerns of local government so long as they do not intrude essentially on the State's exclusive control **[***85]** over the sale or distribution of ***alcohol*** *( People [**728] v De Jesus, supra, at 471*).

Administrative Code § B32-303.0 (renum *§ 20-367*) provides, without any reference whatsoever to the sale or distribution of alcoholic ***beverages***, that all cabarets, **[****10]** catering establishments and public dance halls in the City of New York must be closed to the public between the hours of 4:00 a.m. and 8:00 a.m. The local law is generally applicable in the City of New York to every establishment, whether it is licensed to sell alcoholic ***beverages*** or not. *Alcoholic **Beverage** Control Law § 106 (5)* affects only those establishments licensed to sell alcoholic ***beverages*** for on-premises consumption and prohibits sale or distribution of alcoholic ***beverages*** between 4:00 a.m. and 8:00 a.m. (to noon on Sundays). It further forbids such establishments from permitting customers to continue to consume alcoholic ***beverages*** on premises any later than 4:30 a.m.

**[*766]** In a not unrelated development with respect to a similarly directed New York City statute, the United States Supreme Court, on June 22, 1989, said: "It can no longer be doubted that government '[has] a substantial interest in protecting its citizens from unwelcome noise.' This interest is perhaps at its greatest when government seeks to protect 'the well-being, tranquility, and privacy of the home,' but it is by no means limited to that context, for the government may act to protect even such **[****11]** traditional public forums as city streets * * * from excessive noise." *( Ward v Rock Against Racism, 491 U.S. , 109 S Ct 2746,* [citations omitted].) If that New York City quality-of-life noise control law could pass constitutional muster measured against the *First Amendment of the United States Constitution*, surely the similarly targeted local law under challenge here ought not fall before that hardly comparable paragon, the State Alcoholic ***Beverage*** Control Law.

The local law serves the legitimate local government concern of maintaining the peace and quiet of its ***municipal*** neighborhoods for a brief and relevant portion of each day. It makes no effort to control the sale of and distribution of alcoholic ***beverages***. To be sure, the local law may incidentally affect the *consumption* of ***alcohol*** for one overlapping half hour in the wee hours when most people are turning over for the last time before getting up to go to work. It is that one-half hour during which the Alcoholic ***Beverage*** Control Law itself forbids sale and merely tolerates patrons taking their final gulps to finish "last call" drinks purchased prior to 4:00 a.m. The local law therefore does not clash **[****12]** with the State sale regulation and affects consumption only in the most de minimis fashion and in a manner no greater than is needed to further the general and broader local interest in maintaining tranquility in its neighborhoods for the good of all its citizens and residents. It can legitimately be characterized as not a direct regulatory proposition in the strict legal sense of that word. In any event, the mere fact "that the State and local laws touch upon the same area is insufficient to support a determination that the State has ***preempted*** the entire field of regulation in a given area" *( Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 99* [citations omitted]; *see also, Frew Run Gravel Prods. v Town of v Carroll, 71 NY2d 126, 131)*.

As noted, Administrative Code § B32-303.0 is not inconsistent with the Alcoholic ***Beverage*** Control Law. A local law will be deemed inconsistent with a State statute if the local law permits an act which has been specifically prohibited by **[*767]** State law or, conversely, if the local law prohibits an act which has been specifically permitted by State law *( New York State Club Assn. v City of New York, 69 NY2d 211*, *affd* **[****13]** *487 U.S. 1, 108 S Ct 2225*). Administrative Code § B32-303.0 clearly does not permit an act which has been prohibited by State law because the local law does not authorize anything between the hours of 4:00 a.m. and 8:00 a.m. -- except some peace and quiet. Nor does the local law prohibit an act which has been *specifically permitted* by **[***86]** State law. *Alcoholic **Beverage** Control [**729] Law § 106 (5)* prohibits establishments with State liquor licenses from selling or distributing alcoholic ***beverages*** between 4:00 a.m. and 8:00 a.m. -- that part is four-square consistent with the closing hours mandated by the local law. It is only the failure to forbid the customers from finishing their earlier purchased alcoholic ***beverages*** until 4:30 a.m. that creates the tiniest overlap *(see, Jancyn Mfg. Corp. v*

*County of Suffolk, supra, at 99*). That, however, does not qualify as a legal ***preemption*** collision. The State law does not specifically authorize any conduct during that period; it rather forebears regulation, tolerates a transition instead of an abrupt ending, and it expressly prescribes the kind of conduct that is unlawful. The State law is actually silent on **[****14]** the precise subject of alleged controversy here and that silence should not be elevated, transformed or implied into a superseding interest *(* *People v Judiz, 38 NY2d 529, 532*; *People v Cook, 34 NY2d 100*).

The majority's invalidation of this local law creates the anomaly that the City can order nonalcoholic-dispensing establishments to close and be quiet, but it is powerless as to those in which patrons are allowed to down their drinks for an extra half hour. It also strikes me as a bit incongruous to have the regulated licensees defending the honor and power of their regulatory protagonist, the State Liquor Authority -- which appears to have little or no interest in defeating this small effort by the City of New York to improve ever so incrementally the quality of life of all its residents.

I dissent and would reverse and declare the local law valid.

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# People v. De Jesus

Court of Appeals of New York

November 16, 1981, Argued ; December 22, 1981, Decided

No Number in Original

**Reporter**
54 N.Y.2d 465 *; 430 N.E.2d 1260 **; 446 N.Y.S.2d 207 ***; 1981 N.Y. LEXIS 3205 ****

The People of the State of New York, Appellant, v. Luis De Jesus, Carlos Lopez, Maria Ortiz, Samuel Pagan, Edwin Torres (And 120 Additional Defendants), Respondents

**Prior History: [****1]** Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Monroe County Court (Hyman T. Maas, J.), entered April 8, 1980, which affirmed an order of the Rochester City Court (Charles T. Maloy, J.) dismissing the information against defendants on the ground that the local ordinance on which the prosecutions were based was ***pre-empted*** by the Alcoholic ***Beverage*** Control Law and, therefore, void.

Criminal prosecutions based on informations charging the named defendants, 125 patrons of an unlicensed "after hours" club, with violating a City of Rochester ordinance prohibiting any person from patronizing an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m. were dismissed by the Rochester City Court. On appeal, the Monroe County Court affirmed.

The Court of Appeals affirmed, holding, in an opinion by Judge Fuchsberg, that the informations were properly dismissed since the State, by enacting the Alcoholic ***Beverage*** Control Law, has ***pre-empted*** the field of regulation of establishments which sell alcoholic ***beverages*** and the local ordinance upon which the informations are based impermissibly impinges upon the exclusive State-wide **[****2]** scheme set forth therein.

**Disposition:** Order affirmed.

## Core Terms

alcoholic ***beverage*** control, regulation, ordinance, establishments, alcoholic ***beverage***, patrons, local law, liquor, sell alcoholic ***beverages***, local government, consumption, ***pre-empted***

## Case Summary

**Procedural Posture**
Defendants were charged with violating a city ordinance prohibiting the purchase of ***alcohol*** after hours, and the Monroe County Court (New York) entered a judgment that affirmed an order of the city court dismissing the information against defendants on the ground that the local ordinance, on which the prosecutions were based, was ***pre-empted*** by the Alcoholic ***Beverage*** Control Law.

**Overview**
The appeal required the court to determine the extent to which the State, by enactment of N.Y. Alco. Bev. Cont. Law ch. 478 had ***pre-empted*** the field of regulation of establishments that sold alcoholic ***beverages***. The court found that the Alcoholic ***Beverage*** Control Law was pre-emptive because the regulatory system it installed was both comprehensive and detailed. Of particular relevance, it endowed the State Liquor Authority with the power to grant licenses under defined circumstances, and it provided for criminal sanctions against unauthorized purveyors of alcoholic ***beverages*** and carried its own provision against disorderliness being permitted on such premises. Moreover, the state's statutory structure imposed its own direct controls at the local level by creating local alcoholic ***beverage*** control boards. The court also found that a distinction argued by the State between the local and state regulations was not show. By dealing solely with the actions of patrons of establishments which sell alcoholic ***beverages***, the ordinance impinged impermissibly on the exclusive Alcoholic ***Beverage*** Control Law.

**Outcome**
The order of the county court was affirmed.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > Elements

Governments > Police Powers

Criminal Law & Procedure > Criminal Offenses > ***Alcohol*** Related Offenses > General Overview

Criminal Law & Procedure > ... > ***Alcohol*** Related Offenses > Distribution & Sale > General Overview

***HN1***[] **Distribution & Sale, Elements**

Section 44-14 of the ***Municipal*** Code of the City of Rochester states that no person shall patronize an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m. in violation of the Alcoholic ***Beverage*** Control Law.

Governments > Legislation > Enactment

Governments > Local Governments > Police Power

Governments > State & Territorial Governments > Relations With Governments

***HN2***[] **Legislation, Enactment**

Since the fount of the police power is the sovereign state, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority. As pertinent here, in the spirit of this broad principle, *N.Y. Const. art. IX § 2(c)(ii)* specifies that any local law be not inconsistent with any general law and that the legislative power of local government is limited to the extent that the legislature shall restrict the adoption of such a local law. That such inconsistency or restriction is not limited to cases of express conflict between local and State laws.

## Headnotes/Syllabus

**Headnotes**

**Intoxicating Liquors -- State *Pre-emption* of Regulatory Field**

The Alcoholic ***Beverage*** Control Law (L 1934, ch 478) is exclusive and State-wide in scope and, thus, no local government may legislate in the field of regulation of establishments which sell alcoholic ***beverages***. Accordingly, criminal prosecutions based upon informations charging defendants, 125 patrons of an unlicensed "after hours" private club, with violating a local ordinance that prohibits any person from patronizing an establishment which is selling or offering for sale alcoholic ***beverages*** after 2:00 a.m., were properly dismissed; said ordinance impermissibly impinges upon the Alcoholic ***Beverage*** Control Law since it prohibits persons from patronizing such establishments at times when the pre-emptive State-wide scheme, which allows the sale of alcoholic ***beverages*** at retail for on-premises consumption until 4:00 a.m. (*Alcoholic **Beverage** Control Law, § 106*, *subd 5*), would permit them to do so.

**Counsel:** *Donald O. Chesworth, Jr., District Attorney (Kenneth R. Fisher* and *David L. Pogue* of counsel), for appellant. I. The rights of all respondents were scrupulously **[****3]** honored on appeal and records have been painstakingly maintained to substantiate this protection of respondents' rights. II. Since the State Alcoholic ***Beverage*** Control Law did not ***pre-empt*** the local ordinance, the Trial Judge improperly dismissed the informations. *(* *People v Judiz, 38 NY2d 529*; *People v Cook, 34 NY2d 100*; *Myerson v Lentini Bros. Moving & Stor. Co., 33 NY2d 250*; *People v Lewis, 295 NY 42*; *Belle v Town Bd. of Town of Onondaga, 61 AD2d 352*; *People v Winner's Circle Flea Market, 102 Misc 2d 355*; *People v Hardy, 47 NY2d 500*; *People v Shelley, 103 Misc 2d 1087*; *People v Sentella, 83 Misc 2d 515*; *People v Corie, 196 Misc 1029*; *People v O'Neil, 280 App Div 145*.) III. Section 44-14 of the ***Municipal*** Code of the City of Rochester is not unconstitutionally overbroad or vague. *(* *People v Smith, 44 NY2d 613*; *People v Bergerson, 17 NY2d 398*; *People v Cornish, 104 Misc 2d 72*; *United States v Harriss, 347 U.S. 612*; *People v Byron, 17 NY2d 64*; *Grayned v City of Rockford, 408 U.S. 104*; *People v Wood, 93 Misc 2d 25*; *People v Pagnotta, 25 NY2d 333*; *People ex rel. Lichtenstein v Langan, 196 NY 260*.)

*Edward* **[****4]** *J. Nowak, Public Defender (Brian Shiffrin* of counsel), for respondents. I. The courts below were correct in ruling that the State of New York has ***pre-empted*** the City of Rochester from passing and enforcing an ordinance seeking to regulate establishments which sell alcoholic ***beverages***, such as the one respondents were accused of having violated. *(* People v Judiz, 38 NY2d 529; Matter of Albert Simon, Inc. v Myerson, 36 NY2d 300; People v Cook, 34 NY2d 100; Myerson v Lentini Bros. Moving & Stor. Co., 33 NY2d 250; Robin v Incorporated Vil. of Hempstead, 30 NY2d 347; People v Hardy, 47 NY2d 500; Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441; *Tad's Franchises v Incorporated Vil. of Pelham Manor, 42 AD2d 616, 35 NY2d 672*; Grundman v Town of Brighton, 5 Misc 2d 1006; Matter of Cannon v City of Syracuse, 72 Misc 2d 1072.) II. This court is without jurisdiction to review the constitutional issues raised in respondents' pretrial motion to dismiss, because the lower court, explicitly and at the People's request, made no decision on the constitutional issues. *(* Matter of Attorney General, 155 NY 441; Curtin v Barton, 139 NY 505.) III. **[****5]** Assuming, *arguendo*, that this court chooses to consider the issue of vagueness, section 44-14 of the ***Municipal*** Code of the City of Rochester is impermissibly vague in violation of the constitutional guarantees of due process and freedom of association. *(* Matter of Sussman v New York State Organized Crime Task Force, 39 NY2d 236; People v Berck, 32 NY2d 567; Papachristou v City of Jacksonville, 405 U.S. 156; People v Diaz, 4 NY2d 469; People v Pagnotta, 25 NY2d 333; Fenster v Leary, 20 NY2d 309; People v Firth, 3 NY2d 472; People v Vetri, 309 NY 401; United States v Brewer, 139 U.S. 278; Winters v New York, 333 U.S. 507.) IV. Assuming, *arguendo*, that this court chooses to consider the issue of overbreadth, section 44-14 of the ***Municipal*** Code of the City of Rochester is impermissibly overbroad in violation of defendants' rights to due process and freedom of association. *(* People v Pagnotta, 25 NY2d 333; People v Bunis, 9 NY2d 1; People v Gillson, 109 NY 389; People v Estreich, 297 NY 910; People v Kuc, 272 NY 72; Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441; Healy v James, 408 U.S. 169; *Mine* ***[****6]*** *Workers v Illinois Bar Assn., 389 U.S. 217*.)

**Judges:** Chief Judge Cooke and Judges Jones, Wachtler and Meyer concur with Judge Fuchsberg; Judge Gabrielli dissents and votes to reverse in a separate opinion in which Judge Jasen concurs.

**Opinion by:** FUCHSBERG

## Opinion

**[*467] [**1262] [***208] OPINION OF THE COURT**

This appeal calls upon us to decide the extent to which the State, by enactment of the Alcoholic ***Beverage*** Control Law (L 1934, ch 478), has ***pre-empted*** the field of regulation of establishments which sell alcoholic ***beverages***.

The issue arises in the context of criminal prosecutions based on informations charging the named defendants, 125 patrons of an unlicensed "after hours" club, [1] **[****7]** with violation of section 44-14 of the ***Municipal*** Code of the City of Rochester. ***HN1***[↑] The ordinance states that "[no] person shall patronize an establishment which is selling or offering for **[*468]** sale alcoholic ***beverages*** after 2:00 a.m. in violation of the Alcoholic ***Beverage*** Control Law". [2]

After thorough briefing and extensive oral argument by both sides on a motion defendants brought on under CPL 170.30, the Criminal Division of the Rochester City Court, of the view that the State had not delegated "the power to restrict and regulate the sale of alcoholic ***beverages***", dismissed the accusatory instruments against all the defendants. On the People's appeal to the Monroe County Court, that tribunal affirmed. Certification by a Judge of this court, acting pursuant to CPL 460.20, now brings the matter before us for review. For the reasons which follow, we believe the courts below were correct in the decisions they reached.

Our analysis begins with the general observation that, ***HN2***[↑] since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority (56 Am Jur 2d, ***Municipal*** Corporations, Counties **[****8]** and Other Political Subdivisions, § 428). As pertinent here, in the spirit of this broad principle, article IX (§ 2, subd [c], par [ii]) of the New York State Constitution specifies that any

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[1] A private club incorporated pursuant to State law as a nonprofit corporation which sells liquor only to members is not exempt from regulation under the Alcoholic ***Beverage*** Control Law *(* People v Hardy, 47 NY2d 500, 504).

[2] The balance of this local law reads: "The terms 'selling' and 'sale' shall have the same definitions as found in Section 3 (28) of the Alcoholic ***Beverage*** Control Law".

local law be "not inconsistent with * * * any general law" and that the legislative power of local government is limited "to the extent that the legislature shall restrict the adoption of such a local law".

That such "inconsistency" or "restriction" is not limited to cases of express conflict between local and State laws is apparent from our decision in *Robin v Incorporated Vil. of Hempstead (30 NY2d 347)*, a case which posed a like issue regarding the State's statutory scheme for the regulation of medicine. In *Robin*, the nature of the subject matter being regulated, the lack of any perceived "real distinction" between any particular locality and other parts of the State in this regard, and the accompanying legislative declaration that the State's Department of Health "'shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services'" combined to **[*469]** demonstrate a "design to ***pre-empt*** **[****9]** the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities" **[***209]** *( id., at p 350)*.

On these bases, *Robin* struck down a village law which did not deviate in the slightest from the State statute's definition of a "justifiable abortional act", but merely added the precaution that such an act "be performed only in a hospital duly licensed and accredited under the New York State Department of Health, and having equipment and facilities acceptable to the State Hospital Review and Planning Council". So holding, we emphasized that, in the presence of factors akin to those found in *Robin*, a local government is precluded from legislating on the same subject matter unless it has received "clear and explicit" authority to the contrary *( id., at pp 350-351; Matter of Kress & Co. v Department of Health of City of N. Y., 283 NY 55, 60* [State's Agriculture and Markets Law's regulation of the manufacture and sale of frozen desserts held pre-emptive]).

Measured against these criteria, the Alcoholic ***Beverage*** Control Law is surely pre-emptive. For one thing, the regulatory system it installed is both comprehensive **[****10]** and detailed. Of particular relevance here, it endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic ***beverages*** (*Alcoholic* ***Beverage*** *Control Law, §§ 17*, 55-99, *100*, *130*). Among other details, it specifies that such ***beverages*** may be sold "at retail for on-premises consumption" daily until 4 a.m. and that the actual consumption thereof may be permitted for one-half hour thereafter (*Alcoholic* ***Beverage*** *Control Law, § 106, subd 5*). It also carries its own provision against disorderliness being permitted on such premises (*Alcoholic* ***Beverage*** *Control Law, § 106, subd 6*). Moreover, the State's statutory structure imposes its own direct controls at the local level by creating local alcoholic ***beverage*** control boards and by, for example, granting these administrative instrumentalities the power to further restrict the hours during which alcoholic ***beverages*** may be sold at retail (Alcoholic ***Beverage*** Control Law, §§ 30-43, *43*, *subd 3*).

**[*470]** Nor is the policy behind the legislation left to the imagination. *Section 2 of the Alcoholic* ***Beverage*** *Control Law* declares **[****11]** it the goal of the State "to regulate and control the manufacture, sale and distribution within the state of alcoholic ***beverages*** for the purpose of fostering and promoting temperance * * * and obedience to law". It is not necessary to weigh these objectives qualitatively against the considerations of health with which the court dealt in *Robin* to appreciate that implicitly here too no "real distinction" is to be drawn between the parochial interest of a particular city or other locality on the one hand and that of the State as a whole on the other. In short, the State made a studied decision that the problems to which the statute was directed, and which the Federal Government has failed to solve (see US Const, 18th, 21st Amdts), would be more effectively met not at the local community level but by State action alone.

It should come then as no surprise that the courts (see *Tad's Franchises v Incorporated Vil. of Pelham Manor, 35 NY2d 672*, affg *42 AD2d 616*; *Matter of TJPC Rest. Corp. v State Liq. Auth., 61 AD2d 441*), [3] **[****13]** the New York State Moreland Commission on the **[**1263]**

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[3] The People's reliance on *People v Hardy (47 NY2d 500, supra)* for its contention that the State has not ***pre-empted*** the field of regulation of sale and consumption of alcoholic ***beverages*** is misplaced. In fact, review of the original record in that case indicates that no ***pre-emption*** issue was ever raised in this court. Accordingly, we did not discuss or decide whether the City of Rochester was ***pre-empted*** from including establishments which sell alcoholic ***beverages*** in a ban on the maintenance of a "public resort" which disturbs the peace, comfort or decency of a neighborhood. In any event, unlike the one here, the ordinance in *Hardy* was not directed at and did not regulate the sale or consumption of alcoholic ***beverages***. Rather, it was a general ban on disturbances of the peace at any "place of public resort".

**[***210]** Alcoholic ***Beverage*** Control Law (Study Paper No. 1, Relationship of the Alcoholic **[****12]** ***Beverage*** Control Law and the Problems of ***Alcohol***, p 2 [1963]); [4] New York State's Attorney-General (1972 Opns Atty Gen 97, Feb. 22, 1972) and its Comptroller (31 Opns St Comp, 1975, p 100, No. 75-729) all have recognized that the Alcoholic ***Beverage*** Control Law is exclusive and Statewide in scope and that, thus, no local government may legislate in this field.

**[*471]** Nevertheless, the People urge that, even conceding its pre-emptive character, the Alcoholic ***Beverage*** Control Law is applicable only to licensed clubs whereas the local law regulates unlicensed ones. Noting that the ordinance contains no such limitation, we believe the short and yet more sweeping answer to this argument is that the State statute embraces all sellers of ***alcohol***. Lest there be any doubt, as indicated earlier, the Alcoholic ***Beverage*** Control Law includes a provision making it a crime to sell such ***beverages*** without a license. It also contemplates the enjoining of unlicensed sales and the seizure and forfeiture of the property of establishments which evade **[****14]** this ban (*Alcoholic **Beverage** Control Law, § 123*). Further, while the Alcoholic ***Beverage*** Control Law in part speaks of "licensees", in its punitive and prohibitory provisions it is targeted in the main to "any person" (e.g., *Alcoholic **Beverage** Control Law, § 130*, *subds 3*, 5; see *People v O'Neil, 280 App Div 145*).

We also reject the People's related attempt to erect a barrier between the State law and the local ordinance by contending that the former is aimed exclusively at the improper activities of operators of alcoholic ***beverage*** dispensing businesses and the latter at the conduct of their patrons. Such a distinction, even if it otherwise existed, became irrelevant once the State carved out this area of regulation for itself. And, this is nonetheless true because the State consciously decided that to concentrate on sellers and selling rather than drinkers and drinking would be the most "effective and appropriate" means of carrying out its self-appointed mission (New York State Moreland Commission on the Alcoholic ***Beverage*** Control Law, pp 2, 53).

Finally, all this is not to say that establishments selling alcoholic ***beverages*** are exempt from local laws of general application **[****15]** such as, to take several examples, one requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness at any "place of public resort" *( People v Hardy, 47 NY2d 500*). But, contrary to the People's position, the ordinance here is not of this sort. By dealing solely with the actions of patrons of establishments which sell alcoholic ***beverages***, it impinges impermissibly on the exclusive **[*472]** Alcoholic ***Beverage*** Control Law. Further, by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law (see, e.g., *Wholesale Laundry Bd. of Trade v City of New York, 12 NY2d 998*, affg *17 AD2d 327*).

Consequently, the order of the County Court should be affirmed. [5]

**[****16]**

**Dissent by:** GABRIELLI

## Dissent

Gabrielli, J. (dissenting). I agree with the majority that the State has ***pre-empted*** the field of "regulation of **[**1264]** **[***211]** establishments which sell alcoholic ***beverages***" (p 467), and that the goal of the Alcoholic ***Beverage*** Control Law is "to regulate and control the manufacture, sale and distribution within the state of alcoholic ***beverages*** for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law" (*Alcoholic **Beverage** Control Law, § 2*). The Legislature has seen fit to achieve these purposes primarily through regulation of the sale of liquor, rather than by regulating the conduct of the consumers of liquor.

[4] The New York State Moreland Commission on the Alcoholic ***Beverage*** Control Law was appointed by Governor Nelson A. Rockefeller by executive order to conduct "a thorough study and reappraisal" of the Alcoholic ***Beverage*** Control Law (see Public Papers of Governor Nelson A. Rockefeller, pp 572-574 [1963]). The nature and authority of the Moreland Commission are discussed in *Seagram & Sons v Hostetter (16 NY2d 47*).

[5] Aside from their ***pre-emption*** point, defendants also grounded their motion to dismiss the informations on what they deemed to be the ordinance's unconstitutional vagueness and overbreadth in contravention of due process and freedom of association guarantees. As was the case with the courts below, in view of our finding of ***pre-emption***, we have no occasion to consider or pass on either question.

I disagree, however, with the majority's conclusion that the local ordinance challenged on this appeal (City of Rochester ***Municipal*** Code, § 44-14), which penalizes only the patrons of after-hours establishments, operates in an area the Legislature has reserved to the State under the Alcoholic ***Beverage*** Control Law. This ordinance is aimed, not at liquor regulation, but at the protection of the peace, comfort and decency of the neighborhood -- surely, a legitimate goal of local government **[****17]** (cf. *People v Hardy, 47 NY2d 500*). In his memorandum in support of the ordinance, the acting police chief noted the various police problems caused by the patronizing of after-hours drinking establishments. In my view, the City of Rochester certainly has the power to enact ordinances to deal with such purely local problems, in a manner which does not interfere with **[*473]** the State's power to regulate liquor. I believe that this is all the challenged ordinance sought to accomplish.

Accordingly, I would reverse and hold the ordinance to be a valid and lawful exercise of local government power.

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**MEMORANDUM**

**New York**
**State Liquor Authority**

**Office of Counsel**

TO: NYSBA Local and State Government Law Section
FROM: Paul Karamanol, Senior Attorney
SUBJECT: Preemption Doctrine and the Alcoholic Beverage Control Law
DATE: September 13, 2019

Gentlepersons,

As a result of the 21st Amendment that ended Prohibition, all 50 states are responsible for implementing their own alcoholic beverage regulatory regime. The New York Alcoholic Beverage Control Law (ABCL) has been deemed by the Court of Appeals to be comprehensive and detailed in nature, thereby demonstrating that the New York Legislature had what's known as "preemptive intent" in the drafting of the ABCL. As a result, the preemption doctrine constitutes a fundamental limitation on home rule powers and local municipal governments may exercise only those home rule regulatory powers over liquor licensed businesses in their jurisdictions that are not prohibited via operation of the preemption doctrine or that are otherwise provided for within the ABCL itself.

The preemption doctrine is enshrined in Article 9 of the New York State Constitution to guard against local municipal intrusion upon regulatory matters that the state has carved out for itself via preemptive intent, as follows:

> "(c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, **except to the extent that the legislature shall restrict the adoption of such a local law relating to other**

> **than the property, affairs or government of such local government**…." [NY CLS Const, art IX, §2(c)] (Emphasis mine.)

Regarding the determination of "preemptive intent," by the state, the Court of Appeals set forth in People v. De Jesus, 54 N.Y.2d 465 (1981), that "since the fount of the police power is the sovereign State, such power can be exercised by a local governmental unit only when and to the degree it has been delegated such lawmaking authority [internal citations omitted]." Furthermore, the Court of Appeals in the De Jesus case specifically found that no local government may legislate in the field of alcoholic beverage regulation or of establishments which sell alcoholic beverages in the state because the state has enacted a regulatory system for alcoholic beverages manufacture, distribution and sales that was both comprehensive and detailed – thereby demonstrating "preemptive intent" in the field of alcoholic beverage regulation, as follows:

> "…the Alcoholic Beverage Control Law is surely pre-emptive. For one thing, the regulatory system it installed is both comprehensive and detailed. Of particular relevance here, it endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic beverages. Among other details, it specifies that such beverages may be sold at retail for on-premises consumption daily until 4 a.m. and that the actual consumption thereof may be permitted for one-half hour thereafter. It also carries its own provision against disorderliness being permitted on such premises [Internal quotes and citations omitted]." [People v. De Jesus, 54 N.Y.2d at 469].

The De Jesus Court thereby invalidated a Rochester City ordinance prohibiting persons from patronizing any establishment selling alcoholic beverages after 2:00 a.m. because "by prohibiting persons from patronizing such establishments at times when State law would permit them to do so, the local law, in direct opposition to the pre-emptive scheme, would render illegal what is specifically allowed by State law." [People v. De Jesus at 472].

The De Jesus Court did, however, set up an exception to the Preemption Doctrine for local laws of "general application" that do not directly impinge upon the exclusive domain of the ABCL, as follows:

> "…this is not to say that establishments selling alcoholic beverages are exempt from local laws of general applications such as, to take several examples, one requiring smoke alarms in all business premises, or one forbidding dumping of refuse on city sidewalks, or one prohibiting disorderliness at any place of public resort [Internal quotes and citations omitted]." [People v. De Jesus at 472].

The Court of Appeals again struck down a local law concerning the same subject matter of hours of operation, distribution, or consumption of alcoholic beverages in the case of Lansdown Entertainment Corp. v. NYC Dep't of Consumer Affairs, 74 N.Y.2d 761 (1989). The Lansdown Court struck down a New York City Cabaret License requirement that cabarets needed to be closed between the hours of 4:00 a.m. and 8:00 a.m. because existing ABCL §106(5)(b) allowed alcoholic beverages to be sold for on-premises consumption at licensed premises right up until 4:00 a.m., with patrons allowed to remain on the premises consuming their alcoholic beverages until 4:30 a.m. [Lansdown v. NYC Dep't of Consumer Affairs, 74 N.Y.2d at 761]. Since the local statute made illegal what the state statute specifically allows and the legislative history did not give any indication that the local law was

intended as a law of general application it was struck down under the Preemption Doctrine, as follows:

> "Although the State law does not exempt licensed establishments from local laws of general application, section 20-367 does not qualify as such a local law since its legislative history does not indicate a specific intent to exercise a legitimate local function such as maintaining the peace and quiet of residential neighborhoods; rather the local law merely mirrored the State law. Moreover, even if the local law was adopted for the asserted purpose, there is still a head-on collision between the State law and the ordinance as the latter is applied to establishments licensed by the State, and since the State has preempted any local regulation concerning the subject matter of hours of operation, distribution or consumption, local laws which concern the same subject matter must give way to the State law." [Lansdown, 74 N.Y.2d at 761].

The limits of the Preemption Doctrine in the ABCL context were established in the case of a New York City zoning ordinance governing the operation of adult entertainment establishments in DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91 (2001). In upholding a New York City zoning ordinance governing permissible locations of adult entertainment establishments, the DJL Rest Corp Court found that the local law "applies not to the regulation of alcohol but to the locales of adult establishments irrespective of whether they dispense alcoholic beverages." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97]. The DJL Rest Corp Court further distinguished the ruling as follows:

> "A liquor licensee wishing to provide adult entertainment must do so in a location authorized by the AZR- not because it is selling liquor, but because it is providing adult entertainment. Conversely, if an adult establishment wishes to sell liquor, it must

> obtain a liquor license and comply with the ABC Law. That the ABC Law and the AZR have some overlapping requirements is merely peripheral and involves no more than…a zoning ordinance's inevitable exertion of some incidental control over a particular business." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97, 98].

Due to the foregoing, the Doctrine of Preemption operates to strike down most, but not all, local laws that impact the sale of alcoholic beverages since the Court of Appeals has repeatedly determined that the state has enacted a comprehensive and detailed regulatory scheme in this area via the ABCL. That said, local laws that merely exert some "incidental control" over liquor licensees such as requiring smoke alarms in all business premises, or forbidding the dumping of refuse on city sidewalks, or which serve a general public safety purpose are likely to survive scrutiny by the courts under current caselaw precedent.

**LOCAL OPTION UNDER THE ABCL**

The ABCL does provide for local input into alcoholic beverage regulation and control in several ways. First, all applicants for on-premises retail licenses such as restaurants, hotels, or taverns must provide the State Liquor Authority (Authority) with proof that they have notified their local municipal clerk of their intent to file the application at least 30 days prior to the actual filing date, pursuant to ABCL §110-b(1)(a), which states in pertinent part as follows:

> "1. Not less than thirty days before filing any of the following applications, an applicant shall notify the municipality in which the premises is located of such applicant's intent to file such an application: (a) for a license issued pursuant to section fifty-five, fifty-

> five-a, sixty-four, sixty-four-a, sixty-four-b, sixty-four-c, sixty-four-d, eighty-one or eighty-one-a of this chapter;" [ABCL §110-b(1)(a)].

In New York City, such 30 day notifications must also be provided prior to the filing of any renewal application, alteration application, or substantial corporate change (defined as a change in 80% or more of the officers, directors, or stock ownership of a corporate licensee.) [See ABCL §§110-b(1)(b), 110-b(1)(c), and 110-b(1)(d)]. The 30 day municipal notifications provide localities with the ability to advise the Authority of any objections they may have to issuance of a license to the applicant, or at the location. The Authority takes such local advice into account during the licensing process.

In addition, the Authority has the power to adopt into law county-wide resolutions passed by a county legislative body or board of supervisors (whichever is appropriate) further limiting the county-wide permissible hours of sale of alcoholic beverages via ABCL §17(9), as follows:

> "9. Upon receipt of a resolution adopted by a board of supervisors or a county legislative body requesting further restriction of hours of sale of alcoholic beverages within such county, and upon notice and hearing within such county, to approve or disapprove such hours within such county." [See ABCL §17(9)].

Finally, local towns and cities have the ability to hold a local option vote to become "dry," or even "partially dry," by circulating petitions and holding a vote that otherwise conforms with the Election Law for their residents regarding a series of seven (7) local option questions which describe for their voters the different types of retail liquor licenses available under article 9 of the ABCL. The questions that must be presented for voters as part of any such local option vote are set forth in ABCL §141, in pertinent part, as follows:

"Question 1. Tavern alcoholic beverage license. Shall a person be allowed to obtain a license to operate a tavern with a limited-service menu (sandwiches, salads, soups, etc.) which permits the tavern operator to sell alcoholic beverages for a customer to drink while the customer is within the tavern. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 2. Restaurant alcoholic beverage license. Shall the operator of a full-service restaurant be allowed to obtain a license which permits the restaurant operator to sell alcoholic beverages for a customer to drink while the customer is within the restaurant. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 3. Year-round hotel alcoholic beverage license. Shall the operator of a year-round hotel with a full-service restaurant be allowed to obtain a license which permits the year-round hotel to sell alcoholic beverages for a customer to drink while the customer is within the hotel. In addition, unopened containers of beer (such as six-packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 4. Summer hotel alcoholic beverage license. Shall the operator of a summer hotel with a full-service restaurant, open for business only within the period from May first to October thirty-first in each year, be allowed to obtain a license which permits the summer hotel to sell alcoholic beverages for a customer to drink while the customer is within the hotel. In addition, unopened containers of beer (such as six-

packs and kegs) may be sold "to go" for the customer to open and drink at another location (such as, for example, at his home)?

Question 5. Retail package liquor or wine store license. Shall a person be allowed to obtain a license to operate a retail package liquor-and-wine or wine-without-liquor store, to sell "to go" unopened bottles of liquor or wine to a customer to be taken from the store for the customer to open and drink at another location (such as, for example, at his home)?

Question 6. Off-premises beer and wine cooler license. Shall the operator of a grocery store, drugstore or supply ship operating in the harbors of Lake Erie be allowed to obtain a license which permits the operator to sell "to go" unopened containers of beer (such as six-packs and kegs) and wine coolers with not more than 6% alcohol to a customer to be taken from the store for the customer to open and drink at another location (such as, for example, at his home)?

Question 7. Baseball park, racetrack, athletic field or stadium license. Shall a person be allowed to obtain a license which permits the sale of beer for a patron's consumption while the patron is within a baseball park, racetrack, or other athletic field or stadium where admission fees are charged?" [See ABCL §141].

As to the impact of a local option vote, ABCL §141(3) sets forth the following:

"If a majority of the votes cast shall be in the negative on all or any of the questions, no person shall, after such election, sell alcoholic beverages in such town contrary to such vote or to the provisions of this chapter; provided, however, that the result of such vote shall not shorten the term for which any license may have been lawfully issued under this chapter or affect the rights of the licensee thereunder; and no person shall after

such vote apply for or receive a license to sell alcoholic beverages at retail in such town contrary to such vote, until, by referendum as hereinafter provided for, such sale shall again become lawful." [See ABCL §143].

One final note for local municipal attorneys, as per a 2006 Attorney General's Opinion, municipal "social host" type laws of the type intended apportion liability for or otherwise address underage consumption of alcoholic beverages at social gatherings held in private residences are not preempted by the ABCL or any other state law. [See 2006 N.Y.Op.(Inf.) Att'y Gen. 2].

**CONCLUSION**

The alcoholic beverage regulatory regime in New York was put in place at the end of Prohibition in 1934 via adoption by the New York Legislature of the ABCL. The ABCL has been repeatedly deemed by the Court of Appeals to be comprehensive and detailed in nature, thereby demonstrating that the legislature had preemptive intent in the drafting of the ABCL. As a result, local municipal governments may exercise only those regulatory powers over liquor licensed businesses in their jurisdictions that are not prohibited via operation of the preemption doctrine. There are, however, certain provisions of the ABCL specifically designed to incorporate local municipal input, including requiring all on-premises license applicants to provide their local municipal clerk with notification of their intent to file at least 30 days prior to the actual filing of their application with the Authority (New York City applicants and licensees must also provide municipal notifications for renewals, alterations, or substantial corporate changes), allowing the Members of the Authority to adopt resolutions of a board of supervisors or county legislature further limiting the hours of operation for alcoholic beverage

sales in a given county, and setting forth procedures for local option votes held in accordance with the Election Law that provide local municipalities with the ability to become "dry," or "partially dry," based upon the outcome of such a vote. Finally, according to a 2006 informal Attorney General's opinion, municipal "social host" type laws of the type intended to apportion liability for or otherwise address underage consumption at social gatherings held in private residences are not preempted by the ABCL or any other state law.

# Preemption Doctrine & the Alcoholic Beverage Control Law

## NYSBA Local and State Government Law Section

Paul S. Karamanol, Senior Attorney

State Liquor Authority Office of Counsel

# Alcoholic Beverage Control Law enacted at end of Prohibition in 1934

- 21st Amendment grants all 50 states primary jurisdiction to regulate the alcoholic beverage industry within their borders.
- Alcoholic Beverage Control Law ("ABCL") was intended to regulate what was at one time considered a vast criminal enterprise with pervasive political influence.
- ABCL has been amended repeatedly but never truly overhauled since.

# Preemption Doctrine enshrined in Article 9 of the New York State Constitution

- "(c) In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, **except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government**…." [NY CLS Const, art IX, §2(c)] (Emphasis mine.)

# People v. De Jesus, 54 N.Y.2d 465 (1981)

- Invalidated Rochester City ordinance prohibiting persons from patronizing any establishment selling alcoholic beverages after 2:00 am. [People v. De Jesus 54 N.Y.2d at 472].
- Extended Preemption Doctrine for the first time to the ABCL, stating that regulatory system set up thereby is "both comprehensive and detailed…." [People v. De Jesus, at 469].
- Set up exceptions to the Preemption Doctrine for local laws of general application, such as requiring smoke alarms in all businesses, forbidding dumping of refuse, or prohibiting disorderliness at any public place. [People v. De Jesus at 472].

# Lansdown Entertainment Corp. v. NYC Dep't of Consumer Affairs, 74 N.Y.2d 761 (1989)

- Struck down NYC Cabaret License requirement that cabarets needed to be closed between the hours of 4:00 am and 8:00 am because ABCL Sec. 106(5)(b) allows for on-premises sales until 4:00 am and consumption on the premises until 4:30 am. [Lansdown v. NYC Dep't of Consumer Affairs, 74 N.Y.2d at 761].
- NYC statute made illegal what the state statute specifically allows and the "legislative history does not indicate a specific intent to exercise a legitimate local function such as maintaining the peach and quiet of residential neighborhoods…." [Lansdown, 74 N.Y.2d at 761].

# DJL Rest. Corp. v. NYC, 96 N.Y.2d 91 (2001).

- Court of Appeals upheld NYC zoning ordinance governing adult entertainment establishments finding that local law "applies not to the regulation of alcohol but to the locales of adult establishments irrespective of whether they dispense alcoholic beverages." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97].
- "A liquor licensee wishing to provide adult entertainment must do so in a location authorized by the AZR- not because it is selling liquor, but because it is providing adult entertainment. Conversely, if an adult establishment wishes to sell liquor, it must obtain a liquor license and comply with the ABC Law. That the ABC Law and the AZR have some overlapping requirements is merely peripheral and involves no more than…a zoning ordinance's inevitable exertion of some incidental control over a particular business." [DJL Rest. Corp. v. City of New York, 96 N.Y.2d at 97, 98].

# Local Option under the ABCL

- Municipal notification of at least 30 days prior to filing of application with the Authority is required for all applicants for on-premises retail licenses. [ABCL Sec. 110-b(1)(a).]
- County-wide resolutions further limiting permissible hours of sale. [ABCL §17(9)].
- Local option votes to become “dry” or “partially dry.” [ABCL Art. 9].

# Municipal Notifications for Applicants

- Municipal notification of at least 30 days prior to filing of application with the Authority is required for all applicants for on-premises retail licenses. [ABCL Sec. 110-b(1)(a).]
- In NYC prior municipal notification is also required for renewal applications, alteration applications, or substantial corporate changes. [ABCL §§110-b(1)(b), 110-b(1)(c), and 110-b(1)(d)].
- 30 Day notifications must be provided to town clerks and provide local municipalities with the opportunity to advise the Authority of any objections they may have to issuance of a license to the applicant or at that particular location.

# Any questions?

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