FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3095

CLASSY CYCLES, INC.,

Appellant,

v.

PANAMA CITY BEACH,

Appellee.

On appeal from the Circuit Court for Bay County.
James B. Fensom, Judge.

November 13, 2019

WOLF, J.

Classy Cycles, Inc. challenges a final summary judgment upholding Panama City Beach's (City) ordinances pertaining to the rental of motorized scooters. Two ordinances are at issue, one prohibiting the overnight rental of scooters and one completely prohibiting the rental of scooters in the city effective September 8, 2020. Appellant claims the ordinances are arbitrary as a matter of law because the City does not have the power to ban a business from the entire city unless the business constitutes a per se legal nuisance. They also argue that the ordinances are preempted by Florida Statutes.[1] We find no error in the trial court's

[1] Chapter 2019-109, Laws of Florida, was submitted as supplemental authority, but both sides agreed at oral argument

determination that a geographically small city has the right to restrict a business from operating within the city when the undisputed facts demonstrate that the restriction is for the safety of the city's citizens and visitors. We also find that chapter 316 does not preempt the ordinances because it provides the City the right to pass restrictions on types of vehicles which may be operated in congested areas.

UNDISPUTED FACTS

In 2015, the City passed ordinances requiring drivers of rented scooters to wear vests and requiring businesses renting scooters to the public to carry insurance on the scooters. This court reversed a trial court's order finding the ordinances valid, holding that these ordinances were preempted by state law. *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

On June 8, 2017, the City enacted two new ordinances: 1415, which prohibits the overnight rental of scooters; and 1416, which completely prohibits the rental of scooters in the City effective September 8, 2020. Both ordinances contain extensive whereas clauses, painting a portrait of the City's rationale for adopting them: The City is geographically small and crowded and is being besieged by inexperienced scooter drivers seeking amusement and driving in a dangerous manner; the City is a tourist destination frequented by tens of thousands, and its streets are congested by scooters that are being driven illegally and in areas where they are not permitted; the City's residents and visitors are put in dangerous situations as a result of the improper use of scooters, especially at night; City businesses have complained about numerous trespasses on their property by people driving scooters while being disruptive; City police have been unable to cope with the situation and essential police resources are being drained; the City has been unable to control the situation through less restrictive means.

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that the statute was inapplicable to the scooters being regulated in this case.

A portion of the whereas clauses describing this situation is setout in the footnote below.[2]

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[2] In ordinance 1415, pertaining to nighttime rental of scooters:

> Whereas, the City Police Chief has reported an increase in calls from private owners asking to trespass rented scooters from their property, and complaints from business owners regarding the movement of rented scooters through their properties; and
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> Whereas, the City Council has observed the frequent and recurring recreational use of scooters operating on sidewalks, boardwalks, parking lots, parking garages, weaving in and out of traffic, and the numerous traffic stops undertaken by law enforcement to address and curb such use which is in violation of state and local laws; and
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> Whereas, the Council finds that two material factors have combined to generate or increase the irresponsible behavior of the rented scooter operators which has become a public nuisance, namely (1) the fact that the scooters are rented in many, and probably most, cases as an amusement to ride-the-strip, to see and be seen, and not to "go to the grocery store," and (2) that the increase of traffic congestion on the City streets resulting from the growth of retail and accommodations has denied the rented scooter operators the use of the streets for amusement and so they weave in traffic and scoot along sidewalks, the right shoulder of the road, parking lots, all in conflict with pedestrians; and
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> . . . .
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> Whereas, the City Police Chief has stated scooter rentals at night present the biggest nuisance to the public and the greater impediment to his department's protection of the visitors and residents of this City; and
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> . . . .

Whereas, during the period of March 1 through April 13, 2018, the City Police Department conducted 3,162 traffic stops while also attempting to protect the public and investigate other crimes committed in the City; and

Whereas, during the first 13 days of April 2017, the City Police Department received 19 citizen complaints, and rented scooters after 5:00 p.m. were involved in 81 traffic stops and 18 motor vehicle accidents which resulted in 104 traffic citations; and

Whereas, City Police Office receive numerous requests to remove rental scooters from private property or are forced to arrange for the towing of vehicles following traffic citations or motor vehicle accidents. . . .

Whereas, the Council finds that the operation of rented motor scooters is particularly dangerous at night because the congestion and proclivities of the visitors and the extraordinary demands placed upon law enforcement prevent adequate policing of scooter operation at night, in addition to the fact that typically visitors who rent scooters are unfamiliar with the area, and often are not skilled scooter drivers so that they become more easily confused and distracted in nighttime traffic with reduced visibility and the flare of artificial lights;

. . . .

In ordinance 1416, pertaining to the complete prohibition of the rental of scooters:

Whereas, the City of Panama City Beach is a tourist destination frequented by tens of thousands at a time; and

. . . .

Whereas, as the popularity of rental scooters increased the behavior of scooter operators became noticeably dangerous as traffic violations were more

common among rental scooter than other vehicles. This problem was amplified by the lack of training, supervision, and oversight practiced by the rental scooter businesses; and

. . . .

Whereas, irresponsible driving behavior by scooter renters has become so common that it frequently affects visitors and residents who are all-to-often forced to modify their own behavior or routes of travel to compensate for this irresponsible behavior, or else fall victim to a motor vehicle accident involving a renter scooter; and

. . . .

Whereas, the City's efforts to regulate rental scooter businesses to improve the behavior of the industry and its customers have been long and varied, and reflect the longstanding tension between the associated and varied problems observed by the City arising from the rental of scooter and the popularity of rented scooters with tourists, ...

Whereas, since January 1, 2017 through May 23, 2017, the Panama City Beach Police department wrote 305 rented scooter traffic citations, made 319 rented motor scooter stops and worked 56 rented scooter motor scooter crashes; and

Whereas, the number of scooter rentals per day and the typical reckless and often illegal driving behavior of rental operators create an impracticable strain upon City resources and siphons those valuable resources from other important police work; and

Whereas, the City is fortunate to enjoy a robust and growing tourism and more recently local and regional retail economy which has resulted in the expansion of major roads and connectors and even more significant

increases in the number of vehicles on those roads because the City is linear, being 8 miles long but only one-mile-wide with only three, parallel thoroughfares, all of which combined has resulted in increased congestion on City streets; and

Whereas, the materially increased congestion and side of City roads and intersections of roads have made it increasingly dangerous for inexperienced operators of rented scooters to operate and, frequently play, in the streets; and

Whereas, additionally the increased congestion has created greater and greater incentives for the operators of rented scooters to take short cuts through parking lots, on pedestrian sidewalks, on the pier board-walk, and generally through private or quasi-public property where through traffic of any kind is appropriate, and frequently when those areas are occupied by pedestrians; and

. . . .

Whereas, the limits of the City's infrastructure capacity, resources to police dangerous, disrespectful, and frequently simply mindless, behavior of the rented scooter drivers, combined with the sheer volume of rented motor scooters on the street have materially and adversely impacted the tourists' experiences and the residents' quality of life; and

. . . .

Whereas, the City has attempted everything within its home rule authority to improve or remove the danger and nuisance posed by the behavior of the customers of the scooter rental businesses but its unsuccessful attempts to dampen the unacceptable behavior of the customers of those businesses, and the refusal or inability of the industry itself to do so, have left no effective legislative alternative within its authority other than to

On June 12, 2017, Classy Cycles commenced the underlying action seeking to have ordinances 1415 and 1416 declared invalid, arguing the ordinances are preempted by state law, they impermissibly burden the statutory right of drivers to operate a motor vehicle on public streets, they treat drivers of scooters differently than other drivers, and the ordinances cannot as a matter of law prohibit renting a scooter. The factual findings contained within the whereas clauses were not challenged in the trial court nor have they been challenged on appeal.

Both parties filed motions for summary judgment, and the trial court, after several hearings, entered final summary judgment in favor of the City.

ISSUES ON APPEAL

The specific arguments raised in appellant's brief are: (1) the City's ordinances are arbitrary and unreasonable because they ban an activity that is not a per se nuisance; and (2) the City's ordinances are preempted and thus invalid because they are an attempt by the City to indirectly regulate what this court ruled the City could not directly regulate in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

Much of the argument between the parties concerns whether the ordinances are traffic control ordinances or zoning ordinances. Ultimately this question does not control our analysis. No matter how they are categorized they restrict the rental of scooters with the goal of limiting their use within the city. This is the action which we must review.

RATIONAL BASIS REVIEW

Appellant argues the City's ordinances are arbitrary because they restrict and ultimately eliminate the business of renting scooters within the city. They contend that the rental of scooters to

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> make the rented-scooter resource unavailable to the visitors to the beach by prohibiting the rental of them;
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> . . . .

the public is not a per se nuisance, so the City may not enact ordinances completely prohibiting this business because such ordinances would be arbitrary and unreasonable as a matter of law. They rely on the cases of *Carter v. Town of Palm Beach,* 237 So. 2d 130 (Fla. 1970); and *Inglis v. Rymer,* 152 So. 4 (Fla. 1934).

The City contends that it is permitted to prohibit activity which threatens the health, safety, and welfare of its citizens and visitors, even when the activity is not a per se nuisance because of a constitutional amendment granting municipalities broad powers and the Municipal Home Rule Powers Act (MHRPA). We first look to the history of a city's ability to adopt ordinances for the health, safety, and welfare of their communities.

Under the constitution of 1885, the Legislature was required to pass a general or special act to grant municipalities the power to perform any given function. *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992), modified sub nom. *Collier County v. State*, 733 So. 2d 1012 (Fla. 1999), holding modified by *Sarasota County v. Sarasota Church of Christ, Inc*., 667 So. 2d 180 (Fla. 1995). Municipalities thus derived all of their power from the Legislature, and unless the Legislature explicitly granted them the power to perform a given function, the municipalities were without authority to act. *Id.*

In 1968, the State amended the Florida Constitution and provided for broad inherent municipal powers, "except as otherwise provided by law." *Id.* (quoting Art. VIII §2(b), Fla. Const.). The legislature further adopted this view when it passed the Municipal Home Rule Powers Act (MHRPA), which codified the constitution's recognition of the broad powers inherent in municipalities and authorized them to wield any power not expressly prohibited by law. *See* § 166.021, Fla. Stat.

Specifically, under section 166.021, the MHRPA provides that municipalities have inherent governmental powers that do not require legislative authorization:

> (1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform

> municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.
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> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act.

§ 166.021, Fla. Stat.

Under this framework, the parties dispute to what extent a municipality can prohibit a certain activity. Appellant argues a municipality cannot totally prohibit any business activity that is not a per se nuisance. The City contends it can prohibit any activity, provided the reasoning supporting the prohibition is not arbitrary or unreasonable. We agree with the City.

Prior to the enactment of the MHRPA, courts routinely struck down ordinances prohibiting certain business or leisure activities because the respective municipalities were not banning activity that was considered a per se nuisance and the municipalities were acting outside of valid authority conferred by the legislature. *See Inglis v. Rymer*, 152 So. 4 (Fla. 1934) (holding that an ordinance prohibiting skating rinks that charged a fee was invalid because the municipality had no express authority to enact such an ordinance unless the activity was considered a per se nuisance); *Carter v. Town of Palm Beach*, 237 So. 2d 130 (Fla. 1970) (holding that an ordinance prohibiting surfing was invalid because even though the municipality had authority to regulate surfing, the ordinance was arbitrary and unreasonable because it sought to prohibit an activity that was not a per se nuisance). We find appellant's argument unpersuasive for several reasons.

First, the case law cited by appellant is at least partially based on the outdated analysis from *Inglis* that one had to look to the city charter to determine whether the city had the right to ban the

particular activity. 152 So. at 5. Second, while the court in *Inglis* held that banning a business activity throughout the city was arbitrary and unreasonable under those particular circumstances, the facts in this case indicate that the limitation on the rental of motor scooters constitutes reasonable exercise of police powers by the City.

As the City points out, the law has changed since *Inglis* and *Carter* were decided. The Legislature passed the MHRPA and provided municipalities with inherent authority to pass ordinances pertaining to a legitimate exercise of municipal power. Municipal ordinances no longer require an express statutory provision authorizing their enactment, but the ordinances must pass the rational basis test to be upheld. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632 (Fla. 3d DCA 2010) (citing *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995)).

The "per se nuisance" requirement is no longer in effect because it was attached to the now defunct rule requiring municipalities to only exercise authority expressly granted to them by the legislature. The modern test is an application of the rational basis test, which requires that the ordinance in question be reasonable and not arbitrary. *Id.*

The trial court addressed the applicability of *Carter* and the per se nuisance rule cogently by pointing out that the holding in *Carter* did not survive the expansion of municipal home rule power as evidenced by modern case law upholding prohibitions of activities that are not per se nuisances. *See Kuvin v. City of Coral Gables*, 62 So. 3d 625, 628 (Fla. 3d DCA 2010) (upholding prohibition of parking trucks in residential areas); *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010) (upholding prohibition of sex offenders from residing within 2500 feet of a school); *Lamar-Orlando Outdoor Advert. v. City of Ormond Beach*, 415 So. 2d 1312, 1315 (Fla. 5th DCA 1982) (upholding prohibition of off-site advertising); *Lambros, Inc. v. Town of Ocean Ridge, Fla.*, 392 So. 2d 993, 993 (Fla. 4th DCA 1981) (upholding prohibition of all commercial uses of property); *Blank v. Town of Lake Clarke Shores*, 161 So. 2d 683 (Fla. 2nd DCA 1964) (upholding prohibition of all commercial activity).

Thus, under modern home rule power, municipalities have broad authority to regulate activities impacting public health, safety, and welfare so long as such regulations are not arbitrary or unreasonable. *See, e.g., City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1174 (Fla. 1st DCA 1993). Accordingly, to the extent that appellant argues on appeal that the City was without authority to prohibit the leasing or rental of motor scooters because motor scooters are not a "per se nuisance," appellant's argument is without merit as it relies on an out dated legal test that is no longer applicable.

Our job under the rational basis test is not to determine whether the City used the best method or least intrusive means, but whether the actions were reasonably related to accomplishing its goal.[3] *Strohm v. Hertz Corp./Hertz Claim Mgmt.*, 685 So. 2d 37, 39-40 (Fla. 1st DCA 1996). Under this analysis, the "statute need only bear a reasonable relationship to a legitimate state interest. Some inequality or imprecision will not render a statute invalid." *Id.* at 39; *Acton v. City of Fort Lauderdale*, 440 So. 2d 1282, 1284 (Fla. 1983). Under the rationale basis standard, courts uphold governmental regulations as long as there appears to be a plausible reason for the governmental action. *Strohm*, 685 So. 2d at 40.

In *Kuvin v. City of Coral Gables*, 62 So. 2d 625, 632 (Fla. 3d DCA 2010), the court described the review of city land use regulations under a rational basis standard as follows:

> Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court and this Court have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. *See Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 933 (Fla. 1995) ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no

[3] Appellant has never argued that the strict scrutiny test applies in this case.

> substantial relationship to legitimate societal policies."); *Harrell's Candy Kitchen, Inc. v. Sarasota–Manatee Airport Auth.*, 111 So. 2d 439, 443 (Fla. 1959) (holding that zoning regulations are presumptively valid, "and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to public health, safety, morals or general welfare"); *City of Coral Gables v. Wood*, 305 So. 2d 261, 263 (Fla. 3d DCA 1974) ("A zoning ordinance will be upheld unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare.").

(Emphasis supplied.)

In *Carter v. Town of Palm Beach*, 237 So. 2d 130 (Fla. 1970), the court recognized the ability of cities to prohibit surfing within portions of the city for the safety of its citizens. However, the court held that the complete prohibition of this activity from all the beach area is arbitrary and unreasonable. *Id.* at 131-132. We do not disagree that generally an ordinance prohibiting a legal business from operating within an entire city is arbitrary and unreasonable.

In *Carter*, there is no indication that the Town argued there were dangerous conditions present throughout the entire city. Here, however, the situation laid out within the whereas clauses unequivocally states that the dangerous conditions existed throughout the entire city. Under these limited circumstances, we do not find the ordinances to be arbitrary or unreasonable.

It has been suggested that the ordinances were arbitrary because rather than prohibiting the operation of scooters, the ordinances instead prohibit the rental of scooters. It is not our job to second guess the City on its method of accomplishing its legitimate goals. There are a number of reasons to limit scooter rentals other than to impose a total ban on their operation. Owners may be more experienced riders than one-time renters or may rely on scooters for their primary mode of transportation as opposed to renting them for amusement and then operating them in a dangerous manner. It may be that the City chose this method

in an attempt to avoid the preemption argument. Whatever the rationale, the City's reasoning in choosing this particular method of limiting rental scooter use is not within the scope of rational basis scrutiny.

PREEMPTION

Appellant also argues that the City's ordinances are preempted by chapters 316, 320, and 322, Florida Statutes, as well as the holding of this court in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016).

The City argues that there is no express preemption because the ordinances are not traffic laws that regulate the manner of use of vehicles which is preempted by chapter 316, Florida Statutes. The City also argues that the holding in *Classy Cycles* is limited to the matters specifically addressed in that case: the ordinances requiring scooter renters to wear vests and requiring scooter rental businesses to carry a specific insurance for scooter rentals.

The Florida Supreme Court most recently addressed the issue of preemption of local ordinances in *D'Agostino v. City of Miami*, 220 So. 3d 410 (Fla. 2017). In *D'Agostine*, the court laid out the legal framework for preemption stating:

> Florida law recognizes both express preemption and implied preemption. [*Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010)] On one hand, express preemption requires a specific legislative statement—it cannot be implied or inferred—and the preemption of a field is accomplished by clear language. *Id.* On the other hand, implied preemption occurs when the state legislative scheme is pervasive, and the local legislation would present a danger of conflict with that pervasive scheme. *Id.* In other words, preemption is implied when the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature. *Id.* . . . *The test for implied preemption requires that we look "to the provisions of the whole law, and to its object and*

> *policy." Browning*, 29 So. 3d at 886 (citing *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006)). Further, "[t]he nature of the power exerted by the Legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital to this determination." *Id.* (citing *Harden*, 938 So. 2d at 486).

D'Agastino, 220 So. 3d 410 at 421 (emphasis added).

The key question becomes whether the Legislature intended to preempt an area of local regulation. But, in applying this test, "we must be careful and mindful in attempting to impute intent to the Legislature to preclude a local elected governing body from exercising its home rule powers." *Id.* at 421 (citing to *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996)).

The main preemption question in this case is to what extent chapter 316, Florida Statutes, the Florida Uniform Traffic Code, precludes the passage of the City's ordinances. Chapter 316 contains two broad preemption provisions: The first is section 316.002, Florida Statutes, which prohibits municipalities and localities from enacting ordinances that conflict with state traffic laws; the second is section 316.007, Florida Statutes, which prohibits municipalities and localities from enacting ordinances on any matters covered by chapter 316 without authorization. *Masone v. City of Aventura*, 147 So. 3d at 495-96 (Fla. 2014). Local authority to regulate in this area is specifically addressed in section 316.008, Florida Statutes[4], which states in pertinent part:

> (1) The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:

[4] Appellant did not argue below, or on appeal, that section 318.008(1)(n), Florida Statutes, cannot be used to ban motor scooters throughout an entire city.

. . . .

> (n) Prohibiting or regulating the use of heavily traveled streets by *any class or kind of traffic* found to be incompatible with the normal and safe movement of traffic.

(Emphasis added.)

In *Masone*, the supreme court was confronted with the question of whether municipal ordinances imposing penalties for red light violations detected by devices using cameras were invalid because there were preempted by state law. 147 So. 3d at 494. The court found that the municipal ordinances were preempted because they regulated the movement of traffic and provided for penalties covered under the Uniform Traffic Code. *Id.*

Similarly, this court in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016), was confronted with ordinances that attempted to regulate matters specifically addressed and regulated within the Uniform Traffic Code. This court determined the ordinance requirement that operators of rented scooters wear green vests was preempted by the express provisions in sections 316.002 and 316.007, Florida Statutes. *Id.* at 786. This court also determined that the ordinance requiring additional insurance for renters of scooters was expressly preempted by chapter 316 and impliedly preempted in chapter 324, Florida Statutes. *Id.* at 788.

The trial court in this case found that the holding in *Classy Cycles* was inapplicable because the ordinances at issue here do not address the actual operation of motor vehicles or disturb the uniformity of Florida's traffic laws. We agree with the trial court. Unlike *Masone*, the ordinances at issue here do not regulate the method of driving or attempt to apply penalties for improper driving behavior in conflict with state regulations on the same subject. Unlike the ordinances in *Classy Cycles*, these ordinances do not attempt to regulate conduct or behavior while driving or impose additional requirements in order to drive on the streets. The ordinances in this case also do not impose additional requirements over and above what is required by state law.

The ordinances simply regulate a business that is causing traffic congestion and unsafe conditions within the city. It has always been within the purview of a local government to regulate uses that will cause traffic congestion through its land use code. *See Watson v. Mayflower Prop. Inc.*, 223 So. 2d 368 (Fla. 4th DCA 1980).

As previously stated, the Uniform Traffic Code itself recognizes an exemption for local government to reasonably exercise their police powers by "*prohibiting or regulating* the use of heavily traveled streets by any *class or kind* of traffic found to be incompatible with the normal and safe movement of traffic." § 316.008(1)(n), Fla. Stat. (emphasis added). Thus, whether these are designated land use or traffic ordinances they are not preempted, and the only question is whether they are a reasonable exercise of police powers.[5] We agree with the trial court's determination that they are and AFFIRM.

RAY, C.J., concurs; MAKAR, J., concurs in part and dissents in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in part, dissenting in part.

Motorized scooters, or more specifically, the irresponsible driving behavior of inexperienced youthful operators primarily

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[5] While the parties stipulated that chapter 2019-109, Laws of Florida, is inapplicable, we would note that the new legislation continues to recognize the right under section 316.008(1)(n) for local governments to adopt "an ordinance governing the operation of micromobility devices and motorized scooters on streets, highways, sidewalks, and sidewalk areas under the local government jurisdiction."

during Spring Break's evening hours, has resulted in a total prohibition of any rentals in Panama City Beach beginning on September 9, 2020. On that day, no scooter may be rented from within the City, the purpose of which is to control traffic movement by reducing the community's seasonal reckless-scooter problem. Rentals are not just prohibited during the peak Spring Break period, however, but on a 365/24/7 basis. Scooters rented elsewhere (for example in neighboring Panama City) and owner-operated scooters remain permissible.

Over the years, the City has taken different approaches to motorized scooters, initially embracing them as complementing the community's tourist and visitor industry but later deeming them a scourge as usage increased markedly. As traffic infractions and accidents increased, and efforts at industry self-regulation failed,[*] the City says it successfully altered scooter operators' behavior by requiring that renters wear brightly colored safety vests and carry signed safety brochures (so they couldn't claim ignorance of public safety laws). The resulting "dramatic reduction in dangerous driving" was "short lived," however, due to this Court's decision in *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (Fla. 1st DCA 2016) (*Classy Cycles I*), which curtailed regulations deemed pre-empted by state law. Soon thereafter, the City enacted Ordinances 1415 and 1416, the latter implementing a total ban in September 2020 following a grace period that ostensibly allows rental companies to recoup their investments.

Judge Wolf's opinion, which addresses the legality of Ordinances 1415 and 1416, provides a thorough and thoughtful discussion of the current status of municipal law and concludes

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[*] Emblematic of the City/rental company standoff is a Whereas clause in Ordinance 1416, which recounts that employees of one rental company showed up at a City meeting "all wearing a red t-shirt emblazoned with its business name and slogan, which is 'Ride It Like You Stole It.'" The City, citing Urban Dictionary, pointed out the irony that the slogan means to "Drive fast; drive as if you stole the car and the police are after you – to drive a vehicle faster and more recklessly than it should be driven, acting as if you aren't the one paying for the repairs."

that both ordinances are lawful. I fully concur in Judge Wolf's opinion except the conclusion that the total ban on intra-city scooter rentals in Ordinance 1416 is permissible.

Whether the ban is an allowable exercise of municipal regulatory powers or is pre-empted by state law requires review of the applicable traffic control laws. A municipal regulation—even a reasonable one—may be impermissible if the legislature has carved out an area of regulation for uniform state application and not included the regulation as an enumerated local government power.

Such is the case with Florida's Uniform Traffic Control Law, codified in chapter 316, Florida Statues, which has clear statements as to its purpose and strict limitations on local government powers.

> It is the legislative intent in the adoption of [chapter 316] to make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities. The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. *Section 316.008 enumerates the area within which municipalities may control certain* ***traffic movement*** *or parking in their respective jurisdictions.* This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith. *It is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.*

§ 316.002, Fla. Stat. (2019) (emphases added); *see also id.* § 316.007 ("The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and *no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized*.") (emphasis added). As the highlighted portions indicate, the legislature has made clear that the state's traffic

control laws in chapter 316 trump municipal ordinances excepting only those specific areas set out in section 316.008. And our supreme court has echoed this point, stating that "[c]hapter 316 could not be clearer in providing that local ordinances on 'a matter covered by' the chapter are preempted unless an ordinance is 'expressly authorized' by the statute." *Masone v. City of Aventura*, 147 So. 3d 492, 496–97 (Fla. 2014).

The legislature has set forth limited and specifically defined powers that local governments statutorily possess as to traffic movement and control, set forth in section 316.008, entitled "Powers of local authorities," which states in relevant part:

> (1) The provisions of this chapter [State Uniform Traffic Control] shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:
>
> . . .
>
> (g) Restricting *the use* of streets.
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> (h) Regulating *the operation* of bicycles.
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> . . .
>
> (n) Prohibiting or regulating *the use* of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic.
>
> . . .
>
> (t) Adopting and enforcing such temporary or experimental regulations as may be necessary to cover emergencies or special conditions.

§ 316.008, Fla. Stat. (2019) (emphasis added). *See City of Aventura*, 147 So. 3d at 496 ("As indicated in section 316.002, section 316.008 contains an enumeration of specific powers that local authorities

may exercise *to control traffic movement* or parking in their respective jurisdictions 'within the reasonable exercise of the police power.'") (emphasis added).

In this case, the motor scooters at issue were within the statutory definition of a motorcycle for purposes of chapter 316, such that the City was limited to the powers in section 316.008 in dealing with traffic movement and control. On this point, the legislature recently made clear that the operation of motorized scooters is permissible and on par with bicycles in most respects such as operating on sidewalks and bicycle paths. Ch. 2019-109, § 3, Laws of Florida, ("Motor Vehicles-Micromobility Devices"); § 316.2128(1), Fla. Stat. (2019) ("The operator of a motorized scooter or micromobility device has all of the rights and duties applicable to the rider of a bicycle under s. 316.2065, except the duties imposed by s. 316.2065(2), (3)(b), and (3)(c), which by their nature do not apply."). The recent legislation further provides that "this section [316.2128] may not be construed to prevent a local government, through the *exercise of its powers under s. 316.008*, from adopting an ordinance *governing the operation of* micromobility devices and *motorized scooters* on streets, highways, sidewalks, and sidewalk areas under the local government's jurisdiction." § 316.2128, Fla. Stat. (emphasis added).

The statutorily defined "powers of local authorities" that govern the operation of motorized scooters (deemed motorcycles previously) was, and remains, limited to twenty-three topics, none of which suggest that a total ban on scooter rentals within a municipality is permissible as a means of traffic control. Each method of regulation in section 316.008(1) deals with the manner of *use* of motorized scooters or their *operation*, and not the manner in which they are sold, rented, or otherwise made available commercially for use or operation. The City and trial judge both characterize the total rental ban in Ordinance 1416 as a permissible regulation because it does not ban all scooters, does not affect operating standards for scooters generally, and falls outside the pre-emptive canopy of chapter 316, which does not directly address the regulation of rental vehicles commercially within a municipality.

Nonetheless, it is beyond debate that the *sole reason* for the total intra-city rental ban is to regulate and control traffic movement on the City's streets that spills into adjoining areas. The conclusion that Ordinance 1416 regulates "only the business of renting motor scooters" overlooks the City's specific regulatory intent, which is to "deny access" to rented scooters to prohibit their "use" and thereby the traffic stops, citations, and accident investigations that would occur. The ban is *specifically intended* to have a direct and immediate impact on traffic movement, not merely an incidental or inconsequential side effect; controlling the use and operation of motorized scooters in the City's traffic flow is its raison d'être.

For this reason, the City must directly employ one of the twenty-three listed powers in subsection 316.008(1) that address traffic movement and control versus totally banning intra-city scooter rentals as an indirect means to regulate their use and operation. A ban, such as the one in this case, amounts to an indirect prohibition of a permissible activity that is unlawful. That's the focus of *Alachua County v. Lewis Oil Co., Inc.*, 554 So. 2d 1210 (Fla. 1st DCA 1989), where a moratorium on underground petroleum storage tanks was held to be an indirect and unlawful means of prohibiting what the county could not ban. *Id*. at 1211 ("The intended and actual effect of the moratorium is therefore to indirectly do what [the county] is prohibited from doing directly, i.e., enforce standards stricter than DER standards, without first obtaining DER approval."); *see also City of Gainesville v. GNV Invs., Inc.*, 413 So. 2d 770, 771 (Fla. 1st DCA 1982) (upholding "trial judge's finding that the Plan Board unlawfully and arbitrarily denied" a proposed skate center). No case, including *Lewis Oil*, is a perfect match factually and legally to this one, but its legal principle fits nicely. *See also State ex rel. Powell v. Leon Cty.*, 182 So. 639, 642 (Fla. 1938) ("It is fundamental and elementary that the legislature may not do that by indirect action which it is prohibited by the Constitution to do by direct action.").

The ban on rental scooters is akin to St. Petersburg's proposed ban on horse-drawn carriages that the attorney general deemed impermissible based on the limited authority in section 316.008. In opining that such a ban is impermissible, the attorney general concluded:

> In light of the authority granted under s. 316.008, F.S., this office has stated that under certain conditions and in the reasonable and nondiscriminatory exercise of its police power, a municipality may regulate or prohibit the use of certain streets within the municipality by any class or kind of traffic. *Such limited authority, however, does not empower a municipality to absolutely bar or prohibit the riding or driving of horses or horse-drawn vehicles on all streets of the municipality or to unreasonably discriminate against such use of the public streets within the municipality.* Thus, there may be certain heavily traveled streets within a municipality where the use of horse-drawn carriages may be incompatible with the normal and safe movement of traffic; however, a municipality would appear to be precluded from prohibiting such carriages on all streets under its jurisdiction.

Op. Att'y Gen. Fla. 93-22 (1993) (footnote omitted) (emphasis added); *see also* Op. Att'y Gen. Fla. 80-80 (1980) (use of public streets by horses, ridden or driven, is preempted by chapter 316). As the trial judge noted, a total ban on all scooters—rentals and non-rentals—would violate chapter 316, but so would a ban that does not comply with section 316.008.

The City's frustration factor, understandably, is high. If chapter 316 and its pre-emptive force did not exist, the City could do as it sees fit under its broad home rule powers to regulate and control traffic movement and associated problems. Cities have means of addressing seasonal scooter inundation, such as restricting or prohibiting scooter operations where they are deemed incompatible with traffic safety standards. Although the legislature has pre-empted the field, it has given local governments a defined set of tools to address traffic movement and control, including section 316.008(1)(n), which allows "[p]rohibiting or regulating the use of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic." § 316.008(1)(n), Fla. Stat.; *see also* Op. Att'y Gen. Fla. 2002-11 (2002) ("Accordingly, while the City of Cedar Key may restrict the operation of golf carts on city

streets where such operation is determined to be incompatible with the normal and safe movement of traffic, the city may not impose a more restrictive age requirement for the operation of a golf cart than that which is allowed by section 316.212, Florida Statutes, nor may the operator be required to have a valid Florida driver's license."). In addition, although *Classy Cycles I* rejected the application of subsection 316.008(1)(t) to the City's year-round safety vest and insurance requirements, it did not foreclose its application to temporary situations, such as the peak Spring Break season, where especially heavy inundations of visitors may justify local regulations on use and operation of motorized scooters to combat the types of problems the City perpetually faces.

This case, however, does not involve subsections (1)(n) or (1)(t), which were not cited in the trial court's order or by the parties in their submissions. The City—although referencing subsection (1)(n) at the end of the last preamble in Ordinance 1416—has not relied on that subsection as the basis for its regulatory authority, and Classy Cycles does not contend the City failed to act within the powers set out in subsection (1) generally. Instead, the focus has been on whether pre-emption applies to the challenged ordinances, the trial court ruling it does not.

The exclusive purpose of the City's ban on intra-city rentals of motorized scooters is to regulate traffic movement, which is within the pre-emptive core of Florida's Uniform Traffic Control Law, chapter 316. It was error to conclude otherwise. That said, the legislature has granted local governments specific powers, such as those in sections 316.008(n) and (t), to address raucous and disruptive traffic situations such as those occurring with regularity in Panama City Beach. This litigation did not address whether the City's ban was within these specific statutory powers—which is for another day.

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