

Local Governments Navigating the California Constitution

PRESENTED BY THE MUNICIPAL LAW INSTITUTE OF THE LEAGUE OF CALIFORNIA
CITIES* AND THE CALIFORNIA CONSTITUTION CENTER OF UC BERKELEY SCHOOL OF
LAW FEBRUARY 8, 2013

CONSTITUTIONAL POWER OF CITIES

Manuela Albuquerque



Director, Complex Public Litigation & Projects, Burke Williams & Sorensen,
1901 Harrison Street, Oakland Ca. 94601, Tel. 510.273-8780, Fax: 510-839.9104

I. INTRODUCTION

In California, the powers of the cities are set forth, in the main, in two constitutional provisions: Article 11, section 7, which describes the power of all cities, and Article 11, section 5, which embodies the principle that cities created pursuant to a charter have the ability to override general state laws with which they conflict as to any subject which can be classified as a municipal affair.¹

II. NATURE OF CITIES –NOT SUBDIVISIONS OF THE STATE

California cities are instruments of local government unlike counties which are deemed subdivisions of the state. (*Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 467 [“A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government.”]). (citation omitted.)² In contrast with Article XI section 1, which deals with counties, Article XI section 2 does not describe cities as subdivisions of the State. It merely provides that the “Legislature shall prescribe uniform procedure for city formation and provide for city powers.”

III. GENERAL POWERS

Once formed, general law cities have authority to structure and manage their own affairs. For example, general law cities have the authority to decide whether they will adopt a city manager form of government and whether they will have an elective mayor. (Gov. Code §§ 34800 and 34900.) They also have wide latitude in deciding what municipal services they will provide³ or services they need (See also *Myers v. City of Calipatria* (1934) 140 Cal.App. 295, 298 [“It was discretionary with the city council whether the office of city attorney should be filled or not.”].)

¹ CAL. CONST. art. 11, §§ 5,7.

² “The State is divided into counties which are legal subdivisions of the State.” (Cal. Const. § 1 (a).)The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing ‘the policy of the state at large’ (*County of Marin v. Superior Court* (1960) 53 Cal.2d 633, 638, 2 Cal.Rptr. 758, 349 P.2d 526; accord *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1158).

³ For example, cities may establish libraries, museums and hospitals, but are not required to do so (Gov. Code §§ 37542 and 37601; Educ. Code § 18900), they may spend money on music or promotion, but are not required to do so (Gov. Code § 37110), they may contribute to nonprofit educational radio or television stations, but are not required to do so (Gov. Code § 37110.5); and they may use public funds to remove graffiti but are not required to do so (Gov. Code § 53069).

General law cities also have broad power to decide the instrumentalities by which municipal services will be provided. There is no statutory requirement that a general law city hire any employees at all or that it appoint any city officers whatsoever, with the possible exceptions of the police and fire chiefs.

Government Code section 36505 provides:

The City Council shall appoint the chief of police. It *may* appoint a city attorney, superintendent of streets, a civil engineer, and such other subordinate officers or employees *as it deems necessary*. (emphasis added.)

There is likewise no requirement that a city establish a civil service systems but it has the authority to do so:

It is the intent of this chapter to enable the legislative body of any city to adopt such a personnel system, merit system, or civil service system as is adaptable to the size and type of the city. The system may consist of the mere establishment of minimum standards of employment and qualifications for the various classes of employment, or of a comprehensive civil service system, as the legislative body determines for the best interests of the public service.

(Gov't Code §45000.)

A city has the implied powers to carry out its purposes: “In general, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate and necessary for their effective exercise. (*Ravettino v. San Diego* (1945) 70 Cal. App. 2d 37, 47.) This inherent power is also reiterated in Government Code section 37112 which provides: “In addition to other powers, a legislative body may perform all acts necessary or proper to carry out the provisions of this title.”⁴

Municipal powers include the power to contract to accomplish municipal functions: “[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity. [Citation.]” (*Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734.)

⁴ Title 4 of the Government Code concerns “Government of Cities.”

IV. ARTICLE XI SECTION 7 GRANTS ALL CITIES BROAD POWERS

The key defining constitutional provision is Article XI, section 7. It provides in pertinent part as follows:

A county or city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.

Moreover, the constitutional grant of power cannot be denied by the state legislature merely by enacting a law which prohibits the city from acting without any affirmative act of the legislature occupying the field. Such denial would violate the express authority granted by the constitution to the municipality to enact local regulations. The California Supreme Court stated the principle thus: “In other words, an act by the legislature in general terms that the local legislative body would have no power to enact local, police, sanitary or other regulations, while in a sense a general law, would have for its effective purpose the nullification of the constitutional grant, and, therefore, be invalid.” Thus, while article 11, section 7 is referred to continually as the source of cities’ “police” power, its explicit terms contain no such limitations, and in fact authorize the enactment of all police, sanitary or other ordinances and regulations

Article XI, section 7 of the California Constitution grants a city broad discretionary power to “make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws.” (See also Gov. Code § 37100 [“The legislative body [of a city] may pass ordinances not in conflict with the Constitution and laws of the State or United States.”].)

“At all times since adoption of the Constitution in 1879, section 11 of article XI has specified that ‘Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.’” (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.)

“[L]ocal governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other.” (*Id.* at p. 62.)

The police power granted by the Constitution is “the power of local governments to legislate for the general welfare.” (*Pleasant Hill Bayshore Disposal, Inc. v. Chip-It*

Recycling, Inc. (2001) 91 Cal.App.4th 678, 689.) “The police power is considered so important that it is deemed an inherent attribute of political sovereignty.” (*Id* at p. 690.) Cities have broad powers. (*Sunset Amusement Co. v. Board of Police Comm’rs* (1982) 7 Cal.3d 64, 72.)

The police power of a city is both broad and elastic.

In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for “the general welfare” The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by courts to be a legitimate object for the exercise of police power. As our civic life has developed, so has the definition of “public welfare” until it has been held to embrace regulations “to promote the economic welfare, public convenience and general prosperity of the community”.

(*Miller v. City of Los Angeles* (1925) 195 Cal. 477, 485 [citations omitted].)

The *Miller* court went on to explain that the police power is read to keep up with the growth of knowledge and “to meet existing conditions of modern life and thereby keep pace with the social, economic, moral and intellectual evolution of the human race.” (*Id.*)

The power thus delegated to municipalities is as broad as that of the Legislature itself, provided the power is exercised within the confines of the city and is not in conflict with the state’s general laws.” (*Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, 711; see also *Candid Enterprises Inc. v. Grossmont Union High School District* (1985) 39 Cal.3d 878, 885 [“Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law.”].)

IV- PREEMPTION-REQUIRES AFFIRMATIVE LEGISLATION

The constitutional grant of power cannot be denied by the state legislature merely by enacting a law which prohibits the city from acting without any affirmative act of the legislature occupying the field

[M]ere prohibition by the state legislature of local legislation . . .without any affirmative act of the legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state constitution to the municipality to enact local regulations. In other words, an act by the state legislature in general terms that the local legislative body would have no power to enact local, police, sanitary or other regulations, while in a sense a

general law, would have for its effective purpose the nullification of the constitutional grant, and, therefore, be invalid.

(*Ex parte Daniels* (1920) 183 Cal. 636, 639.)

V. IRWIN V, CITY OF MANHATTEN BEACH-(1966) 65 Cal.2d 13, 20)

Notwithstanding clear case law holding that the power of a city, whether chartered or general law, finds its origins in the California Constitution itself, there is a line of authority, beginning in 1966, which describes the powers of general law cities in far more restrictive terms. This aberration first emerges in the California Supreme Court decision of *Irwin v. City of Manhattan Beach*. (1965) 65 Cal.2d 13, 20:

A general law city has only those powers expressly conferred upon it by the Legislature, together with such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.' The powers of such a city are strictly construed, so that 'any fair, reasonable doubt concerning the exercise of a power is resolved against the corporation.' (*Hurst v. City of Burlingame* (1929) 207 Cal.134, 138.)

However, the single case, *Hurst v. City of Burlingame*, relied upon in *Irwin* holds no such thing.

In *Hurst*, the California Supreme Court stated instead:

[T]he city is limited in the exercise of the powers by the constitution and general laws. It has only the powers expressly conferred and such as are necessarily incident to those expressly granted or essential to the declared objects and purposes of the municipal corporation.

(*Hurst v. City of Burlingame, supra*, 207 Cal. At p.138.[emphasis added].)

In other words, the source of a city's power is not the state legislature, as *Irwin* stated, but is the constitution itself. Nonetheless, subsequent cases including the recent *Costa Mesa* opinion, continue to cite *Irwin v. Manhattan Beach* for the proposition that general law cities have only those powers specifically conferred upon them by the legislature, rather than the California Constitution.

In other words, it appears that *Irwin v. City of Manhattan Beach* incorrectly quoted its 1929 decision in *Hurst v. City of Burlingame* and all decision which cite to this language suffer from the same fatal flaw. However, in addition the Supreme Court itself has itself described the scope of the Article XI section 7 power far more broadly in its 1969 decision, *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.

It bears repeating:

[L]ocal governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Instead, in the event of conflict between the regulations of state and of local governments, or if the state legislation discloses an intent to preempt the field to the exclusion of local regulation, the question becomes one of predominance or superiority as between general state laws on the one hand and the local regulations on the other.” (*Id.* at p. 62.)

As previously observed, the modern approach to preemption is that in the absence of a conflict with state law the power granted to municipalities is as broad as that of the Legislature itself (*Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, 711; see also *Candid Enterprises Inc. v. Grossmont Union High School District* (1985) 39 Cal.3d 878, 885 [“Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law.”].)

VII PREEMPTION OVERVIEW

The preemption doctrine arises from the limiting language in Article XI section 7: “A county or city may make and enforce within its limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.”

Conflict arises when the state law duplicates, contradicts or enters a field which has been fully occupied by state law whether expressly or by implications. (*Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles* (1991) 54 Cal.3d 1) A local law contradicts state law, for example, when it prohibits what the legislature intends to authorize (*Northern California Psychiatric Soc’y v. City of Berkeley* (1986) 176 Cal.App. 3d 90, 105)

VIII NO PREEMPTION IF SEPARATE FIELD OR STATE PURPOSE

It is clear that a local law does not conflict with state law where the local law regulates an entirely different field and has a different purpose. State and local overlapping regulation is common. (See *Fisher v. City of Berkeley* (1984), 37 Cal.3d 644, 707 [Civil Code sections 1942 or 1947 do not preclude a City from creating retaliatory eviction defenses to evictions in connection with its rent stabilization program in addition to the ones created by state law]; *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 869 [the State Subdivision Map Act does not preempt a city’s condominium conversion ordinance because the local law has an “evident, independent police power

scope and purpose” to conserve rental housing]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 148 [state unlawful detainer laws only preempt the procedures by which tenants can be evicted, but do not preclude a city from creating affirmative defenses to the eviction for purposes unrelated to the state laws regulating eviction procedures]; *In Re Cox* (1970) 3 Cal.3d 205. 200 [state law on trespass does not conflict with local law prohibiting a person from staying on business premises after being asked to leave].)

IX IMPLIED PREEMPTION

Conflict with state law cannot be established merely because the local law imposes constraints that the state law does not. “On the contrary, the absence of a statutory restraint is the very occasion for municipal initiative.” (*Fisher v. City of Berkeley*, supra, 37 Cal.3d at p.707.) In summary, implied preemption can only be valid if the State has occupied the same field by patterned regulation to advance some statewide clearly discernable purpose which cannot tolerate local variation, or where the local government action frustrates some statewide purpose. (See *Fisher v. City of Berkeley*, supra, 37 Cal.3d at pp.707-709.)

In addition, the Supreme Court has stressed that it “will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.” (*Gluck v. County of Los Angeles* (1979) 93 Cal.App.3d 121, 133; accord *Fisher v. City of Berkeley* (1984), 37 Cal.3d 644, 707.)

X. Charter Cities Article XI Section 5

Charter cities are given plenary powers over municipal affairs in Article XI section 5. The latest decision of the California Supreme Court discusses the nature and scope of this provision holding that the state prevailing wage laws do not apply to a charter city. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547.)