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PREEMPTION-POLICE POWER AND MUNICIPAL AFFAIRS

INTRODUCTION

I. SUBSTANTIVE PROVISIONS

A. POLICE POWER

California Constitution, Article XI section 7 states:

> "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 law."

This authority is generally referred to as the police power.

B. MUNICIPAL AFFAIRS POWER

California Constitution, Article XI section 5 states:

> (a) It shall be competent in all city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions in limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.
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> (b) It shall be competent in all city charters to

provide in addition to those provisions allowable by this Constitution, and by the laws of the State for:

(1) the constitution, regulation, and government of the city police force;

(2) subgovernment in all or part of a city;

(3) conduct of city elections, and

(4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for their composition, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

II. THREE PREEMPTION/SUPERCESSION INTERSTICES:(1)CONFLICT BETWEEN STATE AND LOCAL POLICE POWER MEASURE (2)CHARTER CITY REGULATIONS OF MUNICIPAL AFFAIRS SUPERSEDE STATE LAW EXCEPT WHERE THE STATE LAW REGULATES MATTERS OF STATEWIDE CONCERN (3)WHETHER THE PARTICULAR REGULATION ADDRESSES A MUNICIPAL AFFAIR OR IS A POLICE POWER MEASURE

A. POLICE POWER CONFLICTS

California's Tenth Amendment reserved police power is shared between state and local government. The state and cities and counties enjoy police power concurrently. They are free to exercise the full police power of the state within their territorial limits. However, state law can preempt local law. The legislature can occupy a field of legislation or create rights that are beyond the reach of local legislative power. When the state legislature does so the courts role is limited to enforcing that legislative policy. The tension between local and state police power enactment's is mediated by the provision in Article XI section 7 that local measures may not "conflict" with state laws.

The California Constitution provides no definition of "conflict." Rather, case law developed a number of substantive

tests to determine conflict between state and local government and identified three general methods the legislature may express its intent to occupy the field.

1. SUBSTANTIVE TESTS

Does state law ban that which a local ordinance authorizes? *See* Northern California Psychiatric Society v. City of Berkeley, 178 Cal.App.3d 90, 105 (1986).

Does state law authorize that which a local ordinance bans? *See* In Re Hoffman, 155 Cal. 114, 118 (1909); Cohen v. Board of Supervisors, 40 Cal.3d 277, 292 (1985).

Does state law expressly occupy the field thereby precluding local regulation? *See* Galvan v. Superior Court, 70 Cal.2d 851, 859 (1969).

Does local ordinance duplicate state law? *See* Pipoly v. Benson, 20 Cal.2d 366, 371 (1942).

See generally Deukmejian v. County of Mendocino, 36 Cal.3d 476, 484 (1984); James E. Allen, Jr. and Laurence K. Sawyer, The California City versus Preemption By Implication, 17 Hastings L.J. 603, 605, 612 (1966).

2. LEGISLATIVE INTENT TO PREEMPT

A. TESTS

The principal case defining the three methods of determining legislative intent to preempt is In Re Hubbard, 62 Cal 2d. 119, 128 (1964)(holding that a city ban against games of chance did not conflict with state law that restricted certain types of gambling.) Ironically, in defining the methods, even the Supreme Court confused the line of demarcation between matters of statewide concern and municipal affairs as well as when states have clear authority to preempt all police power matters. The Court outlined the following methods of determining legislative

intent to preempt:

(1) Does legislative scheme fully occupy the field?

(2) Does the legislation partially occupy the field though couched in terms that indicate that a paramount state concern will not tolerate further or additional or local regulation?

(3) Where state law partially covers the field, is the subject is of such a nature that the adverse effect of local legislation on transient citizens of the state outweighs the benefits to the municipality?

B. CLEARLY EXPRESSED INTENT

The preemption question is easily resolved where the legislature specifically enunciates its intent fully to occupy the field. It appears that the legislature can accomplish that objective without regulating the subject. The legislature need only create a right to engage in an activity placing that right beyond the reach of local regulation.

C. MINIMALIST PREEMPTION

Equally easy to resolve are the cases where the legislature specifically allows local regulation by setting minimum standards. For example, the Brown Act states its intent to prescribe minimum standards of public access to meetings of local legislative bodies. The Act authorizes the legislative body of a local agency to impose greater access requirements on itself and the bodies it appoints. Cal. Gov't Code § 54953.7.

The California Public Records Act is also interpreted to secure minimum public rights of access to public records. A chartered city may restricts its legislative bodies from going into closed session to discuss pending litigation with their attorney even though the Act allows such a closed session. Similarly, a local entity may require disclosure of records when the Public Records Act would allow non-disclosure.

There are also some state housing and fire safety laws set

minimum standards for the building and operation of structures. These laws are designed to ensure minimal levels of safety. State law in this area often allows local regulation to provide equivalent or greater protections than state law. *See* California Health and Safety Code § 18941.5

D. MIXED MESSAGE PREEMPTION

Some state laws specifically authorize local law that duplicate the state law. Unruh Civil Rights Act, Civ. Code § 51 *et. seq.*, does not preempt duplicative local ordinances. Civ. Code § 52(e). *See* San Jose Country Club Apartments v.County of Santa Clara, 137 Cal.App.3d 948, 952 (1982). *See also* Penal Code § 647(c) that permits local regulation of "conduct upon a street, sidewalk, or other public place or on or in a place open to the public."

E. STATE SILENCE ON PREEMPTION--IMPLIED PREEMPTION

Most often the case. Either the legislature does not think to address the issue or, for political reasons, it declines to address the issue. Courts have developed various tests to infer legislative intent. Like most inquiries into legislative intent, the process is result oriented. The tests, like other rules of statutory construction often serve as *post hoc* rationalizations. Public policy factors weigh heavily in this process.

When the legislature's intent is unclear, then the courts have wide latitude. In Galvan v. Superior Court, 70 Cal.2d 851 (1969), the issue was whether state law that regulated some aspects of handguns and prohibited local licensing preempted a local registration ordinance. The outcome depended on the court's determination of the field of regulation.

If the field encompassed the general subject of handguns or even the possession of handguns, then the local registration ordinance would most likely conflict with and therefore be preempted by the state statute. If on the other hand the court identified the field of state regulation limited to the licensing of handguns, then a local registration ordinance would most likely not conflict with state law. The Court in Galvan held that state law preempted the field of licensing, but not registration. Another case involving the validity of a ban on

handgun possession was Doe v. City of San Francisco, 136 Cal.App.3d 509 (1982). In Doe, the Court looked at the same scheme of state statutes that was before the Galvan Court, but found a different field. The court inferred from Penal Code 12026, the very section Galvan relied on and stated: "that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." Doe, 136 Cal.App.3d at 518.

In In re Hubbard, 62 Cal.2d. 119 (1964), the Court held that a plethora of state laws regulating gambling and "banking or percentage" games did not occupy the field of gambling so as to preempt a local ordinance banning games of chance. Hubbard also applied police power cases to reach the extraordinary conclusion that the regulation of gambling is a municipal affair. Two recent cases have reaffirmed the court's reluctance to infer an intent to preempt local police power.

In Sherwin-Williams v. City of Los Angeles, 4 Cal.4th 893 (1993), a Los Angeles ordinance required that aerosol spray paint cans be displayed in places inaccessible to the public. The question was whether a statute that regulated the transfer and possession of aerosol paints and required point of sale warnings about the illegality of graffiti vandalism preempted the Los Angeles ordinance. Even in the face of a statute that contained preemption language the Court declined to infer an intent to preempt where later amendments to the statutory scheme left untouched the preemption language while changing the scope of the statute.

Likewise, in Bravo Vending v. City of Rancho Mirage, 11 Cal.App.4th 585 (1992), addressed a claim that state law prohibiting sales of cigarettes to minors and expressly occupying the field preempted a local ordinance that banned cigarette vending machines. First, the court rejected the claim that the field of regulation was the sale and distribution of cigarettes. Rather, the court held that the field of state regulation was limited to sale of cigarettes to minors. Significantly, the court held that partial regulation of the field does not give rise to a presumption that the legislature intended to preempt all local ordinances.

Contrast the results in Galvan and Hubbard with the outcome in In Re Lane, 58 Cal.2d. 99 (1962),and Abbot v. Los

Angeles, 53 Cal.2d 674 (1960). In In Re Lane, a Los Angeles ordinance that banned sexual intercourse between unmarried people.[1] Again confronted with a scheme of state laws as comprehensive as those addressing guns and gambling, In Re Lane reached the opposite conclusion and found preemption. Similarly, in Abbot, the Court struck down an ordinance requiring registration of convicted felons staying in the city for more that a specified period of time, even though there was only a limited scheme of state statutes addressing recidivism.

Several points in In Re Lane are significant. First, the majority opinion stated, "It is clear that the legislature has determined that such conduct shall not be criminal in this state." Id. at 104. *Accord* Lancaster v. Municipal Court, 6 Cal.3d 805 (1972).

The Lane majority conclusion stands in sharp contrast with the dissent's assertion that:

> "It has always been the law of this state. . . that where the legislature has prohibited certain conduct, the cities and counties . . .could prohibit other and different conduct in the same field by local ordinance. . . .But where the legislature prohibits certain sexual relations between unmarried persons are we equally to infer an intention of the legislature that the right of unmarried persons to engage in any other sort of sexual relations not expressly forbidden by the legislature has been impliedly granted to them? To so hold is in effect to say that because the legislature has not forbidden fornication, it has licensed it."
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> Id. at 112-113.

The result in Lane is not troubling. However the question raised by the dissent is worth consideration in every case where the court has decide whether the local police power has been preempted by implication. In this regard several factors should

[1] The ordinance actually banned resorting to a place for the purpose of having sexual intercourse with a person to whom the defendant is not married. Ms. Lane was convicted of going from one room to another in her house for the purpose of having intercourse with a person to whom she was not married.

be kept in mind:

(1) The police power was granted to local entities to enable them to address conduct that harms the health welfare and safety of local residents.

(2) The police power needs to be flexible so that the competent legislative body can respond to protean problems and needs of the community.

(3) Indeed courts should be hesitant to find preemption by implication where local conditions can vary substantially from one jurisdiction to another. Fisher v. City of Berkeley, 37 Cal.3d 644 (1984); Gluck V. County of Los Angeles, 93 Cal.App.3d 121, 133 (1979).

(4) If the legislature wants to place an activity beyond the reach of local power it can do so easily.

(5) In the face of legislative silence should the default be in favor of individual or community rights? Courts should be loathe to find that the local police power has been hobbled by default.

(6) What is the nature of the activity or condition that is being regulated? How closely does the legislation touch upon privacy or other fundamental rights? Courts are more willing to infer an intent to preempt when the local regulation touches upon personal or individual rights. Contrast the result in In re Lane and Abbot with the conclusion in Sherwin Williams, Galvan, and Rancho Mirage.

(7) How important is statewide uniformity of regulation?

(8) Although not expressly acknowledged by the courts, the most important issue is determining the potential harm to the community if the legislature must act either to impose regulation or to authorize local regulation?

(9) Does the local ordinance further or reinforce state law without duplicating it? An ordinance regulating massage parlors by setting up a permit scheme and specifying violations of state law as grounds for permit revocation does not conflict with state law. Cohen v. Board of Supervisors, 40 Cal.3d 277 (1985).

CONCLUSION

The policy of Art. XI section 7 that cities and counties have the police power along with the state is essential to effective local governance. Given this sharing of the police power and the state's preeminence, unavoidably, implied preemption must be decided on a case by case basis. That is not bad. Deciding whether to infer a legislative intent to occupy the field necessarily involves all sorts of fictions. The fact of the matter is that the legislature probably never considered the issue. Or, if they did, they could not reach consensus and therefore left the issue to the courts.

The analysis can be clothed in principles of statutory construction, legislative intent and stare decisis. In the final analysis, however, the result will depend on how the judges resolve in their mind the questions discussed above. Reasonable minds can always differ over the field of regulation. Once the field has been selected, then the conclusion on implied preemption is most often a foregone conclusion.

Courts should be reminded that a finding of preemption effectively creates a right to engage in an activity by insulating it from local regulation.

B. MUNICIPAL AFFAIRS vs. MATTERS OF STATEWIDE CONCERN

1. HISTORY

Under the 1849 and 1879 Constitutions state law could override municipal charters and local laws. *See* Municipal Corporations: Municipal Home Rule Municipal Market as a Public Purpose, 11 Cal.L.Rev. 446 (1923). In 1896, the Constitution was amended to provide, "Cities or towns . . . , and all charters thereof . . ., except in municipal affairs, shall be subject to

and controlled by general laws." *See* former art. XI, § 6 of the California Constitution of 1879 as amended in 1896. However, the 1896 Constitution still did not ensure adequate local control because a city's municipal affairs power controlled only to the extent that authority to regulate the matter was specifically enumerated in its charter. *See* Nicholl v. Koster, 157 Cal 416 (1910). As a result, charters would be bulky and the municipal affairs power wooden and inflexible.

The final change was put into place in 1914 when Article XI of the Constitution was amended by revising former section 6 to empower charter cities "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." At the same election former section 8 of Article XI was also amended to include the following: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitation provided in their several charters and in respect to all other matters they shall be subject to general laws." Since this amendment, a Charter is a document of limitation. Upon the adoption of a charter the citizens of a city assume the full power of the state over municipal affairs. The city may exercise all municipal affairs powers except as limited by the charter. *See* West Coast Advertising v. City of San Francisco, 14 Cal.2d 516 (1939). Typically, a charter distributes powers among a city's agencies and then vests the reserve power in the governing body. *See* San Francisco Charter section 1.101.

Since the 1896 Constitutional amendment, courts have struggled to define the term "municipal affairs" In Ex Parte Braun, 141 Cal. 204, 207 (1903), Justice McFarland wrote that the Constitution, uses the loose, indefinable, wild words 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean." Early it was recognized that the municipal affairs power constituted a grant of the full sovereign power of the state over municipal affairs. Whether regulation of a particular activity constitutes a municipal affair essentially entails an *ad hoc* inquiry. Nor is "municipal affairs" a fixed or static concept. *See* Pac. Tel & Tel. City and County of San Francisco, 51 Cal.2d. 766, 771 (1959). In the final analysis,

the judiciary, rather than the legislature, decides what is a municipal affair and what is a matter of state wide concern. *See* Bishop v. City of San Jose, 1 Cal.3d 56, 63 (1969); Sonoma County Organization Public Employees v. County of Sonoma, 23 Cal.3d. 296, 317 (1979).

Instead of laying down a litmus test or bright line, the courts have developed an process of inquiry. That process is animated by the several concerns:

(1) Reluctance to engage the essentially law making function of defining a municipal affair by searching hard to find that there is no conflict between a state law and a local regulation of what is arguably a municipal affair..

(2) Aversion to declaring a state statute or a local measure unconstitutional, the inevitable result of an irreconcilable conflict between a state statute and a local regulation of a municipal affair.

(3) Refusal to enumerate or cast in stone matters that are municipal affairs

(4) Acknowledgment that what constitutes a municipal affair must evolve to meet changing societal needs and priorities.

2. FINAL STAGE OF JUDICIAL EXEGESIS -- TRANSCENDALISM AND DIALECTICS

California Fed. Savings & Loan Assn. v. City of Los Angeles, 54 Cal.3d. 1 (1991), held that a state statute imposing an income tax on savings and loan associations in lieu of all other state and local taxes nullified charter city power to impose business license tax. Cal Fed. rejected the assertion that there were "core" municipal affairs powers that were beyond the reach of state law and reaffirmed that the power to tax is an essential attribute of municipal home rule sovereignty. Id. at 11-15.

Though the City of Los Angeles lost, Cal Fed. laid down a coherent and workable framework of analysis. First, the decision instructs that courts should attempt to harmonize state and local laws touching upon a municipal concern thereby avoiding a conflict. Id. at 16.

The Court then turns to the analysis that must be applied when an irreconcilable conflict is found. The Court states:

> "Subsequent cases rounded out the "municipal affairs" doctrine by taking up the larger theme of the limits on a charter city's sovereignty when aspects of its activities interfere with interests which transcend the municipality. In the main our later decisions reject a static and compartmentalized description of municipal affairs and articulate values that have reinvigorated home rule power over "municipal affairs" in favor of a more dialectical one. Out of these cases emerges the counter point of statewide concern" as a conceptual limitation on the scope of "municipal affairs" and thus on the supremacy of charter city measures over conflicting legislative enactments. . . The phrase "statewide concern is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the legislature, one that facially discloses a focus on extra municipal concerns as the starting point for analysis. By requiring as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests, the phrase resists the invasion of areas which are of intramural concern only, preserving core values of city government. As applied to state and charter city enactment's in actual conflict, "municipal affair" and "statewide concern" represent, Janus-like, ultimate legal conclusions rather than factual descriptions. Their inherent ambiguity masks the difficult but inescapable duty of the court to, in the words of one commentator, 'allocate the governmental powers under consideration in the most sensible and appropriate fashion as between the local and state bodies.'"

Id. at 13.

The Court in Johnson v. Bradley, 4 Cal.4th 389 (1992), followed Cal Fed. and struck down the application to a charter city of an initiative statutory ban on the use of public funding to finance elections.

Johnson declined to decide whether the regulation of charter city elections implicated a *core* municipal affair that was *per se* beyond the reach of state legislation. Id. at 404-405. Rather,

Johnson summarized the Cal Fed. paradigm. First, a court must decide whether there is a genuine conflict between a state and a local law regarding a matter that implicates a municipal affair. If so, then the court must determine whether the state statute is reasonably related to the statewide concern and is narrowly tailored to limit incursion into legitimate municipal interests. If this last test is met, then the conflicting city regulation ceases to be a municipal affair. Id. at 404.

3. MUNICIPAL AFFAIRS VS. MATTERS OF STATEWIDE CONCERN

Much of the analysis of whether a particular subject is a municipal affair or a matter of statewide concern is imported into the determination of whether there are demonstrable interests of an extramural dimension to warrant statewide regulation.

Article XI, section 5 enumerates specific areas of municipal regulation that are municipal affairs. Section 5(b) describes as "plenary" a municipality's control over matters relating to the compensation and terms of employment of its officers and employees. Indeed courts have relied on this language to strike down a state statute that conditioned a grant of state funds on the municipality's not giving pay increases to its employees. *See* Sonoma County Organization of Public Employees v. County of Sonoma 23 Cal.3d at 315-317; *Accord* Ector v. City of Torrance, 10 Cal.3d 129 (1973).

Nevertheless, even as to the regulation of employee terms and conditions of employment, municipal affairs do not always prevail over conflicting state law. *See* Bagget v. Gates, 32 Cal.3d 128, 136 (1982)(Public Safety Officers Bill of Rights applies to a charter city); Professional Firefighters v. City of Los Angeles, 60 Cal.2d 276 (1963)(Firefighters in charter city enjoy right created by state law to unionize); and Los Angeles County Civil Service Comm'n v. Superior Court, 23 Cal.3d 55 (1978)(State mandated process of meeting and conferring with employee representatives did not conflict with county charter mandated civil service commission hearing before amendment to civil service rules.) Query, would the court in Johnson v. Bradley, writing on a clean slate, have found the need to promote labor peace in the public sector sufficient to warrant the significant intrusion into "plenary authority" local affairs imposed by these labor relations statutes?

4. GRAY AREA-IN BETWEEN THE POLICE POWER AND MUNICIPAL AFFAIRS

The conflict between municipal affairs power and the regulation of matters of statewide concern is fundamentally different from the tension between local and state exercise of the police power. With regard to police power matters the legislature can decide to preempt. Once the legislative intent is clear, that is the end of the inquiry. Where municipal affairs are concerned, the courts, not the legislature resolves the conflict. First, the court determines whether the matter is generally a municipal affair. If so, the court next determines whether a transcendent state interest overrides and whether the state law is narrowly tailored to meet the state interest while minimizing the intrusion into municipal affairs prerogative.

Three general areas of regulation can be examined when deciding whether a matter even arguably constitutes a municipal affair: (1)those that regulate interpersonal conduct such as a ban against discrimination, (2)those that regulate the interface between a citizen and his government such as a building code or a lobbyist ordinance, and (3)those that govern the internal functioning of government such as the distribution of authority to award a contract, determining which offices will be elected or appointed, and regulating the types of materials a city will procure, such as a ban on purchasing materials made from tropical hardwoods. Regulation within first category are most likely police power matters. *See* Von Schmidt v. Widber, 105 Cal. 151 (1894)(police power intended to authorize local legislative bodies to make rules of conduct to be observed by citizens.) Regulations within the third category are most likely municipal affairs. See Fragley v. Phelan, 126 Cal. 383 (1899)(internal business affairs of a city are municipal affairs.) The most difficult cases fall in the second category.

5. FUTURE OF MUNICIPAL AFFAIRS

Cal Fed. and Johnson reinvigorated the municipal affairs doctrine by making it clear that the state must overcome a significant burden before it can displace a charter city regulation that implicates a municipal affair. The regulation must be reasonably related to a statewide concern that demonstrably transcends an identifiable municipal interest.

Further, the state law must be narrowly tailored.

Sonoma County made a point that has not been emphasized in the tension between home rule and state authority. A constitutional power such as the authority to appropriate funds may not be used, by way of condition, to attain an unconstitutional result. This holding may become significant in the future. Sonoma County, 23 Cal.3d at 319.

The increasingly complex nature of the governmental problems as well as the growing interdependence of all areas of the state imperil the municipal affairs authority. These problems already have prompted the move toward regional government. More fundamentally, this interdependence gives the state legislature further leverage in identifying matters of statewide concern.

An attempt to impose the Brown Act public meeting requirements on charter cities in the early twentieth century may not have succeeded. In the horse and buggy days, a court may have been hard pressed to find any statewide interest demonstrably transcending a charter city's authority to establish the rules under which its elected and appointed officials will conduct their meetings. However today the application of the Brown Act to charter cities does not even raise a question.

The recent conceptual reinvigoration of the municipal affairs power, however, means little if public entities lack the capacity to raise the resources necessary to discharge their duties and implement their policy initiatives.

Ever since the adoption of Proposition 13, cities and counties have been struggling to establish a firm and reliable revenue base. At the fulcrum of this debate lie in the schools. In recent years the legislature began shifting larger and larger portions of *ad valorem* tax revenues from cities and counties to schools. At the same time other statutory and constitutional initiatives and judicial rulings have narrowed the ability local public entities have to replace revenues lost through the cap on and subsequent shift of *ad Valero revenues*. The objective is to find an enduring conceptual and legal basis for ensuring fiscal authority commensurate with local police and municipal affairs powers.