CITY OF OAKLAND
OFFICE OF THE CITY ATTORNEY
1999 SPRING CONFERENCE
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City of Oakland

OAKLAND'S VEHICLE SEIZURE ORDINANCE "OPERATION BEAT FEET"

The Seizure and Forfeiture of Vehicles used to attempt and/or to Purchase Drugs or Solicit Prostitution

In 1997 the City of Oakland adopted a local Ordinance providing for the seizure and forfeiture of vehicles used to purchase drugs or solicit prostitution. Adopted under the home rule authority provided by the California Constitution to chartered cities, Oakland moved to enact legislation designed to address the blight created by the widespread use of vehicles to conduct quick drive-by purchases of drugs o solicit acts of prostitution, in areas know for high crime. Certain streets within the City had become know as virtual drive-by marketplaces that offered ready access to purchasers who wished to use Oakland, a fast and easy means to conduct illegal activity from their vehicles. This activity seriously degraded the quality of life for residents of the neighborhoods where this conduct occurred.

The enforcement of the Ordinance nicknamed "Operation Beat Feet" was fully operational by calendar year 1998 and was conducted by the Police Department employing "reverse buy" stings with undercover police officers as decoys at designated hot spots within the City of Oakland. The City Attorney, working in conjunction with the Alameda County District Attorney, provided civil and criminal support at the command centers, set up at each operation.

In 1998 the City conducted eight of these operations and seized a total of eighty- five vehicles. The data revealed that of the eighty-five vehicles seized, seventy- three were non-Oakland residents, that is, either the registered owner or the purchaser was from another city or state. This information demonstrates the truly unique problem Oakland faces. Monies collected pursuant to the Ordinance are divided between the Office of the City Attorney and the Oakland Police Department and used to defray costs of operating the program.

OUTLINE

I. The Ordinance

A. Blight-Nuisance Abatement
B. Seize and Forfeit the instrumentality used to cause the nuisance-blight

***II**. The ACLU Challenge*

A. Preemption under State Law
1. CA Vehicle Code section 22659.5
2. CA Vehicle Code section 21
3. CA Health and Safety Code section 11469-95
4. Conflict with state asset seizure law because
a. no underlying conviction required
b. no requirement of proof beyond a reasonable doubt
c. no innocent owner defense provided
d. no specified minimum amount of drugs required to invoke ordinance

***III**. The City of Oakland's Legal Justification*

A. The Ordinance falls within the Home Rule powers of Chartered Cities
1. the subject matter is a municipal concern
2. the subject matter concerns itself with unique matters of local health and safety
B. CA Vehicle Code section 22659.5 is not an express or inferred expression or legislative preemption
1. 22659.5 has no preemption expression
2. 22659.5 is merely a pilot program--a data gathering experiment
3. 22659.5 at the time the ordinance was enacted only applied to a handful of cities in CA and therefore cannot be understood to reflect an intent to occupy with statewide uniformity
C. CA Health and Safety Code Sections do not preempt the Ordinance
1. the ordinance does not occupy the same field
2. the ordinance is not in conflict with state law
3. the ordinance is not preempted by implication

***IV**. The Superior Court Upholds the Ordinance*

A. The Ordinance is not expressly or by implication preempted by state law
B. The subject matter is a municipal affair

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APPROVED AS TO FORM AND LEGALITY
/S/
INTRODUCED BY COUNCILMEMBER /S/

ORDINANCE No. 12093 C.M.S.

ORDINANCE AMENDING ORDINANCE NO. (*11987*) **12015** C.M.S. TO PROVIDE TECHNICAL CORRECTIONS TO THE ORDINANCE ESTABLISHING THAT ANY VEHICLE USED TO SOLICIT AN ACT OF PROSTITUTION OR TO ACQUIRE OR ATTEMPT TO ACQUIRE A CONTROLLED SUBSTANCE IS A NUISANCE AND SUBJECT TO SEIZURE AND FORFEITURE.

WHEREAS, the citizens of Oakland have complained to the Oakland City Council Public Safety Committee of the nuisance created in their neighborhoods by persons driving vehicles into their neighborhoods in order to acquire or attempt to acquire controlled substances or solicit acts of prostitution; and

WHEREAS, persons who operate vehicles and use them to acquire controlled substances or solicit acts of prostitution bring crime and decay to the neighborhoods where they solicit acts of prostitution and/or acquire or attempt to acquire controlled substances; and

WHEREAS, seizing the vehicles of persons who come into the local neighborhoods to attempt to or to solicit acts of prostitution and/or acquire or attempt to acquire controlled substances will be deterred from creating said nuisance if the vehicles are subject to seizure and forfeiture;

WHEREAS, on (*June 24, 1997*) **October 21 1997**, the Oakland City Council adopted Ordinance No. (*11987*) **12015** C.M.S. which now requires certain technical and clerical corrections as noted herein;

NOW THEREFORE,

THE CITY COUNCIL OF OAKLAND DOES ORDAIN AS FOLLOWS:

ARTICLE 23 IS HEREBY ADDED TO CHAPTER 3--PUBLIC WELFARE, MORALS AND POLICY OF THE OAKLAND MUNICIPAL CODE.

Section 3-23.01. Any vehicle used to solicit an act of prostitution, or to acquire or attempt to acquire any controlled substance, is declared a nuisance, and the vehicle shall be enjoined and abated as provided in this Ordinance. Any person or his or he servant, agent, or employee who owns, leases, conducts, or maintains any vehicle (hereinafter referred to as "the property"), used for any of the purposes or acts set forth in this section is guilty of a nuisance.

Section 3-23.02. Upon proof that the property was used for any of the purposes set forth in Section 3-23.01, the court shall declare the property a nuisance and order that the property be forfeited, sold, and the proceeds distributed as set forth in Section 3-23.09.

Section 3-23.03. All right, title, and interest in any property described Section 3- 23.01 shall vest in the City upon commission of the act giving rise to the nuisance under this Ordinance.

Section 3-23.04. Vehicles subject to forfeiture under this Ordinance may be seized by any peace officer upon process issued by any court having jurisdiction over the property. Seizure without process may be made if any of the following situations exist:

(a) The seizure is incident to an arrest or a search under a search warrant.

(b) There is probable cause to believe that the property was used in violation of this Ordinance.

Section 3-23.05. Receipts for vehicles seized pursuant to this Ordinance shall be delivered to any person out of whose possession such vehicle was seized, in accordance with Section 1412 of the Penal Code.

Section 3-23.06. Property seized pursuant to 3-23.04, where appropriate, may be held for evidence. The District Attorney or City Attorney shall institute and maintain the proceedings.

Section 3-23.07.
(a) Except as provided in subdivision (g), if the District Attorney or City Attorney determines that the factual circumstances do warrant that the vehicle described in Section 3-23.01 is subject to forfeiture, the District Attorney or City Attorney shall file a petition for forfeiture with the Superior Court of Alameda County.

(b) A petition for forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture.

(c) The District Attorney or City Attorney shall cause a notice of the seizure and of the intended forfeiture proceedings, as well as a notice stating that any interested party may file a verified claim with the Superior Court of Alameda County, to be served by personal delivery or by registered mail upon any person who has an interest in the seized vehicle. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 3-23.08 and directions for the filing and service of a claim.

(d) An investigation shall be made by the Oakland Police Department as to any claimant to a vehicle whose right, title, interest, or lien is of record in the Department of Motor Vehicles or appropriate federal agency. If the Oakland Police Department finds that any person, other than the registered owner, is the legal owner thereof, and such ownership did not arise subsequent to the date and time of arrest o notification of the forfeiture proceedings or seizure of the vehicle, it shall forthwith send a notice to the legal owner at his or her address appearing on the records of the Department of Motor Vehicles or appropriate federal agency.

(e) All notices shall set forth the time within which a claim of interest in the property seized or subject to forfeiture is required to be filed pursuant to Section 3-23.08.

(f) With respect to vehicles described in Section 3-23.01 for which forfeiture is sought and as to which forfeiture is contested, the City of Oakland shall have the burden of proving by a preponderance of the evidence that the vehicle was used as set forth in 3-23.01. Trial shall be before the Court *or jury*. The presiding judge of the Superior Court shall assign the action brought pursuant to this Ordinance for trial.

(g) The District Attorney or City Attorney may, pursuant to this subsection, order the forfeiture of vehicles seized under this Ordinance. The District Attorney o City Attorney shall provide notice of the proceedings under this subsection, including:

(1) A description of the vehicle.
(2) The date and place of seizure.
(3) The violation of law alleged with respect to forfeiture of the property.
(4) The instructions for filing and serving a claim with the District Attorney or City Attorney pursuant to Section 3-23.08 and time limits for filing a claim.

If no claims are timely filed, the District Attorney or City Attorney shall prepare a written declaration of forfeiture of the vehicle to the City and dispose of the property in accordance with Section 3-23.09. A written declaration of forfeiture signed by the District Attorney or City Attorney under this section shall be deemed to provide good and sufficient title to the forfeited property .The District Attorney or City Attorney ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person who received notice of the forfeiture proceedings.

If a claim is timely filed, then the District Attorney or City Attorney shall file a petition for forfeiture pursuant to this section within 30 days of the receipt of the claim.

Section 3-23.08.

(a) Any person claiming an interest in the vehicle seized pursuant to Section 3-23.01 must, at any time within 10 days from the date of the notice of seizure, file with the Superior Court of Alameda County a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the District Attorney or City Attorney within 10 days of the filing of the claim.

(b) (1) If a verified claim is filed, the forfeiture proceeding shall be set fo hearing on a day not less than 30 days therefrom.
(2) The hearing shall be before the Court.
(3) The provisions of the Code~ of Civil Procedure shall apply to proceedings under this Ordinance unless otherwise inconsistent with the provisions o procedures set forth in this Ordinance. However, in proceedings under this Ordinance, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this Ordinance.

Section 3-23.09. In all cases where vehicles seized pursuant to this Ordinance are forfeited to the City, the vehicles shall be sold, *or if cash is paid as settlement in lieu of forfeiture of the vehicle,* and the proceeds of sale shall be distributed *and appropriated* as follows:

(a) To the bona fide or innocent purchaser, conditional sales vendor, mortgagee or lien holder of the property, if any, up to the amount of his or her interest in the property I when

the Court or District Attorney or City Attorney declaring the forfeiture orders a distribution to that person.

(b) To the District Attorney or City Attorney for all expenditures made o incurred by it in connection with the publication of the notices set forth in Section 3- 23.07, and the sale of the vehicle, including expenditures for any necessary repairs, storage, or transportation of any vehicle seized under this Ordinance.

(c) The remaining funds shall be distributed as follows:
(1) Fifty percent to the local law enforcement entities that participated in the seizure distributed so as to reflect the proportionate contribution of each agency.
(2) Fifty percent to the District Attorney or City Attorney.

(d) All the funds distributed to the local law enforcement entities or District Attorney or City Attorney pursuant to subparagraph (c) shall not supplant any funds that would, in the absence of this subdivision, be made available to support the law enforcement and prosecutorial efforts of these agencies.

For the purposes of this section, "local governmental entity' means any city, county, or city and county in this state.
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

Case No. 798896-7

SAM C. HORTON, CHERI BRYANT,
Petitioners and Plaintiffs

v.
CITY OF OAKLAND, OAKLAND CITY COUNCIL,
ROBERT C. BOBB, City Manager,
City of Oakland, JOSEPH SAMUELS, Jr.,
Chief of Police, City of Oakland,

Respondents and Defendants.

PETITIONERS' REPLY MEMORANDUM
DATE: October 8,1998
TIME: 9:15 a.m.
DEPT: 8

TABLE OF AUTHORITIES
CASES

CONSTITUTION

STATUTES

California Vehicle Code
Section 21
Section 22659.5
Section 22660

Stats. 1998, c. 758(AB 1788)

OTHER AUTHORITIES

1993 California Legislative Service c. 485 (AB 1332)

Analysis of Assembly Bill 1788 (Senate Rules Committee)

Analysis of Assembly Bill 1788 (Senate Committee on Public Safety)

I. OAKLAND'S VEHICLE SEIZURE ORDINANCE DEALS WITH MATTERS OF STATEWIDE CONCERN OUTSIDE THE SUPERSEDING POWERS OF CHARTER CITIES WITH RESPECT TO MUNICIPAL AFFAIRS

Defendants attempt to circumvent completely the state preemption doctrine by their claim that the Ordinance "falls within the 'home rule' powers granted to charter cities, and concerns itself exclusively with a municipal affair." Defendants' Memorandum ("Def. Mem.") at 14. Thus, according to defendants, the conflict between the Ordinance and state law is permissible under Article XI, section 5(a) of the California Constitution. This argument is dependent on defendants convincing this Court that the Ordinance does not deal with matters of statewide concern, but rather with "municipal affairs" within the meaning of Article XI, sec. 5(a). However, defendants' cursory discussion, which completely ignores the case law, falls far short of establishing this dispositive point.

In determining whether the Ordinance deals with a matter of statewide concern this Court must "give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation." *Bishop v. City of San Jose*, 1 Cal.3d 56, 63 (1969). In other words, "the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern." *Id.*

The statutes adopted by the Legislature with respect to prostitution and drug-related vehicle seizures not only demonstrate an intent to preempt this field, but also show that this is a matter of "statewide concern." With respect to Vehicle Code §22659.5, the legislative findings articulate a recognition that the problem of "prostitution in neighborhoods" was a problem in communities throughout the state. 1993 Cal. Legis. Service c. 485, § 1 (A.B. 1332). The fact that the Legislature responded by establishing a vehicle seizure pilot project limited to certain designated local government entities, and specifying detailed mandatory procedures (Veh. Code § 22659.5 (c)), contradicts

defendants' assertions that its Ordinance concerns "problems unique to the City of Oakland," and that "the state has not enacted any legislation designed to deal with this particular problem..." Def. Mem. at 2.

Furthermore, as will be discussed more fully below (pp. 5-6, *infra*), the Legislature has very recently amended Vehicle Code § 22659.5 to expand coverage to all cities and counties in the state and to remove the sunset provision; this amendment makes it even clearer that this is a matter of statewide concern.

In addition, this Court must give weight to Vehicle Code § 21 in determining whether the Ordinance affects matters of statewide concern. Defendants suggest that Vehicle Code § 21 is "not applicable" when a court is considering the powers of a charter city (Def. Mem. at 2), but this is plainly incorrect. While section 21 by itself would not supersede a charter city ordinance that affected only "municipal affairs," the courts have taken into account this clear expression by the Legislature in determining whether local ordinances that affect matters covered by the Vehicle Code are of statewide concern or are municipal affairs. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563 (1961) (relying in part on Vehicle Code § 21 in determining that charter city's ordinance did not deal with municipal affairs); *Barajas v. City of Anaheim*, 15 Cal. App. 4th 1808, 1818 (1993) (same). The courts have consistently recognized, that, with respect to Vehicle Code matters, "if there is a doubt as to whether such [local] regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state." *Ex parte Daniels*, 183 Cal. 636,639 (1920) (charter city); *Lossman v. City of Stockton*, 6 Cal. App. 2d 324,44 P.2d 397,399 (1935) (charter city).

Similarly, the detailed and comprehensive state legislation concerning drug-related vehicle seizures establishes that the seizure and forfeiture of vehicles by law enforcement agencies is a matter of statewide concern and not "exclusively" a municipal affair. The Legislature acknowledged the potential "harsh effects on property owners" of civil forfeiture, and admonished law enforcement agencies to "protect the interests of innocent property owners." Health & Saf. Code § 11469 (j). It backed up its concern by mandating a number of procedures to prevent abuses of civil forfeiture. In addition, the Legislature required local agencies to adopt policy and procedure manuals and to provide training for officers assigned to forfeiture programs. Health & Saf. Code § 11469(d)(e). Finally, the Legislature enacted detailed provisions controlling the distribution of funds generated from asset forfeiture, and reporting and auditing requirements. Health & Saf. Code § 11489.

All of these provisions reflect a recognition that the seizure of vehicles by law enforcement agencies is a matter of statewide concern. Under defendants' analysis, charter cities would be free to ignore all the requirements and admonitions of state law and adopt their own prostitution and drug-related forfeiture operations to seize vehicles of motorists who pass within their borders, and to ignore state law in the distribution of the funds. Such a Balkanized approach to vehicle forfeiture goes far beyond the home rule powers of Article XI, §5.

That the field of vehicle seizure and forfeiture is a matter of statewide concern is consistent with the case law. Matters that have been considered municipal affairs include local matters of taxation and revenue (*The Pines v. City of Santa Monica*, 29 Cal.3d 656 (1981)), salaries of city employees (*Popper v. Broderick*, 123 Cal. 456 (1899), contracting for city construction projects (*Smith v. City of Riverside*, 34 Cal. App. 3d 529 (1973)), and term limits for elected city officials. *Cawdrey v. City of Redondo Beach*, 15 Cal. App. 4th 1212 (1993).

Vehicle seizure and forfeiture is quite different from these subjects. While these local laws concern only a city's residents and businesses, the Ordinance can impact any person who is driving within the city limits. In fact. a focus of this Ordinance was to target transients who are driving into the City. Thus, the city keeps separate statistics for "Out of Town Suspects" and "Out of Town Vehicles" seized. *see* Declaration of Alan L. Schlosser in Support of Petition for Writ of Mandate, Exh. A, p.2. The fact that the Ordinance is targeting persons not residing in Oakland is another indicia that the Ordinance goes beyond "municipal affairs." *Lossman*, 44 P. 2d at 401 ("when police and fire equipment make use of the streets of a city, it affects not only the citizens of that city but frequently endangers the safety of visiting motorists and pedestrians as well, and then becomes a matter of public concern and amenable to general law.").

This Ordinance concerns subjects that have been considered matters of statewide concern.[1] The problems that traffic in drugs and prostitution cause local communities is not a problem unique to Oakland. The means that Oakland has chosen to address this problem --i. e. , the seizure, forfeiture and sale of vehicles allegedly used in these offenses, with the proceeds of the sales going to local law enforcement agencies --takes the Ordinance out of an area of purely municipal concern. The Legislature has clearly recognized that civil forfeiture is a tool that carries with it a potential to abuse and deprivation of individual rights. especially when coupled with its revenue-generating aspects. The principles of home rule do not allow Oakland to ignore the "reasonably tailored" procedures and guidelines that the State Legislature has adopted to provide a balance between these rights and the needs of law enforcement.[2]

II. OAKLAND'S VEHICLE SEIZURE ORDINANCE RELATING TO PROSTITUTION IS PREEMPTED BY VEHICLE CODE § 22659.5[3]

A. The Ordinance is Expressly Preempted by the Vehicle Code

Defendants' argument against preemption relies on the fact that section 22659.5 is "temporally and geographically limited" to characterize it as "the Legislature's data-gathering experiment." Def. Mem. at 4. Even prior to the 1998 amendment, defendants' argument flies in the face of the statutory language and defendants' own pre-litigation characterization of the statute. The Legislature's specific and limited list of local

government entities authorized to enact a prostitution-related vehicle seizure ordinance, and the explicit direction that such entities can "only" take the actions specified in the statute to abate the nuisance caused by these vehicles (Veh. Code) §22659.(c)), is totally inconsistent with defendants' characterization of this statute as only an "optional invitation to participate." Def. Mem at 4.[4] It seems clear that what the Legislature did in enacting section 22659.5 was to address a matter of statewide concern -the seizure of vehicles used in prostitution offenses -by initially authorizing only certain cities and counties to adopt a vehicle seizure ordinance which included certain mandatory procedures and requirements.[5]

Furthermore, a very recent amendment to Vehicle Code §22659.5 has now removed the temporal and geographical limitations of the statute, and directly refutes defendants' assertion that the Legislature "has not concluded that any uniform, statewide program is needed." Def. Mem at 3. Assembly Bill 1788, which came into effect on September 23, 1998, amends section 22659.5 in two respects: 1) it removes the geographical limitation so that the statute now applies to "any city, any county, or any city or county"; and .2) it eliminates the temporal limitation by deleting the January 1, 1999 sunset provision formerly in subsection le). Stats. 1998, ch. 758, § 3 at 7-8. (A copy of AB 1788 is attached as Exhibit 1 to the Second Request for Judicial Notice.)

This legislative enactment, and the legislative history behind it, thoroughly contravene defendants' attempt to avoid the explicit preemptive effect of section 22659.5(c) by characterizing this program as an optional data-gathering experiment. Rather, the Bill Analysis describes existing law as a legislative authorization for specified local entities to adopt an ordinance that would implement certain procedures to abate the nuisance of vehicles used in prostitution-related offenses, and states clearly that the purpose of AB 1788 is to "extend the authorization" statewide so that any city or county could adopt such an ordinance.[6]

Defendants have argued that the "inference to be drawn" from the limited coverage of section 22659.5 is that the "Legislature does not know the impact and has not concluded that any uniform, statewide program is needed." However, it is now clear that the Legislature has come to a very different conclusion. The explicit question posed to the Legislature was as follows: "HAS THIS PROGRAM BEEN EFFECTIVE. IF SO, SHOULD THE SUNSET BE LIFTED AND SHOULD IT BE EXPANDED STATEWIDE?"[7] By enacting AB 1788, the Legislature has answered both these questions in the affirmative. To argue that Oakland (or any other city in the state) is free in the face of the statewide expansion of this program to ignore the mandatory provisions of section 22659.5(c) and adopt its own conflicting vehicle seizure program is to utterly ignore the statutory language and legislative history. [8]

Because the subject of vehicle seizures is not a "municipal affair..' this legislative action does not impinge on the home rule powers of Oakland as a charter city. The preemptive effect of Vehicle Code §22659 .5(c) is consistent with Vehicle Code §21; it is also consistent with the cases which invalidate on preemption grounds local ordinances which adopt standards or procedures in conflict with governing provisions of the Vehicle Code, and which state that delegation to local authorities of power with respect to the Vehicle Code will be "strictly construed." See Pet. Mem. at 6-8 & n.8.[9]

B. The Prostitution-Related Provisions of the Oakland Ordinance Are Preempted by Legislative Implication

Even if this Court were to deem Vehicle Code §22659.5(c) as not explicitly preempting Oakland's enactment of a vehicle seizure ordinance which conflicts with the mandatory state procedures, the Ordinance is clearly preempted by legislative implication under both the first and second prongs of the *Hubbard* test.

The Legislature occupied the field of prostitution-related vehicle seizures by initially creating a pilot project and limiting participation to certain designated entities for five years. Having apparently concluded that the vehicle seizure program was successful, the Legislature has now decided to continue the program indefinitely on a statewide basis (thereby closing what defendants termed the "gaping holes in the statutory scheme." Def. Mem at 5.). This statewide coverage "clearly indicate[s] that [this subject] has become exclusively a matter of state concern." *In re Hubbard*, 62 Cal. 2d 119,128 (1964) (first prong); as in *Soffer*, any prostitution-related vehicle seizure ordinances must follow. the mandatory statutory procedures.

Certainly, under the second prong of the *Hubbard* test, the subject of prostitution-related vehicle seizures has been "partially covered by general law in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." *Id*. Oakland's argument that every local government in this state is free to adopt its own prostitution-related vehicle seizure program, and to follow or not follow the mandatory procedures of Vehicle Code §22659.5 as they choose, is incompatible with what the Legislature has done in this field.

III. OAKLAND'S VEHICLE SEIZURE ORDINANCE RELATING TO DRUGS IS PREEMPTED BY STATE LA W

In their opening Memorandum, petitioners argued that the state, in Health & Safety Code § § 11469, et. seq., had occupied the field of the seizure and forfeiture of vehicles used in drug-related offenses- i.e., that "the subject matter has been partially covered by general law couched in such terms as to indicate clearly that the paramount state concern will not tolerate further or additional local action." In re Hubbard, 62 Cal. 2d at 128.

Defendants' Memorandum relies primarily on their argument that the Ordinance and this state statute do not occupy the same field because the state law targets vehicles used in drug trafficking involving significant amounts of drugs, whereas the Ordinance targets persons who are buying drugs. As shown by their own example (Def. Mem. at 7), defendants recognize that under the Ordinance even an innocent owner whose vehicle was involved in acquiring a small amount of drugs for personal use would be subject to a seizure and forfeiture proceeding under the Ordinance without the procedural protections and safeguards that a major drug dealer selling drugs would have if his vehicle was seized under state law --namely, the requirement of a criminal conviction for the underlying offense, the provision of an innocent owner's defense, and the "beyond a reasonable doubt" burden of proof in the forfeiture proceeding. What defendants ignore is the statutory language and legislative history of the state law, which demonstrates that the Legislature recognized the potential for abuses in the forfeiture remedy, and included procedural protections and safeguards to curtail such abuses. Accordingly, the Ordinance's expansion of the field of persons subject to forfeiture of their vehicles, and elimination of some of the most important procedural protections o
state law, constitutes "further or additional local action" which directly conflicts with the "paramount state concern" of placing limits on the use of drug-related vehicle forfeiture.[10]

Defendants ignore completely the Guidelines of Health & Safety Code §11469, in which the "paramount state concern" to place limits on the use of asset forfeiture in California is reflected in the requirements of a manual for policies and procedures, of ongoing training, and an explicit concern for due process and innocent property owners. This concern also is reflected in the legislative history of the state law. Defendants' argument that this Court should ignore the legislative history presented by petitioners is seriously flawed. Def. Mem. at 13-14. In stating the "purpose" of Assembly Bill 114, the bill's author (Assemblyman Burton) noted that asset forfeiture statutes "are susceptible to abuse," and therefore, the "purpose of this bill is to put in place the necessary protections to ensure that people's property rights, and due process rights are protected. " Pet. Mem. at 10. The fact that this statement of purpose was given at the outset of the legislative process, and that that process involved subsequent amendments to the original bill, in no way undermines the relevance of the bill author's statement concerning the purpose of the legislation. *See, e.g., Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 434 (1995). ("Comments by the author of a bill are properly considered where such comments were before the legislative body and presumably entered into its deliberations in passing the bill.")

In fact, the Bill Analysis submitted by defendants confirms that the principles behind the author's statement of purpose remained intact at the conclusion of the legislative process. The Analysis notes that the "amendments clarify that knowledge and consent must be proved as to third parties" and that the amendments "provide a compromise between various groups, including law enforcement, business interests, civil libertarians, and others," which provide "additional 'innocent owner' protections." Defendants' Request for Judicial Notice, Exhibit 2. In AB 114, the Legislature, recognizing the potential for abuse

of asset forfeiture, struck a balance between the needs of law enforcement and the rights of property owners; in enacting its own vehicle seizure ordinance, the City of Oakland plainly rejected that balance and opted for a more expansive version without the procedural protections of state law. By ignoring the "state concern underlying those provisions for the owners' procedural rights" (*Morehart v. County of Santa Barbara*, 7 Cal. 4th 725,757 (1994)), the Ordinance conflicts with state law in violation of Article XI, §7.

Defendants make much of the fact that, in other provisions of the Health & Safety Code, the Legislature did not enact the same procedural protections for asset forfeitures not involving vehicles. Similarly, defendants cite other statutes which provide for property forfeiture without incorporating all of these procedural protections. However, none of these other sections and none of these other statutes apply to the seizure of vehicles that are being used to commit drug-related offenses; what is significant is that with respect to such seizures, the Legislature chose to enact these procedural requirements. Defendants distort petitioners' argument by asserting that petitioners claim that Health & Safety Code §11469 *et. seq*. represents "the standard to which all forfeiture statutes in the state of California must conform." Def. Mem. at 23. Oakland has chosen to enact an ordinance dealing with drug-related vehicle seizures, and in that field the State has acted so as to preempt local laws which conflict with the state's requirements.

IV. CONCLUSION

For the foregoing reasons, the Oakland Ordinance is in conflict with and preempted by state law in violation of Article XI, §7 of the California Constitution.

ENDNOTES:

1. "It is noteworthy that in many fields of legislation local home rule has given way to the desirability of uniform state laws because of ever-increasing population and urbanization and the need for statewide uniformity in such areas as control of traffic. public health and public offenses." Lawing v. Faull, 227 Cal. App. 2d 23, 29 (1964). (*emphasis added*.)

2. "In the event of a true conflict between a state statute reasonably tailored to the resolution of a subject of statewide concern and a charter city tax measure, the latter ceases to be a 'municipal affair' to the extent of the conflict and must yield." *California Federal Savings and Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 7 (1991)

3. At the outset, petitioners want to highlight the legal legerdemain that defendants have used throughout their argument that obscures and confuses the question at issue. In Argument I of the Memorandum, defendants argue that the Ordinance concerns "municipal affairs" within the meaning of Article XI, § 5 of the California Constitution, and thus supersedes state law because of the home rule powers of charter cities. In Argument II, defendants address the claim made in petitioners' opening Memorandum -i.e., that the

Ordinance is in conflict with state law and is thus preempted under Article XI, § 7 of the California Constitution. Defendants appear to recognize the distinction between the two arguments by beginning their Argument II with the phrase "Even assuming that abatement of prostitution blight is not a municipal affair…." Def. Mem. at 6. However, defendants proceed to disregard this assumption and continually rely on Oakland's status as a charter city and their claim that the ordinance deals with "municipal affairs" to oppose petitioners' preemption arguments and to distinguish the cases petitioners cite with respect to Article XI, §7 preemption. Def. Mem. at p.4, l. 18-21; p. 4, n. 1, l. 25; p. 5, l. 7; p. 5, n. 3, l. 27.

It is important that the relationship between these two arguments be kept clear. If Oakland's vehicle seizure ordinance is not a "municipal affair" but rather deals with matters of statewide concern, then Oakland, like all other cities, is subject to general state laws and the preemption principles of Article XI, §7. While defendants have blurred this point, it is made very clearly in the case law. See *Smith*, 34 Cal. App. 3d at 534 ("A charter city may make and enforce all ordinances and regulations with respect to its municipal affairs, subject only to restrictions and limitations contained in its charter, but with respect to other matters, such as those of statewide concern, it is bound by general laws if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation."); *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 512 (1982) ("If a matter is considered a 'municipal affair', a charter city may regulate the subject even if its regulation conflicts with general law. (citations omitted.) However, in an area of statewide concern a local legislative body may act only if the state has not revealed an intention to occupy the field to the exclusion of all local regulation."); *California Federal Savings*, 54 Cal. 3d at 17 ("If, however, the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution, then the conflicting city charter measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by Article XI, section 5(a) from addressing the statewide dimension by its own tailored enactments.").

4. What would have been the point of carefully listing certain cities and counties, and taking the trouble to amend the statute to add certain entities to the list (Stats 1996, c.1019 (A.B. 2949) § 4) (adding Kern County and any city in Kern), if, as defendants would have it, any city or county in the state was free to adopt the ordinance authorized by section 22659.5 or, as Oakland has done, adopt its own vehicle seizure program and ignore the express direction to follow the statutory procedures?

5. Defendants' own public records contradict their depiction of Vehicle Code § 22659.5 as simply an "optional invitation to participate" in a "data-gathering experiment." In 1993, a memo from the Oakland City Attorney to the City Council described the pending legislation (establishing the five-year pilot program) as "legislation which *authorizes* the City to promulgate a local ordinance providing for the seizure of vehicles involved in prostitution in violation of Penal Code section 647 (b)." (p.1) (emphasis added). See Reply Declaration of Alan L. Schlosser, Exhibit 1. It goes on to describe the legislation as establishing "a five year pilot program, which, broadly speaking, *enables law enforcement to seize vehicles on public nuisance grounds*.…" Id. (emphasis added). The substance of the memo raises a number of concerns with the pending legislation which the memo

concludes would make it difficult to enforce. Accordingly, the memo recommends that the City engage in a lobbying effort to secure changes in the bill. (p.4) There is nothing in this memo that supports defendants' present view that this legislation is simply an optional invitation to collect data; rather,. it is clearly being addressed as a state law that would provide the City with statutory authorization to seize vehicles, and that the restrictions in the statute would bind and restrict Oakland If adopted by the Legislature.

As a comparison of the memo with Vehicle Code §22659.5 as enacted makes clear, Oakland was apparently successful in getting the Legislature to remove most of the provisions in .AB 1332 to which it objected, but the City was not able to delete the requirement that there be a conviction as a prerequisite to a vehicle seizure. Having lost that point. in Sacramento, the City subsequently .adopted its own Ordinance to circumvent the state statute. In so doing, the City violated the preemption principles of Article XI, §7.

6. "Existing law, until January 1 1999, authorizes specified counties and cities to establish a pilot program that implements procedures to declare any motor vehicle a public nuisance when the vehicle is used in the commission of specified crimes relation to prostitution. The cities or counties are authorized to implement procedures within the program to order the defendant not to use the vehicle again for purposes of the specified crimes and to impound the vehicle of a defendant who violates that order.
This bill would extend the authorization for the establishment of that pilot program to any city , any county, or any city and county, may, by ordinance, adopt the provisions of the above pilot project." Analysis of AB 1788 before Senate Rules Committee, Third Reading (p.3). (A copy of this Analysis is attached as Exhibit 2 to the Second Request for Judicial Notice.)

7. See Bill Analysis of AB 1788 prepared for the Senate Committee on Public Safety (p. 6), (A copy of this analysis is attached as Exhibit 3 of the Second Request for Judicial Notice.)

8. In their opening memorandum, petitioners argued that the Ordinance and Vehicle Code §21 clearly occupied the same field in that both authorized vehicle seizure to achieve the same goal -i.e., "the reduction of prostitution in neighborhoods." Pet. Mem. at 4 & n.4. This similarity of legislative purpose is reinforced by the fact that the amendment of Vehicle Code §22659.5 in AB 1788 is combined with other changes in statewide statutes whose legislative purpose was "to deter individuals from 'cruising' residential neighborhoods in search of prostitutes" Bill Analysis, p. 4 (Second Request for Judicial Notice. Ex. 3) This belies Oakland's claim that "the Ordinance concerns itself with problems unique to the City of Oakland." Def. Mem. at 2.

9. Defendants suggest that Vehicle Code §21 and these cases have no bearing on this case because Oakland is a charter city. Def. Mem. at 4-5, n. 1&3. However, as discussed above, vehicle seizures deal with matters of statewide concern, and thus section 21 and these cases are relevant in adjudging whether Oakland's Ordinance is preempted. This is made clear in *People v. PKS, Inc*., 26 Cal. App. 4th 400 (1994), a case cited by petitioners that defendants choose not to discuss in their Memorandum. In *PKS*, the court

relied on the preemption principles embodied in Vehicle Code §21 in finding that an ordinance of a charter city (San Francisco) establishing standards for excessive towing charges was preempted because it conflicted with a specific provision of the Vehicle Code which established different standards.
Also, the amendment to section 22659.5 thoroughly undermines defendants' attempt to distinguish *City of Costa Mesa v. Soffer*, 11 Cal. App. 4th 378 (1992). Def. Mem. at 5, n.3. In that case, the state statute at issue (Vehicle Code §22660) provided that "a city, county, or city and county, may adopt an ordinance" that would provide for the nuisance abatement of inoperative vehicles. This is the *identical* language used by the Legislature in expanding §22659.5 (which, interestingly, is codified in the Vehicle Code directly before section 26660). Thus, the Court's reasoning in Soffer applies with equal force to the instant case - the Vehicle Code provision does not preempt the local ordinance as long as the mandatory procedures of the state statute are "follow[ed]...to the letter." *Id*. at 383, n.8.

10. To mask the conflict between the two laws, defendants fail to acknowledge an overlap. If a vehicle is used in Oakland by persons involved in drug trafficking to acquire a significant amount of drugs, the persons involved could be charged for possession for sale under state law. That vehicle would be subject to forfeiture under Health & Safety Code § 11470 (e). However, the same vehicle would also be subject to seizure under the Ordinance. The fact that the Ordinance's procedures make it far easier for the City to prevail in a forfeiture proceeding, and the fact that under the Ordinance all the revenue generated by the forfeiture goes to Oakland, creates a strong incentive to ignore state law and proceed under the local forfeiture program. And of course, this incentive will exist for every local government entity in this state. See *Ex Parte Daniels*, 183 Cal. at 636. ("The invalidity of such an ordinance is emphasized by the fact that under the scheme of state legislation contained in the Motor Vehicles Act the fines and penalties imposed for its violation are placed in a special fund for the improvement of highways, whereas if imposed for the violation of a municipal ordinance they go into the municipal treasury.").

Dated: October 5, 1998 Respectfully Submitted,

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OCT 01 1998

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JOSEPH SAMUELS JR., Chief of Police

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

SAM C. HORTON, CHERl BRYANT,

Petitioners and Plaintiffs,

v.

CITY OF OAKLAND, OAKLAND CITY COUNCIL, ROBERT C. BOBB, City Manager, City of Oakland, JOSEPH SAMUELS, JR., Chief of Police, City of Oakland,

Respondents and Defendants.

Case No. 798896- 7

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR WRIT OF MANDATE

Date: October 8,1998
Time: 9:15 A.M.
Dept.: 81

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I.
THE ORDINANCE FALLS WITHIN THE HOME RULE POWERS GRANTED TO CHARTER CITIES

Plaintiffs mischaracterize the City of Oakland's powers. As a chartered city, Oakland has the power of home rule under the California Constitution whereby such cities may make laws which are inconsistent with and prevail over general law when the subjects of those laws are municipal affairs. Cal. Const. Art. XI § 5. The broad language plaintiffs cite concerning the preemptive effect of the Vehicle Code under Section 21 is, thus, not applicable here. The cases cited addressed only the powers of general law cities. *See e.g. City of Lafayette v. County of Contra Costa*, 91 Cal.App.3d 749 (1979) (general law city); *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893 (1993) (charter city conceded subject was not a municipal affair). The courts, not the Legislature, must determine whether a charter city ordinance prevails over the general law. When conflict exists between general law and the ordinances of a chartered city, the "question becomes one of predominance or superiority" as between the two over the subject of regulation. *Bishop v. City of San Jose*, 1 Cal.3d 56, 62 (1969).

Determination of whether the subject of conflicting laws is a matter of statewide concern or a municipal affair is a judicial function. *Id*. at 63. The Legislature's conclusion that a matter is of statewide concern is, of course, entitled to great weight, but "the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern." *Id*.

The effect of the Legislative declaration found in Section 21 of the Vehicle Code must be viewed in light of the constitutional grant of power to charter cities. Section 21 declares that "the provisions of this code are applicable and uniform throughout the State. ..and no local authority shall enact. ..any ordinance on the matters covered by this code." Section 21 can be understood only as a limited effort at preemption otherwise, the Legislature would be free to eliminate the home rule provisions of the Constitution merely by placing any statute within the Vehicle Code. For the majority of the Vehicle Code, however, this section results in preemption: the regulation of traffic through the rules of the road has expressly been determined to not be a municipal affair. *Ex Parte Daniels*, 183 Cal. 636,639 (1920) (holding that control over the flow of street traffic is not a municipal affair). However, the Ordinance does not concern such matters as speed limits or pedestrians crossing the street, and no lack of uniformity results in these rules by operation of the Ordinance.

As set forth in *Butterworth v. Boyd* (1938) 12 Cal.2d 140, 147:

"No exact definition of the term 'municipal affairs' can be formulated,
and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case. The comprehensive nature of the power is, however, conceded in all the decisions, and it is recognized that it is not fixed but fluctuates in scope, and that changes in conditions make necessary new and broader applications thereof." [Citations]

Thus, whether the Ordinance concerns itself with a municipal affair or a matter of statewide concern is a determination exclusively reserved to this Court to make.

The Ordinance targets the nuisance and blight created when individuals drive into poorer neighborhoods of this City to purchase drugs from dealers or prostitutes who takeover the neighborhood creating virtual "drive by markets" of illegal activity .The forfeiture provisions were expressly incorporated into the Ordinance for the purpose of discouraging the very conduct that creates the blight, that is, the use of vehicles as a means to conduct a quick illegal street-corner transaction. As implemented, the enforcement of the Ordinance has been limited to areas identified by the citizens and police as overrun with drug dealers or prostitutes who directly benefit from the ready access vehicles have to their curb side marketplace. The neighborhood blight is further underscored by the presence of such a curbside marketplace, allowing drug dealers and prostitutes an easy customer stream, as vehicles quickly enter, procure the illegal substance or activity and exit the neighborhood. The police set up "sting" operations designed to dry up the dealers and prostitutes "drive by" source of ready income in blighted areas targeted for clean up. In this regard, the Ordinance concerns itself exclusively with problems unique to the City of Oakland. Moreover, as discussed more fully below, the state has not enacted any legislation designed to deal with this particular problem, nor has it expressly or impliedly forbidden local municipalities from taking steps to abate the criminal behavior that creates the nuisance.

II.
CALIFORNIA VEHICLE CODE SECTION 22659.5 DOES NOT PREEMPT THE CITY OF OAKLAND'S NUISANCE ABATEMENT ORDINANCE

A. THE ORDINANCE IS NOT EXPRESSLY PREEMPTED BY THE VEHICLE CODE

Even assuming that abatement of prostitution blight is not a municipal affair, the Ordinance is not preempted. That which is not strictly a municipal affair is not necessarily an area of exclusively statewide concern. Overlap exists in which both state and municipality may legitimately act. *Bishop*, 1 Cal.3d at 62. In such an area, the Legislature preemption must be done actively. The "Legislature has no power to forbid the municipality" to act; rather, it must implement its own program. *Wilton v. Henkin*. 52 Cal.App.2d 368,372 (1942). In enacting Section 22659.5 as a temporary, limited, and optional pilot program, the Legislature did not implement a program which expressly excludes municipal action under the home rule provisions of the California Constitution.

Section 22659.5 is permissive, not mandatory; it extends an invitation to participate in the Legislature's data-gathering experiment. Under Section 22659.5(a), one of the named localities "may adopt an ordinance" to participate in the Legislature's "five-year pilot program." Cal. Veh. Code § 22659.5(a). The purpose of this program is not, as plaintiffs suggest, to reduce prostitution; but, rather, "to ascertain whether declaring motor vehicles a public nuisance. ..would have a substantial effect." 1993 Cal. Legis. Serv .Ch. 485 § 1. The difference between this goal and that of actually reducing prostitution is significant:

the goal here is to uncover information, gather data, conduct an experiment. The inference to be drawn is the Legislature does not know the impact and has not concluded that any uniform, statewide program is needed. The subsection misidentified by plaintiffs as an express preemption provision does not alter this conclusion.

Plaintiffs' assertion that Section 22659.5(c) is an express preemption provision ignores the language of the section as a whole. Subdivision (c) states: "[t]he only action that may be taken to enjoin and abate the declared nuisance are those actions specified in subdivision (b)." Cal. Veh. Code § 22659.5(c). The declared nuisance clearly relates to subdivision (a), which creates a "five-year pilot program which implements procedures for declaring a motor vehicle a public nuisance." Cal. Veh. Code § 22659.5(a). The asserted preemption provision is bound to the meaning of the term "pilot program," yet the Legislature has nowhere defined it. Nor have the courts given it a judicial construction. The consistency created by subdivision (c) would, of course, aid in analyzing the data. It is no more than common sense that, if comparisons are to be made, the programs must in fact be comparable. In that light, the limitation of subdivision (c) has a far more limited purpose than preemption: it ensures a baseline for comparison. The City, however, did not accept the optional invitation to participate and its procedures therefore need not conform to the pilot programs. [1]

Finally, the claim of express preemption ignores the fundamental limitations of Section 22659.5 with its *automatic repeal* provision *as of January 1. 1999*. In addition, Section 22659.5 does not have statewide effect: only designated portions of the State-the counties (and cities within) of Alameda, Contra Costa, Kern, San Diego, and Sacramento, as well as the cities of San Francisco, Long Beach, and a portion of Los Angeles-are affected. Cal. Veh. Code § 22659.5(a). Thus, it appears other areas of the State-including general law cities which do not have the constitutional grant of home rule -- could enact an ordinance identical to the City's without the question of preemption by Section 22659.5 arising.[2] In essence, then, if construed as having preemptive effect, Section 22659.5 only preempts particular localities. Such an interpretation means the Legislature acted to forbid a charter city from exercising its own constitutional powers -- precisely what is forbidden under *Wilton*. Moreover, such action would best be characterized as determining the municipal affairs of the named localities. This is beyond the Legislature's power under Article XI, Section 5.

This section, then, is temporally and geographically limited: it extends to a few named localities for five years (which has now dwindled to only a few more months). The claim that, even if it should have the power to do so, the Legislature would enact so narrow a law as an expressly preemptive statute is absurd without much clearer language than any to which plaintiffs point.[3]

B. THE ORDINANCE IS NOT PREEMPTED BY LEGISLATIVE IMPLICATION

In addition to the possibility of express preemption, a local ordinance can also be preempted by implication. A charter city may legislate freely on municipal affairs unless:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

In re Hubbard, 62 Cal.2d 119,128 (1964). Many of the peculiarities of Section 22659.5 addressed above are also relevant to the analysis of implied preemption, and the effect of Section 22659.5 is the same: the Ordinance is not preempted under any prong of this test.

Although plaintiffs do not identify which tests should result in preemption of the Ordinance, plaintiffs' argument implicitly addresses only the first. By comparing the asserted Legislative intent of Section 22659.5 with that of the Ordinance, plaintiffs apparently argue that the Legislature's intent fully and completely covers the subject matter. The specifics of legislative intent were addressed above; substantial differences between the two programs are clear.

Plaintiffs also ignore the inconvenient details of the test: the state law must "*clearly* indicate [the subject] has become exclusively a matter of state concern." *Id*. (Emphasis added.) Section 22659.5 offers no such clear indication: it fails to completely cover either the subject matter or even the State of California. Such gaping holes in the statutory scheme (if a scheme can even be said to exist) leave no place for a claim of exclusive state concern.

Section 22659.5 also fails to preempt under the second test for implied preemption. Again, this test requires a clear indication of preemptive intent. *In re Hubbard*, 62 Cal.2d at 128. There is no language in the section indicating a paramount state concern exists "which will not tolerate further or additional local requirements." *Galvan v. Superior Court*. 70 Cal.2d 851,853 (1969). The issue of a paramount state concern "involves the question 'whether substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level.'" *Id*. at 863-4. The City's need for local control is obvious, as substantial portions of the City have decayed under the weight of prostitution blight. And no showing of adequate recognition or comprehensive state problem solving can be made here. The Legislature has done no more than acknowledge the possibility of a problem and ask for volunteers to gather data.

The third implied preemption test no more avails Plaintiffs. The Ordinance does not impose any particular burden on transients. No threat exists that, under the Ordinance, persons outside the City will somehow be lured into soliciting prostitutes in Oakland. A transient who neither solicits prostitutes nor allows others to do so with his vehicle suffers no injury from the Ordinance. There is no demarcation between legal and illegal behavior when a transient enters into the City. Thus, the Ordinance does not have a significant adverse effect on transients.

C. HEALTH AND SAFETY CODE SECTIONS 11469 ET SEQ. DO NOT PREEMPT THE ORDINANCE

1. The Ordinance does not occupy the same field

Petitioners contend that the Ordinance occupies the same field as California' s drug asset forfeiture statute and therefore is preempted. Respondents vigorously disagree.

The statutory scheme that Petitioners claim occupies the same field as the Ordinance is found in Health and Safety Code §§ 11469 *et seq*., California's Seizure and Disposition statutes. These statutes provide a scheme for the forfeiture of the **tools and profits** of **drug dealers**. In enacting this statute, the Legislature expressly provided for the forfeiture of the property of those individuals who sell or manufacture drugs. Health and Safety Code § 11469(j). The statute targets the tools used by and profits realized by drug dealers. *Caplin & Drysdale v. United States* (1989) 491 U.S. 617,105 L.Ed.2d 528, 544; *People v. Superior Court (Clements).* (1988) 200 Cal.App.3d 490,499.

With respect to automobiles, the statute targets automobiles, which have been used to facilitate the manufacture, possession for sale of specified controlled substances in certain amounts. Health and Safety Code § 11470(e). Petitioners' assertions that the statute attempts to control and deter drug transactions by targeting vehicles used in connection with drug offenses overgeneralizes and overlooks a critical distinction. The state statute was narrowly tailored to attack the drug trade from the supply side, with the forfeiture of automobiles used by drug dealers to assist in the manufacture or sale of controlled substances. This is further evidenced by the fact that the Legislature predicted forfeiture on minimum quantities of controlled substances (Health and Safety Code § 11470(e), evidencing the Legislature's purpose of targeting automobiles used to facilitate drug dealing, not drug possession or acquisition. In similar fashion, the Legislature focused exclusively on drug dealing when it targeted the proceeds of drug sales and the forfeiture of real property .Only trafficking offenses qualify as target crimes for forfeiture. Health and Safety Code §§ 11470(f) and (g). The Ordinance is narrowly circumscribed to focus on abating a nuisance and is not concerned with the use of automobiles to assist in the manufacture or distribution of drugs. Ordinance, § 3-23.01. All of which serves to demonstrate that the Ordinance targets conduct which is not covered by the state statute.

To illustrate, if the Oakland Police Department arrested an individual driving an automobile which contained 14.25 grams or more of heroin, state law would permit the

seizure and eventual forfeiture of the automobile on the grounds that it was used as an instrument to facilitate the possession for sale of heroin. Health and Safety Code § 11470(e). Under the Ordinance, the automobile would not be seizable or forfeitable because it was not used to acquire or attempt to acquire a controlled substance. Ordinance, § 3-23.01. Conversely, the Ordinance would permit the seizure and eventual forfeiture of an automobile used to acquire heroin for personal use; state law would not. Thus, contrary to Petitioner's characterizations, the Ordinance does not occupy the same field and would not be preempted. *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 291-292.

2. The Ordinance is not in conflict with state law

Petitioners are equally incorrect in asserting that the Ordinance conflicts with the state statute. To conflict with state law, the Ordinance would have to prohibit conduct, which the state statute authorizes, or permit conduct, which the state statute forbids. *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383,396-397.

Petitioners identify several differences between the state law and the Ordinance, which they claim establishes the conflict between the two schemes. In comparing and contrasting the two schemes, the court must focus on the entire statute and not just isolated sections. Viewed in its entirety, the state statute does not require a conviction and proof beyond a reasonable doubt as a prerequisite to forfeiture in *all* cases. For example, the forfeiture of proceeds in excess of $25,000.00 does not require a conviction and the burden of proof is clear and convincing evidence. Health and Safety Code §§ 11470, 11488.4(i)(4). With respect to property identified in Health and Safety Code §§ 11470(a),(b),(c) and (d), no conviction is required and the burden of proof is a preponderance of the evidence. Health and Safety Code § 11488(i); *People v. Nazem* (1996) 51 Cal.App.4th 1225,1232 n.7. Where forfeiture is not contested, no conviction is required and the burden of proof is merely a prima facie case. *People v. Parcel No.056-500-09* (1997) 58 Cal.App.4th 120, 126-127. Where the defendant in the underlying or related criminal action willfully fails to appear, no conviction is required and the burden of proof is a prima facie case, Health and Safety Code § 11488.4(k). Thus convictions and proof beyond a reasonable doubt are not required in all cases under the state scheme. The enactment of these provisions establishes that the Legislature intended to permit forfeiture in the absence of a conviction and with less than proof beyond a reasonable doubt in some cases. .Accordingly, the Ordinance does not conflict with the state statute.[4]

Lastly, Petitioners argue that the lack of an innocent owner defense conflicts with the state law. It should be noted that the lack of an innocent owner defense is not an issue which raises constitutional concerns. The forfeiture of the property of persons who may not have had knowledge of the facts giving rise to the forfeiture is permissible and has been upheld repeatedly. *Bennis v. Michigan* (1996) 516 U.S. 442, 116 S.Ct. 994; *Calero-Toledo v. Pearson Yacht Leasing Co*. (1974) 416 U.S. 663. In *Bennis*, the United States Supreme Court upheld the validity of a nuisance abatement statute from the state of Michigan which, like the Ordinance, targets automobiles used to commit acts of

solicitation and which, like the Ordinance, does not provide an innocent owner defense. *Bennis* was decided two years after the enactment of the Health and Safety Code sections at issue in this case. The Ordinance was modeled after the Michigan statute and was enacted after the *Bennis* decision was issued. The Ordinance does not occupy the same field as the state statute but is directed at the nuisance created when cars are used to acquire controlled substances. The City of Oakland has enacted a nuisance abatement provisions consistent with constitutional law. Although as a corollary to the enforcement of the Ordinance, drug trafficking will also be discouraged, an ordinance designed to discourage criminal acts is not necessarily preempted by the state statute proscribing those acts. *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th at 409. Moreover, as discussed more fully below, the Legislature has enacted forfeiture provisions under the Penal and Vehicle Codes, which do not recognize an innocent owner defense. The existence of these provisions establishes that the presence or absence of such a defense is a policy consideration, not an intention to preempt.

3. The Ordinance is not preempted by implication

The remaining question is whether the Ordinance attempts to occupy an area that the Legislature impliedly intended to preempt. The test for determining whether an area of law is fully occupied on the basis of legislative implication, as discussed above, is set forth in *In re Hubbard* (1964) 62 Cal.2d 119, 12; *See also Galvan v. Superior Court* (1969) 170 Cal. 2d 851, 859-860).

Here, there is no preemption, Petitioners must establish that the state law partially covers the subject matter of the Ordinance and is couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional action-even if it could be argued that the state statute partially covers the same subject matter -- as throughout Respondent argues its difference, there is no indication that the Legislature even considered the conduct proscribed by the ordinance, much less that it intended to limit the use of the forfeiture remedy to drug trafficking offenses.

In support of their position, Petitioners refer to the differences between the statute and the Ordinance.[5] The problem with Petitioners' analysis is that it ignores other statutes enacted by the Legislature concerning the seizure and sale of forfeited assets. These statutes differ markedly from the provisions of the Health and Safety Code.

Petitioners make no mention, for example, of Penal Code §§ 186 *et seq*. Under these sections, property acquired as the result of criminal profiteering activity, including automobiles, may be forfeited for drug trafficking violations. Penal Code section 186.2(a)(17). The state here has enacted legislation which permits the forfeiture of property involved in drug trafficking and which does not have an innocent owner defense.[6]

Petitioners also make no mention of Vehicle Code § 14607.6. Under this statute, a motor vehicle is subject to forfeiture as a nuisance if it is driven on a highway by a driver with a

suspended or revoked license who has a previous misdemeanor conviction for driving without a valid license or for driving on a suspended or revoked license.[7] There is no innocent owner defense in the statute.[8] Thus, under state law, the interest of a co-owner of a motor vehicle can be forfeited for violation of a mere traffic offense, even if the co-owner had no knowledge of the facts giving rise to the forfeiture.

Petitioners' assertions with respect to the distribution scheme are also without merit. Penal Code §§ 186 *et seq*., for example, permit the forfeiture of the profits of trafficking in drugs (penal Code § 186.2 (a)(17)) and provide that the forfeited assets be remitted to the general fund of the prosecuting agency. Penal Code § 186.8(c). There is no requirement that special funds be established and no requirement that the expenditure of these funds be audited or reported. Similarly, Penal Code §246.1 provides for the forfeiture and sale of automobiles used to commit certain crimes involving firearms. After expenses are paid, the proceeds of the sale are remitted to the city or county where the offense occurred. Penal Code § 246.1 (d)(5). Again, no auditing, reporting or special funds requirements apply. Penal Code § 502.01 permits the forfeiture of computer equipment used to commit computer-related crimes. The distribution scheme for this statute also does not have auditing, reporting or special funds requirements.

Petitioners would like the Court to find that Health and Safety Code §§ 11469 *et seq*., represent a "patterned approach" establishing the standard to which the use of the forfeiture remedy must conform. Such standard, they argue, represents a paramount state concern that will not tolerate any further or additional action. The Legislature's enactments in the field of asset forfeiture establish the contrary: there is no "patterned approach" Because there is no uniformity in the procedures and requirements attendant to the seizure, sale and distribution of forfeited assets under state law, the state statute relied on by Petitioners cannot be said to manifest the standard to which all forfeiture statutes in the state of California must conform. Far from being a "patterned approach" it is a "pitted" approach.

Lastly, while Plaintiffs argue the effect of the ordinance is adverse on the transient citizens of the state, such an effect has clearly been equal and benefits the municipality. Moreover, the behavior targeted by the ordinance is criminal. Thus the ordinance is a justified police measure that protects the City's interest in assuring public safety without interfering with the legitimate exercise of any constitutionally protected activity. *In re Hoffman* (1967) 67 Cal.2d 845,853. In upholding a local ordinance proscribing loitering while carrying concealed weapons, the Court of Appeal stated:

> "Turning to the third *Hubbard* test, no adverse effect upon transient citizens appears to outweigh the possible benefit to the municipality. Clearly, nonresidents who pass through San Francisco will not be confronted by a peculiar prohibition, unless of course they are disposed to loiter for a sinister or unlawful purpose while carrying, concealed, a dangerous or deadly weapon. If they, are so disposed, the municipality has a legitimate interest in proscribing such conduct by transient and citizen alike."

Yuen v. Municipal Court (1975) 52 Cal.App.3d 351,357. The Ordinance does not present the citizenry with a peculiar prohibition, unless they are in the act of purchasing or attempting to purchase illicit drugs, which conduct the city has a legitimate interest in proscribing by transient and citizen alike.

III.
THE OPINION OF THE LEGISLATIVE COUNSEL IS NOT PERSUASIVE

7 The opinion of Legislative Counsel (Ops. Cal. Leg. Counsel, No. 24752, March 17, 1998) has been heavily relied on to support plaintiffs' position that the Ordinance is preempted by state law. The opinion of Legislative Counsel has no precedential value, is not binding on this court and contains several points of weak analysis which make it unpersuasive as well. In 1993, for example, Legislative Counsel issued an opinion at the request of then Assemblyman John Burton, which stated that as of January 1,1994, California ceased to have an asset forfeiture law (Ops. Cal. Leg. Counsel, No. 30765, November 24, 1993). This opinion came at the end of a bitter fight between law enforcement advocates and Assemblyman Burton with respect to California's asset forfeiture law. The asset forfeiture provisions in effect between 1989 and 1993 were set to expire in 1993. If the Legislature did not extend those provisions, then the law that was in effect in 1988 would take effect on January 1, 1994. When no agreement was reached between Assemblyman Burton and law enforcement representatives, the 1993 Legislative session ended without any action taken by the Legislature. Not surprisingly, Assemblyman Burton requested and obtained an opinion from Legislative Counsel that California had no asset forfeiture law. This opinion engendered years of wasteful and needless litigation during which the California courts repeatedly held that Legislative Counsel's opinion was wrong. See Mundy v. Superior Court (People) (1995) 31 Cal.App.4th 1396; People v. One 1986 Toyota Pickup (De La Torre) (1995) 31 Cal.App.4th 254; People v. $31,500 in United States Currency (1995) 32 Cal.App.4th 1442; People v. $1,930 United States Currency (1995) 38 Cal.App.4th 834). Moreover, as demonstrated earlier, the opinion misstates the law, makes no mention of the distinction between charter and general law cities, and overlooks other legislative enactments which contradict the opinion's over generalized assertions. Significant in this regard is the lack of any discussion of Vehicle Code section 14607.6, Penal Code sections 186 *et seq*., Penal Code section 246.1, or Penal Code section 502.01. For these reasons, Respondents urge the Court to give the opinion of Legislative Counsel little or no weight.

IV.
THE ANALYSIS OF AB 114 REFERS TO A BILL THAT THE LEGISLATURE DID NOT ENACT

In support of their arguments concerning the Legislature's intentions in enacting AB 114, Petitioners refer this Court to a Digest prepared by staff counsel for the Assembly Committee on Public Safety for a Hearing that occurred in that Committee on April 20, 1993 (see Analysis of AB 114, attached as an Exhibit to Petitioners' Appendix of

Authorities). The version of AB 114 that was heard in Committee on April 20, 1993, however, is not the version that was enacted by the Legislature in 1994. Petitioners no doubt are unaware that a two-year bill such as AB 114 can undergo various incarnations before it is passed and signed into law. As stated earlier, the 1993 Legislative session ended without any changes to Health and Safety Code sections 11470 et seq. Subsequently, a dispute arose as to whether those sections had expired, which dispute was settled when the Courts of Appeal held that no expiration had occurred and the opinion of Legislative Counsel to the contrary was in error. *See, e.g., Mundy v. Superior Court (People)* (1995) 31 Cal.App.4th 1396.

As the Digest indicates, there were several related Bills pending on that date. Assemblyman Burton's was one of them. A copy of the Bill is attached as an Exhibit.[9]

As it existed in 1993, among other things, AB 114 would have required convictions unless the defendant fled the jurisdiction or died ("Text" pp.-4); put the forfeited assets into a state general fund, (Text, p. 6); and provided for attorneys fees for claimants who prevailed over the state in a forfeiture action. ("Text", p. 5.) In contrast, as set forth above, the version of AB 114 that was passed by the Legislature and signed into law does not require convictions in all cases, does not put the forfeited assets into a state general fund, and contains no provisions for attorneys fees. Similarly, the April 1, 1993, version of AB 114 would have required the burden of proof to have been beyond a reasonable doubt in all cases ("Text" p. 2). In contrast, the version that was enacted into law has three burdens of proof, including by a preponderance of the evidence for some of the listed properties.

The Bill Analysis prepared for the Conference Report on A.B. 114, which actually refers to the version of the Bill that was enacted states that A.B. 114 was enacted to provide "a compromise between various groups, including law enforcement, business interests, civil libertarians and others, in effecting new asset forfeiture provisions and in clarifying the current status of the law. See Proposed Conference Report No. 1 August 15, 1994, California State Assembly Home Page, http:www.leginfo.ca.gov/pub/93…_114_cfa_940817_203247_asm_floor, downloaded September 11, 1998 (attached as an Exhibit).[10]

The changes that were made to AB 114, therefore, represent compromises reached between competing interests over the procedures to be used in the forfeiture of the tools and profits of drug traffickers. In light of the subsequent amendments to AB 114, the Digest prepared for the April 20, 1993 Hearing cannot be utilized to determine the Legislature's intent when it enacted another version more than a year later. Moreover, it cannot be relied upon to support Petitioner's contentions that the procedural safeguards referred to by Assemblyman Burton were intended to preempt local governments from enacting legislation which does not contain them. Respondents therefore request that the Court rely on the provisions that were actually enacted in determining Legislative intent.

CONCLUSION

The Ordinance falls within the "home rule" powers granted to charter cities and concerns itself exclusively with a municipal affair. California Vehicle Code section 21 must read in conjunction with the home rule powers reserved to charter cities pursuant to California Constitution Article XI section 5. California Vehicle Code section 22659.5 is a temporary, information-gathering statute which does not expressly or impliedly preempt the Ordinance. Health and Safety Code sections 11469 *et seq*. were implemented to strip drug traffickers of the tools and profits of their trade and thus do not occupy the same field as the Ordinance, do not conflict with the Ordinance and do not expressly or impliedly preempt the Ordinance. Thus, based upon all these reasons, Respondents respectfully request the Petitioners Application for Writ of Mandate be denied.

ENDNOTES:

1 Plaintiffs' argument that differences between the Ordinance and Section 22659.5 should result in invalidity on the grounds that delegations of authority must be strictly construed is ill-conceived. *People v. Moore* is inapposite, as the Ordinance was independently enacted under the City's Article XI, § 5 power over municipal affairs; thus, no delegation occurred. *Barajas v. Anaheim* is also inapposite, as it concerned the repeal of a specific delegation to ban vending from vehicles while provisions allowing regulation were retained. *Barajas v. Anaheim*. 15 Cal.App.4th 1808, 1814 (1993). *Barajas* thus stands for little more than the proposition that, when the Legislature explicitly repeals a portion of a statute, it intends to effect some change. *Id*. at 1814-15.

2 This lack of statewide effect conflicts with Vehicle Code Section 21 (declaring the Vehicle Code to be "uniform throughout the State"), further vitiating any claim to preemptive effect.

3 Plaintiffs' comparison of this case to *City of Costa Mesa v. Soffer* is inappropriate due to these particular features of Section 22659.5. Soffer concerned Vehicle Code Section 22660, which controls nuisance declarations of inoperative vehicles. *City of Costa Mesa v. Soffer*. 11 Cal.App.4th 378, 383 (1992). The power granted to a charter city by the California Constitution was not addressed in the opinion. The law in question in *Soffer* was of statewide operation, contained no automatic repeal provision, and was not enacted as a pilot program. Cal. Veh. Code § 22660. Thus, while *Soffer* is a correct statement of the law regarding general law cities and Section 22660, it is irrelevant to the question presented here.

4 Petitioners also cite a jury trial right, which they claim is not available to persons desiring to contest the forfeiture of a vehicle under the Ordinance. Since the inception of vehicle seizures and forfeitures under the Ordinance, all claimants have been advised of their right to have the forfeiture hearing tried to a jury . *See Declaration of Deputy City Attorney*

Marcia L. Meyers. Moreover, on [date] the Ordinance was amended to include specific language guaranteeing the right to a jury trial. *See Declaration of Deputy City Attorney Marcia L. Meyers.* As to this concern, both in its enforcement and its language, the Ordinance is not in conflict with state law.

5. I.e., the burden of proof, jury trial rights, defenses and procedural prerequisites, as reflecting a "paramount state concern for uniformity" with respect to the seizure and sale of forfeited assets.

6. The only persons whose interests are protected from forfeiture are bona fide purchasers for value, lienholders, mortgagors, secured interest holders or interest holders under a conditional sales contract. Penal Code § 186.7. Anyone else would lose their interest in the property to forfeiture irrespective of their knowledge of the facts giving rise to the forfeiture.

7. The burden of proof on the prosecution is by a preponderance of the evidence and a judgment of forfeiture does not require the conviction of a defendant of the offense, which made the vehicle subject to forfeiture as a condition precedent to forfeiture. Vehicle Code section 14607.6(e)(5).

8. Co-owners whose interest in the vehicle is forfeited must recover for any losses from the unlicensed, suspended or revoked driver. Vehicle Code section 14607.6(m).

9. Pursuant to California Evidence Code section 452 (c), Respondents request that the Court take judicial notice of Assembly Bill No. 114, Amended in Assembly April 1, 1993, California Legislature -- 1993-1994 Regular Session, January 11, 1993, hereinafter "Text".

10. Pursuant to California Evidence Code section 452 (c), Respondents request that the Court take judicial notice of the Bill Analysis for the Proposed Conference Report No. 1, August 15, 1994.

Dated: October 1, 1998

JAYNE W. WILLIAMS, City Attorney
JOYCE M. HICKS, Assistant City Attorney
MARCIA L. MEYERS, Deputy City Attorney

By: xxxxxx x xxxxxx
Attorneys for Respondents and Defendants
CITY OF OAKLAND, ROBERT C. BOBB
and JOSEPH SAMUELS JR. :

The District Attorney of Alameda County joins with the City Attorney of Oakland in urging the Honorable Court to deny this Motion for Writ of Mandate.

Dated: October 1,1998
i
Respectfully submitted,

THOMAS J. ORLOFF, District Attorney
RUSSEL J. GIUNTINI, Deputy District Attorney
ARMANDO G. CUELLAR JR., Deputy District Attorney
ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

By; xxxxxxx x xxxxxxx xx (xx xxxxxx xxxxxx)
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The Honorable Henry E. Needham, Jr.
Judge of the Superior Court
Department 81
Alameda County Superior Court
201-13th Street, 2nd Floor
Oakland, CA 94612-9991

Re: *Horton. et al. v. City of Oakland. et al*.
Alameda County Superior Court Action No. 798896-7
Our File No. 98232

Dear Judge Needham:

Respondents are providing the Court and opposing counsel with a recently issued decision which is relevant to the issues presented by the above-captioned case. A copy of the decision is attached as "Exhibit A ".

The case, California Rifle and Pistol Association v. City of West Hollywood (1998) __Cal.App.4th__, 98 Daily Journal D.A.R. 10389 (Thursday, October 1, 1998), was issued the day respondents brief was filed and therefore not included in respondent's Points and Authorities. Accordingly, and in compliance with State Bar Rule 5-200, we bring the decision to the Court's attention before the Hearing date, currently scheduled for October 8,1998.

In this case, an Ordinance banning the sale of 'Saturday night specials' within the limits of the City of West Hollywood was challenged on preemption grounds. The plaintiffs argued that state statutes regulating the registration and licensing of handguns (Government Code section 53071) and the manufacture, sale or possession of imitation firearms (Government Code section 53071.5), as well as California Penal Code section 12026 (prohibiting permits or licenses for handguns kept in a residence or business), preempted the Ordinance. Two opinions from the Legislative Counsel of California were cited by plaintiffs in support of their position.

The Court of Appeal affirmed the trial court's grant of summary judgment for the city, rejecting Legislative Counsel's opinions to the contrary.

Respondents would like to draw the Court's attention to the careful analysis conducted by

the Court of Appeal, in particular, the Court's limited focus which is discussed on page 10391 of the opinion:

" Whether to preempt or not to preempt is a decision for the Legislature, not for the courts. The courts simply carry out legislative intent regarding preemption. The courts cannot properly base. decisions about preemptive intent upon subjective opinions regarding the quality or value of the Legislature's reasons. Instead, the courts must simply determine whether the Legislature did or did not intend to preempt."

In applying this narrow focus to the question before it, the Court of Appeal observed:

"The ordinance in question here does not directly conflict with any state statute, and the question of whether to have such an ordinance is a decision within the authority of local elected legislators... In the absence of a sound legal reason to do so, a court would be acting illegitimately if it interfered with the political judgment of local elected officials simply because some might disagree with that political judgment." [page 10389].

With these guidelines, the Court of Appeal found that where the statute limits itself to one or two aspects of a particular field, that limitation manifests a legislative intent not to preempt other areas contained within that field. The court concluded, for example, that Government Code section 53071 which limits itself to the regulation of "registration or licensing" of handguns did not preempt the city's Ordinance banning the "sale" handguns. Similarly, Government Code section 53071.5 which limited itself to regulating the manufacture, "sale" or possession of "imitation" firearms did not preempt the Ordinance banning the sale of "real" firearms [page 10391].

In the case before this Court, the Legislature specifically limited the application of Health and Safety Code sections 11469 et seq. to the conduct engaged in by drug dealers. Following the reasoning of *California Rifle and Pistol Association*, this indicates legislative intent not to preempt local municipalities from enacting Ordinances which focus on the conduct engaged in by drug buyers. Petitioners have attempted to avoid this distinction by countering with what can be best characterized as a "it doesn't make sense" argument. It doesn't make sense that the Legislature would enact laws governing the forfeiture of the property acquired or used by drug dealers and that the Legislature would not intend for those laws to govern the forfeiture of the property used by drug purchasers. Thus, they contend, the Legislature must have intended to

preempt. This argument was raised in *California Rifle and Pistol Association*, and rejected.

"Arguments might be raised about whether it makes sense for the Legislature to occupy the field of regulation of imitation firearms, while not occupying the field of regulation of real firearms, but even assuming an opinion that it doesn't make sense, such an opinion would not operate to transport the locus of decision from the Legislature to the courts." [page 10391]

Moreover, as discussed more fully in Respondents brief, the differences that exist between the Health and Safety Code and the Ordinance are policy considerations which are best left to the elected officials who enacted the legislation. This Court, as did the Court of Appeal, should defer to the political judgment of Oakland's elected city officials. This is especially so because the Ordinance was drafted in conformity with established constitutional principles, is authorized by the "home rule" provisions of the California Constitution, and concerns itself with a municipal affair.

Respondents urge the Court to follow the narrow focus approach adopted by the Court of Appeal in *California Rifle and Pistol Association* and find that the Ordinance is not preempted.

Respectfully submitted,

JAYNE W. WILLIAMS
City Attorney

By:xxxxxx x xxxxxx
MARCIA L. MEYERS
Deputy City Attorney

MLM:ke
Enclosure

cc: Alan Schlosser
American Civil Liberties Union
(via facsimile w/enclosure)