

November 8, 2012

**SUPREME COURT  
FILED**

**NOV - 9 2012**

Hon. Tani Cantil-Sakuye, Chief Justice  
and Associate Justices of the California Supreme Court  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

**Frank A. McGuire Clerk**  

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**Deputy**

Re: League of California Cities' Letter, Pursuant to California Rules of Court, Rule 8.1125 Seeking Depublication of Opinion in *Costa Mesa City Employees' Association v. City of Costa Mesa*, Court of Appeal for the 4<sup>th</sup> Appellate District, Div. 3, Case No. G045730; (Petition for review pending - California Supreme Court Case No. S 206157.)

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

I am writing on behalf of the League of California Cities ("League") to seek depublication of the Court of Appeal's opinion ("Opinion") in the above-entitled case in accordance with California Rules of Court ("Rules") Rule 8.1125.

**A. INTERESTS OF LEAGUE OF CALIFORNIA CITIES**

The League is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance.

The Committee has identified this case as being of such significance because the Opinion holding that general law cities have no inherent power to contract out without express statutory authority (Slip Op., pp. 18-21) severely impairs the ability of all general law cities to decide what services to provide their residents and how to do so in the most cost-effective manner.

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The benefits to city residents of contracting out are clear, particularly in these difficult economic times. Contracting can allow cities to provide the best possible services in the most efficient and cost-effective manner. Cities need not embark on enormous capital projects to house staff and provide services, but can shift this expense to private contractors. Because private contractors generally provide services to more than one entity, overhead costs are shared, and smaller cities are able to take advantage of the economies of scale. Contracting for services also allows cities greater flexibility to adapt to the changing needs and economic resources of their communities. It enables them to purchase only the services actually needed, when needed.

Private contractors are often able to provide better services at a lower cost due to increased resources, more modern equipment and competitive bidding. Cities are able to use any money saved to offset operating deficits or to provide other badly needed municipal services.

#### **B. THE ADVERSE EFFECT OF THE OPINION ON CITIES**

The Opinion holds that general law cities may not contract out for services absent express statutory authorization. It thereby precludes all general law cities from taking advantage of economies of scale or other efficiencies, skill or competence in the private sector. As a result cities will be forced to deny their citizens important services altogether, if they cannot afford to hire and house sufficient in-house staff.

The Opinion also overturns the settled and longstanding practices of a large group of at least 70 general law cities who since the 1950s have contracted for most of the services provided to their citizens ("contract cities"). Many small and more recently incorporated cities would effectively cease to exist if they could not contract for services. Over a five year period one city saved millions of dollars by contracting out tree trimming, signal maintenance, street sweeping and other services. These savings allowed the city to reallocate tax dollars to other areas in which they were needed. Another city reported a 300% increase in tree trimming productivity as a result of contracting out those services.

In addition to its troubling preclusion of contracting out, long considered a necessary and unremarkable incident of municipal power, the Court of Appeal takes a radical approach to preemption doctrine, holding that where a state statute authorizes specific services to be contracted out, it impliedly prohibits anything it fails to authorize. This articulation of preemption doctrine conflicts with longstanding jurisprudence in this area that the state must either expressly or impliedly occupy a field to advance state legislative ends. The

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Opinion could thus create new claims that cities' legislative actions are preempted by state law, merely because the challenged actions are not explicitly authorized in a statute.

### **C. SUMMARY OF REASONS FOR DEPUBLICATION REQUEST**

The publication of an opinion is essentially a decision that the opinion was crafted thoughtfully and analytically in order to provide guidance to other courts and litigants throughout the state about the applicable legal principles or how they should be applied under new circumstances. It should not, however, land like a meteor, wreaking havoc in a carefully constructed municipal legal landscape developed and tended over decades, which the Opinion does not even discuss.

Courts of Appeal may certainly disagree with one another on new and different questions after explaining and analyzing why they have chosen to depart from the analysis of another Court of Appeal. And, of course, they may distinguish relevant precedent. Under well-established principles of stare decisis, however, the Court of Appeal may not disregard, as it did here, California Supreme Court jurisprudence or simply ignore and fail to analyze other Courts of Appeal decisions which are germane to the questions the Court decided. As a result, the publication of the Opinion serves only to confuse and not to guide. It neither elucidates the relevant law nor fills analytical gaps. Moreover, it fails to even note, let alone explain, its basis for departing from other Courts of Appeal opinions on contracting out or the standards applicable to preemption analysis under California Constitution Article 11 section 7. (See California Rules of Court, Rule 8.1105 (c).)

Specifically, the Opinion eviscerates the broad constitutional powers of general law cities and the very principle of local control embodied in Article XI section 7 by requiring a general law city to justify every discretionary decision by reference to some express State statutory grant of authority and treats the absence of a grant as an implied proscription. This turns constitutionally autonomous organs of local governments answerable to the constituents who elect them, into wards of the state who must seek specific statutory permission for everything they do, notwithstanding a body of well-established jurisprudence to the contrary.

Second, the Court of Appeal justifies its extraordinary intrusion into the discretionary decisions of cities by invoking the language in Article XI section 7, which limits the constitutional power to that which does not conflict with state law. While it is well established that the State may enact affirmative legislation in pursuit of a statewide goal

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requiring uniformity and thereby preempt city action, the Court of Appeal's analysis overturns a century of preemption doctrine by interpreting a state law which is permissive, as an implied prohibition on everything the statute does not address. Worse, the Court of Appeal does not seem to recognize that preemptive state legislation must be affirmatively aimed at achieving some state purpose and fails to even identify what possible state purpose could justify such a *sub silentio* usurpation of cities' constitutional authority under Article XI section 7.

Finally, the Opinion ignores the dispositive California Court of Appeal reported opinion finding that the purpose of allegedly preemptive Government Code section 53060 was solely to make clear that competitive bidding requirements were inapplicable to contracts for services where the quality of the service is just as important as its costs. (See *Cobb v. Pasadena City Board of Education* (1955) 134 Cal.App.2d 93, 96.) "That statute [53060] removes all question of the necessity of advertising for bids for 'special services' by a person specially trained and experienced and competent to perform the special services required." (*Id.*)<sup>1</sup>

The next section discusses the problems with the Opinion viewed in its jurisprudential context, beginning with the important powers of cities as organs of self government.

**D. The Court of Appeal Opinion Is Contrary To Existing Law**

**1. Cities' Broad Powers And Discretion Include the Power To Contract To Fulfill Their Municipal Functions**

California cities are instruments of local government unlike counties which are deemed subdivisions of the state. (*Abbott v. Los Angeles* (1958) 50 Cal.2d 438, 467 ["A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government."]). (citation omitted.)<sup>2</sup> In telling contrast, with Article XI section 1, which

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<sup>1</sup> A parallel statute, Government Code section 37103, enacted at the same time, was placed in the division of the Government Code dealing with City powers.

<sup>2</sup> "The State is divided into counties which are legal subdivisions of the State." (Cal. Const. § 1 (a).) The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing 'the policy of the state at large . . . ." (*County of Marin v. Superior Court*

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deals with counties, Article XI section 2 does not describe cities as subdivisions of the State. It merely provides that the "Legislature shall prescribe uniform procedure for city formation and provide for city powers."

Once formed, general law cities have authority to structure and manage their own affairs. For example, general law cities have the authority to decide whether they will adopt a city manager form of government and whether they will have an elective mayor. (Gov. Code §§ 34800 and 34900.) They also have wide latitude in deciding what municipal services they will provide.<sup>3</sup> (See also *Myers v. City of Calipatria* (1934) 140 Cal.App. 295, 298 ["It was discretionary with the city council whether the office of city attorney should be filled or not."].)

While the Government Code gives some examples of types of services general law cities may provide (or in a few instances are required to provide), general law cities have the authority to provide other services so long as they do not conflict with general law.

General law cities also have broad power to decide the instrumentalities by which municipal services will be provided. There is no statutory requirement that a general law city hire any employees at all or that it appoint any city officers whatsoever, with the possible exceptions of the police and fire chiefs. Government Code section 36505 provides:

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

A city has the implied powers to carry out its purposes: "In general, powers given to municipal corporations include the further power to employ such modes of procedure as are appropriate and necessary for their effective exercise. (*Ravettino v. San Diego* (1945)

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(1960) 53 Cal.2d 633, 638, 2 Cal.Rptr. 758, 349 P.2d 526; accord *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1158).

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

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70 Cal. App. 2d 37, 47.) This inherent power is also reiterated in Government Code section 37112 which provides: "In addition to other powers, a legislative body may perform all acts necessary or proper to carry out the provisions of this title."<sup>4</sup>

Municipal powers include the power to contract to accomplish municipal functions: "[A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity. [Citation.]" (*Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734.)<sup>5</sup>

## 2. California Constitution Article XI Section 7 Grants Cities Broad Powers

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

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

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

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<sup>4</sup> Title 4 of the Government Code concerns "Government of Cities."

<sup>5</sup> (See also 74 Ops.Cal.Atty Gen. 109 (1992) [holding that, unlike general law counties – which are required by law to have their jails supervised by the county sheriff (see Penal Code § 4000 *et seq*) – a general law city may contract the operation of its jails to a private firm: "In the absence of any law which would prohibit a city from establishing a private detention facility, we believe that section 37112 of the Government Code grants the basic authority to do so."].)

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superiority as between general state laws on the one hand and the local regulations on the other.” (*Id.* at p. 62.)

The police power granted by the Constitution is “the power of local governments to legislate for the general welfare.” (*Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.* (2001) 91 Cal.App.4th 678, 689.) “The police power is considered so important that it is deemed an inherent attribute of political sovereignty.” (*Id.* at p. 690.) Cities have broad powers. (*Sunset Amusement Co. v. Board of Police Comm’rs* (1982) 7 Cal.3d 64, 72.)

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

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

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

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

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

The Opinion acknowledges that cities have broad constitutional powers. (Slip. Op., p.14, fn.3.) But it rests its preclusion of cities’ ability to contract out on two statutes which are

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framed in explicitly permissive in language, as the League next explains.

#### **E. THE OPINION IGNORES WELL-SETTLED PREEMPTION DOCTRINE**

The Court of Appeal agreed that “cities have the implied authority to enter into contracts to carry out their necessary functions” citing *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 734.) (Slip.Op. p.14.) It then stated that the manner of contracting may be regulated and must comply with legal requirements (*Id.*) The Court then contradicted itself by concluding that contracting for any services must be explicitly authorized by Government Code sections 37103 and 53060 or other statute or is impermissible (*Id.*) Neither statute, however, mandates the procedure for contracting.

The only reported opinion construing the genesis of Government Code section 53060 held that it was enacted to codify cases holding that such services were not subject to competitive bidding: “That statute [53060] removes all question of the necessity of advertising for bids for ‘special services’ by a person specially trained and experienced and competent to perform the special services required.” (*Cobb v. Pasadena City Board of Education* (1955) 134 Cal.App.2d 93, 96.) While Government section 37103 predates by a year the enactment of section 53060 it reads very similarly. The Opinion fails to even mention the *Cobb* case, let alone distinguish it.

Instead, the Court of Appeal relied on an Attorney General opinion construing Government Code sections 53060 and 31000 relating to a general law county. (76 Ops. Cal. Atty Gen. 86 (1993).) As we have explained earlier in this letter, counties are subdivisions of the state. The Attorney General’s rationale that the county could not contract for services which did not fall within the language of these statutes rested on a claimed legislative purpose of protecting civil service employees, citing to the Civil Service provisions of the California Constitution. (*Id.* at pp 90-91.) These apply to the State but have no application to cities, including general law cities. Indeed, cities are authorized but not required to have civil service systems. (See Government Code section 45000 – 45010.) A second Attorney General opinion on which the Court of Appeal also relies draws the same conclusion as to a general law city without taking any account of the *Cobb* case, the jurisprudence concerning the nature and power of cities to contract to fulfill their municipal functions or preemption doctrine.

Government Code section 37103 is contained in Title 4 - Government of Cities. Division 2, Chapter 3 on General Powers [of the legislative body]. It reads as follows:



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The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters. It may pay such compensation to these experts as it deems proper.

The Court of Appeal read section 37103 to “generally prohibit cities from contracting with a private entity, unless the contract is for ‘special services.’” (Slip.Op., p. 15.) The Court of Appeal’s novel reading of a permissive statute as a proscription is at odds with the principles of statutory construction. “In determining such [legislative] intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.” (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 314-15.) The ordinary import of the word “may” is permissive rather than proscriptive.

Using the Court of Appeal’s method of construction leads to some very peculiar outcomes. For example Government Code section 37102, which immediately precedes section 37103, similarly reads as follows: “The legislative body may use any available funds to provide employment to the city’s destitute or needy unemployed residents.” Under the Court of Appeal’s holding in the Opinion, presumably this section too would have to read to “generally prohibit a legislative body from using funds to provide employment to anyone unless they are “destitute” or “needy” “unemployed residents.”

A succeeding section 37110, interpreted in the same manner leads to an even more absurd result: “The legislative body may spend money from the general fund for music and promotion, including promotion of sister city and town affiliation programs.” This section would have to be interpreted to generally prohibit expenditures for all programs not specified.

The Opinion also violates principles of preemption enunciated by this Court:

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

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

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

Implied preemption of a city's right to contract for services, one of the most fundamental attributes of municipal sovereignty, can only be valid if the State has occupied that field by patterned regulation to advance some statewide clearly discernable purpose which cannot tolerate local variation, or where the local government action frustrates some statewide purpose. (See *Fisher v. City of Berkeley*, *supra*, 37 Cal.3d at pp.707-709.) The Court of Appeal identified no such statewide patterned regulation nor any state legislative purpose which a city's contracting for services would frustrate, and indeed none exists.

In addition, this Court has stressed that it "will be reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." (*Gluck v. County of Los Angeles* (1979) 93 Cal.App.3d 121, 133; accord *Fisher v. City of Berkeley* (1984), 37 Cal.3d 644, 707.) Determining what municipal services to provide its residents and the most cost effective way to provide them is quintessentially a subject of intense local concern that will vary considerably from one locality to another based upon the needs and resources of each community.

In short, the Court of Appeal's decision is analytically aberrant and contradicts decades of careful development of municipal law. The League respectfully requests that the Court of Appeal opinion be depublished by this Court.

BURKE, WILLIAMS & SORENSEN, LLP



MANUELA ALBUQUERQUE

Attorneys for Amicus Curiae, League of California Cities

cc: Service List Attached

**PROOF OF SERVICE**

I, Monet Garrett, declare that I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On November 8, 2012, I served a copy of the:

**League of California Cities' Amicus Curiae Letter, Pursuant to California Rules of Court, Rule 8.500(g) Seeking Depublication of Opinion in Costa Mesa City Employees' Association v. City of Costa Mesa, Court of Appeal for the 4th Appellate District, Div. 3, Case No. G045730; (Petition for review pending - California Supreme Court Case No. S 206157.)**

by **MAIL** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Burke, Williams & Sorensen, LLP, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Oakland, California.

by **EMAIL**. I caused the document (without enclosures) described above, to be sent via email in PDF format to the above-referenced person(s) at the email addresses listed.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 8, 2012, at Oakland, California.

  
MONET GARRETT