

1. INTRODUCTION

Several months ago, the League legal intern Kara Ueda asked me to prepare this paper on a topic described as the “legal underpinnings of home rule and other aspects of preserving local control.” I welcomed the assignment because it presented an opportunity to look back over twenty five years advising local government in the context of a core issue of our practice.

The following pages reflect on representative problems of local control with emphasis on problems that I have handled. As I look through the years, it seems clear that power is becoming more and more centralized at the regional, state and federal level. It is difficult to assert the need for “local control” as our society grows in complexity, boundaries between our communities merge in a continuous span of urban development, and the electronic age changes the way we communicate and do business. Consequently, the paper I have written does not address ways to preserve local control. I think we need to recognize and accept the limits on local control if we are going to be effective counselors to the cities we represent.

2. LEGAL AUTHORITY OF CITIES

If we start with the basic legal standard that governs local action, Article 11, section 7 of our constitution promises that “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Article 11, section 5 gives charter cities plenary power over municipal affairs. Pursuant to these sections, California cities have broader local powers than the powers of cities in some other jurisdictions. The broad grant of power under the California state constitution contrasts with many other states who adhere to “Dillon's Rule” of strict construction concerning the legislative powers of local governing bodies. Dillon's Rule provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. Thus, California cities start from a position of much greater power than the cities of Rhode Island, Virginia or other jurisdictions that still follow Dillon's Rule. Theoretically at least, local governments have power to adopt ordinances that promote and protect the public health, safety and general welfare. These are the kinds of regulations that we think of as “police power” regulations, the authority of local government to pass ordinances that regulate matters within the boundaries of a local jurisdiction.

3. LEGAL STANDARDS GOVERNING LOCAL ENACTMENTS:

3.1 General Background

In general, a California city has authority to adopt local ordinances so long as there is no express or implied preemption under state law. A detailed analysis of the standards for local preemption is beyond the scope of this paper. However, I refer the reader to *Sherwin-Williams Company v. City of Los Angeles* (1993) 4 Cal.4th 893, for a relatively recent and detailed analysis by our state supreme court when it upheld Los Angeles' anti graffiti ordinance requiring sales of spray paint.¹ In general, if otherwise valid local legislation conflicts with state law, it is preempted and is void. Local regulation can also be preempted by federal regulation. A conflict exists when local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

3.2 Express Preemption

One example where the legislature has expressly stated its intent to fully occupy the field is found in Business & Professions Code section 22435.7(a), a section regulating shopping carts of the type found at supermarkets and other local stores. The section states "[t]he Legislature hereby finds that the retrieval by local government agencies of shopping carts specified in this section is in need of uniform statewide regulation and constitutes a matter of statewide concern that shall be governed solely by this section." When the Legislature enacts such a declaration, any local regulation is expressly preempted by the uniform statewide standard. This particular section, adopted in 1996, was roundly criticized by League officers during the years that I represented the City Attorney's Department on the League Board of Directors. I have a contrary opinion because I believe that cities and counties should not be enacting individual procedures and standards for impounding, returning or disposing of shopping carts. We cannot expect grocery stores with outlets in various cities to follow different procedures enacted by the different cities in which they do business.

3.3 Implied Preemption

While I accept the need for uniform procedures in the grocery business, there was a time when I took a different position. In the early 80's I successfully defended Berkeley against a claim of preemption in a case concerning another aspect of

¹ In the Los Angeles case, the California Supreme Court, in an opinion authored by Justice Mosk, held that an anti-graffiti ordinance regulating the retail display of aerosol paint and broad-tipped marker pens was not preempted by state law. For a fascinating discussion of graffiti culture and practice, read the subsequent case of *Sherwin Williams v. City and County of San Francisco* (N.D. Cal 1994) 857 F.Supp. 1355, which upheld a similar ordinance in San Francisco.

supermarket regulation. In *Park & Shop Markets, Inc. v. City of Berkeley* (1981) 116 Cal.App.3d 78, the Court of Appeal upheld Berkeley's local bottle bill. Berkeley had determined that there were significant problems with solid waste and with litter. In 1976, the Council passed an ordinance that required a deposit of not less than five cents on all beverage containers sold in Berkeley. Various markets and industry groups filed suit and by the time the case found its way to the court of appeal, I was the city attorney. The First District Court of Appeal upheld the ordinance and the California Supreme Court denied a hearing. The Court held that the ordinance was rationally related to a legitimate local interest and was not preempted by state law. In particular, the court rejected an argument that the ordinance was preempted by state law which reserves to the state the exclusive right to regulate the sale of alcoholic beverages, stating "the purpose of the ordinance is to regulate beverage containers; it does not purport to regulate the sale of alcoholic beverages." (116 Cal.App.3d at 93.) The Court's opinion in the *Park & Shop* case is an interesting example of the traditional "hands off" approach to local regulation that is directed toward addressing social problems that have not been addressed by the Legislature.²

This case demonstrates the importance of local innovation as a way of overcoming vested interests that may be present in Sacramento. At the time the *Park & Shop* case was decided, California had no statewide bottle bill. After the Berkeley decision, the industry realized that it would probably be subject to different local ordinances enacted throughout the state. It then realized that control at the state level was probably a lesser evil, and in 1986, California was able to pass a comprehensive statewide act, The California Beverage Container Recycling and Litter Reduction Act, Public Resources Code sections 14500 et seq. That Act does preempt local regulation, providing in section 14529 that " This division is a matter of statewide interest and concern and is applicable uniformly throughout the state. Accordingly, this division occupies the whole field of regulation of recycling-related refund values, redemption payments, deposits and similar fees relating to beverage containers. No city, county or other public agency may enforce or implement any existing or new ordinance, resolution, regulation, or rule establishing recycling-related refund values."

A more recent example is *California Rifle and Pistol Association, Inc. v. City of West Hollywood* (1998) 66 Cal. App. 4th 1302, holding that prohibiting the sale of Saturday Night specials was not preempted by state law.

3.4 Traffic Regulation

While Berkeley has been quite successful in litigating issues of local control, it did not win them all. How can any local concern be more basic than concern about

² In contrast, one could review the case of *Tabler t/a Foodarama Supermarket v. Board of Supervisors of Fairfax County* (1980) 269 S.E.2d 358, decided shortly before the Berkeley case in a "Dillon's Rule" state. In the *Foodarama* case, the Supreme Court of Virginia gave short shrift to the local jurisdiction and held that there was no authority to enact a local bottle bill.

public safety, specifically preventing a city's citizens from being run over by speeding cars careening through residential neighborhoods? Nevertheless, Berkeley was strongly rebuked by the California Supreme Court after it installed traffic diverters for just that purpose. Berkeley's diverters were intended to channel traffic away from residential streets and onto the collector and arterial streets in the community. In 1982, the California Supreme Court scolded the city for exceeding its power over its local streets. The court relied on Vehicle Code section 21, which sets forth a Dillon's Rule type of approach to matters in the vehicle code. The section states "Except as otherwise expressly provided, the provisions of this [Vehicle] code are applicable and uniform throughout the state and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized therein." The court held that the traffic diverters were not authorized and were invalid. Why, you may ask, are the diverters still in place? Immediately after the decision, I was able to work with our local Assemblyman Tom Bates, to write a bill that was passed as emergency legislation and amended Vehicle Code section 21101 by adding paragraph (f). That paragraph now provides that a city can adopt rules and regulations "[p]rohibiting entry to, or exit from, or both, from any street by means of islands, curbs, traffic barriers or other roadway design features to implement the circulation element of the general plan." This bill was an example of local government working effectively with the state legislature to promote local interests.

Nevertheless, municipal attorneys should be cautious when legislating on matters that are arguably within the scope of the Vehicle Code. (See, e.g., *City of Poway v. City of San Diego* (1991) 229 Cal.App.3d 847, holding that San Diego did not have authority under Vehicle Code section 21101(f) to close a portion of a regionally significant roadway that extended into a neighboring city.)

3.5 Policy Issues of Local Control

Berkeley also lost the case of *Northern California Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, in which the court invalidated an initiative ordinance banning electroshock therapy in the city. The court reviewed the applicable legal standards and held that Berkeley's ordinance was preempted. In doing so, it used very broad language, stating that "matters of health and medicine, including psychiatry, are of statewide concern." (*Id.* At 108.) That is a very expansive statement that could be used as a rationale for preempting all sorts of local police power regulations.

While the court took a very expansive view of the "field" that was fully occupied by state action, the court's summary of the applicable policy considerations is a useful summary, as follows:

"The significant issue in determining whether local regulation should be permitted depends upon a balancing of two conflicting interests: (1) the needs of local

governments to meet the special needs of their communities; and (2) the need for uniform state regulation, whether local legislators are more aware of and better able to regulate appropriately the problems of their areas, 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." (178 Cal.App.3d at 101, citations omitted.) Even though these standards may appear weighted in favor of local control, I submit that with the passing years these standards are tipping against, not in favor of, local control.

4. OTHER EXAMPLES OF REDUCED LOCAL CONTROL

4.1 Tax and Finance

When I started practicing law, there was no Proposition 13. Local governments imposed an annual tax levy, collected taxes and paid for municipal services. In *City of Berkeley v. Oakland Raiders* (1983) 143 Cal.App.636, the court of appeal upheld Berkeley's Professional Sports Events Tax, a 10% gross receipts tax that the city had enacted in 1974, after learning that the Oakland Raiders football team planned to play preseason football games at the U.C. Berkeley stadium. While that case used traditional analysis and gave deference to the local jurisdiction, the law governing local taxes has completely changed since that tax was adopted. Local jurisdictions must now comply with the voter approval requirements of Proposition 13 and Proposition 218 as well as other provisions of law in order to adopt local taxes, fees and assessments. (Cal. Const. Article 13 A, B, C and D, Gov. code sections 66000 et seq.) All these procedural requirements and substantive standards are established by state law, removed from the potential for local control.

Proposition 13 not only changed the way that taxes are imposed, it changed the way that revenues are collected and allocated to local agencies. Now almost all financial decisions are made at the state level and local government efforts to challenge tax allocations and reallocations have not been successful. (See *County of Sonoma v. Commission on State Mandates*(2001) 84 Cal.App.4th 1264.) Property tax revenues are collected locally but allocated to local entities through complex formulas devised by state legislators.

While we may resent these relatively recent changes, let's look back even further in time. Until early in this century, local officials were completely exempt from federal income taxes. In 1937, the U.S. Supreme Court held that the manager of a municipal water supply was immune from federal taxation on the grounds that providing water service was an essential governmental function. (*Bush v. Commissioner* (1937) 300 U.S. 352, 362.) In later years, the courts abandoned those rules so that nowadays no one even considers that some city manager or other local government official might be exempt from federal income tax. Those funds flow to Washington where they are

divided up and, in some instances, returned to local government with strings attached as described below.

In those rare occasions when local government has any surplus funds, local governments used to invest the funds according to their own best judgment. In 1995, after several public entities suffered large losses in speculative investment vehicles, the state legislature stepped in and passed comprehensive legislation governing the investment of local funds. (Government Code sections 53630 et seq.) In particular, section 53630.1 states “The Legislature finds and declares that the solvency and creditworthiness of each local agency can impact the solvency and creditworthiness of the state and other local agencies within the state. Therefore, to protect the solvency and creditworthiness of the state and all of its political subdivisions, the Legislature hereby declares that the deposit and investment of public funds by local officials and local agencies is an issue of statewide concern.” Now surplus funds must be invested in accordance with the standards set forth by state law. Is this a bad policy decision? I don’t think so.

4.2 Land Use

Land use is one area that we like to think of a sacrosanct - a true bastion of local control. Our cities have their own general plans and control their own destinies. Or can we? The regulatory structure that we apply every day is almost entirely comprised of state law. The procedural and substantive requirements of the California Environmental Quality Act, Public Resources Code §§21000 et seq. ("CEQA") govern decision making on both public and private projects. The Subdivision Map Act, Government Code §§66410 et seq. permits local regulation but is so complex that it is simpler to incorporate the state requirements in local ordinance. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725.)

Some of the areas where cities retain local authority are decisions that pit one city against another in a race to get sales tax revenue. Auto malls, big box retailers, movie theater complexes have all had their day. Is this really a sensible way to make land use decisions? We are all familiar with the “nimby” and “BANANA” reactions among local citizens when regional facilities such as power plants, landfills or airports are proposed for construction in someone’s neighborhood. As a result, we are seeing proposals for regional facilities siting legislation. In the near future, state law may govern siting of major power facilities and other necessary but unpopular land uses. Local opposition to low income housing and housing for those with special needs has led to a wide variety of statutes precluding local action in those areas. State law limits local ability to reject day care facilities and homes for emotionally disturbed and other individuals with special needs.³ Local governments no longer have the authority to determine the

³ (See California Residential Care Facilities for the Elderly, Health and Safety Code sections 1569; Residential care facilities for Persons with Chronic Life Threatening Diseases, Health and Safety codes section 1568.01; Pediatric Day Health and Respite Care Facilities, Health and Safety Code section 1760 et seq.; mental health facilities, Welfare and Institutions Code sections 5120;

amount of development impact fees required to fund schools. Instead, Gov. Code section 65995 limits the amount of school fees with the declaration that “the subject of the financing of school facilities with development fees is a matter of statewide concern. For this reason the Legislature hereby occupies the subject matter of mandatory development fees and other development requirements for school facilities finance to the exclusion of all local measures on the subject.” (Section 65995(e).) State law has directed local government to consider second units as an important source of housing. (Gov. Code Section 65852.2.) State law has enacted narrow grounds for denying affordable housing. (Gov. Code Section 65589.5.)

The state is not the only governmental entity to take a role in "local" land use planning. In recent years, we have seen the federal government enter areas of local land use regulation. For example, an Antioch zoning ordinance regarding drug treatment clinics was held to violate the federal Americans with Disabilities Act (ADA). (*Bay Area Addiction Research & Treatment, Inc. v. City of Antioch* (9th Cir. 1999) 179 F.3d 725. City urgency ordinance prohibiting new substance abuse clinics within 500 feet of any residential property discriminates on the basis of disability.) The Federal Communications Commission has expanded its regulatory control over satellite dish antennas, ham radio antennas (PRB-1) and siting of other communications facilities. Expanding into other areas of local regulation, Congress has passed "The Religious Land Use and Institutionalized Persons Act of 2000" which then President Clinton signed into law on September 22, 2000. In a nutshell, it provides that a government entity cannot impose land use regulations in a manner that poses a substantial burden on the religious exercise of a person, (including a religious assembly or institution), unless it demonstrates that imposition of such burden is in furtherance of a compelling governmental interest; and is the least restrictive means.

4.3 Public Employment

Still searching for some area in which we retain the unfettered right to make local decisions, let's consider local public employment. Even more than local land use, a local agency's right to control its local employees would seem to be a matter of exclusive local control. If local employment is not a "municipal affair," what is? (*Bishop v. San Jose* (1969) 1 Cal.3d 56, 61; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296.) Local employment will be the topic of a more detailed paper later in this conference. Suffice it to say that the courts have eroded local control in a variety of contexts, holding that local entities are subject to both state and federal statutes that benefit public employees. In 1982, the Rose Bird court stunned the public agency bar by holding that the Police Officers' Procedural Bill of Rights applied to all cities including charter cities. (*Baggett v. Gates* (1982) 32 Cal.3d 128.) In 1985, the U.S. Supreme Court expanded the wage and overtime protections of the Federal Fair Labor Standards Act to state and local employees, expressly overruling an earlier case

Alcoholism or Drug Abuse Recovery or Treatment Facilities (Health & Safety code sections 11834.10 et seq.)

to the contrary and replacing authority previously considered to be local in nature with federal regulation. (*Garcia v. San Antonio Metropolitan Transit Authority et al.* (1985) 469 U.S. 528, overruling *National League of Cities v. Usery* (1976) 426 U.S. 833.)

5. FEDERAL AND STATE DOLLARS: THE CARROT ALONG WITH THE STICK

The examples above have all focused on state and federal *regulations*, but state and federal *dollars* also affect local standards. On the state level, Proposition 13 has eroded local control by concentrating funding decisions at the state level. On the federal level, despite talk about reductions in government spending and tax cuts, more money is flowing to Washington than ever before. When the federal and state governments return that money to local government, they inevitably attach strings.

In the *San Antonio Transit* case, it was certainly important that *San Antonio* looked to the federal government for financial assistance and received substantial assistance both for capital and operating costs from federal funds. We are all familiar with federal and state grants that set water quality standards and mandate water, wastewater, and storm drain upgrades. In a recent Attorney General's opinion, the Attorney General reviewed an opinion request involving a charter city that passed an ordinance prohibiting the fluoridation of the city's water supply. (83 Ops. Atty. Gen 24, February 18, 2000.) The Attorney General noted that the health of local citizens is a matter of statewide concern and opined that the ordinance conflicted with state law. The A.G. reviewed a state statute that requires local entities to accept state funds and install fluoridation systems. Construing the particular statutory scheme, the A.G. stated that "when sufficient outside funding becomes available to cover the capital and associated costs of installation, the city must install a fluoridation system regardless of its local ordinance. Thereafter, it must operate the fluoridation system in any fiscal year in which it has been given funding by an outside source to cover the costs of operating and maintaining the system." (83 Ops. Att. Gen. at 29.)

As another example, California's state courts have recently held that local libraries do not need to screen internet sites for youthful users. (*Kathleen R. v. City of Livermore*, No. AO 86349, First Dist. Court of Appeal, slip opinion filed March 6, 2001.) However, Congress has passed the Children's Internet Protection Act (Pub.L.No. 106-554, tit. XVII, § 1701 et seq. (Dec. 21, 2000) 114 Stat. __), which conditions libraries' receipt of certain federal funds and assistance on the use of filtering technology to prevent minors from viewing obscene or other harmful material on computers linked to the Internet. Both the ACLU and the American Library Association have announced plans to sue and the outcome is uncertain, but the example of federal funds tied to standards of conduct or specific programs is not unusual.

6. THERE IS STILL A PLACE FOR LOCAL INNOVATION

Even as the courts have replaced local control with state or federal regulation, they have continued to support and encourage local innovation. For example, there is an interesting footnote in the *San Antonio* case that reads as follows: “[T]he traditional nature of a particular governmental function can be a matter of historical nearsightedness; today's self evidently ‘traditional’ function is often yesterday's suspect innovation. Thus, National League of Cities offered the provision of public parks and recreation as an example of a traditional governmental function. 426 U.S. at 851. A scant 80 years earlier, however, in *Shoemaker v. United States*, 147 U.S. 282 (1893), the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals ‘in common,’ and that ‘[in] the memory of men now living, a proposition to take private property [by eminent domain] for a public park would have been regarded as a novel exercise of legislative power.” (*Id.* at 297, footnote 9.)

The court also noted that "the essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else including the judiciary --- deems state involvement to be. ...The science of government is the science of experiment, and the States cannot serve as laboratories for social and economic experiment if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands." (*Garcia v. San Antonio Metropolitan Transit Authority*, supra, 469 U.S. at 546.) Thus, local government is encouraged to undertake creative and expanded activities even though it might find the scope of its actions restricted by state or federal law.

7. CONCLUSION

In the past few minutes, we have reviewed dozens of examples where local government may have, at one time, had power to regulate but now is subject to state or federal regulations. If we look at these issues in a historical context, it seems the nation is gradually moving from local regulation and autonomy to centralized regulation in almost every area of local activity. This is a trend that has to continued for many years and does not show any signs of reversing itself. The emergence of our integrated and industrialized national economy has concentrated power and increased interest in maintaining standards of general applicability. Look back in time – as we developed the automobile and airplane, the federal government took over safety standards and took a more active role in our transportation system. As we become a nation of Walmarts and Home Depots, the need for uniform standards and controls is different from the days of individually owned general stores. As more and more of us purchase computers, clothes, books and more from out of state sources using the internet, it seems apparent that a national sales tax will someday replace the individual state taxes.

These changes affect the way that municipal attorneys do business. As public officials, we need to act responsibly to promote local innovation while still recognizing the existence of laws that govern almost everything we do. If we fail to acknowledge the need for uniform standards, I believe we will lose credibility and find ourselves left high and dry in the receding tide of local control.