# Pre-emption Unveiled: THE FULL MONTY

*by Manuela Albuquerque*

**The great thing about city government is that when you encounter injustice and think to yourself, "There ought to be a law to take care of that," you can do more than just wish things were different — you can actually adopt that law. Or can you? There is a pesky little "P" word — pre-emption — that could throw a monkey wrench into the works. It has sounded the death knell for many a great municipal legislative scheme. Perhaps you have wondered, "Is it just *my* city attorney who seems to shrink cravenly when those Sacramento toughs start throwing their collective legislative weight around, or is there more to this pre-emption business?" Now you can see the full Monty revealed right here in these pages, even before Kenneth Starr finds out about it.**

### Constitutional Power of Cities

There is good news and bad news about pre-emption. The good news is that the California Constitution, in Article 11, section 7, grants cities broad powers to adopt laws on any subject within their jurisdictional boundaries. The bad news is that those laws cannot conflict with state law. The doctrine of pre-emption concerns itself with a conflict between local law and state law. This is more difficult to determine than it may seem.

But first, the good news. Article 11, section 7 reads: "A county or city may make and enforce within its limits all police, sanitary and other ordinances and regulations not in con-

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flict with general laws." On her good days, you have probably heard your city attorney speak ponderously of the breadth of the "police power" as she explained to your political opponents that the law you just authored is perfectly legal, while you nodded approvingly. You may even have wondered what the powers of the police had to do with your new law on recycling. Although this shorthand reference to constitutional authority as the "police power" conjures up unpleasant images of some oppressive fascist state, the police power is actually the power to broadly legislate, as the explicit language of Article 11, section 7 makes clear.

The commonplace reference to it as the "police" power appears to be based on the fact that the first type of law referred to in this section of the California Constitution is a "police" ordinance. The police power, notwithstanding its name, is not really about enhancing the power and prestige of the police chief. Whatever you feel about your city's police chief, or your city attorney for that matter, you just have to love the police power if you are a local government aficionado.

***The essence of the doctrine of pre-emption is to define when a local law may frustrate and, therefore, conflict with state law.***

The California Supreme Court has held that the power to enact laws within a city's borders, even on matters of statewide concern, is as broad as that of the state itself, in the absence of pre-emptive state laws (*Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 62). Just because the legislature has adopted laws on a subject does not mean a city cannot pass its own laws on the same subject. Quite to the contrary, the overlap of state and local legislation in many areas is the rule, not the exception. And remember, a city does not need the legislature's permission to legislate, except in a pre-empted area; Article 11, section 7 is all the enabling legislation a city needs to adopt laws within its borders. But that very grant of power comes with a built-in limitation; the section prohibits local laws that "conflict" with state law. The essence of the doctrine of pre-emption is to define when a local law may frustrate and, therefore, conflict with state law.

### Pre-emption: Contradicting State Law

The most obvious example of such a conflict is where state and local law directly contradict one another, for example, when the state says something is legal and the city says it is illegal. In a recent case favorable to cities, the California Supreme Court ruled that state law did not prohibit the City of Inglewood from providing data processing services on parking tickets to the City of San Diego (*Lockheed Information Management Services Co. v. City of Inglewood* (1998) 17 Cal. 4th 170). This case was a major victory for cities because the court of appeal had ruled to the contrary. There is a marked contrast between the superficial analysis of the court of appeal and the careful and considered analysis of the California Supreme Court. This divergence of approach often determines the outcome. The less rigorous the analysis, the more likely it is that the result will be adverse to the city, except in those cases where the local law has immediate visceral appeal and, thus, evokes a more sympathetic judicial response. The early pre-emption cases are a hodgepodge of unpredictable outcomes with virtually no analytical framework underlying their conclusions. Fortunately, every year pre-emption doctrine gains more definition and body. Now there are many useful principles to guide the analysis.

For instance, the California Supreme Court has pointed out that just because state law is silent and does not prohibit something does not mean the state intends to preclude local regulation. "On the contrary, the absence of a statutory restraint is the very occasion for municipal initiative" (*Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 707). The courts carefully look at the legislative history of the portion of state law that is claimed to be pre-emptive, in order to determine whether the local law really contradicts the state law. Of course, discerning what exactly policymakers were up to in the state capitol is often an exercise in soothsaying and about as easy as determining what a city council really meant. At least at the local level, an interpretation from the city council can be sought directly and with relative ease, but that is not true of discerning the intent of the entire California State Legislature. Nonetheless, ascertaining legislative intent is the heart of any pre-emption analysis; it will generally focus on the actual language of the state statutory scheme.

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### Pre-emption by Duplicative State Law

A state law can also pre-empt a local law that is duplicative of state law because it closely tracks the state law's provisions while deviating from it in certain respects. However, invalidating local laws as duplicative of state law and therefore pre-empted, however, is used infrequently

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### Pre-emption and Charter Cities

Cities with charters are better situated when it comes to a pre-emption battle with the state, because of what is known as the "home rule" provision of the California Constitution. Article 11, section 5(a) of the constitution provides in relevant part that charter cities "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and with respect to other matters they shall be subject to general laws." Section 5(c)(4) goes on to provide that charter cities have "plenary authority," subject only to the restrictions of Article 11, to provide for the manner, method, times at which and terms for which municipal officers are elected, appointed or removed, the compensation that is paid them and their qualification, tenure of office and removal.

As to "municipal affairs" and these matters over which the charter city has "plenary authority," local law supersedes state law. There is no precise definition of municipal affairs but the courts have defined various subjects as tending to be municipal affairs. Taxes fall into this category. For example, the benefit of charter cities' ability to trump state law protected Berkeley and Los Angeles from invalidation of their transfer taxes under Proposition 62 ( see e.g., *Fisher v. County of Alameda* (1993) 20 Cal. App. 4th 120; *Fielder v. City of Los Angeles* (1993) 14 Cal. App. 4th 137). That advantage has been significantly diminished since the passage of Proposition 218.

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## The Fight for Local Control: League Efforts

Many of the League's efforts with respect to both legislative and legal advocacy are intended to preserve cities' prerogatives to act (or not act) on various policy issues. This effort to preserve local control is most effective if legislators and the courts are hearing from city officials about the importance and wisdom of leaving a particular policy issue to local determination, as opposed to state determination. In a state as diverse as California, one size rarely fits all.

Accordingly, this is why it is especially important for city officials to communicate with their respective assemblymembers and senators about the importance of local control. One helpful resource in this effort is the League's *Legislative Bulletin,* a weekly alert about pending legislation. This bulletin, sent out each Friday by first-class mail to city halls (and available to others on a subscription basis) alerts city officials to legislation that they should bring to state officials' attention, because of its potential to help or hurt local control. The information is also available to League members online at www.cacities.org.

On the judicial front, the League fights for local control through the coordination of "friend-of-the-court" (amicus curiae) briefs. These briefs are filed in appellate litigation with statewide impact briefs through the League's legal advocacy programs. League briefs are prepared by volunteer writers, either from city attorneys' offices or municipal law firms, on a *pro bono* basis. The briefs are filed on behalf of participating cities, not the League, so each city has the opportunity to decide for itself whether to join the effort as a friend of the court in a given case.

More information about the League's legislative and legal advocacy efforts is available on the League's website (www.cacities.org). Interested city officials may also wish to review the January and February 1998 issues of *Western City* for a summary of legislative issues and tips on lobbying the legislature. The League also recently has developed a packet of materials with sample resolutions and other materials to facilitate cities' participation in the League's legal advocacy program. These materials were sent to city attorneys' offices attached to the April 1998 Legal Advocacy Committee Report and also distributed as part of the City Attorneys Spring Conference materials in May.

Coming up in July, *Western City* shares techniques on how city officials can put local control and city issues on the radar screens of candidates for the state legislature.

For more information on subscribing to the League's *Legislative Bulletin*, call the League's fax-on-demand service at (800) 572-5720 and request document 11.

## For More Information

Can't get enough of the full Monty? The League offers three resources on pre-emption.

The League's *Municipal Law Handbook* includes a section on pre-emption that discusses such subjects as the municipal affairs doctrine and cites additional cases on the key legal principles discussed in the accompanying feature article. The handbook can be ordered by calling (916) 658-8253 or by faxing a request to (916) 658-8240. The complete handbook costs $150 for League members and $350 for nonmembers.

A more detailed discussion is contained in a paper by Buck Delventhal, presented at the Municipal Law Institute Committee's 1997 symposium, entitled "Pre-emption: Police Power and Municipal Affairs." Members can obtain a copy by faxing a request to the League library at (916) 658-8240.

Finally, the nature of a city, its constitutional powers and the way these have been regarded in the courts are discussed at some length in a paper by Manuela Albuquerque, presented at a 1997 symposium co-sponsored by the Municipal Law Institute Committee of the City Attorneys' Department and Hastings College of the Law. The paper, "California and Dillon — The Times They are A-Changing," can also be obtained by faxing a request to the League library at (916) 658-8240.

by the courts. The more common bases for invalidating local laws are when they either directly contradict state law, or regulate in an area that has been expressly or by implication reserved for the state, a concept commonly referred to as "occupation of the field."

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### Pre-emption by Express or Implied Occupation of the Field of Regulation

The legislature can pre-empt a local government's regulation of an area or "field" by reserving that field for the exclusive regulation of the state. In such cases, it does not matter if the local law is complementary to the state law. When the state law has a provision that explicitly states that it intends to reserve the field of regulation for itself, the local law may still be lawful if it regulates a different "field." An example of this type of reasoning to uphold the local law is *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 148–149. In that case, the California Supreme Court found that although there were detailed state law provisions that exclusively regulated the procedure to be followed to evict tenants, the state had not occupied the field of substantive defenses to such evictions and thus, local rent control laws could impose good-cause requirements before tenants could be evicted.

### Test for Implied Occupation of the Field

Even where the legislature has not explicitly reserved a field of regulation exclusively for itself, the state can be found to have occupied the field by implication. The courts have established a three-part test for occupation by implication. For a law to be pre-empted by implied occupation of the field, the law has to:

1) Constitute a patterned approach that fully covers the field and leaves no room for local regulation;
2) Partially cover the area in a manner that makes it clear that the state has a paramount concern that will not tolerate further local regulation; or

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3) Partially cover the field and the effect on transient citizens outweighs any benefit from the local regulation (*in re Hubbard* (1964) 62 Cal. 2d 119, 128).

If the state law recognizes local regulation, pre-emption will not be implied (*People ex rel Deukemejian v. County of Mendocino* (1984) 36 Cal. 3d 476, 485). Similarly, if the state law contains no express pre-emption language, and the problems that prompted regulation can vary from one jurisdiction to another, pre-emption by implication will be disfavored and the local law upheld (*Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 707).

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From a review of recent pre-emption cases decided from 1995 onward, it appears that local governments prevailed more than half the time. In general, the courts appear to have become more analytical and less superficial about assuming that an area has been pre-empted. This is particularly true in the area of constitutional doctrine relating to the powers of charter cities. (See "Pre-emption and Charter Cities" on page 9.) Many pre-emption cases have enunciated critically important legal principles that are helpful for cities. As each city builds these principles into an imposing edifice of precedent favorable to cities, the opinion from that city's case will in turn yield additional legal principles that can provide further support for the structure. In fact, the City of Berkeley successfully used this approach in an amicus brief on a Berkeley case in the state supreme court, when it relied on a gem of a quote from *Gluck v. County of Los Angeles* (1979) 93 Cal. App. 3d 121, 133, a single somewhat obscure court of appeal case, in the hopes that the supreme court would adopt the same principle, thereby enhancing the importance and utility of the principle for cities throughout the state. The principle — that implied pre-emption is disfavored when there is a significant local interest that may vary from one jurisdiction to another — now appears in the California Supreme Court decision of *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 707.

In other words, it is important for cities to think strategically and collectively as they litigate each case and frame their arguments in the most persuasive analytical terms. When they do so they both help themselves to win their own cases and, as an added bonus, develop the law in a manner that advances the legal interests of all cities.

Conversely, cities should be aware that tilting at legal windmills on tenuous legal theories can create a judicial backlash that can harm all cities. Thus, talking tough about fighting cases all the way to the state supreme court can win you some short-term political popularity, but it can backfire in the end when the courts strike back and you receive the bill for attorneys' fees. Suddenly, what you thought of proudly as raw political courage can begin to look uncomfortably like foolhardy legal brinkmanship at the taxpayers' expense. In other words, learn to think globally about your legal interests as a city before you act locally to legislate and litigate in an arguably pre-empted area.

### Conclusion

City officials, take heart. The constitutional power of cities is broad and the courts are not going to strike down your laws just because there is some state law that affects the area that you regulate. At the same time, be wary and knowledgeable of the pitfalls of pre-emption. Remember that even when there is an arguably pre-emptive state law that seems to stand in your way, by paying careful attention to how the findings and purposes in an ordinance are drafted, a city can often carve out a field of municipal regulation that is distinct from the field regulated by state law. Do not to yield to the temptation to summarily dismiss your city attorney for using the "P" word — you can use all the thoughtful legal help you can get. A careful and knowledgeable city attorney is there to help you pick your legal battles wisely and strategically. Part of playing the pre-emption game is to know when to hold 'em and know when to fold 'em. Good luck!

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