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September 8, 2003

REPORT TO THE COMMITTEE ON NATURAL RESOURCES AND CULTURE

PREEMPTION OF PROPOSED ORDINANCE REGULATING EXOTIC PLANTS

INTRODUCTION

On June 12, 2002, the Natural Resources and Culture Committee reviewed and discussed a draft ordinance to restrict the sale, distribution, and cultivation of four non-native invasive species of plants: giant reed (*Arundo donax)*, pampas grass (*Cortaderia selloana*), German ivy (*Senecio mikanioides*), and tamarisk (*Tamarisk chinensis*). Staff identified these four species as highly injurious to native plant species and wildlife in the City, and testified that without additional regulation, businesses and residents can continue to purchase and plant these species on private property, contributing to their continued spread in natural open spaces, smothering native plant species and their ecosystems. The Committee also received testimony regarding the high costs of eradication and the continuing efforts by the City in that regard. The draft ordinance would make it illegal to sell, distribute, cultivate, transfer, or make a gift of any of the four plants within the City of San Diego.

At the June 12 hearing, the City Manager recommended the adoption of the proposed ordinance to assist local efforts to control the spread of these plants in natural open space environments and preserve and protect the City's natural resources. The Committee asked for additional revisions to the draft ordinance, and for the draft ordinance to be returned to the Committee for further review.

Shortly thereafter, staff and the City Attorney's Office met and discussed the draft ordinance with Kathleen Thuner, San Diego County Agricultural Commissioner, and her staff. Ms. Thuner conveyed the position of her office that the City is preempted by state law from enforcing the proposed ordinance. Ms. Thuner contends that existing law requires the California Department of Food and Agriculture [CDFA] to protect the agricultural industry in California and prevent the spread of injurious pests, and authorizes the Secretary of the Food and

Agriculture Department to establish, maintain, and enforce regulations to prevent the spread of pests.[1] Thus, she contends existing law would preempt any ordinance the City might adopt seeking to regulate the spread of noxious weeds.

Ms. Thuner proposed several alternatives to the proposed ordinance for addressing the issue of noxious exotic plants within the City. These included brokering a voluntary agreement with the Nurseryman's Association to not sell pampas grass, giant reed, German ivy or tamarisk in San Diego nurseries, and lobbying for increased restrictions in state laws. Staff has been exploring and will report on these options.

At the time of these discussions, the State's noxious weed list did not include the exotic plants identified in the City's proposed ordinance. Since that time, however, the CDFA has added several plants to the noxious weeds list, including, giant reed (*Arundo donax)*, German ivy (*Senecio mikanioides*), and tamarisk (*Tamarisk chinensis*). Cal. Code Regs, § 4500. The plants listed are targeted for eradication or containment, depending upon their rating, and the plan established by the CDFA or the commissioner for management of the plant. *See State of California, Department of Food and Agriculture, Division of Plant Industry: Pest Ratings of Noxious Weed Species and Noxious Weed Seed* (included in Attachment B to this Report). The State rates noxious weeds as "A", "B", or "C". Per Ms. Thuner, an A-rated plant cannot be sold or imported. Each County Agricultural Commissioner has discretion to decide whether to restrict the sale or importation of B-rated plants within their counties. The C-rating is used for not yet rated plants, and for plants on the Federal noxious weeds list.

Pampas grass (*Cortaderia selloana*) was considered but not added to the list because of opposition posed by the California Association of Nurserymen.[2] Pampas grass could, however, be added in the future.

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[1] Cal. Food and Ag. Code §§ 401, 403, and 5322. *See also Summary of California Laws and Regulations Pertaining to Nursery Stock*, Attachment A to this Report: "The County Agricultural Officer is an enforcing officer of all laws, rules, and regulations relative to the prevention of the introduction into or the spread within the state of plant pests . . . under the supervision of the Secretary of Food and Agriculture." *See also*, CDFA's website, pi.cdfa.ca.gov/weedinfo/weedlaws.html.

[2] See attachment to Memorandum of Jannise Thom, Legal Assistant, dated August 16, 2002, Attachment B to this Report.

DISCUSSION

I. The Proposed Ordinance Seeks to Regulate a Municipal Affair and is Not Preempted by State Law.

This Office disagrees with Ms. Thuner's conclusion that the proposed ordinance would be preempted by state law. As a charter city, the City of San Diego is granted the power and authority by the California Constitution to make and enforce all ordinances and regulations in respect to municipal affairs. Cal.Const. Art. XI §5(a). The laws of a charter city are only preempted by state law if (1) the state legislation is in conflict with the local law, (2) it concerns a matter of state-wide interest, and (3) it is reasonably related and narrowly tailored to that statewide interest. *Johnson v. Bradley*, 4 Cal.4th 389, 398-399 (1992). Based on the analysis set forth below, it is our opinion that the proposed ordinance restricting the sale, distribution, and cultivation of certain non-native invasive plants within the City of San Diego would not be preempted by state law.

A. The City has the Right to Enforce All Ordinances in Respect to Municipal Affairs.

The "home rule doctrine" of the California Constitution empowers charter cities, like the City of San Diego, to control their own affairs. *Johnson v. Bradley*, 4 Cal. 4th at 396-397. This doctrine is based on "'the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.'" *Id., quoting Fragley v. Phelan*, 126 Cal. 383, 387 (1899). Thus, the City of San Diego, as a charter city, has the right to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations" in its Charter "and in respect to other matters" it is subject to the general laws of the state. Cal. Const. Art. XI, § 5(a).

This power is the basis for the distinction between chartered cities and general law cities. While every city may enact and enforce local ordinances that do not conflict with general laws, chartered cities, like the City of San Diego, are granted exclusive power under the California Constitution to legislate their municipal affairs, even if those ordinances conflict with existing state laws. *Isaac v. City of L.A.*, 66 Cal. App. 4th 586, 599; *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62 (1969). On matters of "statewide concern," however, the state holds the power to regulate that area, and a charter city may enact an ordinance only if the state allows it; that is, if the local law does not conflict with state law by duplicating, contradicting, or entering into a field fully occupied by general law, either expressly or by implication. *Isaac*, 66 Cal. App. 4th at 599-600; *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984).

B. Conflict Between State and Local Law.

The first step in a preemption analysis is determining whether a conflict exists between the local ordinance and existing state law. If there is no actual conflict between the two, there is no issue for the charter city. *Johnson v. Bradley*, 4 Cal. 4th at 398-399. In this instance, there does not appear to be a conflict because the proposed ordinance does not duplicate or conflict with any existing state law, and, as discussed below, the state has not fully occupied the field of regulation. Nonetheless, for the purpose of this analysis, we will assume that a conflict exists.

C. Matter of Statewide Concern.

The next step in the analysis is determining whether the conflicting state law is a matter of statewide concern. If not, the law of the charter city is valid. *Vial v. City of San Diego*, 122 Cal. App. 3d 346 (1981).

Whether a particular ordinance is of municipal or statewide concern is a question decided by the courts based on the facts of each case and the proper allocation of "the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies." *Johnson*, 4 Cal. 4th at 399-400; *Isaac*, 66 Cal. App. 4th at 599. A statewide concern must encompass more than a city's interests; there must be "a convincing basis" for such state legislative action "originating in extramural concerns." *Johnson*, 4 Cal. 4th at 399-400. A statement by the Legislature that the state law is intended to preempt all local law is important persuasive evidence before a court, but is not determinative. *DeVita v. County of Napa*, 9 Cal. 4th 763, 783 (1995). Rather, the doctrine of preemption does not apply unless: (1) the subject matter has been so fully and completely covered by state law as to clearly indicate that it has become exclusively a matter of statewide concern; (2) the subject matter has been partially covered by state law in a way that clearly indicates that a paramount state concern will not tolerate local action; or (3) the subject matter has been partially covered by state law and the negative effect of a local ordinance on transient citizens of the state outweighs the possible benefit to the municipality. *Cox Cable San Diego, Inc. v. City of San Diego*, 181 Cal. App. 3d 952, 961 (1987); *see also People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984).

The California Food and Agricultural Code [the Code] is a system of laws adopted by the State Legislature to promote and protect the state's agricultural industry, and the public health, safety, and welfare. Code, § 3. The Code empowers the CDFA to carry out the purposes of the Code. §§ 101, 401-409. Although the Code strongly emphasizes the protection and promotion of agriculture, it also seeks to "prevent the introduction and spread of . . . noxious weeds" in natural areas. § 403. "Noxious weed" is any plant designated as such by the Director of the CDFA that is "troublesome, aggressive, intrusive, detrimental, or destructive to agriculture, silviculture, or important native species, and difficult to control or eradicate." Code, § 5004. A noxious weed can also be a "pest" if it is "dangerous or detrimental to the agricultural industry"(Code, § 5006), or it can be regulated as a "horticultural product" if it is grown as nursery stock or ornamental plants (Code, § 5009). For pest control, including quarantine and abatement procedures, the County Agricultural Commissioner is the enforcing officer of the state's laws. Code, §§ 5101 *et seq*. The Code provides the Commissioner with broad powers to eradicate or control plants that

have been identified as pests. The Code also provides for the licensing and regulation of sellers of nursery stock. Code, §§ 6701 *et seq*. The Code includes a procedure for establishing a "weed management area" supervised by a multi-government agency and an "integrated weed management plan" to manage noxious weeds within that area. Code, §§ 7270-7274.

A limited statement of preemption is contained in section 5323 for laws and regulations addressing plant quarantine and pest control. That section provides, in part:

> This division and the regulations which are established pursuant to this division, are of a statewide interest and concern and are intended to occupy the field. No local jurisdiction shall adopt ordinances, laws, or regulations which prevent, hinder, or delay the effect or application of this division or regulations established pursuant to this division.

This section appears in Article 2 (Quarantine and Other Regulations for Pests Within the State) of Part 1 (Regulations and Inspection Stations) of Division 4 (Plant Quarantine and Pest Control). Article 2 provides that the Director my investigate a pest "which is not generally distributed within this state" and "establish, maintain, and enforce quarantine, eradication, and such other regulation" as necessary to exterminate or prevent the spread of the pest. Code, §§ 5321, 5322. As stated earlier, a "pest" is defined as "dangerous or detrimental to the agricultural industry." Code, § 5006. Division 4, however, also includes the sections on noxious weeds and noxious weeds management.

There is no case law that explains the appropriate application of this section or its scope. On its face, section 5323 seeks to preempt local laws only to the extent they conflict with state law, and appears written to work with existing local laws, where possible. Similarly, section 5026, also found in Division 4, provides that the Director may overrule a local agency's ordinance or regulation, but only when the Governor has declared a state of emergency relating to an eradication effort and the local law would "materially interfere" with the eradication effort. Both section 5323 and section 5026, were adopted as part of the same legislative action, Senate Bill 1619, adopted in 1982.

In contrast, section 11501.1 regarding pesticides, uses strong language to keep cities from regulating any aspect of pesticide use:

> No ordinance or regulation of local government may prohibit or in any way attempt to regulate any matter relating to the registration, sale, transportation, or use of pesticides, and any of these [local] ordinances, laws, or regulations are void and of no force or effect.

This section was added by the legislature after the California Supreme Court held that a local initiative prohibiting the aerial spraying of phenoxy herbicides in Mendocino County was not preempted by the state's laws and regulations governing the use of such chemicals. Whereas

section 11501.1 pronounces that local ordinances on the subject are void, the language of sections 5026 or 5323 assume that local ordinances exist and are valid unless they interfere with the state's laws. *See also,* Code § 5305, allowing local quarantine laws, as long as they are first approved by the County Agricultural Commissioner.[3]

Although the state has enacted laws empowering the CDFA and County Agricultural Commissioners to control pests, under the first prong of the test for applying the preemption doctrine, the state has not so fully and completely regulated noxious weed pests so as to indicate that the issue is exclusively a matter of statewide concern or to eliminate the need for local regulation of locally noxious weeds. Rather, while the state can adopt regulations and eradication efforts that specifically address certain pest plants, (*e.g.*, Cal. Code Regs. § 3960 (alligatorweed); Cal. Code Regs. § 3961 (dudaim melon); Code, §§ 6048-6049, Cal. Code Regs. § 3962 (hydrilla)), or restrict the movement of certain plants within the state (Cal. Code Regs., §§ 3400-3432)[4], it can also do nothing, and leave the local jurisdiction to deal with its local problem. For example, the four plants that the City seeks to regulate that are a documented local problem, are not yet the subject of any eradication effort by the CDFA or subject to restrictions on their sale or cultivation. Nonetheless, pampas grass is commonly seen in the City's coastal open spaces, giant reed clogs the San Diego River, tamarisk deprives nearby plants of water and nutrients, and all of these weeds, including German ivy, progressively destroy native habitat as they crowd out native plants.

Further, the CDFA is limited by its available resources and is unable to react to all local invasive pest issues. *See* CDFA website at pi.cdfa.ca.gov/weedinfo/preventionprgm.html. Through the Integrated Pest Control Branch of CDFA's Noxious Weed Prevention and Control Program, CDFA runs control programs against some established pests, focusing primarily on A-rated weed populations. *Id.* As stated on the CDFA website:

> The majority of [weed] control projects are in the northeastern four counties, where Scotch thistle is a major target. The northern fourth of the state also has large populations of a variety of other A-rated weeds . . . The central part of the Sierran foothills has a large infestation of skeletonweed, but the control efforts on that weed have moved to a containment strategy, to try to keep the weed out of uninfested counties. The number of species and the size of infestations taper off towards the south of the state . . .

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[3] A local government "shall not" establish a quarantine "against another" local government without consent of the director. Such a quarantine would restrict the movement of plants into the protected area. The City's proposed ordinance prohibits the sale or transfer of the identified plants in the City, but does not restrict movement of the plants through the City. However, the proposed ordinance could be interpreted to limit the transport of the identified plants from growers to City nurseries for sale.

[4] When a plant is subject to a quarantine, it is unlawful to possess, propagate, plant, process, or sell a plant that has been moved in violation of the quarantine. Code, § 5306.

Id. The Biological Control Program, matching established foreign pests with natural enemies, is also limited by available resources, "and there are generally only enough resources to attack the most pressing problems." *Id.*

Practically, CDFA must prioritize pest problems based on its statewide concern of protecting agriculture and addressing the most serious pest problems in the state. Where a noxious weed is a purely local problem and concern, it does not merit CDFA's interest unless it has the potential for spreading statewide and CDFA has the resources to address it. Thus, while state laws may occupy the field in regard to pests that threaten agriculture or threaten to spread across the state, the state has not and cannot address primarily local pest problems.

Applying the second prong of the test, the legislature has indicated in section 5026 that local action will be tolerated, unless the Governor has declared a state of emergency and local law would materially interfere with the state's emergency eradication efforts. No state of emergency has been declared in relation to the four plants the City seeks to regulate. Likewise, in section 5323, the legislature has indicated that local law can coexist with state law, as long as it does not hinder, delay, or prevent the application of state law. The proposed ordinance contains restrictions that would supplement and compliment existing state laws and regulations, not conflict with them.

Under the third prong, the City's proposed ordinance would have little effect on the transient residents, as it pertains to the sale and cultivation of plants in the City of San Diego. Thus, it cannot be concluded that the effect on transient residents outweighs the possible benefit to the municipality. *County of Mendocino*, 36 Cal. 3d at 487.

D. Reasonably Related and Narrowly Tailored to a Statewide Interest.

Although the promotion and protection of agriculture is an "extramural concern" and a matter of statewide interest, the proposed ordinance is of much more limited and local scope. It seeks to regulate four plant pests that have been documented as a serious problem locally and continue to harm the native habitats in the City's undeveloped open spaces. As such, the proposed ordinance seeks to regulate a matter of local concern, that is appropriately addressed by local government on a local level. Unless the regulation of these plants has become a matter of statewide concern through the enactment of state laws, the proposed ordinance should be a valid regulation in respect to a municipal affair. *See, e.g., County of Mendocino*, 36 Cal. 3d at 484 (local initiative prohibiting aerial spraying of phenoxy herbicides is proper local regulation for health purposes unless it conflicts with general laws).

Accordingly, the City is not preempted from adopting local legislation to regulate invasive pest plants within the City for the purpose of preserving the native habitat in the City's open spaces. However, to the extent that the City's ordinance may conflict with the state's quarantine laws and the requirement in Code section 5305 to obtain the County Agricultural Commissioner's approval of any local quarantine laws, we recommend that the City obtain such approval prior to adopting the ordinance.

II. Requested Changes to Proposed Ordinance.

On June 12, 2002, the Natural Resources and Culture Committee, as part of its motion, directed that the proposed ordinance be modified to limit "cultivation" to cultivation for business purposes. In the attached draft ordinance, that change has been made in section 63.1602. That section now reads:

> Except as provided in this division, it is unlawful for any person to sell, distribute, cultivate for sale or distribution, transfer, or make a gift of any of the following plants: . . .

Also, as the CDFA conducts and approves research regarding noxious weeds and their natural enemies, section 63.1603 has been modified to include programs approved by the CDFA or the County Agricultural Commissioner as within the bona fide scientific research exception.

CONCLUSION

The City is not preempted from enacting an ordinance to restrict the propagation, sale, or distribution of non-native pest plants that are a threat to native habitat and wildlife in open space in the City of San Diego because the proposed ordinance does not conflict with existing state laws and regulations and because the proposed ordinance seeks to regulate a municipal affair. The state has enacted some laws and regulations for pest plants and noxious weeds in the City of San Diego, but has not so occupied the field of regulation so as to preclude local regulations to address local concerns.

Although the City's proposed ordinance does not seek to prohibit the transport of noxious weeds through the City, this Office recommends that the City work with and seek the approval of the County Agricultural Commissioner of the proposed ordinance to the extent that it may present a quarantine issue under sections 5305 and 5306 of the Food and Agriculture Code.

Respectfully submitted,

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RC-2003-24