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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LEGAL ANALYSIS OF PROPOSED ORDINANCE BANNING ALCOHOL CONSUMPTION IN WATERS ADJACENT TO THE CITY'S BEACHES

INTRODUCTION

In response to an alcohol-induced melee that took place in Pacific Beach during Labor Day weekend 2007, City Council approved a one-year ban on alcohol consumption on all City beaches effective January 14, 2008. On November 4, 2008, voters approved Proposition D, making this ban permanent. Since then, various organized events known as "Floatopias" have occurred in the waters adjacent to the beaches covered by the ban. These events involve the consumption of alcohol by participants bathing or on floatation devices. The City Council is now considering a ban on the consumption of alcohol by bathers in the water that would prohibit such events. We provide below an overview of the legal issues implicated by the proposed ban.

QUESTIONS PRESENTED

1. Does the City of San Diego have jurisdiction to institute a ban on alcohol consumption by bathers in the waters adjacent to San Diego beaches?

2. Is such a ban preempted by federal or state law?

3. Does such a ban require another vote of the electorate?

BRIEF ANSWERS

1. Yes. The City of San Diego has jurisdiction extending one marine league, or three geographic or nautical miles, from the shoreline. The City has concurrent jurisdiction over this area with the State of California and the federal government, and may regulate in this space so long as the proposed alcohol prohibition does not conflict with state or federal law.

2. No. While the City is preempted by state and federal law from regulating the consumption of alcohol on vessels, it is not preempted from regulating such consumption by bathers.

3. Most likely, no. Generally, a vote of the electorate is required to amend or repeal a measure approved by the voters, unless the measure provides otherwise. However, recent court decisions have held that a legislative body may address the general subject matter of a voter-approved measure, so long as there is no attempt to authorize what the voters prohibited or to prohibit what the voters authorized.

DISCUSSION

I. JURISDICTION

Pursuant to the Submerged Lands Act, the United States has delegated jurisdiction to the states for "three geographical miles"[1] from the coastline. 43 U.S.C. § 1312. The states are granted the right "to manage, administer, lease, develop, and use the said lands and natural resources." 43 U.S.C. § 1311. Accordingly, the State of California claims jurisdiction up to "three English nautical miles" from its coast. *See* Cal. Const. art III, § 2; Cal. Gov't Code § 170. However, the United States retains "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314.

The State of California holds the waters along its coastline "not in its proprietary capacity but as trustee for the public." *City of Berkeley v. Superior Court,* 26 Cal. 3d 515, 521 (1980) (citing *City of Long Beach v. Mansell,* 3 Cal. 2d 462, 482 (1970); *People v. Kerber,* 152 Cal. 731, 733 (1908); *Ward v. Mulford,* 32 Cal. 365, 372 (1867)). The public's right includes access to the water for purposes of navigation, commerce, fishing, hunting, bathing or swimming, "and the right to preserve the tidelands in their natural state as ecological units for scientific study." *City of Berkeley,* 26 Cal. 3d at 521.

As a general rule, the state may enact laws regulating the waters within its jurisdiction subject to the ultimate authority of the federal government. "The power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute, except as limited by the paramount supervisory power of the federal government over navigable waters." *Marks v. Whitney,* 6 Cal. 3d 251, 260. Thus, "the State, as trustee for the People, has the power to 'act in any manner consistent with the improvement' of trust purposes." *Personal Watercraft Coalition v. Board of Supervisors,* 100

[1] The terms "geographical mile" and "nautical mile" are used interchangeably by the courts. *See U.S. v. California,* 439 U.S. 30, 31 (1978); *U.S. v. State of Cal.,* 381 U.S. 139, 148 n.8 (1965). However, a geographical mile is approximately 11 feet longer than a nautical mile. *See State v. Kirvin* (1998) 718 So.2d 893, 900 n.3.; Fla. AGO 95-51 n.14., 1995 WL 698054 (Fla.A.G.).

Cal. App. 4th 129, 145 (2002). This includes the power to share this authority with local government. *Id.*

The State of California has granted such power through its constitution, which provides 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." Cal. Const. art. XI, § 7. Pursuant to this power, "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." *Candid Enterprises, Inc. v. Grossmont Union High School Dist.,* 39Cal. 3d 878, 885 (1985). Except for this limitation, a city's police power "under this provision . . . is as broad as the police power exercisable by the Legislature itself." *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 140 (1976).

In accordance with the State's grant of power, our City Charter provides that the City's jurisdiction extends to "one Marine League"[2] into the Pacific Ocean. San Diego Charter § 3; *see also City of San Diego v. Granniss,* 77 Cal. 511, 517-18 (1888). As such, the City has concurrent jurisdiction to enact laws governing the waters within our territorial limits, provided such laws do not interfere with the power of the state or federal government. California cases have generally upheld local regulations governing navigable waterways provided that they do not deny access or prohibit use entirely. *See Personal Watercraft*, 100 Cal. App. 4th at 129 (permitting Marin County to prohibit jet skis in its territorial waters). *Compare People ex. Rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 406-07 (1979) (striking down an ordinance that effectively prohibited any recreational use of the American River). Since the proposed ordinance merely regulates alcoholic consumption and does not deny or limit access to the water, it is a permissible exercise of the City's jurisdiction.

II. PREEMPTION

If a valid local ordinance conflicts with state law it is preempted and void. *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal. 4th 893, 897 (1993). "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *Sherwin-Williams* at 897 (citing *Candid Enterprises*). Local legislation is "duplicative" when it is coextensive with the general law (for example, imposing the same criminal prohibition). *Sherwin-Williams* at 897. It is "contradictory" when it is inimical to the general law. *Id.* Finally, it enters an area that is fully occupied when the Legislature either expressly intends to occupy the field or:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or

[2] One marine league is equivalent to three nautical or geographical miles. *See Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122 (1922).

> additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

Candid Enterprises, 39 Cal. 3d at 886.

Similarly, state or local laws that conflict with federal laws are void as a violation of the Supremacy Clause of article VI of the U.S. Constitution. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Id.* (citing *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

The first step in analyzing whether federal law occupies the field, is determining Congressional intent. The "purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 516 (internal quotations omitted). In some cases, Congress expressly states its intent to preempt state authority. In other cases, the intent to preempt state law is implied:

> Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law [citations omitted]; (ii) when compliance with both federal and state regulations is an impossibility [citations omitted]; or (iii) when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Bronco Wine Co. v. Jolly, 33 Cal. 4th 943, 955 (2004) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

Neither the state nor the federal government has regulated bathers in general. We have identified only one state law regulating bathers, which specifically relates to alcohol consumption by bathers on a portion of the Truckee River, near Lake Tahoe. Cal. Bus. & Prof. Code § 25608.10. Therefore, the City is not preempted from regulating the actions of bathers within its territorial limits.

However, federal and state laws do regulate the consumption of alcohol on "vessels." *See* 46 U.S.C. § 2302 (c) (prohibiting the operation of a vessel under the influence of alcohol or a dangerous drug); Cal. Harb. & Nav. Code § 655(b) ("No person shall use any vessel or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage, any drug . . ."). Moreover, state law expressly preempts the City from regulating vessels except in certain specified areas (such as time-of-day restrictions, speed zones, special-use areas, and sanitation and pollution control). Cal. Harb. & Nav. Code § 660(a).

In order to avoid a preemption issue, we have drafted the proposed ordinance to apply to "bathers" but not "vessels." See Section 56.54(h) in draft ordinance attached as Exhibit A. In the ordinance, we define "bather" as set forth in the California Harbor and Navigations Code, to mean:

> [A] person floating, swimming, wading, or bodysurfing, with or without the aid of a floatation device, including, but not limited to, floating upon or with the aid of a surfboard, paddle board, surfmat, innertube, life preserver, or air mattress, except a floatation device which is designed to be propelled by a sail, mechanical means, power, oars, or paddle.

Cal. Harb. & Nav. Code § 651.1.

The California Harbors and Navigations Code, on the other hand, defines a vessel as a "watercraft used or capable of being used as a means of transportation on water" with certain exceptions. Cal. Harb. & Nav. Code § 651. We do not believe that the types of floatation devices used during "Floatopias" fall within the definition of a "vessel" because they are primarily used for recreational swimming and floating rather than transportation. However, in order to avoid inadvertently capturing watercrafts that do fall within the definition of a "vessel," we have expressly exempted "vessels" from the ordinance.

Given the absence of any express or implied intent by state or federal legislatures to regulate bathers, the proposed ordinance is not preempted. It does not duplicate, contradict, or enter a field fully occupied by either the federal or state government. While state and federal laws do regulate vessels, they have been expressly exempted from the reach of the ordinance.

III. AMENDING VOTER-APPROVED PROPOSITIONS BY ORDINANCE

A. General Legal Principles

Pursuant to San Diego Municipal Code sections 27.1043 and 27.1049,[3] a majority vote of the electorate is required to amend or repeal a legislative act adopted by the voters, unless the original measure provides otherwise.[4] Similar provisions are found in Cal. Elec. Code section 9217[5] and Cal. Const., art. II, § 10(c).[6] The purpose of such a limitation of legislative

[3] "Unless the legislative act provides otherwise, any legislative act proposed by an initiative petition or directly by the City Council and adopted by the voters may be amended or repealed only by a vote of the requisite number of voters or by Charter amendment." SDMC § 27.1049.

[4] Within certain limits, charter cities have discretion to adopt procedures governing initiatives and referenda. Cal. Const. art. II, § 11.

[5] "No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance." Cal. Elec. Code § 9217.

power is to prevent hostile legislatures from undermining voter approved initiatives through amendment. *See People v. Kelly,* 47 Cal. 4th 1008, 1025 (2010); *MHC Financing Ltd. Partnership Two v. City of Santee,* 125 Cal. App.4th 1372, 1388 (2005).

While we did not find any cases interpreting SDMC section 27.1049, a number of courts have addressed California Elections Code section 9217 and article II, section 10(c) of the California Constitution. Although the Elections Code is generally not applicable to a charter city such as San Diego (*See* Cal. Const. art. II, § 11 and art. XI, § 5(b); Cal. Elec. Code §§ 10101 *et seq.*), the cases interpreting it provide general guidance.

Until recently, courts took a fairly broad view of what is considered an "amendment" to existing law. As one court described:

> [An amendment includes] any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence. A statute which adds to or takes away from an existing statute is considered an amendment . . . . [An amendment is] a legislative act designed to change some prior or existing law by adding or taking from it some particular provision.

Mobilepark West Homeowners Assn. v. Escondido Mobilepark West, 35 Cal. App. 4th 32, 40 (1995) (quoting *Franchise Tax Bd. v. Cory,* 80 Cal. App. 3d 772, 776-77 (1978)).

In comparing the provisions of the new law with existing law, "if its aim is to clarify or correct uncertainties which arose from the enforcement of the existing law, or to reach situations which were not covered by the original statute, the act is amendatory, *even though in its wording* it does not purport to amend the language of the prior act." *Mobilepark West*, 35 Cal. App. 4th at 40 (again quoting *Cory*). (Italics in original.) However, under *Mobilepark West,* not all amendments required voter approval. For example, an amending statute could properly clarify ambiguities in the proposition. It was also permissible to legislate "in a related but distinct area, such that legislative enactments related to the subject of an initiative statute may be allowed." *Mobilepark West*, 35 Cal. App. 4th at 42.

The California Supreme Court has recently questioned the broad language of earlier cases, and clarified the rule for when voter approval is required.

> As applied to the question of what constitutes an amendment under the constitutional provision, these statements . . . appear overbroad and inconsistent with the observations [in recent Supreme Court cases] that, despite the constitutional provision, the Legislature remains free to enact laws addressing the general subject matter of an initiative, or a 'related but distinct area' of law that an initiative measure 'does not specifically authorize or prohibit.'

People v. Kelly, 47 Cal. 4th 1008, 1027 (2010) (citing *People v. Cooper,* 27 Cal. 4th 38, 47 (2002); *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 830 (2008)). Reiterating this view in a later case, the California Supreme Court stated that to determine whether a particular provision amends a proposition "we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits." *People v. Superior Court (Pearson),* 48 Cal. 4th 564, 571 (2010).

The facts of these recent cases are illustrative. In *San Diego NORML*, the court held that the identification card provision in the Medical Marijuana Program (MMP) was not an amendment of the voter-approved Compassionate Use Act (CUA), because "the MMP's identification card system is a discrete set of laws designed to confer distinct protections under California law that the CUA does not provide without limiting the protections the CUA does provide." *San Diego NORML* 165 Cal. App. 4th at 830. The court found that there was no amendment "[b]ecause the MMP's identification card program has no impact on the protections provided by the CUA," the identification card provision was voluntary and only provided additional protection to medical marijuana patients. *Id.* at 831.

However, in a later case, the court found that another provision of the MMP, which limited the amount of medical marijuana an individual could possess for the purposes of raising an affirmative defense, was an improper amendment of the CUA. *Kelly* 47 Cal. 4th at 1043. The CUA imposed no such limits and instead permits an amount reasonably related to the individual's medical needs. *Id*. Finally, in *Pearson*, the court found that a proposition's discovery provisions all concerned the underlying trial and did not apply to habeas corpus matters, therefore a post-conviction discovery statute was not an improper amendment. *Pearson,* 48 Cal. 4th at 567.

B. Proposition D

SDMC section 56.54 previously banned consumption of alcoholic beverages on public property without a special event permit, but exempted public parks and beaches unless specifically designated. Drinking alcohol was already unlawful at certain City beaches (except for special events) but only during specified periods. Ballot Materials, San Diego City Election (November 4, 2008). On January 14, 2008, City Council approved a one-year ban on alcohol consumption, which prohibited alcohol consumption 24 hours a day on all City beaches. *Id*. In the November 2008 election, voters approved Proposition D to make permanent the one-year alcohol consumption ban. The voters were presented with the following ballot question:

> Shall the People of the City of San Diego amend San Diego Municipal Code section 56.54 to make the consumption of alcohol unlawful 24 hours a day at City beaches, Mission Bay Park, and all coastal parks?

Ballot Materials, San Diego City Election (November 4, 2008).

In describing the ballot measure, the City Attorney's impartial analysis stated that the proposition asked voters "to continue and to expand the temporary 24-hour ban on alcohol consumption at beaches, Mission Bay Park and coastal parks." *Id*. The argument in favor of Proposition D stated that "drunk and disorderly conduct had become commonplace year-round on city beaches" culminating in a 2007 Labor Day "riot" in Pacific Beach. *Id*. In describing the benefits of the then temporary ban, the argument stated that "San Diego families with small children have returned to the beach," that "the sand is no longer littered with piles of trash," and that "senior citizens can safely enjoy an oceanfront walk." *Id*.

C. The Proposed Ordinance

Applying the recent court decisions to the proposed ordinance, a vote of the electorate is not likely required to institute a ban on alcohol consumption by bathers. The ordinance under consideration is separate from the subject matter of Proposition D and does not seek to alter the proposition. This ordinance does not seek to regulate alcohol consumption on beaches or parks, which was the subject matter voted on by the public.

Further, in voting on Proposition D, the public did not consider the topic of alcohol consumption on or in the water. Neither the ballot question, the City Attorney's impartial analysis, nor the argument in favor of the proposition mentioned the consumption of alcohol in the water or by bathers. Additionally, nothing indicates intent to create a comprehensive measure to address regulation of all public alcohol consumption. The ballot question presented to voters was limited to "City beaches, Mission Bay Park, and all coastal parks." The only discussion of regulation of other public areas was a statement in the City Attorney's analysis indicating that approval of the proposition would not affect alcohol consumption regulations of other parks and areas, "so long as the existing laws do not conflict with the voter-enacted amendments." Ballot Materials, San Diego City Election (November 4, 2008).

As in *San Diego NORML*, the proposed ordinance does not affect the prohibition approved by the voters. Proposition D and the supporting ballot materials do not address alcohol consumption by bathers, and the proposed ordinance does not address alcohol consumption on beaches or parks.

CONCLUSION

The proposed ban on alcohol consumption by bathers is a proper exercise of the City's police powers. The City has concurrent jurisdiction with the State of California and the federal government extending one marine league, or three geographical or nautical miles, from the shoreline. While the City is preempted by state and federal law from regulating the consumption of alcohol on vessels, it is not preempted from regulating such consumption by bathers. Additionally, a vote of the public is not required to implement the proposed ban. Generally, a vote of the electorate is required to amend or repeal a measure approved by the

voters, unless the measure provides otherwise. While the proposed ban is in an area related to Proposition D, it is distinct and does not address anything the initiative specifically authorized or prohibited.

Respectfully submitted,

By _____

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Attachment
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