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REPORT TO THE HONORABLE MAYOR AND CITY COUNCILMEMBERS

STATE PREEMPTION OF THE CITY'S ABILITY TO REGULATE THE CONTRACTING PROFESSION

INTRODUCTION

Recently, a request was made at a San Diego City Council meeting to revise a pending ordinance amending the San Diego Municipal Code regarding solar rooftop permitting. The request, in part, was to require as part of the permit application and final inspection sign-off that the "solar energysystem installation work will be performed by a licensed electrical contractor or general contractor[,] who, [sic] will certify that installation will only be done by state-certified electricians, electrical apprentices from a registered electrical apprenticeship program in California and/or electrical Trainees from a registered electrical Trainee program in California." Memorandum from Council President Pro Tem Marti Emerald to Jan Goldsmith, City Attorney (Aug. 18, 2015) (on file with the Author). The request was made in the interest of safety.

QUESTION PRESENTED

May the City of San Diego limit which state licensed professionals may engage in contracting work, when the State of California licenses a broader category of professionals to perform that contracting work?

SHORT ANSWER

No. The State of California preempts local regulation of those businesses, occupations, or professions licensed by the Department of Consumer Affairs, which includes the Contractors' State License Board.

ANALYSIS

I. THE STATE REGULATES THE LICENSING OF CONTRACTORS

The Contractors' State License Board, part of the Department of Consumer Affairs, is authorized to make such regulations as are reasonably necessary to carry out the provisions of the chapter regulating the licensure of contractors. Cal. Bus. & Prof. Code §§ 101, 7008. To that

end, the Contractors' State License Board has promulgated regulations set forth in the California Code of Regulations, Title 16, Division 8.

Contractors may be general engineering contractors (Class A), as defined in California Business and Professions Code section 7056, general building contractors (Class B), as defined in California Business and Professions Code section 7057, or a specialty contractor, licensed pursuant to one of the specialty classifications in title 16, sections 832.02-832.62 (Class-2 to C-61) of the California Code of Regulations. Cal. Bus. & Prof. Code § 7055; Cal. Code Regs., title 16 § 830(a). Contractors licensed in one classification may not work in the field of any other classification without the appropriate license.¹ Cal. Code Regs., title 16 § 830(b).

The Contractors' State License Board identifies the classifications of those authorized to perform solar energy projects as those holding licenses in the classifications of general engineering contractors, general building contractors, and the following specialty classifications:

C-4 – Boiler, Hot-Water Heating and Steam Fitting contractors are authorized to perform projects including solar heating equipment associated with systems authorized by this classification.

C-10 – Electrical contractors are authorized to perform any solar projects which generate, transmit, transform or utilize electrical energy in any form for any purpose.

C-36 – Plumbing contractors are authorized to perform any project using solar equipment to heat water or fluids to a suitable temperature.

C-46 – Solar contractors install, modify, maintain, and repair thermal and photovoltaic solar energy systems. A licensee in this classification shall not undertake or perform building or construction trades, crafts or skills, except when required to install a thermal or photovoltaic solar energy system.

C-53 – Swimming Pool contractors are authorized to include the installation of solar heating in swimming pool projects.

Contractors' State License Board, 2010 Industry Bulletin, *Contractor Classifications Authorized to Perform Solar Projects*, June 30, 2010, http://www.cslb.ca.gov/Media_Room/Industry_Bulletins/2010/June_30.aspx

One of the requests at the City Council meeting was that the City's solar ordinance be amended to require that the work be performed by a "licensed electrical contractor or general contractor" who would certify that the work would only be performed by "state-certified electricians, electrical apprentices from a registered electrical apprenticeship program in California and/or electrical Trainees from a registered electrical Trainee program in California." From the list above, it is apparent that classifications other than a "licensed electrical contractor or general contractor" may perform work related to the installation of solar energy systems. For example, boiler, hot-water heating and steam fitting contractors (C-4), plumbing contractors

¹Work may also be performed that is "incidental and supplemental" to the work for which the contractor holds the appropriate license. Cal. Bus. & Prof. Code § 7059; Cal. Code Regs., title 16 § 831.

(C-36), solar contractors (C-46), and swimming pool contractors (C-53) may all perform work related to solar energy systems.

II. THE STATE PREEMPTS ANY LOCAL REGULATION OF THE CONTRACTING PROFESSION

A conflict with state or federal law exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993); *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (federal preemption analysis will look to whether the federal government has determined that it has exclusive governance, or whether the state or local law conflicts with federal law).

Whether an ordinance duplicates or contradicts a general law will depend on the specifics of any proposed regulation. Duplication is found when the local regulation imposes the same criminal prohibition that the general law imposed. *Sherwin-Williams*, 4 Cal. 4th at 897-98. An ordinance contradicts state law if one cannot comply with both the local and state laws or the local ordinance is harmful to the state law. *Id.* at 898.

An ordinance is also preempted if there has been an express or implied intent by the state legislature to fully occupy the field. *Nordyke v. King*, 27 Cal. 4th 875 (2002) (county ordinance prohibiting possession of a firearm on county property found not to be preempted by state firearms statutes). The State of California, through the Department of Consumer Affairs and its related regulatory bodies, regulates and licenses numerous professions from accountants to vocational nursing. Cal. Bus. & Prof. Code §§ 100, 101. One of these regulatory boards is the Contractors' State License Board. Cal. Bus. & Prof. Code § 101(j). The state regulatory oversight of these professions is for the protection of the public health, safety, and welfare. Cal. Bus. & Prof. Code § 101.6 (the same basis given for the proposed local regulation).

The California Business and Professions Code explicitly states that cities and counties may not prohibit a person or group of persons licensed by the Department of Consumer Affairs or one of the regulatory bodies established by the Business and Professions Code from engaging in that business, occupation, or profession, or in any portion of that business, occupation, or profession. Cal. Bus. & Prof. Code § 460(a). “[T]he City cannot prohibit a licensed contractor from practicing any aspect of contracting work that falls within the perimeter of the state license.” *Stacy & Witbeck, Inc. v. City & County of San Francisco*, 36 Cal. App. 4th 1074, 1095 (1995).² Although cities and counties may regulate the quality and character of installations performed by contractors through permits and inspections, this does not authorize “a city or county to enact regulations relating to the qualifications necessary to engage in the business of contracting.” Cal. Bus. & Prof. Code § 7032.

² Cities may refuse to contract with certain licensed contractors “to protect the public purse.” *Stacy & Witbeck, Inc.*, 36 Cal. App. 4th at 1095 (upholding municipal disbarment of irresponsible contractor). Agencies subject to the Public Contract Code may also be required to specify in bidding documents which classification of license is necessary to perform the work. *M&B Construction v. Yuba County Water Agency*, 68 Cal. App. 4th 1353 (1999).

The state has preempted the field of regulating what license is necessary to perform various types of contracting work. *R.W. Agnew v. City of Los Angeles*, 110 Cal. App. 2d 612 (1952). “The state license implies permission to the licensee to conduct his business at any place within the state. This permission should not be circumscribed by local authorities.” *R.W. Agnew*, 110 Cal. App. 2d at 617 (quoting *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 448 (1946)). Because the state has preempted the field of regulating contract licensing, and the Contractors’ State Licensing Board has determined that numerous types of licenses and certifications may engage in various aspects of solar energy-related construction, the City could not legally require the installation to be performed by only a “licensed electrical contractor or general contractor.” To do so would make performance of the work by other specialty classifications a violation of the San Diego Municipal Code, even though those contractors are licensed by the Contractors’ State License Board for that occupation.

In addition, the San Diego Municipal Code already requires that an electrical permit may only be issued to a person, firm, or corporation that holds a valid California State Contractor’s License that permits electrical installation, or to the property owner or lessee. SDMC § 129.0306.

CONCLUSION

The State of California regulates many professions, including which licenses are required to perform various types of contracting work. If the State has licensed a person or group of persons to engage in a particular business, cities and counties may not legally prohibit that person or group of persons from engaging in that business, occupation, or profession. A City ordinance that only allows certain state licensed professionals to perform work is preempted by state law. Such a City ordinance would criminalize the performance of that work by other State license-holders.

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By /s/ Shannon M. Thomas
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cc: Andrea Tevlin, Independent Budget Analyst