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MEMORANDUM OF LAW

DATE: May 16, 2016

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Preemption of Local Ordinance Prohibiting the Manufacturing, Sale, Distribution, and Possession of Unregulated Novel Drugs

INTRODUCTION

The San Diego City Council is currently considering an ordinance prohibiting the manufacture, sale, distribution, and possession of novel drugs that are not regulated or prohibited by state law, including synthetic drugs commonly known as "spice" and "bath salts." Certain types of synthetic drugs are currently prohibited under California Health and Safety Code (Health and Safety Code) sections 11357.5 and 11375.5. However, the chemical design of these synthetic drugs is easily manipulated by chemists, often to elude the scope of these Health and Safety Code sections. Federal law prohibits a wider variety of synthetic drugs than California law, but is not directly enforceable by the City of San Diego. This memorandum addresses the question of whether the City is preempted by federal or state law from enacting an ordinance prohibiting specific types of novel drugs not regulated or prohibited by state law.

QUESTION PRESENTED

Is an ordinance prohibiting the manufacture, sale, distribution, and possession of novel drugs not regulated or prohibited by state law preempted by federal or state law?

SHORT ANSWER

Most likely, no. Federal law applicable to controlled substances expressly allows for other regulation. Although the state law analysis is less clear, it would be reasonable for a reviewing court to conclude that a local ordinance prohibiting the manufacture, sale, distribution, and possession of novel drugs not regulated or prohibited under state law, and for the purpose of addressing local issues, is not preempted.

ANALYSIS

I. GENERAL PRINCIPLES OF PREEMPTION

A. Federal Preemption

Article VI of the United States Constitution declares that that laws of the United States "shall be the supreme Law of the Land . . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. This supremacy of federal law over state law, known as preemption, also applies to local law. *Hillsborough County, Fla. v. AutomatedMedical Laboratories, Inc*., 471 U.S. 707, 713 (1985).

There are four types of federal preemption, where a federal law is supreme over a state or local law: express preemption, conflict preemption, obstacle preemption, and field preemption. *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798, 819 (2008). Express preemption applies when Congress has specifically stated its intent to make federal law supreme. *Id.* Conflict preemption exists when "simultaneous compliance with both state and federal directives is impossible." *Id.* Obstacle preemption is more complex, and may apply when a particular state or local law presents an obstacle to achieving the federal law's objectives. *Id.* Finally, field preemption may be found where a court finds that federal law is "sufficiently comprehensive" to regulate an entire subject matter, leaving no ability for additional state or local regulation. *Id.*

B. State Preemption

Generally, a 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. A conflict with general laws (state law) exists if a local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168 (2009) (citing *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1242 (2007)). An area has been fully occupied by state law when "the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedlydone so in light of recognized indicia of intent." *Big CreekLumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006).

Indicia of the Legislature's intent to fully occupy a legal area include:

> (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 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 locality.

Kruse, 177 Cal. App. 4th at 1169 (citing *American Financial Services Assn. v. City of Oakland,* 34 Cal. 4th 1239, 1252 (2005)).

II. FEDERAL LAW MOST LIKELY DOES NOT PREEMPT A LOCAL ORDINANCE PROHIBITING THE MANUFACTURE, SALE, DISTRIBUTION, AND POSSESSION OF NOVEL DRUGS

The federal Controlled Substances Act and its corresponding regulations comprehensively regulate controlled substances at the federal level. *See* 21 U.S.C. §§ 801-802, 804-971; 21 C.F.R. §§ 1308.1-1308.49. A portion of the proposed ordinance prohibits certain synthetic chemical compounds scheduled under federal law (Federal Schedule I, 21 C.F.R. § 1308.11). If the proposed ordinance was challenged on federal preemption grounds, a court would likely find no preemption. Congress has provided an express non-preemption statement. Section 903 of the Controlled Substances Act provides that:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Therefore, state law which does not conflict with federal law will not be preempted under the express or field preemption theories. *San Diego NORML*, 165 Cal. App. 4th at 819.

A court would likely interpret this same section to apply to local laws not in conflict with federal law. The United States Supreme Court has explained that for "purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County, Fla*., 471 U.S. at 713. Following this reasoning, the non-preemption statement by the federal government would logically apply to local laws not in conflict with federal law. Further, the Controlled Substances Act includes other indicia of Congress' intent not to preclude local regulation of controlled substances. Section 885(d) of the Controlled Substances Act describes criminal immunity granted to federal, state and local law enforcement officers enforcing controlled substances laws, and extends such immunity to officers "who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). Congress, therefore, specifically contemplated that local police officers may find themselves enforcing local ordinances regarding controlled substances.

A court would also be unlikely to find conflict or obstacle preemption of the proposed ordinance. The ordinance incorporates definitional portions of the federal law, specifically, Federal Schedule I. By incorporating some of the same controlled substances identified by the federal government, and prohibiting their manufacture, sale, distribution, and possession in the City, the ordinance actually furthers the underlying Congressional intent of federal law. Simultaneous compliance with the proposed ordinance as well as the Controlled Substances Act

is not only possible, but is encouraged by the proposed ordinance. In this way, the ordinance is furthering the intent of Congress in prohibiting Federal Schedule I drugs, and assisting in the pursuit of this goal. *See City of Palm Springs v. Luna Crest Inc*., 245 Cal. App. 4th 879, 885-86 (2016) (finding that the city's medical marijuana dispensaryregulations were not preempted through conflict or obstacle preemption by the Controlled Substances Act).

III. STATE LAW MOST LIKELY DOES NOT PREEMPT A LOCAL ORDINANCE PROHIBITING THE MANUFACTURE, SALE, DISTRIBUTION, AND POSSESSION OF NOVEL DRUGS NOT REGULATED OR PROHIBITED BY STATE LAW

The California Uniform Controlled Substances Act (UCSA) identifies certain drugs as controlled substances in five schedules, set forth in Health and SafetyCode sections 11054 through 11058. Other sections of the UCSA prohibit manufacturing, sales, possession, and being under the influence of the enumerated controlled substances, and provide penalties for violations. *See* Cal. Health & SafetyCode §§ 11350-11392. Additionally, Health and SafetyCode sections 11357.5 and 11375.5 prohibit enumerated types of synthetic drugs not listed in the controlled substance schedules, and provide for either misdemeanor or infraction penalties.

This portion of the memorandumwill examine whether the proposed ordinance conflicts with the UCSA because it duplicates or contradicts the UCSA, or whether it enters an area fully occupied by state law.

A. Conflict Preemption

It is unlikely that a court would find preemption by duplication or contradiction of the UCSA. The proposed ordinance presents no conflict with or duplication of state law, as it applies only to drugs not regulated or prohibited in California. *See* proposed San Diego Municipal Code (SDMC or Municipal Code) § 52.3308(c). None of the Federal Schedule I drugs also currently regulated by the UCSA, such as heroin, fall within the scope of this ordinance. *See* proposed SDMC § 52.3302, definition of Federal Schedule I Drugs. Likewise, the ordinance does not include Synthetic Cannabinoids or Synthetic Cathinones already prohibited by Health and Safety Code section 11357.5 or 11375.5. *See* proposed SDMC § 52.3302, definition of Novel Synthetic Drug. If the California Legislature adopts additional state laws regarding synthetic or psychoactive drugs,[1] state law would automatically take precedence based on the exclusionary language in proposed Municipal Code section 52.3308.

[1] Currently, Health and SafetyCode sections 11357.5 and 11375.5 are the only state statutes addressing synthetic drugs. There is other legislation pending. Senate Bill 139, if passed, would expand the list of prohibited synthetic compounds prohibited by Health and SafetyCode sections 11357.5 and 11375.5. The bill was passed in the Senate and referred to the Assembly with no further action since September 1, 2015. Other proposed legislation includes S.B. 1036 and S.B. 1367. Senate Bill 1036 would include synthetic cannabinoid analogs within the analog definition in Health and SafetyCode section 11401. This bill was passed by the Senate and read in the Assembly on May 3, 2016. Senate Bill 1367 would authorize local ordinances regulating the sale of substances posing a threat to human life or health if certain legislative findings are made. This bill was also passed by the Senate and read in the Assembly on May 3, 2016.

B. Field Preemption

1. *O'Connell v. City of Stockton*

The remaining question is whether the proposed ordinance enters a field fully occupied by state law. The UCSA contains no general, express preemption clause, or an express non-preemption clause similar to the federal Controlled Substances Act. A reviewing court would, therefore, have to determine whether there exists indicia of implied intent to occupy the field of drug prohibitions.

The California Supreme Court has directly addressed this question in the context of a municipal ordinance allowing forfeiture to the city of any vehicle used to acquire or attempt to acquire a controlled substance. *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1065-66 (2007). The Stockton ordinance allowed for vehicle forfeiture after a bench or jury trial when the city proved by a preponderance of evidence that the vehicle in question was used to acquire or attempt to acquire a controlled substance. *Id.* at 1067. Of particular concern to the Court were the apparently contradictory provisions for vehicle forfeiture in the UCSA. Specifically, the UCSA allows for forfeiture of vehicles used to facilitate the manufacture, sale, or possession for sale of certain amounts of specific controlled substances, not including marijuana. *Id.* at 1070; Cal. Health & Safety Code § 11470(e). By contrast, the Stockton ordinance allowed forfeiture merely for acquiring or attempting to acquire a controlled substance, which could include as little as less than an ounce of marijuana. *O'Connell*, 41 Cal. 4th at 1071. Likewise, the burden of proof under the ordinance for vehicle forfeiture, preponderance of the evidence, was substantially lower than the UCSA's standard of proof beyond a reasonable doubt. *Id*; Cal. Health & Safety Code § 11488.4(i)(1). The Court noted that Stockton's ordinance imposed the harsh penalty of vehicle forfeiture for a lower level crime and based on a lower standard of proof than the provisions of the UCSA. *O'Connell*, 41 Cal. 4th at 1071.

Ultimately, the Court rested its opinion on a review of the UCSA as a whole, holding that its "comprehensive nature . . . in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation. The UCSA accordingly occupies the field of penalizing crimes involving controlled substances, thus impliedly preempting the City's forfeiture ordinance to the extent it calls for the forfeiture of vehicle used 'to acquire or attempt to acquire' controlled substances regulated under the UCSA." *Id.* at 1071 (internal citations omitted).

San Diego's proposed ordinance, however, is factually distinguishable from that in the *O'Connell* case because it expressly excludes any drug already regulated or prohibited by state law and does not change the penalties or burden of proof for crimes already defined in the UCSA. The proposed ordinance actually parallels the state synthetic drug crime laws by allowing misdemeanor and infraction penalties similar to those described in Health and Safety Code sections 11357.5 and 11375.5, but for drugs not enumerated in those sections. *See* SDMC § 12.0201. In contrast, the Stockton ordinance in *O'Connell* addressed an area (vehicle forfeiture) already provided for in state law and created harsher penalties than state law.

Additionally, the *O'Connell* Court may have provided qualifying language in its holding. Although it first broadly declares the UCSA to be "comprehensive," manifesting "the Legislature's intent to preclude local regulation," the next sentence clarifies that "[t]he UCSA accordinglyoccupies the field of penalizing crimes involving *controlled substances*. . . ." *O'Connell*, 41 Cal. 4th at 1071 (emphasis added). The City's proposed ordinance does not include any controlled substances and only prohibits drugs completelyunregulated by California law.

2. Indicia of Legislative Intent to Preempt the Field

In addition to the factual distinctions between the proposed ordinance and the *O'Connell* case, several factors suggest that the Legislature has not manifested intent to preempt the entire field of drug regulations and prohibitions such that the proposed ordinance would be preempted.

First, the State Legislature has included express preemption clauses in the Health and SafetyCode when it so desired. For example, section 11100(i) expressly preempts local regulation of the sales of ephedrine and similar products. Cal. Health & SafetyCode § 11100(i). Section 116409 expresslypreempts certain local ordinances related to fluoridation of the public drinking water. Cal. Health & SafetyCode § 116409. Likewise, section 25167.3 preempts local regulation of transportation of hazardous waste. Cal. Health & SafetyCode § 25167.3.

In contrast, the State Legislature has indicated its express intent *not* to preempt local ordinances in certain sections of the Health and SafetyCode. For example, Health and Safety Code section 11538 expressly allows consistent or supplemental local laws addressing loitering for drug activities. Similarly, Health and SafetyCode section 11571.1 expresslyallows local ordinances consistent with or supplemental to state drug abatement laws.

Unlike the preceding examples, the Legislature has made no statement at all regarding local regulation of new drugs completely unregulated by state law. Given the varying postures regarding preemption in the Health and SafetyCode where the state and local ordinances do not conflict, it is clear that the Legislature is equipped to expressly exercise or waive its power of preemption. It has done neither in this case.

Second, the Legislature has shown its intent not to occupy the field of all drugs through its failure to update the existing synthetic drug statutes to include other, known synthetic drug compounds. Despite the expanding list of known synthetic drugs, neither Health and SafetyCode section 11357.5 nor section 11375.5 has been expanded to include these drugs. The federal drug schedules were amended four years ago in 2012 to include new synthetic drugs by the Synthetic Drug Abuse Prevention Act of 2012, yet California took no action.

In the *O'Connell* case, the court interpreted the legislature's silence on including drug possession offenses as a basis for vehicle forfeiture as evidence of intent not to include those offenses. The same cannot be said in this instance. The number of known synthetic drug compounds has increased dramatically in recent years, evidenced by the addition of many synthetic drugs to the federal controlled substance schedules in 2012, and the lengthy list in the proposed ordinance. Many of these compounds were not likely in existence at the time Health

and SafetyCode sections 11357.5 and 11375.5 were enacted. Additionally, when California's synthetic drug laws were enacted, new compounds were clearly not contemplated, and the Legislature has not updated either synthetic drug statute to include additional drugs. These factors weigh against an interpretation of legislative intent similar to that in *O'Connell*.

Third, San Diego is currentlyexperiencing the serious, harmful, local effects of dangerous synthetic drugs. The San Diego Police Department's Report to Council regarding the proposed ordinance dramatically describes the harmful impact of synthetic drugs on residents within the City and details the enforcement obstacles presented by the lack of state law. Many cities throughout California have also resorted to adoption of local ordinances to address the serious local problems caused by synthetic drugs. California cities (and one county) with various types of synthetic drug ordinances include: Adelanto, Barstow, Chula Vista, Encinitas, Oceanside, Redlands, Rialto, San Bernardino, San Diego County, South Lake Tahoe, Twenty Nine Palms, and Victorville. The absence of updated statewide legislation on this topic has created a vacuum contributing to the proliferation of dangerous and harmful synthetic drugs, underscoring the need for local regulation.

The lack of a comprehensive state synthetic drug statute should not prevent the City from exercising its police power to protect its residents. Local ordinances in furtherance of the health, safety, morals and general welfare, or for preventing a public nuisance are traditional areas of local police power. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *The City of Oaklandv. Williams*, 15 Cal. 2d 542, 549 (1940). Courts have noted that such power "is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life. . . ." *Miller v. Board of Public Works*, 195 Cal. 477, 485 (1925); *accord Consolidated Rock Products Co. v. City of Los Angeles,* 57 Cal. 2d 515, 521-22 (1962). In this case, the proliferation of harmful, unregulated synthetic drugs in San Diego, and the absence of effective state laws, compel the City to exercise its police power for the protection and welfare of its residents.

C. Home Rule Doctrine

In addition to granting police power to cities, the California Constitution empowers charter cities to control their own municipal affairs subject to the limitations of their charters and state law on matters of statewide concern. Cal. Const. art. XI, § 5(a); *Johnson v. Bradley*, 4 Cal. 4th 389, 398 (1992). San Diego is a charter city. A law of a charter city is only preempted by state law if it conflicts with state law on a matterof statewide concern. *Id.*

In this instance, there does not appear to be a conflict between the proposed ordinance and state law. As discussed above, the prohibitions in the proposed ordinance do not duplicate or conflict with any provision of state law. However, presuming a conflict exists, it is reasonable to conclude that the proposed ordinance would not be preempted by state law.

"When there is a true conflict between a charter city measure and a state statute, the next question is whether the subject of the conflicting laws is one of statewide concern." *City of Watsonville v. State Dept. of Health Services,* 133 Cal. App. 4th 875, 886 (2005). 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 400; *Isaac v. City of Los Angeles,* 66 Cal. App. 4th 586, 599 (1998). The doctrine of preemption does not apply unless: (1) the subject matter has been so fully and completelycovered by state law as to clearly indicate that it has become exclusively a matterof 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 the 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*, 188 Cal. App. 3d 952, 961 (1987); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484-85 (1984).

Although the state has enacted a varietyof laws prohibiting enumerated drugs and defining penalties for violations of those prohibitions, it has not so fullyand completely regulated synthetic drugs in a manner indicating that the issue is exclusively of statewide concern, or eliminating the need for local regulation of new types of synthetic drugs. The absence of comprehensive state regulation of synthetic drugs, and the proliferation of such drugs, leaves the City to find solutions to the local impacts of such drugs. The state has not passed any new laws giving the City additional enforcement options to combat the serious health and public safety issues caused by unregulated synthetic drugs.

The City's proposed ordinance merely supplements state law. An ordinance prohibiting the manufacture, sale, distribution, and possession in San Diego of drugs unregulated by the state in no way conflicts with or frustrates state laws prohibiting other types of drugs. The ordinance is designed to protect the citizens of San Diego, and would have minimal effect on transient citizens of the state outweighing the benefits to and protections for the residents of San Diego.

CONCLUSION

If the proposed ordinance is adopted and challenged on preemption grounds, a reviewing court would be unlikely to find that the proposed ordinance is preempted by federal law. Federal law expressly disclaims preemption and the proposed ordinance in no way conflicts with federal law. There is risk a court may find state law preemption based on the *O'Connell* case holding that the UCSA occupies the field of drug prohibitions and penalties. However, the state's failure to enact updated, comprehensive synthetic drugs laws, and the serious local impacts of synthetic drugs, provide the City with a solid and reasonable argument against state law preemption and in support of using its police powers to protect the health, safety, and welfare of the residents of San Diego.

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