

MEMORANDUM OF LAW

DATE: December 10, 1986

TO: City Manager
FROM: City Attorney
SUBJECT: Proposed Ordinance to Confiscate Property
Incident to Drug Arrests

By means of a recent memorandum, your office asked whether the City could enact an ordinance allowing the police to confiscate personal property of seller and buyer in a drug arrest. We have researched this question and have concluded that such an ordinance would be preempted by existing state and federal law.

DISCUSSION

1. STATE LAW PREEMPTION

Article XI, section 7, of the California Constitution states 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." Thus, although The City of San Diego may enact drug abuse control regulations, such regulations would be invalid insofar as they are in conflict with state laws.

The California Supreme Court has enumerated a test for determining whether a local law is in conflict with general laws. In *Lancaster v. Municipal Court*, 6 Cal.3d 805, 807-808 (1972), the court held that "(c)onflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (Citations omitted; emphasis added.)

California law concerning forfeiture of assets arising from controlled substance violations is principally contained in Division 10, Chapter 8 of the California Health and Safety Code. Section 11470 provides for forfeiture of, inter alia: controlled substances, materials and equipment used to make or distribute controlled substances, items used as containers for controlled

substances, certain interests in boats, airplanes or vehicles used for possession for sale or sale of specified minimum amounts of controlled substances, and money or other things of value used in exchange for controlled substances or to facilitate violation of narcotics laws. Section 11488 permits a peace officer making an arrest for various violations of state laws prohibiting transportation, sale, or possession for sale of controlled substances to seize assets subject to forfeiture. Section 11488.1 specifically permits cities and counties to initiate

forfeiture proceedings with respect to assets seized by their peace officers.

The California forfeiture laws only permit seizure when the controlled substances involve specific minimum amounts: 14.25 grams of heroin, 10 pounds of marijuana, and 28.5 grams of most other controlled substances. These amounts are seldom encountered in the "street" environment, where a cocaine sale, for example, usually involves approximately .25 gram.

Of note in this area is AB 4145, signed on September 23, 1986. This bill, effective January 1, 1987 provides for streamlined procedures for forfeiture of assets seized incident to drug arrests.

2. FEDERAL PREEMPTION

The rule of federal preemption is based on the Commerce Clause of the Constitution, and was first stated in *Cooley v. Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851). "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." (Id. at 319, 13 L. Ed. at 1005); See also *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). Congress has enacted sweeping legislation with respect to forfeiture of drug related assets. The Comprehensive Crime Control Act of 1984 (Public Law 98-473) finalized an extensive mechanism for combatting drug trafficking by stripping offenders of their economic power. The Act provides for the use of criminal or civil forfeiture of assets in all drug felony cases. (S. Rep. No. 225, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. and Ad. News, 3182, 3376.) As a result of the Act, section 881 of Title 21 United States Code provides for forfeiture to the United States of controlled substances, raw materials and equipment used in any step of manufacture or distribution of controlled substances or containers used for controlled substances. In addition, the law provides for forfeiture of conveyances, including aircraft, vehicles or

vessels used to transport controlled substances, money or other things of value used as exchange or traceable to an exchange of controlled substances and real property used in the violation of drug laws.

The federal forfeiture statutes differ from the state statute in that there is no minimum quantity required for a federal seizure. In a case originating in San Diego involving a minute amount of marijuana, the Ninth Circuit affirmed the forfeiture of a Porsche 911S saying:

(Petitioner) does not dispute there was a

statutory violation when the police found marijuana in the trunk of her auto. Instead, she contends it is unconscionable to require forfeiture where a vehicle contains only .226 grams of marijuana. She further contends that the purpose of the statutes is to punish drug traffickers and Congress did not intend to sanction forfeitures in this type of case.

The courts have uniformly held that a vehicle is subject to forfeiture no matter how small the quantity of contraband found. E.g. *United States v. One 1957 Oldsmobile*, 256 F.2d 931, 933 (5th Cir. 1958); *United States v. One 1971 Porsche Coupe Auto*, 364 F.Supp. 745, 748-749 (E.D. Pa. 1973). Although the legislative history suggests Congress was concerned with drug trafficking, this does not mean that other conduct was not intended to fall within the statute. *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 12 (1st Cir. 1977). In any event, there is no need to refer to the legislative history of the forfeiture statutes because the statutory language is unambiguous. *Id.* Consequently, (petitioner's) vehicle was subject to forfeiture despite the small quantity of marijuana found in the trunk. *United States v. One 1976 Porsche 911S, etc.* 670 F.2d 810, 812 (9th Cir. 1979).

A recent case clearly establishes federal preemption in this area. In *United States v. \$5,644,540.00, etc. No. 85-1976*, September 16, 1986 (to be reported at 799 F.2d 1357 (9th Cir. 1986)), a rental car employee discovered millions in currency and

gold plus a quantity of cocaine in the trunk of one of their vehicles left in a San Francisco Airport parking lot. The federal government filed a forfeiture claim which was opposed by various private parties and the State of California. California's claims were that (1) the property was unclaimed and was subject to the escheat provisions of Civil Procedure section 1500 et seq., which were not preempted by federal law and (2) the property was subject to state taxes. The court denied all competing claims holding that all right and title to the property vested in the federal government at the time of the illegal transaction.

While it might appear that a federal-state preemption issue

exists, the federal law in this area does not preempt the existing state law. The assets forfeiture program involved is not a regulatory scheme but a sanction. The forfeiture sanctions provided under both federal and state law are optional, not mandatory. The preemption issue might arise if the federal and state governments both chose to exercise the option of utilizing their respective forfeiture provisions against the same asset, but since the choice is made by the law enforcement officer making the seizure, no conflict exists.

It is well recognized that federal statutes made pursuant to the constitution are controlling over conflicting state statutes. *Judson v. Herrington*, 71 Cal.App.2d 565. But under the dual sovereign theory, the state is a separate sovereign and dominant in its own sphere (*Redding v. City of Los Angeles*, 81 Cal.App.2d 888 (1947)), its power diminished only to the extent the constitution grants power to the federal government. *U.S. v. California*, 297 U.S. 175 (1935). Since the power to utilize forfeiture as a means of crime prevention is not a power exclusively granted to Congress, it is a legitimate exercise of the state police power.

Accordingly, in response to the desires expressed in your memorandum, there is no present legal impediment to seizure of vehicles of persons involved in drug transactions, regardless of amounts, provided the seizures are done in the name of the United States. This requires only that the formal seizure documents be executed by one of our officers who is also sworn as a United States officer. At present, approximately 35 San Diego Police Department members are so sworn.

Insofar as a municipal forfeiture ordinance is concerned, there is nothing left to serve as an underlying violation. The laws controlling substance abuse are all state or federal laws, so a San Diego Police officer making a drug-related arrest must

charge a state or federal violation. Accordingly, he must look to the state or federal law which provides for seizure. For this reason, any municipal ordinance providing for drug-related asset seizure would be preempted by state and federal law.

SUMMARY

Regulation of controlled substances, including seizure and forfeiture of involved assets, is an area completely occupied by state and federal law. Any local ordinance attempting to accomplish similar objectives would be invalid as preempted.

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By

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cc Chief of Police

Captain Tyler, SDPD