MEMORANDUM OF LAW

DATE: December 29, 1989

TO: Norm Stamper, Assistant Chief of Police,
San Diego Police Department

FROM: City Attorney

SUBJECT: Vehicle Impound Cost Recovery Proposal

The statutory scheme relating to a proposed program for recovery of the San Diego Police Department's administrative costs incurred in the process of impounding vehicles was evaluated in a memorandum of law dated August 31, 1989 (Attachment A). You requested reconsideration of that program proposal with a view toward finding some legal support. A possible legal basis for the proposed program has been identified and is discussed below.

San Diego is a charter city with the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in its charter." Charter of the City of San Diego, section 2; California Constitution, article XI, section 5. The power is not absolute, and:

> As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine).

Bishop v. City of San Diego, 1 Cal.3d 56, 61-62 (1969).

Under the preemption doctrine, "local legislation in conflict with general law is void." Lancaster v. Municipal Court, 6 Cal.3d 805, 806 (1972). The California Supreme Court, in People ex rel. Deukmejian v. County of Mendocino, 36 Cal.3d 476 (1984), provides an analysis of how to determine when local legislation is "in conflict" with general law. The Court states:

> Conflicts exist if the ordinance duplicates (citations omitted), contradicts (citations omitted), or enters an area fully occupied by general law, either expressly or by legislative implication (citations omitted). If the subject matter or field of the legislation has been fully occupied by the

> state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair.' (Lancaster v. Municipal Court (1972) 6 Cal.3d 805, 806-808 100 Cal.Rptr. 609, 494 P.2d 681.)

Id. at 484-485.

The original source of all authority to remove (impound or store) vehicles from any highway, public property or private property can be found in the general law and is contained in the California Vehicle Code, sections 22650-22669 (all section references hereinafter will be to the Vehicle Code unless indicated otherwise). Section 22650 states in pertinent part, "It is unlawful for any peace officer or any unauthorized person to remove any unattended vehicle from a highway to a garage or to any other place, except as provided in this code." (emphasis added)

A strict reading of section 22650 leaves no room for complimentary or supplementary local regulations, including the imposition of a fee for recovery of an agency's administrative costs incurred by removing or impounding a vehicle. Section 22650 is underscored by the language of section 21, which states:

> Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein. (emphasis added)

Beginning with the more general, by the plain language of section 21, the Legislature has reserved the right to occupy a major portion of the field as to those matters directly addressed in the Vehicle Code, abdicating authority only where expressly indicated.

Narrowing to the more specific, the intent of section 21 is carried over to the code provisions pertaining to the removal or impounding of vehicles, as is obvious by the plain language of section 22650. In both the general and specific contexts, local legislative action must be expressly authorized by the Vehicle Code.

If the proposed cost recovery program is to survive scrutiny under preemption analysis, the local legislative action cannot duplicate, contradict, or enter an area fully occupied by state

law.

Duplication is not an issue with the instant proposal. Currently, there are no provisions in the state law which would be duplicated in a local resolution enabling the City to recover the administrative costs incurred by the Police Department's impounding of vehicles. Clearly if such provisions already existed in the state law, there would be no need for a local resolution.

Similarly, contradiction is not an issue with the instant proposal. There is no express language in the vehicle code which prohibits the assessment of a fee to recover the administrative costs incurred by the Police Department's impounding of vehicles.

If preemption can be found in this case, it would be based upon an attempt by the City of San Diego to impose additional requirements in a field intended to be fully occupied by state law. Pervasive regulation in a particular field is a clear indication of legislative intent to fully occupy the field. Bell v. City of Mountain View, 66 Cal.App.3d 332, 338 (1977).

Looking to the sections of the Vehicle Code pertaining to the removal, impounding or storing of vehicles, it is difficult to identify any significant area not touched by the state statutory scheme. In section 22651, subsections (a) through (q), peace officers are authorized (not mandated) to remove vehicles under the following circumstances: When a vehicle is left unattended on a bridge, viaduct, causeway, or in any tube or tunnel (22651(a)); when a vehicle is left on a highway in a position so as to obstruct the normal movement of traffic (22651(b)); when a vehicle is found that has been reported stolen or embezzled (22651(c)); when a vehicle is illegally parked, blocking a driveway (22651(d)); when a vehicle is blocking a fire hydrant (22651(e)); when a vehicle is left upon the right-of-way of a freeway for more than four hours (22651(f)); when the driver of a vehicle is incapacitated by illness or injury (22651(g)); when the driver of a vehicle is arrested and immediately brought

before a magistrate (22651(h)); when a vehicle is found on a highway or on public property and it has been issued five or more parking citations which have not been responded to (22651(i)); when a vehicle is found illegally parked and has no license plates or other evidence of registration displayed (22651(j)); when a vehicle is in violation of a local 72 hour ordinance (22651(k)); when a vehicle is parked in violation of posted notices pertaining to street cleaning or street construction (22651(l)); when a vehicle is parked in violation of any other properly posted local notices (22651(m) and (n)); when a vehicle is parked upon a highway, any public lands, or an off-street

parking facility and the registration expiration has exceeded one year (22651(o)); when no person in the vehicle is a validly licensed driver (22651(p)); and when a vehicle has been parked for over 24 hours in violation of signs posted within the boundaries of a common interest development (22651(q)).

Sections 22651.3, 22651.5, 22652, 22653, 22654, 22655, 22655.3, 22655.5, 22656, 22658 and 22659 provide additional authority for removal of a vehicle by a peace officer, including removal from private property, handicapped persons' parking spaces, state property, and railroad right-of-ways; as well as for circumstances including the inability to disconnect an audible vehicle alarm, impounding for investigations and impounding for evidence.

Furthermore, section 22660 authorizes local legislative action in creating a nuisance abatement program for the abatement of abandoned, wrecked, dismantled or inoperative vehicles from private or public property.

Even where the Vehicle Code authorizes local legislative action, the parameters of the local ordinance which would enable removing, towing or storing a vehicle are dictated by the Code.

As pertaining to the circumstances which will enable a peace officer to remove, impound or store a vehicle, only by tortured reasoning could it be stated that the field is not pervasively regulated by the Vehicle Code. It is reasonably clear that the topic is fully and completely covered by state law.

It is also apparent that the main focus of Vehicle Code sections 22650 through 22669 is to clearly define, statewide, the circumstances under which vehicles can be removed, impounded or stored by peace officers. However, there is no equally compelling indication that the Legislature intended to preempt local legislative action regulating the conditions under which properly impounded vehicles are to be released, and specifically,

whether municipalities may impose fees to recover the administrative costs of removing, impounding or storing the vehicles, prior to releasing the vehicle to its owner.

Under the current statutory scheme, only five of the enabling sections authorizing vehicle impounds address conditions which must be met before the vehicle can be released. Of those five sections, only 22651(i) specifically addresses payment of the "cost of towing and storing the vehicle," as a condition of releasing the vehicle. The remaining sections list conditions such as producing identification, producing a valid driver's license and paying the bail amount on parking violations, prior to the release of the vehicle.

Sections 22655.3 and 22655.5 contain provisions whereby the

owner must pay all "towing and storage" costs; however, no guidance is given as to whether administrative costs are included here. Coverage in the general law pertaining to the release of impounded vehicles is vague and sporadic at best and, but for the caveat of section 21, seems to invite local legislative action.

Arguably, the provision of section 21 prohibiting local authorities from "enacting or enforcing any ordinance on the matters covered by the code, unless expressly authorized," can be reconciled with the proposed cost recovery program. Because the code does not specifically address payment of a cost recovery fee as a condition of releasing a vehicle, section 21 is not violated by such a local resolution. For purposes of state preemption, there is support for a subtle legal distinction between circumstances allowing impound and conditions for release of impound.

In Holman v. Viko, 161 Cal.App.2d 87 (1958), and Sehgal v. Knight, 253 Cal.App.2d 170 (1967), local ordinances were challenged on the basis that they were preempted by state law, as it appeared in the Vehicle Code.

In Viko, the court compared then existing section 562 with Los Angeles Municipal Code section 80.39. The state law provided, "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." The local ordinance provided, "No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb, or by the shortest route to the opposite curb except in a marked crosswalk." The court found preemption notwithstanding then existing section 459.1, which authorized

enactment of a local ordinance prohibiting pedestrians from crossing the roadway at other than crosswalks, because the state law impliedly approved pedestrian conduct directly prohibited by the local ordinance. Holman v. Viko, at 91.

In Knight, the contested local ordinance prohibited pedestrians crossing the street in business districts unless in crosswalks. Notwithstanding the existence of Vehicle Code section 21954, which regulated pedestrian traffic in crosswalks, the court found no preemption because section 21961 "did not prevent local authorities from adopting ordinances prohibiting pedestrians from crossing roadways at other than crosswalks." Sehgal v. Knight, at 172.

The Knight court reconciled its ruling with Viko as follows:

> The Marysville ordinance differs in significant respects from the Los Angeles ordinance nullified in Holman v. Viko, . . .

> the Marysville ordinance, in contrast, is an outright prohibition against crossing streets outside of crosswalks. The Holman court noted the distinction by observing that the state law "specifically authorized local ordinances wholly prohibiting crossing between intersections by pedestrians," while the Los Angeles ordinance was an attempted regulation of "manner of crossing." (citation omitted)

Id. at 173.

Distinguishing between regulating pedestrian activity by prohibiting "jaywalking" and regulating the "manner of crossing," involves a highly subtle analysis. However, applying the Knight analysis to the instant proposal provides a basis to argue that the state's statutory scheme which pervasively regulates the circumstances permitting vehicle impounds would not preempt local legislative action regulating the release of impounded vehicles, at least to the extent of imposing a fee for the recovery of administrative costs incurred by impounding the vehicle.

On the other hand, should a court determine that regulations pertaining to the release of impounded vehicles are not legally distinct from the statutory provisions authorizing the removal, impound or storage of a vehicle, the state preemption doctrine would pose a legal impediment to the proposed cost recovery program.

Notwithstanding the legal support for the proposed cost recovery program, it should be noted that the assessment of a cost recovery fee is not analogous to the collection of a service fee as discussed in California Government Code section 54990 et seq. and alluded to in California Constitution, Article XIIIB.

In the Government Code and the Constitution, collection of fees in return for a service envisions a direct benefit being conferred upon the specific recipient paying the fee. It could hardly be argued that the inconvenience and deprivation caused by removing, towing or storing a vehicle against the will of the owner is a "service."

Distinguishing the act of removing from the act of releasing the vehicle to create the illusion that releasing the vehicle is a service is untenable because the removal is the act which necessitates release. In this regard, the assessment of the cost recovery fee more closely resembles a penalty or fine rather than a payment for special services received, and raises due process considerations.

The agency employing the officer who requested the removal, towing or storage of a vehicle must recognize that the due

process considerations which apply to the removal of a vehicle would encompass the payment of the cost recovery fee. Section 22852 mandates that "the agency or person directing the storage shall provide the vehicle's registered and legal owners of record, or their agents, with the opportunity for a poststorage hearing to determine the validity of the storage." Providing poststorage hearings is mandatory under state law any time a vehicle is removed (unless removal was pursuant to sections 22655, 22658, 22660 or 22669).

Under section 22852 subsection (e), the Police Department would be responsible for all of the costs incurred for towing and storing a vehicle, including the cost recovery fee, if a poststorage hearing determines that the basis for the initial removal was invalid.

When section 22852 was amended in 1987, the act provided that, "no reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the Legislature finds and declares that there are savings as well as costs in this act which in the aggregate, do not result in additional net costs." Ch. 1059, Stats 1986. To include in the cost recovery fee an assessment for the poststorage hearing would be contrary to the legislative finding that no additional net costs are incurred. Should the legislative finding be contradicted by sufficient documentation, a claim could be made to the Commission on State Mandates for state reimbursement pursuant to the provisions of California Government Code section 17500 et seq.

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By
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Attachment
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