

MEMORANDUM OF LAW

DATE: March 17, 1993

TO: Daro Quiring, Assistant Deputy Director, Buildings
Division, General Services Department

FROM: City Attorney

SUBJECT: City Ordinance Regulating Tobacco Vending Machines

BACKGROUND

Last October, a proposed ordinance banning tobacco vending machines was before the City Council, along with other proposed amendments to the City's smoking regulations. The vending machine ordinance was advanced by a coalition of citizens who are concerned about minors having easy access to tobacco products. This concern was expressed by the group through extensive public comment and supporting documentation presented to the City Council.

The City Council did not take action on the proposed ordinances but instead directed the City Manager to form a task force composed of health and business representatives to develop recommendations pertaining to the regulation of smoking within the City (hereinafter the "Task Force"), including the issue of tobacco vending machines.

QUESTION PRESENTED

In a memorandum directed to this office on behalf of the Task Force, you requested the City Attorney to render an opinion on the preemptive effect of Penal Code section 308 with respect to an ordinance totally banning tobacco vending machines versus an ordinance which bans tobacco vending machines in all areas except bars.

General Law of Preemption

Article XI, section 7 of the State Constitution 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. Local legislation in conflict with the general laws of the state is void." *Cohen v. Board of Supervisors*, 40 Cal. 3d 277, 290 (1985). "Conflict exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Id.*

The Rancho Mirage Case

In 1990, the City of Rancho Mirage adopted an ordinance which banned the distribution of tobacco products through vending machines. The ordinance was challenged in 1991 by the Bravo Vending Company on the grounds that the ordinance was facially invalid because it was constitutionally preempted by Penal Code section 308. Section 308 regulates the distribution and sale of tobacco products to minors.^F

Penal Code section 308 has been a part of our state law since 1872. In its current version, it reads in pertinent part as follows: "(a) Every person, firm or corporation which knowingly sells, gives, or in any way furnishes to another person who is under the age of 18 years any tobacco, cigarette, or cigarette papers, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense."

On December 7, 1992, in a expansive opinion, the Fourth District Court of Appeal held that the Rancho Mirage ordinance was not preempted by Penal Code section 308. *Bravo Vending v. City of Rancho Mirage*, 11 Cal. App. 4th 585 (1992).

The court laid the groundwork for its ruling by stating that in analyzing any preemption issue there are four questions which must be addressed:

- 1) Does the ordinance duplicate state law?
- (2) Does the ordinance contradict any provision of state law?
- (3) Does the ordinance enter into a field of regulation which the state has expressly reserved to itself?
- and (4) Does the ordinance enter into a field of regulation from which the state has implicitly excluded all other regulatory authority?

Bravo Vending v. City of Rancho Mirage, 11 Cal. App. 4th 585, 596 (1992).

If any of the above questions are answered in the affirmative and the subject matter or field of regulation of the ordinance is the same as the state law, the ordinance is preempted. *Id.* at 598.

The court proceeded to compare the Rancho Mirage ordinance

with Penal Code section 308 within the analytical framework set forth above. In short order, the court answered questions (1) and (2) in the negative. If anything, a ban on tobacco vending machines compliments Penal Code section 308, it does not conflict or duplicate the State law. *Id.* at 596-597. However, the court exhausted itself to the point of frustration in addressing question (3), whether the Legislature intended to exclusively regulate the subject matter of Penal Code section 308.

Subsection (e) of Penal Code section 308 reads as follows: "It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section." The problem faced by the court is that the first and second sentences of subsection (e) are contradictory and irreconcilable. Did the Legislature intend to exclusively regulate the subject matter or did they intend to grant local governments the ability to adopt complimentary regulations?

In attempting to answer this question, the court looked behind the bare words of subsection (e) and extensively scrutinized the legislative history of Penal Code 308, including analysis by the Legislative Counsel, the Legislative Counsel's Digest and testimony before the Assembly Ways and Means Committee. Although the analysis is of value, the court ultimately begged the crucial question when they stated that: "While the inconsistency between the two sentences of subdivision (e) of section 308 is puzzling, we decline the opportunity to solve this conundrum, because it is unnecessary to our analysis." *Id.* at 599. The court vented its frustration in a footnote by stating that "Local governments should not have to guess at the scope of the preemptive effect of this section. We encourage the Legislature to revisit this subject and clarify its intent." *Id.* at 598 n.11.

In *Bravo*, the court was able to avoid answering the difficult question. As mentioned above, a state law will only preempt a local ordinance if the Legislature intends to exclusively regulate a particular subject matter and the local regulation touches upon the same subject. The court in *Bravo* ruled that the Rancho Mirage ordinance did not regulate the same subject matter as Penal Code section 308. *Id.* 605. The court defined the subject matter of Penal Code 308 as the "sale or other distribution of cigarettes to a certain class of potential consumers: minors." *Id.* at 602. The express language of the Rancho Mirage's ordinance made no reference at all to minors. Nor did the court have any legislative history before it to suggest that the true purpose of the ordinance was to prevent minors from gaining access to cigarettes.F

It should be noted that the court may have suspected that the true purpose of the Rancho Mirage ordinance was to prevent minors from buying cigarettes and the court hinted by the following statement that if Bravo had built a better case they may have ruled differently. The court stated: "It may be that, upon a more complete showing of the events which led up to the adoption of the Ordinance, the statements made by the city council while the proposal was being debated, or other evidence, a persuasive case could be made for that conclusion that the true purpose of the ordinance was to prevent minors from buying cigarettes. However, the meager record before us fails to do so."

THE TASK FORCE PROPOSALS

The ban on tobacco vending machines is being considered by the Task Force in order to prevent minors from gaining access to cigarettes. This goal is clearly reflected in the legislative record compiled to this point and is therefore identifiable as the underlying purpose of the legislation. As a result, any Task Force proposal which is codified in the San Diego Municipal Code will be viewed by the court as complimenting the subject matter of Penal Code section 308, whether the ordinance creates a total ban on tobacco vending machines or merely a ban everywhere except bars.

Because the proposed ordinance is a regulation of the same subject matter found in Penal Code section 308, if challenged on grounds of preemption, the City cannot defend any resultant ordinance with the same successful argument used by the City of Rancho Mirage.

This is not to say that a San Diego ordinance partially or totally banning tobacco vending machines is indefensible. Absent an amendment to Penal Code section 308 by the Legislature, a lawsuit would simply force the court to resolve the issue left unanswered in the Rancho Mirage case.

CONCLUSION

As recognized by the Bravo court, the poorly drafted legislation created by the Legislature forces the City to "guess" at the preemptive effect of Penal Code section 308. Our "guess," based largely on the tenor of the Bravo opinion, is that an ordinance banning tobacco vending machines would not be invalidated by the Fourth District Court of Appeal. The court sympathizes with the City's dilemma and would be disinclined to resolve the conundrum in favor of the Legislature when the Legislature itself created the ambiguity in Penal Code section 308 by failing to clearly express whether they intended to fully and exclusively regulate the subject matter of distribution of tobacco products to minors.

Please contact me if you have any questions.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

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