SPECIAL MEETING SYNOPSIS

DRUG PARAPHERNALIA

Meeting Date May 28, 1981 ;3:00 **PM**

Location: City Hall, 915 I Street, 2nd Floor, Council Chambers

VOTING RECORD LEGEND:

VOTING RECORD REFLECTS **FINAL VOTE** OF COUNCIL.

MOV:	MOVED	ABST:	ABSTAIN
SEC:	SECOND	ABS:	ABSENT

M — MAYOR ISENBERG

D1 — ROBERTS	D5 — THOMPSON
D2 — FISHER	D6 — CONNELLY
D3 — POPE	D7 — HOEBER
D4 — RUDIN	D8 — ROBIE

RECOMMENDATIONS OF STAFF/AGENCY	COUNCIL ACTION	VOTING RECORD
1. Ord. adding Chapter 70 to Sacto. City Code re to the Display and Distribution of Drug Paraphernalia	OR 81-040	MOV:D5 SEC:D8 AYES: D6,D2,D3, D8,D4,D5, M NOES: D7 ABS: D1

CITY OF SACRAMENTO

JAMES P. JACKSON
CITY ATTORNEY

THEODORE H. KOBEY, JR.
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SACRAMENTO, CALIF. 95814
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May 21, 1981

Honorable City Council
City of Sacramento
Sacramento, California

In re: DRUG PARAPHERNALIA ORDINANCE

Dear Council Members:

A special meeting of the City Council has been called for Thursday, May 28, 1981, at 3:00 P.M. in the City Council Chambers, 915 I Street, Sacramento. The purpose of this meeting is to determine whether an ordinance totally banning the display or distribution of drug paraphernalia should be adopted.

For your consideration, we attach the following material:

1. Legal opinion prepared by Deputy City Attorney William P. Carnazzo discussing whether the State has preempted local governments in the area of "total ban" drug paraphernalia ordinances.

2. Report on the status of litigation involving the County of Sacramento on its drug paraphernalia ordinance.

3. Report on the status of legislation pending before the State Legislature on drug paraphernalia.

4. Copy of an opinion issued by the Superior Court in Santa Barbara County relating to State preemption of the County of Santa Barbara drug paraphernalia ordinance.

5. A copy of a "total ban" drug paraphernalia ordinance prepared in a form for adoption by the Sacramento City Council.

Very truly yours,

James P. Jackson

JAMES P. JACKSON
City Attorney

JPJ:kn

Cc: Interested Parties

Attachments

APPROVED
BY THE CITY COUNCIL
MAY 28 1981
OFFICE OF THE
CITY CLERK

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May 21, 1981

Law & Legislation Committee
City Hall
Sacramento, California 95814

RE: DRUG PARAPHERNALIA BAN

Honorable Members in Session:

QUESTION PRESENTED

The City Attorney has been asked to render an opinion as to whether an ordinance which totally bans the sale or display of paraphernalia, as defined, is preempted by State law. This opinion is therefore limited to the preemption question. There are questions of constitutional law inherent in such an ordinance; those questions are not addressed here. However, the most recent federal cases dealing with carefully drawn ordinances have upheld them against constitutional challenges.

ANSWER

There are cogent and persuasive arguments which exist on either side of the preemption issue, and either position is supportable under existing case law. We have tried to set forth all of the arguments pro and con in this opinion. However, it is our conclusion that the more persuasive authority at present indicates that if faced with a "total ban" ordinance, an appellate court would likely find such an ordinance to be preempted by State law.

BACKGROUND INFORMATION

The County of Sacramento has adopted a "total ban" ordinance which proscribes all sale or display of drug paraphernalia, and which provides for license revocation and criminal penalties. The City of Sacramento has adopted an ordinance which proscribes the sale or display of drug paraphernalia to minors, and which also provides for license revocation and criminal penalties.

State legislation dealing with drug paraphernalia is found in the Uniform Controlled Substances Act (Health and Safety Code Section 11350, et. seq.). Under the latter act, the private possession, use and sale of "controlled substances" is extensively regulated, with varying penalties applied depending upon the nature of the controlled substance, the nature of the prohibited act, and the extent to which minors are involved.

With the exception of a few sections not pertinent to this inquiry, 1/ the only reference to "paraphernalia" in the Uniform Controlled Substance Act prior to January 1, 1981 is found at Health and Safety Code Section 11364, which reads as follows:

> §11364. Unlawful possession of instrument, paraphernalia, etc., for injection or smoking substance
>
> It is unlawful to possess an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking (1) a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055 or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V. (Emphasis added.)

Prior to January 1, 1976, marijuana was included within the purview of Section 11364; by virtue of Chapter 248, Statutes of 1975, marijuana was deleted from the list of controlled substances, and "decriminalized" in other respects. The net effect of this amendment was to remove paraphernalia designed for use with marijuana from the "unlawful possession" provisions of Section 11364.

On January 1, 1981, Senator Presley's bill, SB 1660 became effective under Chapter 505, Statutes of 1980. That bill is embodied in Health and Safety Code Section 11364.5. This new section prohibits sale or display of paraphernalia, as defined, to minors by requiring separate enclosed rooms; prohibits minors from entering any enclosure where paraphernalia is sold or displayed; and defines the term "paraphernalia". However, there are no criminal sanctions, the only penalty provision being legislative authorization for a local government to revoke a violator's business "license, permit or other entitlement." Health and Safety Code Section 11364.5(g).

The chaptered version of the Presley bill also provides as follows:

> Nothing in this act or any other provision of law shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county or a city and county regulating the sale or display to persons under the age of 18 years of items described in Section 11364.5 of the Health and Safety Code or in Section 306 of the Penal Code. (Emphasis added)

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1. See Health & Safety Code Section 11353, stating that persons who provide prohibited items to minors are subject to special penalties; and Sections 11470 and 11473 dealing with forfeiture of controlled substance containers and paraphernalia.

It is against the above statutory background that the "total ban" type of ordinance must be viewed in order to ascertain whether preemption by State law has occurred.

ANALYSIS

The balance of this opinion will be devoted to defining the term "preemption"; outlining the general principles of the preemption principle; presenting the arguments advanced on both sides of the issue; and rendering a conclusion as to whether preemption is probable.

A. The Meaning of Preemption

The preemption issue may be posed as follows: may local government legislate in a field where there is also State legislation? Or, put another way, is the subject of the local legislation one of such broad, statewide concern that local legislation is precluded?

As applied to drug paraphernalia, the issue is whether, given the current State legislative scheme, the legislature has evidenced an intent to preclude all local legislation other than that which is specifically authorized.

B. General Principles Governing Application of the Preemption Principle

Prior to presenting the arguments on both sides of the preemption issue, the root principles from which both positions emanate must be examined. The decisional law has resulted in three reasonably predictable statements:

1. As to "strictly local" matters, the "home rule" provisions of the California Constitution, Article XI, Section 5, allow local government to legislate directly in conflict with State law.

2. As to matters of "statewide concern", local government may not legislate in the area at all.

3. Where both State and local concerns are involved, the case must be decided on its individual facts. It is in this latter category that virtually all of the myriad preemption decisions fall, with seemingly inconsistent, ambiguous and often confusing results.

In 1962, the California Supreme Court decided In re Lane,2 / where it was held that criminal aspects of sexual activity were fully covered in an extensive state statutory scheme. The local ordinance in issue created a crime of "resorting" between unmarried adults, an act already dealt with under the criminal law. 3/

In 1964, the Supreme Court decided In re Hubbard, 4/ holding that a municipal ordinance prohibiting the playing of "games of chance" was not preempted under the state gambling statutes, which proscribed enumerated games. The court held that local regulation in an area occupied by state law is permissible to "supplement the general by additional reasonable requirement," or where the local regulation is "in aid and furtherance" of state law. 5/

In 1969, several important preemption decisions were handed down by our Supreme Court. In Bishop v. City of San Jose, 6/ the court made it clear that local government, under the Hubbard case, has full power to legislate on matters which are of a local nature, even though there may also be some statewide aspects of the issue, stating that:

> "(T)he fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern: stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern. 7/

Also in 1969, Galvan v. Superior Court 8/ was decided. The ordinance in issue was San Francisco's gun registration procedure.

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2. (1962) 58 Cal.2d 99.

3. In re Lane, supra, was the first case to clearly articulate the "preemption by implication" rules, under which no express legislative intent to preempt need be found.

4. (1964) 62 Cal.2d 119.
5. 62 Cal.2d at p. 124.
6. (1969) 1 Cal. 3d 56.
7. 1 Cal. 3d at p. 63.
8. (1969) 70 Cal. 3d 851.

It was upheld despite an extremely comprehensive state law system of gun control embodied in the Penal Code, Fish & Game Code, Health & Safety Code, Public Resources Code, and Vehicle Code. The court held that the number of state statutes is not the controlling fact, stating:

> "To approach the issue of preemption as a quantitative problem provides no guidance in determining whether the Legislature intends that local units shall not legislate concerning a particular subject, and further confounds a meaningful solution to preemption problems by offering a superficially attractive rule of preemption that requires only a statutory nosecount."9/

These cases have established a three-pronged test to determine whether a subject has been preempted by the Legislature.10/ There is no preemption:

> ...unless: (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 municipality.11/

The above general principles, although relatively simple in their articulation, are difficult in their application. As pointed

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9. 70 Cal.2d at p. 861.

10. Necessarily, these 3 "tests" are formulated to decide those cases falling under the third category specified above.

11. Galvan v. Superior Court, supra, at pp. 659-660; In re Hubbard, supra, at p. 128.

out above, preemption issues have been resolved on a case-by-case basis, resulting often in conflicting and difficult to rationalize decisions. In Gluck v. County of Los Angeles,12/ the court emphasized the confusing array of cases, but pointed out that in applying the three pronged test set out above, the courts seem to look to the following facts:

> (i) whether the purpose of the local regulation is distinct from the apparent purpose of the State regulatory scheme; (ii) whether the local regulation is aimed at a peculiarly local problem, and whether the local viable solutions thereto vary from community to community; and, (iii) whether the regulation would impose an unreasonable burden on persons who migrate from community to community.

These general principles form the basis of both positions on the preemption issue involved in "total ban" ordinances. The respective arguments which emanate from these basic principles will now be set forth.

C. Arguments of Preemption Proponents

Those who conclude that local regulation precluding sale or display is preempted by State law rely essentially upon the same authority as the proponents of the opposite viewpoint.

1. In Carl v. City of Los Angeles, 13/ the court invalidated a city ordinance which prohibited the display of "harmful matter" to minors, upon the ground that it presented a direct conflict with State law on obscenity. In the case of total bans on the sale or display of paraphernalia, the undeniable objective of the ordinance is to limit the usage of controlled substances, which usage is the subject of an extremely thorough, extensive state law: The Uniform Controlled Substances Act. Therefore, as in Carl v. City of Los Angeles, there is a clear and direct conflict between state law and such an ordinance, even though the ordinance appears to operate in an area (distribution and display) not covered by State law. The result in Carl v. City of Los Angeles was that despite the facial dissimilarity between the ordinance and State law, the ordinance has the effect of limiting viewing of obscenity; in fact, that was its stated purpose. Since

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12. (1979) 93 Cal.App.3d 121; see also Carl v. City of Los Angeles (1976) 61 Cal.App.3d 265.

13. (1976) 61 Cal.App.3d 265.

obscenity regulation is covered by state law, the ordinance is preempted. In the case of a ban on sale or display of paraphernalia, the net effect and the stated purpose is to limit controlled substance use. "Use" is clearly a subject totally covered by the Controlled Substance Act. The result is that such an ordinance is preempted. References to cases such as Gluck v. County of Los Angeles 14 / are inapposite. In that case, another newsrack ordinance was challenged upon the ground that its purpose was regulation of obscenity. However, the court held that the demonstrated purpose of the ordinance was traffic safety and control on and around public sidewalks--a purpose entirely independent of obscenity control. In the case of a total ban paraphernalia ordinance, there is no demonstrable independent purpose for the ordinance aside from limiting the use of controlled substances. Thus, the Gluck decision taken together with the Carl decision compel the conclusion that such an ordinance is preempted.

2. Furthermore, such an ordinance necessarily precludes sale or display of paraphernalia designed for the usage of marijuana. In 1975, marijuana was removed from the list of controlled substances; thus, possession of devices for its use were removed from the purview of §11364. A total ban ordinance necessarily precludes sale and display of paraphernalia designed for use with marijuana. To the extent that such devices are included in a total ban ordinance, the latter is in direct conflict with state law; i.e., the ordinance is essentially a ban on the use of substances freed from the restrictions of the Controlled Substances Act. This conclusion formed the basis for the decision of the Superior Court of Santa Barbara County holding that Santa Barbara County's total ban ordinance was preempted by state law. This decision will be discussed at a later point in this opinion.

3. In the recent decision in Music Plus Four v. Robert Barnet 14a/ involving the City of Westminister drug paraphernalia ordinance which prohibited sale or display of paraphernalia to minors (similar to the City's present ordinance), the plaintiff, which was a retail record store corporation which also sold the usual forms of paraphernalia, contended that the ordinance was in conflict with the California Uniform Controlled Substances Act and therefore preempted. At the time of this decision, the 1981 Amendment (the Presley Bill, SB 1660) was not effective, although the court makes reference to it in the opinion.

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14. (1979) 93 Cal.App. 3d 121.

14a. (1980) 114 Cal.App. 3d 113.

The Music Plus Four decision clearly turned upon the fact that the ordinance dealt only with sale and display to minors. The court specifically refers to the limited application of the ordinance to minors twelve separate times in its relatively short discussion of the preemption issue. Thus, the court stated in one of those references that:

> Also implicit in the ordinance is the recognition of the special vulnerability of youth to exploitation by those who help make their living by supplying drug-related devices to the public. 14b/

At the end of the preemption discussion, the court in the Music Plus Four case gave a clear indication that it was limiting its holding to the minors-only form of ordinance. Thus, the court stated in comparing the case to the Gluck holding:

> Similarly, in the case at bench the ordinance is a time, place and manner regulation. It does not prohibit the display or sale of any device; it simply regulates the display of certain devices and drug paraphernalia to minors by requiring that they not be so displayed unless the minor is accompanied by a parent or guardian. Surely this is within a realm of local government where conditions peculiar to the locality may differ from place to place. The local customs, extent of parental control and the degree of sophistication of minors may be quite different in Westminister than they are in San Francisco or Los Angeles. Moreover, a minor who enters a store simply to purchase a record or tape is in a sense a "captive" viewer of drug paraphernalia. 15 / (Emphasis added)

Those local considerations, present as they are in cases involving minors, evaporate when it comes to adults. Thus, there is no significant "locale" difference between geographically-disparate adults so as to establish a condition "peculiar to the locality." There being no peculiar local interest involved, the matter falls directly into the category of a statewide concern fully covered by the Uniform Controlled Substance Act.

14b. Id at p. 122.

15. Id. at p. 125.

4. With respect to the above quoted non-preemption language of SB 1660, 16/ the preemption proponents argue that the express authority conferred by the legislature on cities and counties to regulate sale and display of paraphernalia to minors creates a strong inference of legislative intent to deny to local government authority to regulate sale and display to adults. The reason that the non-preemption language is limited to minors is because the proponents of the bill did not have the votes to get the bill passed with a general non-preemption clause. Thus, the grant of limited power to regulate which authorized local government to enter a previously-closed area, does not imply a legislative purpose to allow further, comprehensive regulation of that area.

5. In connection with SB 1660, Senator Presley on June 20, 1980, placed into the Senate Daily Journal a letter which stated that:

> It is not the intent of this bill to prohibit a City or County or a City and County from regulating the sale or display of paraphernalia to persons over the age of 18 years.

With respect to Senator Presley's letter, the preemption proponents argue that it is a self-serving measure designed solely to create the illusion that the bill inferentially includes a different non-preemption provision. The letter is curious in light of the fact that the bill itself contains no such provision when it could easily have done so had not legislative support been lacking for such a clause.

6. On June 24, 1980, Legislative Counsel addressed an opinion to Senator Presley, wherein it is concluded, based upon certain of the authorities cited above, that a ban on sale or display of paraphernalia to adults would not be preempted:

> To conclude that SB 1660, by implication preempts local regulation of the sale or display of drug paraphernalia to persons over 18 years of age is not a reasonable construction because it goes beyond the scope of the bill and does not conform to the apparent purpose and intention of the Legislature.

With regard to this Legislative Counsel's opinion, preemption proponents contend that it is erroneous in its analysis of general preemption law, and that insofar as it deals with SB 1660 (which contains no criminal penalties) it is irrelevant. The opinion

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16. The operative provisions of SB 1660 are now embodied in Health & Safety Code §11364.5, quoted above.

attempts to apply the Hubbard tripartite test, 17/ but does so without reference to certain facts or any case law authorities. The following analysis discusses the application of that test and demonstrates the errors inherent in the Legislative Counsel's Opinion.

(1) The first "prong" of the test requires analysis of whether the subject matter of the sale and display of paraphernalia has become so covered by state law as to clearly indicate exclusivity of state concern. Legislative Counsel, without authority, citation or analysis of any kind, simply concludes "no" on this issue. Reference must, however, be made to the fact that (a) the real purpose of a total ban ordinance is to regulate use, a subject clearly covered by state law; (b) there is no special local concern regarding adults, whose sophistication does not vary significantly from locale to locale; and (c) the extremely extensive nature of coverage of the Uniform Controlled Substance Act. 18 /

(2) The second part of the three-part test requires analysis of the issue of whether a subject, though only partially covered by state law, is couched in such terms that existing state law clearly indicates a paramount state concern which will not tolerate local action. Legislative Counsel merely concludes that SB 1660 does not itself establish any such indication, thus missing the issue entirely. Even if the subject can be said to be only partially covered by state law, still there are facts which clearly indicate a paramount state concern regarding adults. Thus, the considerations present with regard to minors, so well expressed in the Music Plus Four case, are totally absent in the case of adults.

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17. This is the three pronged analysis established In re Hubbard, and other cases cited in part B above.

18. This Act consists of thirteen chapters setting forth a detailed regulatory scheme. Chapter two of the Act, sections 11053-11058, contains detailed standards and schedules; Chapter three, sections 11100-11136, regulates and controls the use of certain controlled substances; Chapter four, sections 11150-11208, regulate prescription drugs; Chapter five, sections 11210-11256, delimits the lawful and unlawful use of controlled substances; Chapter six, sections 11350-11384, provides for offenses and penalties; Chapter seven, sections 11450-11454, creates a Bureau of Narcotics Enforcement; Chapter eight, sections 11470-11486, provides for seizure and disposition of contraband; Chapter nine, sections 11500-11508, makes provision for the collection and disposition of fines; Chapter ten, sections 11550-11595, provides for the supervision of users of controlled substances; chapters eleven and twelve, sections 11600-11644 create educational programs and a state office of Narcotics and Drug Abuse; and Chapters one and thirteen, sections 11000-11-32 and 11650-11651, contain other miscellaneous provisions.

Further, the legislature specifically excluded marijuana from criminal statutes in 1975, indicating an intent to prohibit regulation of that subject except by the legislature itself. Finally, SB 1660 contains no criminal sanctions, and had the non-preemption clause been intended to allow regulation in the area of adults, it would specifically have so stated.

(3) The third test deals with the deleterious effect of local ordinances on the transient citizenry of the state. Legislative Counsel correctly concludes that the only persons affected by paraphernalia ordinances are local merchants, where the only penalty is loss of business license. But, where there are criminal or other sanctions involved the foundation for that conclusion falls apart.

7. The premption proponents' position is strengthened significantly by a recent Santa Barbara County Superior Court ruling. In that case, the County enacted a total ban type of paraphernalia ordinance which the plaintiff challenged as being preempted by state law. The court agreed with the plaintiff, stating:

> Although the court is in complete sympathy with the goals and aims of the County of Santa Barbara in enacting this Ordinance, much to my regret the Ordinance must fall as it does, in fact, conflict both explicitly and implicitly with existing law.

The court reviewed the Music Plus Four case, supra, and held that it in fact supported the conclusion that the Santa Barbara Ordinance was preempted. The Santa Barbara Court pointed out that in Music Plus Four the appellate court upheld the ordinance expressly because possession or sale by the business owner was not rendered illegal by the ordinance. All that was prohibited was the display of paraphernalia to minors. The court went on to say that the only inference that can be drawn from the Music Plus Four holding is that if possession is prohibited by a local ordinance, it is preempted and thus invalid. In the case of Santa Barbara County's ordinance, the court stated that "delivery" is included within the term "possession", and thus there is a direct conflict with state law.

The court also held that the Uniform Controlled Substances Act was intended to totally occupy the field and that except as specifically authorized by the Legislature (as in the case of SB 1660 with respect to minors), no local legislation is permissible. In supporting its opinion on that point, the court referred to the 1975 amendment to Health and Safety Code §11364, alluded to above. Under that 1975 amendment, marijuana was removed

from the list of controlled substances, with the effect that marijuana paraphernalia was removed from the prohibition of §11364. Such legislative action is further evidence of the intent to occupy the field. In concluding its opinion on the preemption issue, the court stated:

> If the Legislature desires that local governmental agencies can legislate in this area, they can adopt appropriate legislation which would state that preemption was not intended. Ordinances such as Chapter 13-A would then be valid as far as preemption is concerned. Even a cursory review of the Act itself indicates to this court that the Legislature is aware of the knowledge and concern everyone has regarding drug abuse and that the possession and use of drugs and drug paraphernalia is a matter of statewide concern.

D. Arguments Against Preemption

1. Those who conclude that there is no preemption point to language in such cases as Gluck v. County of Los Angeles, 19/ wherein the court stated that:

> The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.

They also point to cases holding that there is no preemption, such as the Galvan case 20/ where the court held that San Francisco could enact a gun registration ordinance:

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19. Supra, 93 Cal.App. 3d at p. 133.

20. Supra, 70 Cal. 2d at p. 862.

> ...because of the substantial areas left unregulated and the very limited regulation...

In the Gluck case, supra, the appellate court upheld a carefully drawn County of Los Angeles ordinance regulating placement or maintenance of newsracks containing sexually explicit displays. The court held that since the ordinance was not designed to preclude distribution of obscenity, but rather to regulate use of local public rights of way, it did not intrude on an area (obscenity distribution regulation) admittedly totally occupied by state law. 21/ In so doing, the court distinguished Carl v. City of Los Angeles, 22/ wherein the newsrack ordinance was designed solely to regulate display of "harmful matter" to minors, by stating that:

> Here, however, we deal with an ordinance which, while related to state law dealing with obscenity and proscribing some forms of sexual activity, does not cover the same ground as the statewide legislation. 23/

Proponents of this position, based on the above authorities, forecast a judicial trend away from preemption, in favor of a position that no matter how comprehensive the state legislative scheme, local ordinances may coexist in the field if there are "holes" or unregulated areas in the field.23a/

2. Some minimal support for this position is found in the recent decision in Music Plus Four v. Robert Barnet, 24 / involving the City of Westminister drug paraphernalia ordinance. At the time of this decision, the 1981 amendment creating Health and

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21. 93 Cal.App. 3d at pp. 130-133. See footnote 1 of the Gluck opinion, at p. 127.

22. (1976) 61 Cal.App. 3d 265.

23. 93 Cal.App. 3d at p. 131.

23a. As pointed out above, however, the Carl and Gluck cases both go beyond the face of the ordinance in judicial examination of the real purpose of the ordinance. If there is a real and independent basis for the ordinance, the fact that it has an incidental effect upon a matter of statewide concern is not fatal. Where, however, as in the case of a total ban ordinance, the purpose is to further control a subject of statewise concern (use of drugs) and if there is no independent rationale, the ordinance is preempted.

24. (1980) 114 Cal.App. 3d 113. See above discussion at Section C.

Safety Code §11364.5 (the Presley Bill, SB 1660) was not effective. 25/ Thus, the specific state statute involved was Health and Safety Code Section 11364, set forth above, dealing with certain paraphernalia.

The court held first that there was no direct, express conflict with the state law, inasmuch as the state law deals with possession, while the ordinance deals only with display for purposes of sale to minors. There being no duplication or direct contradiction with state law, the court proceeded to determine whether, under the three pronged test set forth above, preemption by implication exists. In applying those standards, the court held that:

> (1) "The subject matter is not fully covered by state law, and the coverage does not indicate that it has become exclusively a matter of state concern.... Neither do the provisions of the Controlled Substances Act indicate that the control of the display of such devices to minors is exclusively a matter of state concern.... There is nothing in the general law to suggest a legislative purpose to take over the regulation of local businesses engaged in the exhibition and sale of items which may be legally sold under the general law." 26/
>
> (2) "Although the subject is partially covered by state law"[i.e., §11364 outlaws sale, possession and use of certain types of paraphernalia], "there is nothing in the language of such laws to indicate a paramount state concern precluding additional local action. It cannot reasonably be inferred that the failure to outlaw possession of devices for the use of drugs other than those specified in Section 11364, indicates legislative intent to encourage the sale of all other devices to minors." 27/

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25. It should be noted, however, that the court in its decision, at footnotes 2 and 4, makes specific reference to the new amendment which of course expressly precludes preemption relative to minors. Thus, the outcome of the case may have been influenced by the then imminent amendment.

26. 114 Cal.App. 2d at pp. 123-124.

27. Id. at p. 124.

> (3) "Finally, it is ludicrous to suggest that the effect of this ordinance on transient citizens of the state could possibly outweigh the community interest in protecting its children from indiscriminate exposure to commercial exploitation by businesses devoted to the sale of paraphernalia for the use and abuse of drugs..." 28/

In holding that the three-pronged test was met, the court also considered the argument that the 1975 decriminalization of marijuana, and the consequent removal of marijuana paraphernalia from the purview of §11364, indicates a legislative intent that no local regulation is permissible in this area. The court held that:

> There is nothing in the general law to suggest legislative purpose to take over the regulation of local business engaged in the exhibition and sale of items which may be legally sold under the general laws. 29/ (Emphasis added)

Thus, the court appeared to base its holding on the fact that the purpose of the ordinance was the regulation of local businesses which sell paraphernalia to minors, and not the regulation of the sale, use or possession of paraphernalia in general. In that regard the case is very similar to the holding in the Gluck case, supra, where the court held that the purpose of the newsrack ordinance in question was regulation of local public sidewalks and rights of way, and the fact that the regulation has no effect upon a state-covered subject (obscenity) is not significant. 30/ In the case of a minors-only ordinance, there is a geniune locally protectible interest in keeping the materials away from young people, thus providing an independent basis for the ordinance aside from regulating sale, use or possession. As was pointed out above, however, a total ban ordinance suffers from a lack of any purpose other than limitation of use of controlled substances.

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28. 114 Cal.App. 3d at p. 124.

29. Id.

30. The Gluck case was cited an analogous authority in Music Plus Four, 114 Cal.App. 3d at p. 125.

3. In addition to Music Plus Four, advocates of this position point to cases which allow local regulation of public nudity; 31/ use of firearms by police; 32/ regulation of massage parlors; 33/ and picture arcade hours. 34/ In the latter case, the court held that "It is an exercise of the city's police power to reduce the incidence of conduct which is offensive, dangerous or unlawful under state law." 35/ Thus, the contention here is that the city has the power to regulate paraphernalia merchants incident to its power to reduce the incidence of use of controlled substances, which is conduct "unlawful under state law." 36/ Having such power, the city can totally prohibit all display for purposes of sale.

4. Proponents of this position also rely on the "no-preemption clause" of SB 1660, as quoted above, saying that the existence of such a clause indicates legislative intent to allow local regulation even to the extent of a total ban, despite the reference to "minors" in the clause. In support of their interpretation, the proponents refer to Senator Presley's letter as placed into the Senate Daily Journal, dated June 20, 1980, quoted above. In that letter he urges that the bill (SB 1660) was not intended to preclude sale or display to adults.

5. Finally, reliance is placed on the opinion of Legislative Counsel dated June 24, 1980, addressed to Senator Presley, wherein it is concluded, based upon certain of the authorities cited above, that a ban of sale or display of paraphernalia to adults would not be preempted. As pointed out in Section C above, however, Legislative Counsel's opinion is subject to criticism as being inaccurate and incomplete in its analysis.

6. Recently in Sacramento County Superior Court, the Sacramento County total ban ordinance was subjected to a broad based constitutional attack. The court ruled against the plaintiffs in that case, holding that the constitutional claims were unmeritorious. The issue of preemption was raised and argued, but the court rendered no written opinion.

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31. Eckl v. Davis (1975) 51 Cal.App. 3d 831.

32. Long Beach P.O.A. v. City of Long Beach (1976) 61 Cal.App. 3d 364.

33. Brix v. City of San Rafael (1979) 92 Cal.App. 3d 47.

34. People v. Glaze (1979) 93 Cal.App. 3d 982.

35. 93 Cal.App. 3d at p. 986.

36. Id.

E. Conclusion and Opinion

The guarded language of the court in the Music Plus Four case quoted above, is persuasive, where the court states, with respect to its holding:

> "Surely this is within a realm of local government where conditions peculiar to the locality may differ from place to place."

In regard to the sophistication and conduct of adults, there is serious question as to whether significant enough differences exist as between various locales to create a condition "peculiar to the locality" and thereby remove the subject of paraphernalia from the category of statewide concern.

The 1975 "decriminalization" of marijuana is an extremely important indication of the fact that the legislature has preempted this field. The net result of a "total ban" is to dilute the effect of the legislature's 1975 action, creating a direct conflict with State law. Furthermore, a "total ban" ordinance has as its undeniable real purpose limitation of use of controlled substances. On the contrary, a "minors only" ordinance has the independent purpose of shielding young persons from open exploitation. Since the "total ban" ordinance lacks an independent purpose, its purpose and operation directly impinges on the purpose and operation of the Comprehensive Controlled Substances Act, and it is thus preempted.

Also persuasive is the fact that Senator Presley, in SB 1660, was able only to obtain legislative authorization for local regulation regarding minors; the inability to obtain a stronger non-preemption clause clearly indicates a legislative intent to continue to occupy the field of regulation of drug use and the means to accomplish such use. The counter arguments regarding Senator Presley's letter and bill, Legislative Counsel's Opinion regarding SB 1660, and the effect of Music Plus Four, are not persuasive.

Finally, contrary to the Sacramento County case, there is a written opinion in the Santa Barbara County case which specifically deals with the preemption issue. This opinion is well written and concludes the State has preempted the field with regard to "total ban" paraphernalia ordinances.

Recognizing that there are some persuasive arguments to the contrary, and recognizing the laudable nature of the purpose of a total ban, nevertheless, it is concluded that local regulation in the area of drug paraphernalia, insofar as it pertains to adults, is probably preempted.

Very truly yours,

JAMES P. JACKSON, City Attorney

By William P. Carnazzo
WILLIAM P. CARNAZZO
Deputy City Attorney

CITY OF SACRAMENTO

JAMES P. JACKSON
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May 19, 1981

Law and Legislation Committee
Sacramento, California 95814

RE: Drug Paraphernalia Ordinance

Honorable Members in Session:

SUMMARY

Councilman Connelly has asked for a report on the status of pending litigation in Sacramento County on drug paraphernalia. The principal case challenging the validity of Sacramento County's "total ban" ordinance was decided in favor of the County. Three business license revocations are still pending as are several criminal cases.

BACKGROUND INFORMATION

1. Superior Court Case

The principal case challenging the validity of Sacramento County's ordinance imposing a total ban on the sale of drug paraphernalia is U. S. Posters, et al. vs. Duane Lowe, et al. Superior Court Judge Grossfeld denied the petitioners' request for a preliminary injunction on October 17, 1980. Judge Grossfeld granted the County of Sacramento's motion for summary judgment on April 7, 1981. The Judge held that the County's ordinance was valid on its face. He left open the question of whether the ordinance was being applied in a constitutional manner. The petitioners may appeal Judge Grossfeld's decision.

2. Business License Revocations

Under the County ordinance, business licenses can be revoked if the ordinance is violated. Of the six license revocation proceedings, three have been settled. The three businesses admitted selling drug paraphernalia and promised not to sell it again. If they do sell, the County's task of proof is easy under the settlement agreement. Three license revocation proceedings are still pending and have been set for hearing before a State Administrative Hearing Officer in June and July.

3. Criminal Prosecution

The District Attorney has dismissed the criminal cases as to those persons who worked for the three businesses who have settled the license revocation proceedings. It is my understanding that one other business will enter into a stipulation with the Consumer Fraud Division of the District Attorney's office. There are two other businesses still selling drug paraphernalia in the unincorporated area. These businesses are owned by the same person and criminal cases are still pending against employees working for these businesses.

Very truly yours,

JAMES P. JACKSON
City Attorney

JPJ:KMF

AMENDED IN SENATE MAY 13, 1981

AMENDED IN SENATE MAY 6, 1981

AMENDED IN SENATE APRIL 27, 1981

AMENDED IN SENATE APRIL 2, 1981

SENATE BILL No. 341

Introduced by Senator Russell

(Coauthors: Senators Ayala, Campbell, Davis, Dills, Doolittle, Alex Garcia, Johnson, Montoya, Nielsen, Presley, Robbins, Roberti, and Speraw)

(Coauthors: Assemblymen Baker, Bane, Bergeson, Cortese, Elder, Frazee, Greene, Hallett, Herger, Ivers, Konnyu, La Follette, Leonard, Martinez, McAlister, Moorhead, Nolan, Statham, Maxine Waters, Wray, Wright, and Young)

February 23, 1981

An act to add Section 11014.5 to, and to repeal and add Section 11364 to, the Health and Safety Code, and to amend ~~Section 308~~ *Sections 308 and 1000* of the Penal Code, relating to drug paraphernalia.

LEGISLATIVE COUNSEL'S DIGEST

SB 341, as amended, Russell. Drug paraphernalia.

(1) Existing law makes it unlawful for any person to possess an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking specified controlled substances.

This bill would repeal this provision and would instead make it a misdemeanor, *punishable as specified,* for any person to use, or to possess with intent to use, or to deliver, furnish, or transfer, or to possess with intent to deliver, furnish, or transfer, or to manufacture with intent to deliver, furnish, or transfer, or to deliver, furnish, or transfer to minors

drug paraphernalia, as defined, under specified conditions. *The bill would provide, in particular, that the use or possession with intent to use drug paraphernalia to introduce into the human body marijuana, as opposed to concentrated cannabis or any other controlled substance, shall be punishable by a fine of not more than $100, and that any person arrested for such a violation who does not demand to be taken before a magistrate shall be released by the arresting officer upon his or her own recognizance, as specified, and shall not be subjected to booking.* All drug paraphernalia would be subject to seizure and forfeiture in the manner of controlled substances. *In addition, any violation of the provisions relating to delivery, furnishing, or transportation of drug paraphernalia by a holder of a business or liquor license issued by a local or state governing entity and in the course of the licensee's business would be declared to be grounds for the revocation of any such license.*

Under existing law, the knowing sale, giving, or furnishing of instruments or paraphernalia designed for the smoking or ingestion of any controlled substance to a person under the age of 18 years is a misdemeanor. Existing law also permits local regulation by ordinance of the sale and display of such paraphernalia to persons under the age of 18 years.

This bill would repeal both of these provisions.

This bill would, in addition, declare that it is the intent of the Legislature that the invalidity of any of the specified provisions of law relating to controlled substances shall not effect the validity of other provisions and would further provide those provisions would be severable.

(2) Article XIII B of the California Constitution and Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

However, this bill would provide that no appropriation is made and no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 11014.5 is added to the Health and Safety Code, to read:

11014.5. (a) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this division. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance.

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness, or purity of controlled substances.

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances.

(6) Diluents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances.

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana.

(8) Blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances.

(9) Capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances.

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances.

(11) Hypodermic syringes, needles, and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body.

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls.

(B) Water pipes.

(C) Carburetion tubes and devices.

(D) Smoking and carburetion masks.

(E) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand.

(F) Miniature cocaine spoons, and cocaine vials.

(G) Chamber pipes.

(H) Carburetor pipes.

(I) Electric pipes.

(J) Air-driven pipes.

(K) Chillums.

(L) Bongs.

(M) Ice pipes or chillers.

(b) In determining whether an object is drug paraphernalia, a court or other authority may consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use.

(2) Prior convictions, if any, of an owner, or of anyone

in control of the object, under any state or federal law relating to any controlled substance.

(3) The proximity of the object, in time and space, to a direct violation of this act.

(4) The proximity of the object to controlled substances.

(5) The existence of any residue of controlled substances on the object.

(6) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this ~~act~~ *division*; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this ~~act~~ *division* shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia.

(7) Instructions, oral or written, provided with the object concerning its use.

(8) Descriptive materials accompanying the object which explain or depict its use.

(9) National and local advertising concerning its use.

(10) The manner in which the object is displayed for sale.

(11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

(12) Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise.

(13) The existence and scope of legitimate uses for the object in the community.

(14) Expert testimony concerning its use.

(c) If any provision of this section or the application thereof to any person or circumstance is held invalid, it is the intent of the Legislature that the invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application and to this end the provisions of this section

are severable.

SEC. 2. Section 11364 of the Health and Safety Code is repealed.

SEC. 3. Section 11364 is added to the Health and Safety Code, to read:

11364. (a) It is a misdemeanor *punishable by a fine of not more than one hundred dollars ($100)* for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human ~~body a controlled substance in violation of this division.~~ *body marijuana, other than concentrated cannabis, in violation of this division. In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his or her written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.*

(b) It is a misdemeanor for any person to use, or to possess with the intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body concentrated cannabis or any other controlled substance, other than marijuana, in violation of this division.

~~(b)~~

(c) It is a misdemeanor for any person to deliver, furnish, or transfer, or to possess with intent to deliver, furnish, or transfer, or to manufacture with intent to deliver, furnish, or transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack,

repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this division.

~~(c)~~

(d) Any person 18 years of age or over who violates subdivision ~~(b)~~ *(c)* by delivering, furnishing, or transferring drug paraphernalia to a person under 18 years of age who is at least three years his junior is guilty of a misdemeanor and upon conviction may be imprisoned for not more than one year, fined not more than one thousand dollars ($1,000), or by both.

(e) The violation, or the causing or the permitting of a violation, of subdivision (c) or (d) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of any such license.

~~(d)~~

(f) All drug paraphernalia defined in Section 11014.5 is subject to forfeiture and may be seized by any peace officer pursuant to Section 11471.

~~(e)~~

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, it is the intent of the Legislature that the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application and to this end the provisions of this section are severable.

SEC. 4. Section 308 of the Penal Code is amended to read:

308. Every person, firm or corporation which knowingly sells or 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, or products prepared from tobacco, is guilty of a misdemeanor.

Every person, firm or corporation which sells, or deals

in tobacco or any preparation thereof, shall post conspicuously and keep so posted in his or their place of business a copy of this act, and any such person failing to do so shall upon conviction be punished by a fine of five dollars ($5) for the first offense and twenty-five dollars ($25) for each succeeding violation of this provision, or by imprisonment for not more than 30 days.

The Secretary of State is hereby authorized to have printed sufficient copies of this act to enable him to furnish dealers in tobacco with copies thereof upon their request for the same.

SEC. 5. Section 1000 of the Penal Code is amended to read:

1000. (a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for violation of Section 11350, *Section* 11357, *subdivision (a) or (b) of Section* 11364, *Section* 11365, *Section* 11377, or *Section* 11550 of the Health and Safety Code, or Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or Section 381 or subdivision (f) of Section 647 of the Penal Code, if for being under the influence of a controlled substance, or Section 4230 of the Business and Professions Code, and it appears to the district attorney that, except as provided in subdivision (b) of Section 11357 of the Health and Safety Code, all of the following apply to the defendant:

(1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged divertible offense.

(2) The offense charged did not involve a crime of violence or threatened violence.

(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.

(4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.

(5) The defendant's record does not indicate that he has been diverted pursuant to this chapter within five

years prior to the alleged commission of the charged divertible offense.

(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged divertible offense.

(b) The district attorney shall review his file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) are applicable to the defendant. If the defendant is found ineligible, the district attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his attorney.

~~SEC. 5.~~

SEC. 6. No appropriation is made and no reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution or Section 2231 or 2234 of the Revenue and Taxation Code because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction.

O

CITY OF SACRAMENTO

JAMES P. JACKSON
CITY ATTORNEY

THEODORE H. KOBEY, JR.
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May 20, 1981

Law & Legislation Committee
Sacramento, California 95814

RE: STATE LEGISLATION -- DRUG PARAPHERNALIA

Honorable Members in Session:

SUMMARY

Councilman Connelly has asked for a report on the status of proposed State legislation relating to drug paraphernalia. SB 341 (Russell) has received approval from the Senate Judiciary Committee and is awaiting a hearing before the Senate Finance Committee on June 8, 1981. It is possible that the bill will be allowed to go directly to the Senate floor next week without a hearing before Senate Finance.

BACKGROUND INFORMATION

SB 341 (Russell) prohibits the use or possession of drug paraphernalia. A copy of SB 341 is attached for your information. The bill is sponsored by 14 Senators and 22 Assemblymen. The bill, by a 5-0 vote, was approved by the Senate Judiciary Committee. It has been set for hearing before the Senate Finance Committee on June 8, 1981. However, there is a chance that the bill will be determined to be exempt from financial review and be allowed to proceed directly to the Senate floor for vote prior to June 1st.

AB 1919 (Waters) was a similar bill introduced in the Assembly. This bill would also have outlawed the possession or use of drug paraphernalia. The bill was not processed by the Assembly Rules Committee and all efforts by the proponents are now being devoted to SB 341. The proponents of SB 341 feel confident that their bill will be approved by the Assembly Criminal Justice Committee if it passes the Senate. If passed by the Legislature and signed by the Governor, SB 341 would become effective on January 1, 1982.

Very truly yours,

JAMES P. JACKSON
City Attorney

JPJ:KMF
ATTACHMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

BAMBOO BROTHERS, a General Partnership, Plaintiff, vs. JOHN CARPENTER, etc., et al., Defendants.	NO. 134868 INTENDED DECISION

Plaintiff has challenged Santa Barbara County Ordinance Chapter 13-A relating to drug paraphernalia on constitutional grounds and also that the ordinance conflicts with state law. Although the court is in complete sympathy with the goals and aims of the County of Santa Barbara in enacting this Ordinance, much to my regret the Ordinance must fall is it does, in fact, conflict both explicitly and implicitly with existing law. However, the enforcement of the existing state law should satisfy the needs of the County to gain the desired goal.

The court has examined the numerous California cases relating to the preemption of local ordinances (city and county) by state law under the provisions of Article XI, Section 7 of the

California Constitution. After examining this material it is ver clear that the appellate decisions are anything but consistent and it is difficult if not impossible to reconcile these decisions. The basic case in this area is In re Hubbard 62 Cal.2d 119, 128 (1964), which sets forth the following tripartite test to determi whether a local ordinance has been preempted by state law. If an one of these tests are satisfied, the local ordinance is preempte The three tests are as follows: 1) the subject matter has been s fully and completely covered by general law as to clearly indicat that it has become exclusively a matter of state concern; 2) the subject matter has been partially covered by general law couched i such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; 3) the subje matter has been partially covered by general law and the subject i 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 municipality.

The only case cited to the court specifically involving preemption of a local ordinance concerning California drug paraphernalia is Music Plus Four, Inc. v. Barnet 114 Cal.App.3d 113 (1980). In that case the city of Westminster adopted an ordinance excluding minors from rooms where drug paraphernalia was sold. Th case held that this ordinance was not preempted by state statute primarily on the factual basis that the items could be legally possessed and sold by the store owner, but the only prohibition was the presence of minors within the display area which was a proper concern of local governmental agencies. The recently

enacted Health and Safety Code §11364.5 corroberates the court's position in Music Plus Four, supra, as the Legislature specificall stated that a provision of state law regulating the sale or displa of drug paraphernalia to persons under the age of 18 did not pre-empt city or county ordinances. The Music Plus Four case is therefore not applicable to defendant's position in the instant case. In fact, the language therein is supportive of plaintiff's position as the opinion points out at page 127 that since the Westminster ordinance did not prohibit the use and possession of drugs and drug paraphernalia, which is a violation of state law, the local ordinance was not preempted. The only reasonable inference from this language is that had the Westminster ordinance prohibited possession of drug paraphernalia, the ordinance would have been preempted as the state had occupied the field under the tests in Hubbard.

In the instant case, the Santa Barbara County Ordinance does prohibit the use or the intent to use drug paraphernalia (§ 13-A-3), the manufacture and delivery of drug paraphernalia (§ 13-A-4), the advertisement of drug paraphernalia (§ 13-A-5) and further establishes civil forfeitures of drug paraphernalia (§13-A-6). State law already does essentially the same thing except in the advertising area which will be discussed hereafter.

The State of California has enacted the Uniform Controll Substance Act (hereinafter Act), Health and Safety Code § 11100 to § 11651 (hereinafter all sections cited are to the Health and Safety Code unless otherwise noted). Many of these sections have numerous subparts. Section 11364 specifically makes it unlawful

to possess . . ."paraphernalia used for unlawful injection or smoking certain controlled substances." These controlled substanc are set out in lists earlier in the Act. This language makes unlawful much of the prohibitions of § 13-A-3 and § 13-A-4 of the County Ordinance. While the Ordinance may be somewhat broader in its langauge, under the criteria of In re Hubbard, supra, 62 Cal.2 119, the state has clearly occupied the field as far as use or possession of drugs and drug paraphernalia (delivery under § 13-A-4 of the County Ordinance is obviously included in possession). The Legislature has enacted a very broad, detailed Act covering hundreds of sections concerning drugs, possession, use of drugs, drug paraphernalia, manufacture of drugs as well as forfeiture of drug paraphernalia and numerous other areas relating to drugs and drug use. Section 11470 specifically covers the forfeiture of dru paraphernalia. Also, the Legislature has enacted different penalt for possession of drug paraphernalia making it a misdemeanor punishable by a minimum fine of $30 up to $500 or by imprisonment of not less than 15 days or more than 180 days. The County Ordina makes the same offense an infraction punishable by a maximum of a $100 fine (§ 13-A-8). Obviously the state statutes subject anyone to substantially greater penalties than the local Ordinance In summary, the state, by enactment of these provisions, has completely and fully covered the subject matter.

Moreover, in 1975, the Legislature removed marijuana or cannabis from the list of controlled substances. This was done at the time that the possession of less than an ounce of marijuana was made an infraction. This court cannot assume that the

Legislature conducted an idle act and therefore must assume the Legislature intended to make lawful drug paraphernalia relating to marijuana. As it seems to have been the intention of the County o Santa Barbara to include drug paraphernalia relating to marijuana within their ordinance, this is in direct conflict with the intent of the Legislature. From the representations of counsel for defendants, the County at the time of the drafting of the Ordinanc was unaware of this 1975 amendment to § 11364 deleting drug paraphernalia relating to marijuana.

If the Legislature desires that local governmental agencies can legislate in this area, they can adopt appropriate legislation which would state that preemption was not intended. Ordinances such as Chapter 13-A would then be valid as far as preemption is concerned. Even a cursory review of the Act itself indicates to this court that the Legislature is aware of the knowledge and concern everyone has regarding drug abuse and that the possession and use of drugs and drug paraphernalia is a matter of state-wide concern.

Concerning the prohibition on the advertising of "drug paraphernalia" set forth in County Ordinance § 13-A-5, it is clear that those provisions prohibit commercial speech. The United States Supreme Court has now held that commercial speech is deserving of First Amendment protection. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York 100 S.Ct. 2343 (June 20, 1980). However, commercial speech is tested differently than non-commercial speech under the First Amendment protection. The test set forth for commercial speech is a four part analysis.

It must be determined 1) whether the speech is protected by the First Amendment, i.e., it must concern a lawful activity and must not be misleading; 2) whether the governmemtal interest asserted is substantial; 3) whether the regulation advances that government interest; 4) whether it is not more extensive than necessary to serve that interest.

The exact same language contained in the County Ordinanc was analyzed in Record Revolution v. City of Parma 492 F.Supp. 115 (December 8, 1980). In that case the U.S. Court of Appeals for th Sixth Circuit held that when the cities of Parma, Lakewood and North Olmstead, in Ohio, adopted a prohibition against advertising drug paraphernalia using this same language, it met portions of the test set forth in the Hudson case but failed the fourth prong. Although this decision is not absolutely binding on this court, no other authority has been cited to this court and the Parma decisio is directly on point. In Santa Barbara County as in Parma, Lakewo and North Olmstead, Ohio, any prohibition on advertising must of necessity infringe on areas in which Santa Barbara County has no legitimate interets, i.e., all five of the incorporated cities within the County plus any surrounding areas in which such advertising might reach. Therefore, the prohibition is more extensi than necessary to serve the interest of Santa Barbara County.

Such a prohibition on a state level might well be proper but when this prohibition is applied only in the unincoprorated area of Santa Barbara County it is an infringement on the First Amendment of the United States Constitution and therefore unconstitutional.

Based on the foregoing discussion, this court will declare Chapter 13-A of the Santa Barbara County Code preempted by state law or unconstitutional with regard to the prohibitions on advertising contained therein.

Plaintiff's counsel will prepare an appropriate judgment and submit for approval as to form to counsel for defendants and thereafter submit said judgment to the court.

DATED: March 20, 1981.

Bruce Wm. Dodds

BRUCE WM. DODS
Judge, Superior Court

5/19/81

APPROVED
BY THE CITY COUNCIL

MAY 28 1981

OFFICE OF THE
CITY CLERK

ORDINANCE NO. 81-040

AN ORDINANCE OF THE CITY OF SACRAMENTO ADDING CHAPTER 70 TO THE SACRAMENTO CITY CODE RELATING TO THE DISPLAY AND DISTRIBUTION OF DRUG PARAPHERNALIA

MAY 28 1981

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO AS FOLLOWS:

SECTION 1.

The Sacramento City Code is amended to add Chapter 70 to read as follows:

CHAPTER 70

DRUG PARAPHERNALIA

Sec. 70.100 Purpose.

The illegal use of controlled substances within the City of Sacramento creates serious social, medical and law enforcement problems. The illegal use of such substances by persons under 18 years of age has reached crisis dimensions. It is causing serious physical and psychological damage to the youth of this community, an impairment of educational achievement and of the efficiency of the educational system, increases in non-drug related crime, and a threat to the ability of the community to ensure future generations of responsible and productive adults - all to the detriment of the health, safety and welfare of the citizens of the City of Sacramento.

The proliferation of the display of drug paraphernalia in retail stores within the City, and the distribution of such paraphernalia intensifies and otherwise compounds the problem of illegal use of controlled substances within this community.

A ban only upon the display and distribution of drug paraphernalia to persons under 18 years of age would not be practical. The person who displays or distributes would not have to be concerned with the question of minority and who could lawfully view or receive drug paraphernalia. The already thinly staffed law enforcement agencies would be subjected to intolerable added enforcement burdens by adding age of a person who views or receives paraphernalia as an element of a prohibition upon display and distribution.

A significant number of high school students are 18 years of age or older. It would be unlawful to distribute paraphernalia to some students attending the same school in which the distribution to other students would be prohibited. Permitted display and distribution to adults within the community would symbolize a public tolerance of illegal drug use, making it difficult to explain the rationale of programs directed against similar abuse by youth. The problem of illegal consumption of controlled substances by adults within this community is significant and substantial, necessitating a cessation of the encouragement to drug abuse which the display and distribution of drug paraphernalia create.

This chapter is a measure which is necessary in order to discourage the illegal use of controlled substances within the City of Sacramento.

Sec. 70.101 Definitions.

As used in this chapter, the following terms shall be ascribed the following meanings:

(a) Business. "Business" means a fixed location, whether indoors or outdoors, at which merchandise is offered for sale at retail.

(b) Display. "Display" means to show to a patron or have in a manner so as to be available for viewing.

(c) Distribute. "Distribute" means to transfer ownership or a possessory interest to another, whether for consideration or as a gratuity. "Distribute" includes both sales and gifts.

(d) Controlled substance. "Controlled substance" means those controlled substances set forth in Sections 11054, 11055, 11056, 11057 and 11058 of the California Health and Safety Code, identified as Schedules I through V, inclusive, as said sections now exist or may hereafter be amended, renumbered or added to in any way.

(e) Drug paraphernalia. "Drug paraphernalia" means all equipment, products and materials of any kind which are intended by a person charged with a violation of this chapter for use in manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repacking, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of any law of the State of California. "Drug paraphernalia" includes, but it not limited to, all of the following:

(1) Kits intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(2) Isomerization devices intended for use in increasing

the potency of any species of plant which is a controlled substance;

(3) Testing equipment intended for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(4) Dilutents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose intended for use in cutting controlled substances;

(5) Separation gins and sifters intended for use in removing twigs and seeds from, or in otherwise cleaning or refining marijuana;

(6) Blenders, bowls, containers, spoons and mixing devices intended for use in compounding controlled substances;

(7) Capsules, balloons, envelopes, and other containers intended for use in packaging small quantities of controlled substances;

(8) Containers and other objects intended for use in storing or concealing controlled substances; and,

(9) Objects intended for use in injecting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(B) Water pipes;

(C) Carburetion tubes and devices;

(D) Smoking and carburetion masks;

(E) Roach clips, meaning objects used to hold

burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

(F) Miniature cocaine spoons, and cocaine vials;

(G) Chamber pipes;

(H) Carburetor pipes;

(I) Air-driven pipes;

(J) Bongs.

In determining whether an object is "drug paraphernalia," a court or other authority may consider in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) The proximity of the object to controlled substances;

(3) The existence of any residue of controlled substances on the object;

(4) Director or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver to persons whom he knows intend to use the object to facilitate a violation of the laws of the State of California relating to controlled substances.

(5) Descriptive materials or instructions, written or oral, accompanying the object which explain or depict its use;

(6) National and local advertising concerning its use;

(7) The manner in which the object is displayed for sale, including its proximity to other objects falling within

the definition of drug paraphernalia.

(8) Direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(9) The existence and scope of legitimate uses for the object in the community; and,

(10) Expert testimony concerning its use.

(f) Person. "Person" means a natural person or any firm, partnership, association, corporation, or cooperative association.

Sec. 70.102 Display of Drug Paraphernalia

(a) Except as authorized by law, it shall be unlawful for any person to maintain or operate any business knowing or under circumstances where he should reasonably know that drug paraphernalia is displayed at such business.

(b) Except as authorized by law, it shall be unlawful for any person who is the owner of a business, an employee thereof or who works at such business as an agent of the owner, to willfully display drug paraphernalia at such business.

Sec. 70.103 Distribution of Drug Paraphernalia

Except as authorized by law, it shall be unlawful for any person to distribute to another person drug paraphernalia, knowing or under circumstances where he should reasonably know that it will be used to manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of any law of the State of California.

Sec. 70.104 Exceptions

(a) This chapter shall not apply to any of the following:

(1) Any pharmacist or other authorized person who sells or furnishes drug paraphernalia upon the prescription of a physician, dentist, podiatrist or veterinarian.

(2) Any physician, dentist, podiatrist or veterinarian who furnishes or prescribes drug paraphernalia to his or her patient.

(3) Any manufacturer, wholesaler or retailer licensed by the California State Board of Pharmacy to sell or transfer drug paraphernalia.

(b) No provision of this chapter shall be deemed, whether directly or indirectly, to authorize any act which is otherwise prohibited by any law of the State of California or require any act which is prohibited by any law of the State of California. Nor shall any provision of this chapter be deemed, whether directly or indirectly, to prohibit any act or acts which are prohibited by any law of the State of California.

Sec. 70.105 Violations

(a) Infraction

Any person who violates any provision of this chapter is guilty of an infraction, and upon conviction is punishable by (1) a fine not exceeding fifty dollars ($50.00) for a first violation; (2) a fine not exceeding one hundred dollars ($100.00) for a second violation within one year; (3) a fine not exceeding two hundred fifty dollars ($250.00) for each additional violation within one year. A person who violates the provisions of Section 70.102(a) shall be deemed

to be guilty of a separate offense for each day or portion thereof, during which the violation continues.

(b) Public Nuisance

A violation of any provision of this chapter is declared to be a public nuisance subject to abatement pursuant to Section 731 of the Code of Civil Procedure or pursuant to the procedures specified in Chapter 61 of this Code.

Sec. 70.106 Severability

The City Council hereby declares that it would have passed this ordinance sentence by sentence, paragraph by paragraph, and section by section, and does hereby declare that the provisions of this ordinance are severable and if for any reason any sentence, paragraph or section of this ordinance shall be held invalid, such decision shall not affect the validity of the remaining parts of this ordinance.

SECTION 2.

(certification and publication)

PASSED FOR PUBLICATION: MAY 28 1981

ENACTED: MAY 28 1981

EFFECTIVE: JUN 27 1981

Chairman ~~MAYOR~~

ATTEST:

CITY CLERK