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OPINION	:	No. 07-503
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of	:	December 20, 2011
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THE HONORABLE JAMES F. PENMAN, CITY PROSECUTING ATTORNEY FOR THE CITY OF SAN BERNARDINO, has requested an opinion on the following questions:

1. May a city enact an ordinance making it unlawful and a misdemeanor violation for any person to sell, offer for sale, use, discharge, possess, store, or transport any fireworks within city limits that are not “exempt fireworks” or “safe and sane fireworks” as defined in Health and Safety Code sections 12508 and 12529, respectively?

2. If a city is authorized to enact such an ordinance, may it impose an administrative fine pursuant to Government Code section 53069.4 of up to \$1,000 for each violation?

## CONCLUSIONS

1. A city may enact an ordinance making it unlawful and a misdemeanor violation for any person to sell, use, or discharge any fireworks that are not “exempt fireworks” or “safe and sane fireworks” within city limits. However, although a city may enact an ordinance regulating the offering for sale, possession, storage, or transportation of such fireworks within city limits to the extent that the regulation is consistent with the State Fireworks Law, it may not enact an ordinance that would operate as a total ban on those activities.

2. If a city enacts an ordinance regulating fireworks activities within city limits, the city may impose an administrative fine pursuant to Government Code section 53069.4 of up to \$1,000 for each violation.

## ANALYSIS

The State Fireworks Law<sup>1</sup> sets out “a thorough guide for the state-wide administration and regulation of the manufacture, transportation, licensing, sale and use of fireworks.”<sup>2</sup> Generally speaking, the State Fireworks Law contemplates a system of state licenses governing various fireworks activities, supplemented by local permits where local control is called for. “Anyone wanting to sell or manufacture fireworks must have a license from the state *and* a permit from the city or local government.”<sup>3</sup> Thus it is clear that the State Fireworks Law allows for some degree of local regulation to supplement the state law. The central question here is *how much* local regulation is permissible. As we shall see, the answer depends on what area of fireworks activity is being considered.<sup>4</sup>

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<sup>1</sup> Health and Safety Code §§ 12500-12728. Further references to the Health and Safety Code are by section number only.

<sup>2</sup> *Ventura v. City of San Jose*, 151 Cal. App. 3d 1076, 1078 (1984).

<sup>3</sup> *Id.* (original emphasis).

<sup>4</sup> Under the State Fireworks Law, “fireworks” is a comprehensive term incorporating all classifications of fireworks, including “dangerous” fireworks (§ 12505), “exempt” fireworks (§ 12508), and “safe and sane” fireworks (§ 12529). *See* § 12511 (“fireworks”). Other classifications of fireworks include “agricultural and wildlife fireworks” (§ 12503), “model rocket engines” (§§ 12519-12520), and “emergency signaling devices” (§ 12506). Special rules apply to “exempt” fireworks (§ 12508) and to “safe and sane” fireworks (§ 12529), and those categories of fireworks are not included

## **Sale, Use, or Discharge**

The specific activities of sale, use, and discharge of fireworks are not preempted by state law. Section 12541 provides that, “Nothing in [the State Fireworks Law] authorizes the sale, use, or discharge of fireworks in any city, county, or city and county in which the sale, use, or discharge is otherwise prohibited or regulated by law or ordinance.”<sup>5</sup> In *Ventura v. City of San Jose*, the Court of Appeal concluded that this language “is in effect a disclaimer of preemption,” allowing cities and counties free reign to regulate the fireworks activities to which the section applies.<sup>6</sup> We therefore have no trouble concluding that a city may enact an ordinance regulating, or even banning, the sale, use, or discharge of fireworks within city limits, notwithstanding the detailed regulation of those activities contained in the State Fireworks Law.

Moreover, a violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction.<sup>7</sup> Hence, to the extent an ordinance is valid, violations of it may be made misdemeanors simply by not making them infractions. Consequently, we conclude that a city may enact an ordinance making it unlawful and a misdemeanor violation for any person to sell, use, or discharge any fireworks that are not “exempt fireworks” or “safe and sane fireworks” within city limits.

## **Other Activities**

The questions presented to us inquire not only about the sale, use, or discharge of fireworks, but also about offering them for sale,<sup>8</sup> and their possession, storage, and transportation. Because section 12541 does not refer specifically to these latter activities, it is not as clear whether, or to what extent, local regulation in these areas may be

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within the scope of the question before us. For purposes of brevity, we use the term “fireworks” throughout this opinion to mean “dangerous fireworks” as defined in section 12505.

<sup>5</sup> See also §12541.1(a) (allowing fire district to prohibit or regulate sale, use, or discharge of fireworks within that district, subject to preemption by other state, city or county regulation).

<sup>6</sup> 151 Cal. App. 3d at 1079 (considering earlier version of § 12541, which applied to “use” and “discharge,” but not to “sale,” of fireworks).

<sup>7</sup> Govt. Code §§ 25132(a) (counties), 36900(a) (cities).

<sup>8</sup> State law distinguishes between sale and offering for sale. See e.g., § 12672. “Offering for sale,” for example, may include advertising for sale. See § 12502.

preempted by the State Fireworks Law. In order to answer this part of the question, we turn to general principles of preemption.

The California 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.”<sup>9</sup> If local legislation is in conflict with state law, it is deemed preempted by state law.<sup>10</sup> “A conflict between state law and an ordinance exists if the ordinance duplicates or is coextensive therewith, is contradictory or inimical thereto, or enters an area either expressly or impliedly fully occupied by general law.”<sup>11</sup> Therefore, if a city ordinance duplicates or contradicts state law, or invades an area fully occupied by state law, it is in conflict with state law and void to the extent of the conflict.

An examination of the State Fireworks Law generally reveals a detailed, state-wide scheme of fireworks regulation that may fairly be described as “comprehensive.”<sup>12</sup> It provides for classification of fireworks,<sup>13</sup> licensing of fireworks activities,<sup>14</sup> and monitoring of fireworks transactions at the state level,<sup>15</sup> and it authorizes the State Fire Marshal to enact supplemental regulations to carry out those functions.<sup>16</sup> Among other things, it prescribes a one-week period in each calendar year during which “safe and sane” fireworks may be sold,<sup>17</sup> and provides for pre-approved routes by which firework shipments may be transported.<sup>18</sup>

And yet, despite its scope and detail, the State Fireworks Law is clearly not intended to shut local agencies entirely out of the field of fireworks regulation.<sup>19</sup> Rather,

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<sup>9</sup> Cal. Const. art. XI, § 7.

<sup>10</sup> *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993).

<sup>11</sup> *Am. Fin. Serv. Assn. v. City of Oakland*, 34 Cal. 4th 1239, 1251 (2005).

<sup>12</sup> See 61 Ops.Cal.Atty.Gen. 61, 65 (1978).

<sup>13</sup> §§ 12560-12566.

<sup>14</sup> §§ 12516, 12570-12608.

<sup>15</sup> §§ 12555-12556, 12615-12620.

<sup>16</sup> § 12552-12554.

<sup>17</sup> § 12599.

<sup>18</sup> §§ 12651-12652.

<sup>19</sup> 61 Ops.Cal.Atty.Gen. at 65.

the Legislature has struck a careful balance between state and local concerns by disclaiming preemption in the areas of sale, use, and discharge,<sup>20</sup> while affording local jurisdictions “permitting” authority in other areas.<sup>21</sup> A review of the State Fireworks Law discloses that cities and counties are expressly authorized to issue permits<sup>22</sup> for a variety of fireworks activities, specifically including offers for sale,<sup>23</sup> possession,<sup>24</sup> storage,<sup>25</sup> and transportation.<sup>26</sup>

If a statute authorizes a local agency to issue permits for specified activities, then it is undoubtedly appropriate for the local agency to adopt regulations that provide definite and uniform standards for the issuance of those permits.<sup>27</sup> And local regulation, of course, must take the form of an ordinance if it is to be enforced by the imposition of a

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<sup>20</sup> § 12541; *see Ventura v. City of San Jose*, 151 Cal. App. 3d at 1078.

<sup>21</sup> It stands to reason that a significant degree of local involvement is allowed, for variability in local conditions makes a significant degree of local control over fireworks regulation highly desirable. Indeed, the Legislature has long recognized that “local regulation of fireworks more restrictive than state law is necessary as a fire prevention measure in [many] areas of the state.” 1975 Stat. ch. 104 § 2 (amending State Fireworks Law to disclaim preemption in areas of use and discharge).

<sup>22</sup> *See* § 12522 (“‘Permit’ means the nontransferable permission granted by the public agency having local jurisdiction ...”).

<sup>23</sup> § 12688 (unlawful to advertise to sell fireworks without valid license or permit); *see* § 12502 (“‘Advertise’ means ... offering to sell ...”).

<sup>24</sup> §§ 12640, 12677 (unlawful to possess fireworks without permit); *see* § 12557 (authorizing development of model ordinance regarding possession of 25 pounds or less of fireworks).

<sup>25</sup> §§ 12640, 12673 (unlawful to store fireworks without valid permit); *see* §§ 12572, 12604.

<sup>26</sup> Special rules apply to the transportation of fireworks. *See generally* §§ 12579, 12640-12654. Pre-approved routes of travel are prescribed by law. § 12561; *see* Veh. Code § 31616. In most cases, a state license to engage in a specified fireworks activity includes a license to transport fireworks for the specified purpose over the pre-approved routes. § 12579. However, local permits are required where travel extends outside of the pre-approved routes. *See* §§ 12651-12653.

<sup>27</sup> *See Kugler v. Yocum*, 69 Cal. 2d 371, 376-377 (1968); *Smith v. Co. of Los Angeles*, 24 Cal. App. 4th 990, 1000 (1994).

fine.<sup>28</sup> It is beyond the scope of this opinion to speculate on the specific forms that local ordinances may or may not legitimately take for purposes of regulating fireworks activities. We note, however, that it is well settled that local agencies may use their licensing and permitting powers as an aspect of their police powers to, for example, discourage illegitimate activity associated with certain kinds of businesses, or alleviate the burdens that local enforcement of state law imposes on local officials.<sup>29</sup>

We therefore find that a city may enact an ordinance regulating offers for sale, possessing, storing, or transporting fireworks within city limits. This finding, however, is necessarily qualified by an important limitation: that is, a local agency may not enact any fireworks regulation that is inconsistent with the State Fireworks Law.<sup>30</sup> The instruction of *Ventura* is that the Legislature knows how to fully disclaim preemption when it wants to, and the Legislature has done so with respect to the sale, use, and discharge of fireworks. The power to “*regulate*” other fireworks-related activities is not necessarily the power to “*forbid*” those activities completely. An outright ban on an activity would not be valid where, as here, state law calls for shared control of that activity by means of state licenses and local permits.<sup>31</sup>

Accordingly, we conclude that a city may enact an ordinance regulating the offering for sale, possession, storage, or transportation of fireworks within city limits to the extent that the regulation is compatible with the State Fireworks Law, but that a city may not enact an ordinance that would operate as a total ban on those activities.

### **Administrative Fines**

The second question is whether a city may impose administrative fines pursuant to Government Code section 53069.4 for violations of a fireworks ordinance, rather than prosecuting violations within the criminal justice system. We conclude that such fines are permissible.

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<sup>28</sup> Govt. Code §§ 36900, 36901.

<sup>29</sup> See *Cohen v. Bd. of Supervisors*, 40 Cal. 3d 277, 296-300 (1985).

<sup>30</sup> See Cal. Const. art. XI, § 7; Govt. Code § 37100.

<sup>31</sup> See *Ventura v. City of San Jose*, 151 Cal. App. 3d at 1081-1082. Cf. § 11571.1(a) (“Nothing in this article shall prevent a local governing body from adopting and enforcing laws, consistent with this article, relating to drug abatement. Where local laws duplicate or supplement this article, this article shall be construed as providing alternative remedies and not preempting the field.”).

The Legislature’s purpose in enacting Government Code section 53069.4 was to provide a faster and more cost-effective enforcement mechanism than a criminal prosecution for the violation of a local ordinance.<sup>32</sup> The section was expressly modeled on state legislation that removed the enforcement of most parking violations from the criminal justice system and mandated enforcement of parking violations through civil administrative procedures and civil penalties.<sup>33</sup>

Government Code section 53069.4(a)(1) provides:

The legislative body of a local agency, as the term “local agency” is defined in Section 54951, may by ordinance make any violation of any ordinance enacted by the local agency subject to an administrative fine or penalty. The local agency shall set forth by ordinance the administrative procedures that shall govern the imposition, enforcement, collection, and administrative review by the local agency of those administrative fines or penalties. Where the violation would otherwise be an infraction, the administrative fine or penalty shall not exceed the maximum fine or penalty amounts for infractions set forth in subdivision (b) of Section 25132 and subdivision (b) of Section 36900.

It has been suggested that this provision does not apply to misdemeanor violations because it specifically mentions only infractions. We reject the suggestion. The first sentence of Government Code section 53069.4(a)(1) plainly states that the section applies to “any violation of any ordinance.” This all-inclusive language necessarily encompasses ordinances creating misdemeanors as well as ordinances creating infractions. Moreover, the specific mention of infractions in the phrase “where the violation would otherwise be an infraction” implies that the section is not limited to ordinances creating infractions; if it were so limited, the phrase would be surplusage. We are not free to construe a statute in that manner.<sup>34</sup>

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<sup>32</sup> See Assem. Comm. on Pub. Safety, Analysis of Sen. 814 (as amend. Apr. 24, 1995), 1995–1996 Reg. Sess. 1 (June 12, 1995).

<sup>33</sup> *Id.*; Sen. Rules Comm., Unfinished Bus.—Analysis of Sen. 814 (as amend. Aug. 21, 1995), 1995–1996 Reg. Sess. 2 (Sept. 1, 1995). See Veh. Code §§ 40200 *et seq.* (parking enforcement provisions).

<sup>34</sup> *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159 (1991).

Moreover, several provisions of the State Fireworks Law itself expressly acknowledge the possibility that a local jurisdiction may impose administrative fines for violations of its fireworks ordinances. Section 12557 refers to the administrative fine procedures authorized by Government Code section 53069.4 as a remedy for violations of a local ordinance related to the possession of 25 pounds or less of fireworks. Section 12726(c) mandates a particular distribution of administrative fines or penalties collected by a local government if dangerous fireworks are seized pursuant to a local ordinance that provides for such fines or penalties. We believe that these provisions manifest the Legislature's determination that violations of local fireworks ordinances are appropriate for the administrative penalties and procedures authorized by Government Code section 53069.4.

Finally, we are asked whether a city may impose an administrative fine of up to \$1,000 for each violation of its fireworks ordinance. Government Code section 53069.4 specifies the maximum amount of the administrative fine or penalty that could be imposed for a violation that would otherwise be an infraction,<sup>35</sup> but does not address the amount of an administrative fine or penalty that could be imposed for a violation that would otherwise be prosecuted as a misdemeanor. We note that a fine of \$1,000 is typically the maximum fine authorized as punishment for a misdemeanor,<sup>36</sup> and that the maximum monetary fine or monetary penalty specifically for a violation of a city ordinance is also \$1,000.<sup>37</sup> We note also that section 12700(a), within the State Fireworks Law itself, imposes a fine of up to \$1,000 for a misdemeanor violation of the State Fireworks Law. In light of all these provisions, we believe that it would be reasonable for a city to impose an administrative fine up to a maximum of \$1,000 for each violation of its fireworks ordinance.

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<sup>35</sup> Maximum penalties for infractions range from \$100 to \$1,000 per offense, depending on the nature of the infraction and on how many times a person has committed the same infraction. *See* Govt. Code §§ 25132 (counties), 36900 (cities).

<sup>36</sup> Pen. Code § 19 (“Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.”).

<sup>37</sup> Govt. Code § 36901.

Accordingly, we conclude that if a city enacts an ordinance regulating fireworks activities within city limits, the city may impose an administrative fine pursuant to Government Code section 53069.4 of up to \$1,000 for each violation.

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