TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 80-901
of	:	December 9, 1980
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SUBJECT: BOAT OWNER COVERAGE—A general law city, in operating a public boating program on a city leased body of water, may not law fully adopt an ordinance requiring each boat owner to be covered by a liability policy that names the city as an additionally insured party.

The Honorable Robert C. Frazee, Assemblyman, Seventy-Sixth District, has requested an opinion on a question we have phrased as follows:

May a general law city, in operating a public boating program on a city leased body of water, adopt an ordinance requiring each boat owner to be covered by a liability insurance policy that names the city as an additionally insured party?

CONCLUSION

A general law city, in operating a public boating program on a city leased body of water, may not lawfully adopt an ordinance requiring each boat owner to be covered by a liability policy that names the city as an additionally insured party.

ANALYSIS

We are informed that a general law city located in Southern California leases a lagoon upon which it operates an extensive public boating program. The lagoon is self-contained and is bounded by a state highway and part of the city's residential area.

The city has enacted an ordinance imposing various conditions upon the use of the lagoon. Jet skis may only be used in certain areas during limited periods, power boats have exclusive use of the lagoon at certain times, the maximum number of boats at any one time is limited to 80, and each power boat must have a valid registration. A daily permit fee of $7 is charged ($5 for city residents), with weekly and annual permits also available.

The question presented for analysis is whether the city's ordinance may also contain a provision requiring each boat owner to obtain a liability insurance policy in the amount of $300,000 and naming the city as an additionally insured party. We conclude that such a provision would be contrary to law.

Section 7 of article XI of the Constitution states: "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."[1] In implementing this constitutional authorization with regard to the government of cities, the Legislature has provided in Government Code section 37100 that "The legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States."

Although a city's police power may "be applied only within its own territory and is subject to displacement by general state law," it is otherwise "as broad as the police power exercisable by the Legislature itself. (*Stanislaus Co. etc., Assn. v. Stanislaus* (1937) 8 Cal. 2d 378, 383–384; *In re Maas* (1933) 219 Cal. 422, 425.)" (*Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 140; see also *City of Lafayette v. County of Contra Costa* (1979) 91 Cal. App. 3d 749, 753.)

The usual restrictions and limitations placed upon the exercise of police powers would of course be applicable to a city's authority, ensuring that the means employed to protect the public health, safety, and general welfare are not arbitrary or discriminatory and

[1] Section 5 of the same article provides that the charter provisions of a charter city "with respect to municipal affairs shall supersede all laws inconsistent therewith." The Constitution thus distinguishes between general law cities, the ordinances of which must not be in conflict with state laws, and charter cities, the ordinances of which supersede inconsistent state laws involving "municipal affairs. Our discussion herein is limited to general law cities and the application of section 7.

are reasonably designed to achieve protection of legitimate public interests. [Citations]." (45 Ops. Cal. Atty. Gen. 122, 127 (1965).)

Preliminary, we note that the enactment of financial responsibility laws would come within the general scope of the constitutional police powers authorization. The Legislature, for example, has utilized such powers in adopting the Automobile Financial Responsibility Law. (Veh. Code §§ 16000–16560.) (See *Barrera v. State Farm Mut. Automobile* Ins. Co. (1969) 71 Cal. 2d 659, 671.)

A distinction may be drawn, however, between requiring a person to insure against liability for his own conduct and the possible liability of a third party. This distinction was noted by the *Supreme Court in Ellis v. Board of Education* (1949) 27 Cal. 2d 322, 324–327, where a school board attempted to require those using its facilities for public meetings to obtain liability insurance on behalf of the school district. The court ruled that the cost of such insurance would be a normal cost of "management" and "maintenance" which by express statute could not be passed on to the prospective users in question. (*Id.*, at pp. 328–329.)

Here, we do not have a statute that specifically prohibits a city from requiring a boat owner to obtain liability insurance for the city when using his boat on city leased property. On the contrary, it has been suggested that Harbors and Navigation Code section 660, subdivision (a),[2] authorizes the adoption of such a local requirement. The subdivision provides:

> "*The provisions of this chapter*, and of other applicable laws of this state, *shall govern the use, equipment, and all other matters relating thereto whenever any boat or vessel shall be used on the waters of this state*, or when any activity regulated by this chapter shall take place thereon. *Nothing in this chapter shall be construed to prevent the adoption of any ordinance, law, regulation or rule relating to vessels by any* entity otherwise authorized by law to adopt such measures, including but not limited to any city, county, city and county, port authority, district or state agency; *provided, however, that such measures relating to boats or vessels shall pertain only to time-of-day restrictions, speed zones, special-use areas, and sanitation and pollution control, the provisions of which are not in conflict with the provisions of this chapter or the regulations adopted by the department*. Such measures shall be submitted to the department prior to adoption and at least 30 days prior to the effective date thereof."[3] (Emphasis added.)

[2] All unidentified statutory references hereafter are to the Harbors and Navigation Code.

[3] We note that the statute refers to the use of boats "on the waters of this state." The lagoon in

The suggestion made is that the insurance policy requirement would come within the "special-use areas" authorization of the statute.

We have previously discussed the meaning of a "special use area" as follows: "The context and usage of the term suggests the setting aside of a portion of waters for specified uses to the exclusion of other incompatible uses." (45 Ops. Cal. Atty. Gen. 122, 126 (1965); see also *People ex rel. Younger v. County of El Dorado* (1979) 96 Cal. App. 3d 403, 405–407.) It does not appear that the term reasonably encompasses the setting aside of a body of water for only those boat owners who carry liability insurance. Accordingly, we reject the argument that section 660 authorizes the ordinance provision in question.

It has also been suggested that subdivision (a) of section 268 authorizes the local adoption of a liability insurance requirement. The subdivision provides in part: "Counties or cities may adopt restrictions concerning the navigation and operation of vessels and water skis, aquaplanes, or similar devices subject to the provisions of subdivision (a) of Section 660."

Presumably, this provision adds something to the powers of counties and cities not found in section 660, even though it refers to the latter statute. (See *California Mfgrs. Assn. v. Public Utilities Com*. (1979) 24 Cal. 3d 836, 846; *Fields v. Eu* (1976) 18 Cal. 3d 322, 328.) While we do not attempt to define the precise limits of the "restrictions" authorization contained in section 268, we do not believe that the Legislature intended for a liability insurance requirement to be included within the grant of authority.

Finding no express legislative enactment authorizing the local adoption of a liability insurance requirement, we must ascertain whether such a requirement would conflict with the application of any state laws. (Cal. Const., art. IX, § 7; Gov. Code § 37100.)

As was stated in *Lancaster v. Municipal Court* (1972) 6 Cal. 3d 805, 807, 808, "Local legislation in conflict with general law is void. Conflict exists if the ordinance duplicates [citations], contradicts [citation] or enters an area fully occupied by general law, either expressly or by legislative implication [citations]."

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question was created from marshland adjacent to the Pacific Ocean, it is bounded in part by state property, it is open to the public, a city has a leasehold interest in the property, and the lagoon provides a wide range of boating opportunities. Consequently, we have no doubt that the lagoon constitutes part of the "waters of this state." (See § 651 subd. (k); Cal. Adm. Code, tit. 14, §§ 6550.5. 6552 subd. (g), 6602 subd. (f): *Bohn v. Albertson* (1951) 107 Cal. App. 2d 738, 740–745: see also *People v. Sweetser* (1977) 72 Cal. App. 3d 278, 283; *Hitching: v. Del Rio Wood: Recreation & Park Dist*. (1976) 55 Cal. App. 3d 560. 566–571: *People ex ret. Baker v. Mack* (1971) 19 Cal. App. 3d 1040, 1044–1055.)

No "supplementary" or "complementary" legislation may be enacted by a city in an area "preempted" by the state. (See *In re Lane* (1962) 58 Cal. 2d 99, 102; *Abbott v. City of Los Angeles* (1960) 53 Cal. 2d 674, 681.) Preemption occurs if "'(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.'" (*Galvan v. Superior Court* (1969) 70 Cal. 2d 851, 859–860.)

The Legislature has partially covered the subject matter of boating safety and the liability of a boat owner for the negligent operation of his boat. Subdivisions (b) and (f) of section 661 limits a boat owner's liability for imputed negligence as follows:

> "The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of ten thousand ($10,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of twenty thousand dollars ($20,000) for the death of or injury to more than one person in any one accident and is limited to the amount of ten thousand dollars ($10,000) "for damage to property of others in any one accident."
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> "Where two or more persons are injured or killed in one accident, the owner may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and the payments shall diminish to the extent thereof the owner's total liability on account of the accident. Payments aggregating the full sum of twenty thousand dollars ($20,000) shall extinguish all liability of the owner for death or personal injury arising out of the accident which exists by reason of imputed negligence, pursuant to this section, and did not arise through the negligence of the owner nor through the relationship of principal and agent or master and servant." (§ 661, subd. (f).)

While section 661 may be constitutionally infirm (see *Cal. Pleasure Boating Law* (Cont. Ed. Bar 1963) p. 337; Stolz, *Pleasure Boating and Admiralty* (1963) 51 Cal. L. Rev. 661, 716), it indicates a possible legislative intent to occupy the field of legislation regulating the liability insurance requirements of boat owners.

Such legislative intent is understandable, given the historical context in which the subject has been treated. The tort liability of a boat owner has traditionally been governed by rules of admiralty unique to the maritime industry, and federal law has clearly preempted the field in certain areas. (See Stolz, *supra*, pp. 708–718; Cook, *Death on Inland Waters* (1967) 18 Hastings L. J. 869, 869–872.) By adding to the federal regulatory scheme certain state laws governing other aspects of boating safety and owner liability (see §§ 651.5, 652, 655, 656.4, 658) and the Legislature's intention "to promote uniformity of laws relating" to the use and equipment of vessels (§ 650), it is apparent that any local intrusion into such an area requires particular scrutiny.

We believe that the ordinance in question meets the third test for preemption where "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." (See *Bell v. City of Mountain View* (1977) 66 Cal. App. 3d 332, 338; *Yuen v. Municipal Court* (1975) 52 Cal. App. 3d 351, 354.) If each county and city operating a boating program were free to adopt the type of ordinance provision in question, a boat owner traveling throughout the state would be faced with substantial barriers in the use of his boat. These barriers outweigh the possible benefit to the city in operating its boating program.

It is this latter concept that distinguishes what would otherwise be the rather similar situations of requiring (1) the payment of a daily permit fee and (2) the obtaining of a liability insurance policy. If the former is lawful, a city may insure against its own negligent liability and pass on the costs of such a "management" and "maintenance" cost to those benefiting from the program.

We thus see no dire consequences for the city in the interpretation we have given to the statutory scheme.

In summary, we conclude that a general law city, in operating a public boating program on a city leased body of water, may not lawfully adopt an ordinance requiring each boat owner to be covered by a liability insurance policy that names the city as an additionally insured party.

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