

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

JOHN K. VAN DE KAMP  
Attorney General

---

OPINION	:	No. 83-201
	:	
of	:	<u>JANUARY 4, 1984</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
RODNEY O. LILYQUIST	:	
Deputy Attorney General	:	
	:	

---

THE HONORABLE JAMES E. SMITH, COMMISSIONER,  
DEPARTMENT OF THE CALIFORNIA HIGHWAY PATROL, has requested an opinion  
on the following questions:

1. Does the city or county have the authority to establish a licensing or  
inspection program regulating the transportation of hazardous material over roadways  
within its jurisdiction?

2. Does a city or county have the authority to restrict the roadways upon  
which hazardous material is transported within its jurisdiction?

## CONCLUSIONS

1. A city or county does not have the authority to establish a licensing or inspection program regulating the transportation of hazardous material over roadways within its jurisdiction.

2. A city or county has limited authority to restrict the roadways upon which hazardous material is transported within its jurisdiction.

## ANALYSIS

The questions presented for analysis concern the authority of cities and counties to enact ordinances regulating the transportation of "hazardous material" over roadways within their jurisdictions. The first question deals with a licensing or inspection program, and the second concerns restricting the roads upon which such material may be transported.

Applying the applicable provisions of the Vehicle Code,<sup>1</sup> we conclude that cities and counties may not establish their own licensing or inspection programs regulating the transportation of hazardous material over roadways within their jurisdictions but may to a limited degree restrict the roadways upon which the material is transported within their jurisdictions.

### 1. Local Licensing and Inspection Programs

The first question to be resolved is whether a city or county may exercise its general "police powers" authority to establish a licensing or inspection program. 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."

The "general law" relevant here is Vehicle Code section 21.<sup>2</sup> It provides:

"Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any

---

<sup>1</sup> Federal law on the general subject matter is outside the scope of this opinion. (See 49 U.S.C. §§ 1801-1812; 49 C.F.R. 171-179 (1982); 62 Ops.Cal.Atty.Gen. 448, 457-459 (1979).)

<sup>2</sup> All references hereafter to the Vehicle Code are by section number only.

ordinance on the matters covered by this code unless expressly authorized herein."

A licensing and inspection program regulating the transportation of hazardous material is a matter covered by the Vehicle Code. The Department of the California Highway Patrol ("CHP") is responsible for both licensing (§ 32000.5) and inspecting (§ 32001) motor carriers transporting hazardous material. Section 32000.5 states:

"(a) Every motor carrier who directs the transportation of an explosive and, on and after July 1, 1982, any motor carrier who directs the transportation of a hazardous material, who is required to display placards pursuant to Section 27903, and every motor carrier who transports for a fee in excess of 500 pounds of hazardous materials of the type requiring placards pursuant to Section 27903, shall be licensed in accordance with the provisions of this code, unless specifically exempted by this code or regulations adopted pursuant to this code. This license shall be available for examination and shall be displayed in accordance with the regulations adopted by the commissioner.

"(b) This division shall not apply to any person hauling only hazardous waste, as defined in Section 25115 or 25117 of the Health and Safety Code, and who is registered pursuant to subdivision (a) of Section 25163 of Health and Safety Code or who is exempt from that registration pursuant to subdivision (b) of that section.

"(c) This division shall not apply to implements of husbandry, as defined in Section 36000."

Section 27903 in turn provides:

"Subject to the provisions of Section 25611 of the Health and Safety Code, any vehicle transporting any explosive, blasting agent, flammable liquid, flammable solid, oxidizing material, corrosive, compressed gas, poison, radioactive material, or other hazardous materials, of such type and in such quantities as to require the display of placards or markings on the vehicle exterior by the United States Department of Transportation regulations (49 C.F.R., Parts 172, 173, and 177), shall display such placards and markings in the manner and under conditions prescribed by such regulations of the United States Department of Transportation.

"This section does not apply if the vehicles are transporting not more than 20 pounds of smokeless powder or not more than five pounds of black sporting powder or any combination thereof."<sup>3</sup>

Section 32001 not only authorizes vehicle inspections but also establishes the prerequisites for the transportation of hazardous materials:

"(a) Any authorized employee of the department may inspect any sealed or unsealed vehicle, container, or shipment subject to this division in maintenance facilities, terminals, or other public or private property to ascertain the quantity and kind of hazardous material and to ensure compliance with the provisions of this code and regulations adopted pursuant to this code. If a seal is opened for inspection, the department shall reseal any vehicle, container, or shipment prior to further transportation.

"(b) Unless specifically stated, nothing contained in this division shall be deemed to exempt any vehicle transporting a hazardous material subject to this division or the operator or any other person from other provisions of this code.

"(c) No motor carrier shall direct the transportation of any shipment of a hazardous material in any vehicle unless all of the following are complied with:

"(1) The vehicle is equipped as required by this code and applicable regulations adopted pursuant to law.

"(2) The shipment complies with laws and regulations pertaining to the shipment or transportation of hazardous material.

"(3) The motor carrier holds a valid license for the transportation of hazardous materials."

---

<sup>3</sup> Section 25611 of the Health and Safety Code states:

"Any regulations relating to radioactive material cargo, including, but not limited to, packing, marking, loading, handling, and transportation, shall be reviewed and made compatible with the federal regulations adopted pursuant to the federal Department of Transportation Docket No. HM-164, Notice No. 80-1, within 60 days of the date such federal regulations becomes effective."

Because of these elaborate provisions for the licensing and inspecting of vehicles transporting hazardous material, the first issue may be reduced to whether the Legislature has "expressly authorized" a licensing or inspection program on the local level. If not, a local program would be in conflict with section 21 and the constitutional grant of police powers authority. (See *Rumford v. City of Berkeley*, *supra*, 31 Cal.3d 545, 553; *Pipoly v. Benson*, *supra*, 20 Cal.2d 366, 370; *Aguilar v. Municipal Court* (1982) 130 Cal.App.3d 34, 37; *City of Lafayette v. County of Contra Costa*, *supra*, 229 Cal.App.2d 221, 228-229.)

The Legislature's delegation to local authorities of power to make vehicular traffic rules and regulations "will be strictly construed, --such authority must be 'expressly (not impliedly) declared by the Legislature.'" (*People v. Moore* (1964) 229 Cal.App.2d 221, 228.) "Expressly means "'in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.'"" (*City of Lafayette v. County of Contra Costa*, *supra*, 91 Cal.App.3d 749, 756, fn. 3.)

We have found no provision of the Vehicle Code that expressly authorizes cities and counties to have their own licensing and inspection programs regulating the transportation of hazardous material. The statewide program administered by the CHP is the only statutorily authorized program we have found.

Consequently, a city or county may not enact ordinances under its constitutional police powers authority to regulate the transportation of hazardous material.

One other possibility exists that would give cities and counties the authority to enact the ordinances in question. Under a "home rule" charter provision, local ordinances supersede general state laws with respect to "municipal affairs." (Cal. Const., art. XI, §§ 3, 5; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 315-316; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 135.) The "municipal affairs" doctrine, however, is inapplicable here since regulating the use of the public roads and highways by whatever means is outside its scope. (See *Rumford v. City of Berkeley*, *supra*, 31 Cal.3d 545, 550, fn. 3; *County of Los Angeles v. City of Alhambra* (1980) 27 Cal.3d 184, 192-193; *Pipoly v. Benson*, *supra*, 20 Cal.2d 366, 369; *Ex Parte Daniels* (1920) 183 Cal. 636, 639; *Aguilar v. Municipal Court*, *supra*, 130 Cal.App.3d 34, 37; *City of Lafayette v. County of Contra Costa*, *supra*, 91 Cal.App.3d 749, 753.)

In answer to the first question, therefore, we conclude that cities and counties do not have the authority to establish local licensing or inspection programs regulation the transportation of hazardous material over roads within their jurisdictions.

## 2. Restriction of Roads

The above described rules and analysis are also applicable to the question of whether cities and counties have the authority to restrict the roads upon which hazardous material may be transported within their jurisdictions.

Hence, we are again faced with whether the proposed roadway restrictions by cities and counties are "expressly authorized" by the Legislature so as not to be in conflict with the provisions of section 21. (See *Rumford v. City of Berkeley*, *supra*, 31 Cal.3d 545, 553; *City of Lafayette v. County of Contra Costa*, *supra*, 91 Cal.App.3d 749, 754.)

Unlike the statutory scheme with respect to the licensing and inspection programs, the Legislature has expressly authorized cities and counties to prohibit the uses of particular roads by certain vehicles within their jurisdictions under limited conditions.

The primary statute governing local control over highway uses is section 21101. It states:

"Local authorities may adopt rules and regulations by ordinance or resolution on the following matters:

".....

"(c) *Prohibiting the use of particular highways by certain vehicles*, except as otherwise provided by the Public Utilities Commission pursuant to Article 2 (commencing with Section 1031) of Chapter 5 of Part 1 of Division 1 of the Public Utilities Code. No ordinance which is adopted pursuant to this subdivision after November 10, 1969, shall apply to any state highway which is included in the National System of Interstate and Defense Highways, except an ordinance which has been approved by the California Transportation Commission by a four-fifths vote.

"....." (Emphasis added.)<sup>4</sup>

In *City of Lafayette v. County of Contra Costa*, *supra*, 91 Cal.App.3d 749, 756, fn. 2, the Court of Appeal stated that section 21102, subdivision (c), "covers 'certain

---

<sup>4</sup> A "highway" is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel" and "includes street." (§ 360.)

*classes of vehicles'* such as trucks, or tractors, or oversize or 'excessively noisy' vehicles, or those lacking air-inflated tires. (See 55 Ops.Cal.Atty.Gen. 178, 182-183.)"

While it may be argued that the statute does not authorize local restrictions based upon the *cargoes* of the "certain vehicles," we do not read the statute so restrictively. In a prior opinion, we were concerned with the tranquility of neighborhoods being jeopardized by "excessively noisy" vehicles. (55 Ops.Cal.Atty.Gen. 178, 183 (1972).) We determined that under subdivision (c) of section 21102, "a city or county may prohibit the use of particular highways by certain classes of vehicles determined to be excessively noisy." (*Id.*) Similarly, here, we believe that the statute may be used to protect localities from the possible release of hazardous material by prohibiting the use of certain highways in transporting such material.

A number of qualifications, however, must be stated with regard to the granting of authority under section 21101, subdivision (c). First, besides the limitations contained in the subdivision itself, such as relating to a state highway, various exemptions and conditions attach to the grant of authority (see §§ 21103-21105), and we note that special rules apply to privately owned and maintained roads (see §§ 21107-21108).

Second, as we pointed out in our prior opinion, a city or county may not use its delegated authority under section 21101 to thwart the application of other state laws. (55 Ops.Cal.Atty.Gen., *supra*, 178, 183.) Here, a city or county would be precluded from using its authority under the statute to circumvent the Legislature's statewide program of licensing and inspection by the CHP of those transporting hazardous material.

Third, as in all cases regarding the exercise of police powers, the legislation must not be "arbitrary, unreasonable, or confiscatory." (*Skyline Materials, Inc. v. City of Belmont* (1961) 198 Cal.App.2d 449, 454; see *Neary v. Town of Los Altos Hills* (1959) 172 Cal.App.2d 721, 726-728.)

Finally, we note that with regard to certain types of "hazardous material," the Legislature has delegated to the CHP the responsibility of choosing transportation routes throughout the state. For example, section 33000 states:

"Subject to the provisions of Section 25611 of the Health and Safety Code, the Department of the California Highway Patrol, after consulting with the State Department of Health Services, shall adopt regulations specifying the time at which shipments may occur and the routes which are to be used in the transportation of cargoes of hazardous radioactive materials, as such materials are defined in regulations of the State Department of Health Services."

Although the CHP has not adopted the routing regulations of section 33000 as yet, such regulations will govern over any conflicting local ordinances enacted under section 21101. (See *Governing Board v. Mann* (1977) 18 Cal.3d 819, 828; *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 420.)

Similarly, section 31616 provides with respect to explosives:

*"The Department of the California Highway Patrol, after public hearings with the officials having the responsibility for the prevention and suppression of fire in communities through which routes for the transporting of explosives pass, representatives of transportation companies concerned, explosives manufacturers, and the State Fire Marshal, shall, by regulation, designate the routes in this state which are to be used for the transportation of explosives. The Department of the California Highway Patrol shall prepare for distribution to persons engaged in the transportation of explosives, maps which clearly indicate the routes, as established by the public hearings, which are to be used for the transportation of explosives. The Department of the California Highway Patrol shall prepare for distribution to persons engaged in the transportation of explosives a list of locations of required inspection stops, safe parking places, and safe stopping places and shall revise the list to keep it current."* (Emphases added.)

The CHP has issued detailed routing regulations under the provisions of section 31616. (See Cal. Admin. Code, tit. 13, §§ 1150-1154.) Where the regulations of the CHP do not cover a particular area, however, section 31614, subdivision (a), provides:

*"When transporting explosives through or into a city or any other congested area for which a route has not been designated by the Department of the California Highway Patrol, drivers shall follow such routes as may be prescribed or established by local authorities."*<sup>5</sup>

Here, then, is express authority given to cities and counties to establish transportation routes for explosives where the CHP has not done so. We regard section 31614 as supportive of and consistent with our interpretation of the general language of section 21101.

---

<sup>5</sup> The transportation of "anhydrous hydrazine, fuming nitric acid, and liquid nitrogen tetroxide, when transported in cargo tanks" is also subject to the routing regulations for explosives adopted by the CHP or routing ordinances of cities and counties as the case may be. (§ 31302.)



In answer to the second question, therefore, we conclude that a city or county has limited authority to restrict the roadways upon which hazardous material is transported within its jurisdiction.

\*\*\*\*\*