



CALIFORNIA

LOCAL AUTHORITY TO REGULATE FIREARMS

Article XI, § 7 of 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.” Under this provision, a local government’s police power is as broad as the state Legislature’s power, and a city or county may act to protect the welfare of its residents.¹ A local government’s police power includes the power to regulate firearms.²

Ordinances enacted pursuant to the police power are valid unless they conflict with state law.³ A conflict exists if the ordinance contradicts, duplicates, or enters an area occupied by general law, either expressly or by legislative implication.⁴

“An ordinance contradicts state law if it is inimical to state law; i.e., it penalizes conduct that state law expressly authorizes or permits conduct which state law forbids.”⁵ Local law is duplicative of state law if it is coextensive with state law.⁶ Finally, “local legislation enters an area that is ‘fully occupied’ by [state] law when the Legislature has expressly manifested its intent to ‘fully occupy’ the area or when it has impliedly done so.”⁷

The California Legislature has expressly preempted the following areas of firearms law: 1) licensing or registration of commercially manufactured firearms⁸; 2) licensing or permitting with respect to the purchase, ownership, possession or carrying of a concealable firearm in the home or place of business⁹; and 3) regulation of the manufacture, sale or possession of “imitation firearms”¹⁰.

California Government Code § 53071 provides:

It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in section 1721 of the Labor Code.

California Penal Code § 12026(b) (now section 25605(b)) provides:

No permit or license to purchase, own, possess, keep, or carry...shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code (now sections 29800 et seq. and 29900 et seq., respectively) or Section 8100 or 8103 of the Welfare and Institutions Code, to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen’s or legal

resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.

California Government Code § 53071.5 provides:

By the enforcement of this section, the Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms, as defined in section 12550 of the Penal Code (now section 16700), and that section shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms, including regulations governing the manufacture, sale, or possession of BB devices and air rifles described in subdivision (g) of Section 12001 of the Penal Code (now section 16250).¹¹

In addition, California generally permits local regulation of sport shooting ranges, but provides that local jurisdictions may not enforce new or amended noise control laws on shooting ranges that are in operation and not in violation of existing law at the time of the enactment of the new or amended noise control ordinance, if there has been no substantial change in the nature or use of the range.¹²

Courts will not infer preemption unless the circumstances clearly indicate the Legislature intended to preempt the field.¹³

The Supreme Court of California has held that local regulation may be preempted when the Legislature “has impliedly done so in light of one of the following indicia of intent:”

(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 [locality].¹⁴

Courts have looked to the Legislature’s response to court rulings as an indicator of legislative intent. When courts have ruled that the field of firearms regulation or subfields of firearms regulation are not preempted, the Legislature has responded by choosing to preempt only a few subfields and **not** to preempt the entire field of firearms or other subfields of firearms regulation; courts have found that such a response indicates an intent not to preempt local regulation. Ultimately, the question to be resolved in an implied preemption analysis “is not whether a statute *grants* [a locality] a power, but whether a statute *deprives* [a locality] of a power already bestowed upon the [locality] by the Constitution.”¹⁵

Suter v. City of Lafayette, supra, involved a preemption challenge to an ordinance regulating the location and operation of firearms dealers. Gun sellers challenged the ordinance on state preemption grounds. The court of appeal dismissed the action, holding that local governments are not generally excluded by state law from imposing additional licensing requirements on firearm dealers. *Suter*, 67 Cal. Rptr. 2d at 422. The court found that, with one exception (it struck down the portion of the ordinance regulating firearm storage), the ordinance provisions did not conflict with, duplicate, or enter into a field fully occupied by state law and were not, therefore, preempted.¹⁶

In *Doe v. City and County of San Francisco*, 186 Cal. Rptr. 380 (Cal. Ct. App. 1982), the Court of Appeal of California held that Gov’t Code § 53071 and Penal Code § 12026 (now section 25605) expressly preempted a local ordinance banning the possession of handguns. Because the ordinance contained an explicit exception for concealed weapons licensees, the court found that the measure had the effect of creating a new class of persons who would be required to obtain a license in order to possess a handgun in their home or place of business.¹⁷ The court also stated that:

If we were to find in the San Francisco Handgun Ordinance no “licensing” requirement within the express wording of Government Code section 53071 and Penal Code section 12026 (now section 25605), we

would still reach the conclusion that state law preempts the San Francisco ordinance under the theory of implied preemption. It is at least arguable that the state Legislature's adoption of numerous gun regulations has not impliedly preempted all areas of gun regulation. However, we infer from Penal Code section 12026 (now section 25605) that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities. A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or license.¹⁸

Cases subsequent to *Doe* demonstrate that section 12026 (now section 25605) should be read narrowly.¹⁹

The Supreme Court of California reaffirmed the authority of local governments to regulate firearms – this time in the context of gun shows – in two related cases: *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002) and *Nordyke v. King*, 44 P.3d 133 (Cal. 2002). *Great Western* involved a challenge to a Los Angeles County ordinance prohibiting the sale of firearms and ammunition on county-owned property. The County adopted the ordinance after a California Department of Justice undercover operation revealed numerous illegal firearm sales at a gun show held on the county fairgrounds. Legislative findings accompanying the ordinance also recited the high incidence of gun-related deaths and injuries in the County.

Great Western Shows, Inc., a gun show promoter, filed suit in the United States District Court for the Central District of California, alleging, among other things, that the ordinance was preempted by state law and violated the First Amendment. The district court granted a preliminary injunction, holding that the complaint raised substantial questions regarding whether state law preempted the ordinance. The County filed an interlocutory appeal in the U.S. Court of Appeals for the Ninth Circuit, which then certified to the state supreme court questions relating to preemption and jurisdiction.

The supreme court upheld the ordinance, rejecting plaintiff's claim that state law has preempted the field of gun show regulation. The court observed that there is no express preemption in this area, noting that, on the contrary, Penal Code sections 12071 (concerning the licensing of firearm dealers, now section 26700, *et seq.*) and 12071.4 (regulating gun shows, now section 27300, *et seq.*) explicitly acknowledge the existence of local laws pertaining to gun shows. The court found the ordinance not duplicative of or in conflict with state law, stating that although gun show statutes regulate, *inter alia*, the sale of guns at gun shows and therefore contemplate gun shows, the statutes do not mandate sales such that a limitation of sales on county property would be in direct conflict with the statutes.²⁰

The court refused to find implied preemption under the three "indicia of intent" detailed in *Sherwin-Williams Co., supra*, finding first that state law does not clearly indicate that gun show regulation has become exclusively a matter of state concern. The court declined to find a "paramount state concern" that will not tolerate further local action, noting judicial reluctance to find such a concern where there is a significant local interest to be served that may differ from one community to another: "It is true today as it was more than 30 years ago when we stated it in *Galvan*, '[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County.' (*Galvan, supra*, 70 Cal. 2d at p. 864.)" Thus, the court found, the costs and benefits of making firearms more available through gun shows to the populace of a heavily urban county such as Los Angeles may well be different than in rural counties, where violent gun-related crime may not be as prevalent.²¹

The court also refused to find implied preemption under the third "indicia of intent," agreeing with previous cases that "[l]aws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens."²²

In addition, the court rejected *Great Western's* claim that, while state law may permit local gun show regulations, it would not tolerate a regulation that would have the effect of banning such shows. The court found nothing in state law to indicate a stated purpose of promoting or encouraging gun shows; rather, state law merely acknowledges that such shows take place and regulates them to promote public safety. The court noted further that the ordinance does not affect gun shows

countywide, but only disallows gun sales on county-owned property. The court found that none of the gun show statutes implicitly seek to override a county's ability to manage its property and make fundamental decisions regarding its use:

*Aside from First Amendment public forum considerations or special statutory requirements not before us, the County is not compelled to grant access to its property to all comers. Nor do the gun show statutes mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes.*²³

The Supreme Court of California issued a similar ruling in *Nordyke v. King*, 44 P.3d 133 (Cal. 2002), rejecting a challenge to an Alameda County ordinance prohibiting the possession of firearms and ammunition on county-owned property. The County had adopted the ordinance after a mass shooting at the county fairgrounds on July 4, 1998, and recited the epidemic of gunshot fatalities and injuries in the County as additional justification for the ordinance.

Nordyke was filed by gun show promoters in the United States District Court for the Northern District of California. Plaintiffs sought to enjoin enforcement of the ordinance, arguing that it was preempted by state law and violated the First Amendment. The district court rejected these arguments and plaintiffs filed an interlocutory appeal in the Ninth Circuit. As in the *Great Western* case, the Ninth Circuit certified to the Supreme Court of California the question of whether state law preempted the ordinance.

Incorporating its analysis and holding in *Great Western*, the supreme court found that state law does not preempt the Alameda County ordinance. The court held that the ordinance does not duplicate or contradict state law governing the possession of firearms, including Penal Code section 171b, which exempts from its prohibition on gun possession in public buildings persons who lawfully possess firearms at gun shows:

*The provision merely exempts gun shows from the state criminal prohibition on possessing guns in public buildings, thereby permitting local government entities to authorize such shows. It does not mandate that local government entities permit such a use, and the Nordykes cite no legislative history indicating otherwise.*²⁴

The court noted that the ordinance may be more restrictive than state statutes inasmuch as the latter provide more exceptions to the general prohibition on firearm possession (e.g., those for animal control officers). However, the court stated that "the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property."²⁵ In addition, the court held that even if the ordinance were partially preempted, it would not be invalidated as a whole.

Most recently, in *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895 (Cal. Ct. App. 2008), the Court of Appeal of California, First Appellate District (the same court that decided the *Doe* case), considered whether Proposition H, a municipal ordinance prohibiting the sale, distribution, transfer and manufacture of all firearms and ammunition in San Francisco and banning possession of handguns by San Francisco residents, was preempted by state law. The court held that Penal Code section 12026(b) (now section 25605(b)) and Government Code section 53071 preempted the ban on handgun possession. The court also found that section 53071 and Penal Code sections 12026(b) (now section 25605(b)) and 12125-12133 (the state Unsafe Handgun Act, now sections 32000-32030) preempted the transfer and manufacture prohibitions. The California Supreme Court declined to review the case.

ENDNOTES

1. *Candid Enterprises v. Grossmont Union High School District*, 705 P.2d 876, 882 (Cal. 1985).
2. *Galvan v. Superior Court of San Francisco*, 452 P.2d 930 (Cal. 1969).
3. *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 536 (Cal. 1993).
4. *Id.* at 536-7.
5. *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 428 (Cal. Ct. App. 1997).
6. *Sherwin-Williams*, 844 P.2d at 536.
7. *Id.* at 536-7. (citations omitted).
8. Cal. Gov't Code § 53071.
9. Cal. Penal Code § 12026.
10. Cal Gov't Code § 53071.5. An amendment to this statute, enacted in 2012, allows the County of Los Angeles and any city within the County of Los Angeles to adopt regulations more restrictive than state law when it comes to regulating the manufacture, sale, possession, or use of any BB device, toy gun, replica of a firearm, device that expels a firearm no more than 16 millimeters in diameter, or any device that is so substantially similar in appearance to a firearm as to lead a reasonable person to perceive that the device is a firearm.
11. *Id.* For an exception to this provision regarding the ability of Los Angeles to regulate imitation firearms, see, *supra*, FN 10.
12. Cal. Civ. Code § 3482.1(d).
13. *California Rifle and Pistol Ass'n, Inc. v. City of West Hollywood*, 78 Cal. Rptr. 2d 591, 600 Cal. Ct. App. 1998) (holding that state law did not preempt a local ordinance banning the sale of Saturday Night Specials).
14. *Sherwin-Williams Co.*, 844 P.2d at 537 (citations omitted).
15. *Id.* at 602, 598-601 (California Legislature's history of selective and narrow preemption in response to courts holding that the Legislature had not preempted local firearms regulations indicated that the Legislature had expressly avoided preemption).
16. *Id.*
17. *Id.* at 384.
18. *Id.* at 385 (citation omitted).
19. See *City of West Hollywood*, 78 Cal. Rptr. 2d at 605 (rejecting argument that section 12026, now section 25605, creates a broad right to purchase or possess any handgun not specifically prohibited by state law).
20. *Great Western*, 44 P.3d at 128.
21. *Id.* at 128-129.
22. *Id.* at 129. See *Galvan*, 452 P.2d at 939.
23. *Great Western*, 44 P.3d at 130-131.
24. *Nordyke*, 44 P.3d at 138.
25. *Id.*

ABOUT THE LAW CENTER TO PREVENT GUN VIOLENCE

Founded in the wake of the July 1, 1993, assault weapon massacre at 101 California Street in San Francisco that left eight dead and six wounded, the Law Center to Prevent Gun Violence is now the premier resource for legal expertise and information regarding state and federal firearms laws. We track and analyze gun laws in all 50 states, file amicus briefs in Second Amendment cases across the country, and work with lawmakers and advocates to craft and promote legislation that will reduce gun violence and save lives. We regularly partner with law firms and nonprofit organizations dedicated to combating the epidemic of gun violence in our country, and we invite you to learn more about our work by visiting our website, smartgunlaws.org.

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