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CITY COUNCIL MEETING

SEPTEMBER 21, 1983

OPINION BY
ATTORNEY GENERAL
RE SEX PROGRAM-
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City Clerk Reimche presented an Opinion of John K. Van De Kamp, Attorney General regarding sex programming on television which was received and which concluded that "A California City does not have the legislative power to enact a penal ordinance which would prohibit a person from displaying on a television received for the viewing by a minor, a "sex program" when such minor's parent is not present or such minor does not have a parent's written permission to view the program.

10-30

City Attorney Stein gave a brief analysis regarding the subject opinion.



TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION

No. 83-305

of

JOHN K. VAN DE KAMP
Attorney General

SEPTEMBER 8, 1983

JOHN T. MURPHY
Deputy Attorney General

THE HONORABLE PHILLIP ISENBERG, A MEMBER OF THE CALIFORNIA ASSEMBLY, has requested our opinion on the following question:

Does a California city have the legislative power to enact a penal ordinance which would prohibit a person from displaying on a television receiver, for the viewing by a minor, a "sex program" when such minor's parent is not present or such minor does not have a parent's written permission to view the program?

CONCLUSION

A California city does not have the legislative power to enact a penal ordinance which would prohibit a person from displaying on a television receiver, for the viewing by a minor, a "sex program" when such minor's parent is not present or such minor does not have a parent's written permission to view the program.

ANALYSIS

A proposal was made to a city council that it prohibit by penal ordinance the display of a "sex program" on a television receiver ^{1/} to a minor whose parent was not present or had not authorized such viewing in writing. A "sex program" would be defined in terms of displaying

1. The ordinance is directed primarily at programs transmitted by cable television systems. However, for this opinion we will not distinguish cable programs from programs presented by video disk, tape or other means.

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specified uncl~~o~~sd parts of the human anatomy or specified sexual conduct. Those owning or controlling the television receiver would be responsible for what was displayed to minors thereon. The obvious purpose of the proposal is to punish persons who permit minors to view without parental approval television programs consisting of explicit nudity or sexual conduct. We are asked whether a California city has the legislative power to enact such an ordinance. We conclude that it does not.

THE ORDINANCE CONFLICTS WITH GENERAL LAW.

Article XI, section 7, of the California Constitution states:

"A county or city may make and enforce within its limits all local, police, sanitary, or other ordinances and regulations not in conflict with general law." (See also Gov. Code, § 37100.)

Since a city ordinance enacted under this power would be void if it conflicts with general state laws, we must examine the possible conflicts. A conflict may occur (1) if an ordinance duplicates state law, or (2) if an ordinance contradicts state law by prohibiting what state law allows or allowing what state law prohibits. (Lancaster v. Municipal Court (1972) 6 Cal.3d 805, 807-808; In re Lane (1962) 58 Cal.2d 99, 106; Abbott v. City of Los Angeles (1960) 53 Cal.2d 674, 681-682; Doe v. City and County of San Francisco (1982) 136 Cal.App.3d 509, 517-518.) A conflict may also arise where state law has preempted the particular field of law by express declaration or by implication. (Lancaster v. Municipal Court, supra, 6 Cal.3d at 808; Doe v. City and County of San Francisco, supra, 136 Cal.App.3d at 517-518.)

Since the proposal would forbid the display of "sex programs" to children without parental presence or prior written permission, we are immediately alerted to the state laws prohibiting the dissemination of "harmful matters" to minors. (Pen. Code, § 313-313.4.) Penal Code section 313.1, subdivision (a), provides as follows:

"Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor."

"Harmful matter" is defined in Penal Code section 313:

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"(a) 'Harmful matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors.

"(1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the predominant appeal of the matter shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character of the matter.

"(f) 'Exhibit' means to show.

"(g) 'Minor' means any natural person under 18 years of age." (Emphasis added.)

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In plain meaning, these state statutes prohibit a person from knowingly exhibiting or showing to a minor a picture, drawing, photograph, motion picture or pictorial representation (1) the predominant appeal of which to the average person applying contemporary standards is to prurient interest, (2) is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors and (3) is utterly without redeeming social importance for minors. Does a person who knowingly makes a television receiver available to a minor upon which such harmful matter, in the form of nudity or sex, is being shown fall within the proscription of Penal Code section 313.1, subdivision (a)? We believe so, unless the person is exempted from the statutes.

As we have seen, the proposal would forbid the television display to minors of "sex programs." Assuming for the purpose of this analysis only that the ordinance would meet constitutional tests 2/, it is our opinion that such an ordinance would duplicate the state harmful matter laws by criminalizing the same conduct which has already been made criminal by such laws. (See In re Portnoy (1942) 21 Cal.2d 237, 240 (slot machine ordinance duplicated Penal Code provisions); Pipoly v. Benson (1942) 20 Cal.2d 366, 370 (pedestrian roadcrossing ordinance duplicated Vehicle Code provisions); In re Mingo (1923) 190 Cal. 769, 771 (liquor possession ordinance duplicated Wright Act).) The "invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulation covering the same ground." (Pipoly v. Benson, *supra*, 20 Cal.2d at 371; People v. Villarino (1955) 134 Cal.App.2d Supp. 893, 900.) The ordinance would proscribe the same conduct already proscribed by the state and, accordingly, would duplicate the harmful matter statutes.

We also conclude that an ordinance of the kind proposed would contradict the state laws. It would nullify the exemptions to Penal Code section 313.1 contained in Penal Code section 313.2:

2. The ordinance raises serious questions concerning speech, privacy, vagueness, overbreadth and equal protection. In First Amendment context, "[p]recision of regulation must be the touchstone. . . ." (N.A.A.C.P. v. Button (1963) 371 U.S. 415, 438.) In view of our conclusion, however, it is not necessary that we address these matters.

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"(a) Nothing in this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him.

"(b) Nothing in this chapter shall prohibit any person from exhibiting any harmful matter to any of the following:

"(1) A minor who is accompanied by his parent or guardian.

"(2) A minor who is accompanied by an adult who represents himself to be the parent or guardian of the minor and whom the person, by the exercise of reasonable care, does not have reason to know is not the parent or guardian of the minor."

Accordingly, the person exhibiting the program to the minor would not violate Penal Code section 313.1, subdivision (a), if the minor were accompanied by a parent, a guardian or a person representing himself as either. In contrast, the ordinance would exempt from criminal liability a person who has obtained the prior written permission of a parent. Consequently, the proposed ordinance would, in effect, authorize what state law prohibits.

We conclude that the ordinance described in the proposal would both duplicate and contradict state law and, thus, conflict therewith.

We also conclude that such an ordinance would be invalid because state law has preempted this field of law. If a field of law has been preempted by state law, no local law regulating that field is allowed. (Lancaster v. Municipal Court, supra, 6 Cal.3d 805, 808 (ordinance prohibiting massage parlors invalid since regulation of sexual conduct is a field fully occupied by state law).) We believe the field of law at issue is the distribution to children of harmful matter in the form of explicit nudity or sexual conduct. While we find no express legislative statement of intent to preempt this field, nevertheless such intent is implied from the state laws.

Abbott v. City of Los Angeles, supra, 53 Cal.2d 674 concerned a city ordinance requiring convicted felons to register. State law, however, compelled only sex offenders to register. The court struck down the ordinance recognizing a legislative intent to provide uniform treatment of convicted criminals and holding that state law preempted the field of registration of criminals. (Abbott,

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Id., at p. 688.) Similarly, in In re Lane, supra, 58 Cal.2d 99, 105, the court found a local ordinance regulating prostitution was preempted by state laws in the field of sexual conduct. The tests to determine whether or not the Legislature has occupied a particular field by implication are found in Galvan v. Superior Court (1959) 70 Cal.2d 851, 859-860 (quoting from In re Hubbard (1964) 62 Cal.2d 119, 128):

"(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 of the municipality."

The state laws fully cover the field of distribution of harmful matter to children. As we previously discussed Penal Code section 313, subdivision (b), provides that harmful matter may be found in "any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials." The proposal concerns itself with pictorial representations, namely, sexually explicit television programs. This type of harmful matter is clearly within the Penal Code proscription. Indeed, Penal Code section 313, subdivision (a), covers the entire subject of the distribution of harmful matter, as it relates to children. This field of law, then, is fully, completely and comprehensively covered by the state statutes 3/ which coverage indicates a legislative intent to occupy the field. Consequently, the ordinance would not survive the first preemption test.

Carl v. City of Los Angeles (1976) 61 Cal.App.3d 265 involved an ordinance which, inter alia, prohibited the offer of sale or the sale of harmful matter (as defined in

3. Other state statutes also deal with indecency vis-a-vis children. (See Pen. Code, § 272 (contributing to delinquency of minors); Pen. Code, § 273ab (child abuse).)

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Penal Code section 313) from a newsrack on any public sidewalk unless an adult person was present who was authorized to prevent the purchase by a minor. In finding the ordinance invalid, the court said:

"We think it is obvious that section 313.1 of the Penal Code preempts the field of offering and selling harmful matter to minors. The parallel decisions holding that the statutes relating to adult obscenity preempt the field leave no room for argument on this point. (Whitney v. Municipal Court, 58 Cal.2d 907, 909-911 [27 Cal.Rptr. 16, 377 P.2d 80]; In re Moss, 58 Cal.2d 117, 117 [23 Cal.Rptr.361, 373 P.2d 425]; Spitcauer v. County of Los Angeles, 227 Cal.App.2d 376, 379 [38 Cal.Rptr. 710]; Mier v. Municipal Court, 211 Cal.App.2d 470, 472-473 [27 Cal.Rptr. 602].)

We observe no conceptual difference between a distribution from a newsrack, on one hand, and a transmission from a television screen, on the other hand. As in Carl, local legislation regulating such harmful matter would be void. 4/

Under the second test preemption will be found when the field has been partially covered by general state law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action. To apply this test we must examine "the pattern of [the state] legislation, the language used in the relevant . . . provisions, and the nature of the subject matter." (Long Beach Police Officers Assn. v. City of Long Beach (1976) 61 Cal.App.3d 364, 372.) The pattern of the legislation at issue demonstrates a complete scheme of regulation. Definitions are provided (Pen. Code, § 313), the forbidden conduct is described (Pen. Code, § 313.1), the exceptions are specified (Pen. Code, §§ 313.2 and 313.3), the punishment is indicated (Pen. Code, § 313.4) and a severability clause is included (Pen. Code, § 313.5). The statutes carefully adopt judicial definitions when describing the content of the matter deemed harmful to distribute or exhibit to minors. (Erznoznik v. City of

4. Where the purpose of the local legislation is to resolve a peculiarly local problem, the ordinance may survive as a regulation in a separate field of law. (People v. Kukkanen (1967) 248 Cal.App.2d Supp. 899, 903 (local ordinance prohibiting topless waitresses found valid as local regulation of live entertainment rather than of sexual conduct).)

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Jacksonville (1975) 422 U.S. 205, 212-213; Miller v. California (1973) 413 U.S. 15, 24.) The statutes represent a thoughtful legislative effort to regulate content without entering in the arena of protected speech. Since the ordinance would be disruptive in the legislative scheme, it is our opinion that the ordinance would not pass the second test of preemption.

We further conclude, under the third test, that the proposal would have adverse effects on the state's transient citizens outweighing local benefits. A burden would be placed on transient citizens generally if cities were to enact penal ordinances in varying forms, with conflicting notions of what is harmful to children, on the subject of television viewing. (See Long Beach Peace Officers Assn. v. City of Long Beach, supra, 61 Cal.App.2d 364, 371.) Moreover, the uniform state law provisions proscribing the dissemination of harmful matter to children would be disrupted by disparate local controls.

THE SUBJECT MATTER OF THE ORDINANCE IS NOT A MUNICIPAL AFFAIR.

A chartered city, as distinguished from a general law city, has exclusive power over municipal affairs. (Cal. Const., art. XI, § 5(a).) The case of Bishop v. City of San Jose (1969) 1 Cal.3d 56 examined this constitutional power. At issue in Bishop was the authority of a chartered city to pay its employees salaries below the level of the state wage law. The court recognized that a chartered city has "autonomy with respect to all municipal affairs." (1 Cal.3d at 61.) However, as to matters of "statewide concern," chartered cities remain subject to and controlled by applicable general state law "regardless of the provisions of their charters, if it is the intent and purpose of such general law to occupy the field to the exclusion of municipal regulation (the preemption doctrine)." (1 Cal.3d at 60-61.)

Under Bishop, it must be determined in the first instance whether the local ordinance of a chartered city conflicts with general state law. If it does, as we have already determined here, then it must be decided whether the subject regulated is a municipal affair or a matter of statewide concern. (See 58 Ops.Cal.Atty.Gen. 519, 512 (1975).) Our opinion is that the subject matter is one of statewide concern and that the kind of ordinance proposed, if enacted by a chartered city, would be void.

Municipal affairs are matters which affect the local citizens rather than the people of the state generally. Accordingly, such subjects as wages and salaries (Sonoma County Org. of Pub. Employees v. County of Sonoma

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(1979) 23 Cal.3d 296, 315; Vial v. City of San Diego (1981) 122 Cal.App.3d 346, 347), police and fire department operations (Brown v. City of Berkeley (1976) 57 Cal.App.3d 223, 236) and public park regulations (Simons v. City of Los Angeles (1976) 63 Cal.App.3d 455, 467) have been determined by the courts to be municipal affairs. Indeed, a municipal affair is always a judicially defined term. (Bishop v. City of San Jose, *supra*, 1 Cal.3d 56, 63.) On the other hand, a matter of statewide concern extends beyond the local interests at stake. For example, gun control (Long Beach Police Officers Assn. v. City of Long Beach, *supra*, 61 Cal.App.3d 364, 371-372), telephone lines and highways (Pacific Tel. and Tel. Co. v. City and County of San Francisco (1959) 51 Cal.2d 766, 773; Southern Cal. Roads Co. v. McGuire (1934) 2 Cal.2d 115, 121-122) and regional land uses (CEED v. California Coastal Zone Conservation Comm'n (1974) 43 Cal.App.3d 306, 323) are matters of statewide concern. (See Professional Fire Fighters, Inc. v. City of Los Angeles 60 Cal.2d 276, 293-294 (collected cases).)

The purpose of harmful matter legislation is to protect children. Courts have long recognized juveniles as a class of persons in whose welfare the state has a unique interest. (Ginsberg v. New York (1968) 390 U.S. 629, 640-641 (obscene books); Interstate Circuit v. Dallas (1968) 390 U.S. 676, 690 (obscene films); Prince v. Massachusetts (1944) 321 U.S. 158, 170 (street employment); Sturger & Burn Mfg. Co. v. Beauchamp (1913) (child labor); Marina Point, Ltd. v. Wolfson (1982) 30 Cal.3d 721, 741-742 (housing); T.N.G. v. Superior Court (1971) 4 Cal.3d 767, 778 (juvenile law).) This concern for children is not limited to cities but is statewide in scope. The distribution of harmful matter to children cannot be said to be of paramount importance to cities only.

The interest of the city in this field of law may certainly overlap the state's interest. However, "[w]hen there is doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be a mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state." (Abbott v. City of Los Angeles, *supra*, 53 Cal.2d 674, 681.)

We conclude a California city does not have the legislative power to enact a penal ordinance which would prohibit a person from displaying on a television receiver, for the viewing of a minor, a "sex program" when such minor's parent is not present or such minor does not have a parent's written permission to view the program.

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