PUBLIC LAW Journal

An Official Publication of the State Bar of California Public Law Section

Vol. 38, No. 3
Summer 2015

MCLE SELF-STUDY ARTICLE

(Check end of this article for information on how to access 1.0 self-study credit.)

Can the State Use Its Spending Powers to Circumvent Charter Cities' Home Rule Authority?

*By Jonathan V. Holtzman, Randy Riddle & Steve Cikes**

I. INTRODUCTION

Public lawyers have long debated whether California's "home rule" doctrine for charter cities is coming or going. For years, it seemed the doctrine was eroding, as more and more issues were found to be matters of "statewide concern." Then, in *State Building and Construction Trades Council of California v. City of Vista* (*City of Vista*),[1] the California Supreme Court held that charter cities did not have to comply with the State's prevailing wage law on locally-funded public works projects—affirming that the expenditure of local revenues on such projects was within a charter city's home rule powers.

The victory for charter cities was short-lived. The next year, the Legislature passed SB 7, a law that conditioned *all* state construction funding on a charter city's agreement to pay prevailing wages on *all* public works projects—regardless of whether any state money is involved.

Several cities have sued the State, challenging the constitutionality of SB 7. Remarkably, the superior court presiding over that case ruled that this transparent end-run around *City of Visa* was constitutional because it represented a permissible exercise of the State's discretionary spending powers. The case is now pending before Fourth District Court of Appeal.

Inside this Issue

By euphemistically repackaging legislation as a "financial incentive" rather than an explicit mandate or even a punishment for not paying prevailing wages, the State is attempting to do indirectly what the California Constitution prohibits it from doing directly. Most cities receive subsidies from the State for various services. If the Legislature may condition the disbursement of funds on charter cities relinquishing their home rule powers even as to purely local matters the State is not funding, there would appear to be few practical limitations on this authority, placing the continued vitality of the home rule doctrine in serious jeopardy.

This article discusses the *City of Vista* case, SB 7, and the litigation over SB 7 to date. It also discusses existing state case law, which, in general, seems ill-suited to address this type end-run around the home rule doctrine. Finally, the article proposes a legal test derived from federal law that is better equipped to deal with overbroad legislative attempts to condition funding on the waiver of home rule powers.

II. HOME RULE AUTHORITY OF CHARTER CITIES

Article XI, section 3(a) of the California Constitution authorizes city voters to adopt a charter, the provisions of which "are the law of the State and have the force and effect of legislative enactments." Courts have recognized that a charter serves as the constitution for a city.[2] The primary advantage of a charter is that it transfers the power to regulate municipal affairs from the State to city voters, giving voters much more control over how their local system of government is structured and operates.[3]

Article XI, section 5(a) of the California Constitution—known as the "home rule" provision—grants charter cities plenary authority over their "municipal affairs."[4] Once a city has adopted a charter, the charter becomes the "supreme law" of the city with respect to municipal affairs, subject only to conflicting provisions of the federal and state constitutions.[5] As one court explained, a charter city's authority over municipal affairs is "all embracing … free from any interference by the state through general laws."[6] Where a city has adopted a charter, it "has full control over its municipal affairs … whether or not its charter specifically provides for the particular right sought to be exercised…."[7]

This is not to say that charter cities are immune to state regulation. Over the years, courts have recognized that state law may supersede a charter city's home rule powers if the law addresses a matter of statewide concern and is narrowly tailored towards that end.[8]

In *California Federal Savings and Loan Association v. City of Los Angeles* (*California Federal*),[9] the California Supreme Court articulated a four-part test to resolve an asserted conflict between a state statute and a city's charter. Under this test, a court must first determine if there is an actual conflict between a provision in the city's charter and state law at issue.[10] If not, then there is no need to consider any of the other elements.

If there is an actual conflict, then the court must decide if the issue addresses a "municipal affair."[11] If not, the inquiry ends, and the state law governs.

But if the issue does involve a municipal affair, then the question becomes whether the subject matter of the state law is one of "statewide concern."[12] If the subject matter does not address a statewide concern, then the charter provision controls and is "beyond the reach of the legislative enactment."[13]

Finally, if the subject matter does constitute a statewide concern, then the court must determine whether the statute is "reasonably related" and "narrowly tailored" to the resolution of that concern.[14] If not, the charter provision controls.

Using this test, courts have held that charter cities' home rule authority trumps conflicting state laws that do not address a matter of statewide concern or are not narrowly tailored to further that interest.[15] The California Supreme Court's decision in *City of Vista* is the most recent example of a full-throated articulation of home rule powers.

III. THE SUPREME COURT'S *CITY OF VISTA* DECISION AND THE LEGISLATURE'S RESPONSE

In *City of Vista*, the city enacted an ordinance prohibiting the payment of prevailing wages on locally-funded public works projects.[16] The city council then adopted a resolution approving a plan to build two fire stations that did not comply with the State's prevailing wage law.[17]

In response, the State Building and Construction Trades Council of California filed a petition for writ of

mandate seeking to compel the city to comply with the State's prevailing wage requirements. The superior court denied the union's petition, and the court of appeal affirmed.[18]

On review, the California Supreme Court applied *California Federal*'s four-part test to determine whether application of the State's prevailing wage law would impermissibly impinge on the city's home rule authority. Initially, the Court held that "[t]he wage levels of contract workers constructing locally-funded public works projects are certainly 'municipal affairs.'"[19]

Next, the Court found that because the prevailing wage law does not exempt charter cities from its scope, and the city's ordinance prohibits compliance with that law, an actual conflict existed between the two.[20] The Court then determined that the wage levels of contract workers constructing locally-funded public works projects did not constitute a matter of statewide concern, finding no basis to distinguish the wage levels of contract workers from the wages of charter city employees, which the Court had previously found was not a matter of statewide concern.[21] The Court therefore held that application of the prevailing wage law to charter cities would violate constitutional home rule principles.[22]

In the wake of the *City of Vista*, the Legislature quickly enacted SB 7,[23] which modified the State's prevailing wage law. In particular, SB 7 amended the prevailing wage law to provide that: "A charter city shall not receive or use state funding or financial assistance for a construction project if the city has a charter provision or ordinance that authorizes a contractor to not comply with the provisions of this article on any public works projects."[24] SB 7 further prohibits a charter city from receiving state funding or financial assistance "if the city has awarded, within the prior two years, a public works contract without requiring the contractor to comply with all of the provisions of this article."[25]

There is little doubt that SB 7 was drafted—and ultimately enacted—to evade *City of Vista*. SB 7 was first introduced on December 3, 2012, the same year the Supreme Court decided *City of Vista*. Indeed, *City of Vista* was specifically mentioned during the Senate hearing on SB 7. According to Senate analyses, SB 7 was intended to "sidestep" the issue of "whether wage levels of contract workers constructing locally funded public works are a municipal affair or a matter of statewide concern."

In short, the Legislature's intent in passing SB 7 could not have been clearer: It was designed as an end-run around *City of Vista*'s holding that the wages of workers on locally-funded public works projects was a municipal affair and thus outside the realm of State regulation.

IV. SB 7 LITIGATION

In response to the passage of SB 7, the cities of El Centro, Carlsbad, Fresno, Oceanside and Vista filed a petition for writ of mandate against the State, challenging SB 7's constitutionality.[26] The cities' lawsuit claimed that SB 7 violated Article XI, section 5(a) of the California Constitution because it conditioned their ability to receive state funding on the relinquishment of their plenary authority to set wage levels for workers on their locally-funded public works projects, as guaranteed by the Supreme Court in *City of Vista*. The cities argued that imposing such conditions on projects that the State otherwise has no authority to control was impermissible.

The superior court denied the cities' petition. In doing so, the court, paying only lip service to *City of Vista*, noted that SB 7 contained "detailed findings supporting its statewide concern of creating and maintaining a skilled construction workforce."[27] The court further found that pursuing state policy objectives through financial incentives is generally permissible and, as a result, SB 7 did not present any "actual conflict" with the city ordinances at issue. Accordingly, the court concluded that SB 7 did not intrude on charter cities' home rule authority.

The cities have appealed the superior court's decision and the case is now pending before the Fourth District Court of Appeal.[28]

V. HOW COURTS SHOULD ADDRESS SB 7 AND SIMILAR, FUTURE LEGISLATION

SB 7—and the recent superior court decision upholding it—are troubling on several levels. Although the Legislature has attempted to characterize the legislation as merely providing a "financial incentive," it effectively holds charter cities hostage, requiring that they relinquish their home rule authority over locally-funded projects to receive needed state funding. And should SB 7 be held constitutional, that decision would almost certainly open the floodgates for similar legislation, leading to the complete erosion of home rule powers.

For example, the Legislature has long sought to impose interest arbitration for public safety employees. The California Supreme Court in *County of Riverside v. Superior Court*[29] rejected that as an improper invasion of home rule principles. Why not impose it as a condition of state funding? As another example, voters in charter cities are free to determine whether they elect their city council members by district or at large. Under the SB 7 approach, the Legislature could seek to condition disbursement of state funds on a city's acquiescence to district elections.

Unfortunately, there is very little California case law addressing the extent to which the State may use its spending powers to impinge upon charter cities' home rule powers. But with the SB 7 case pending in the court of appeal and the predictable interest of the Legislature in passing similar laws in the future, this will change—for better or worse.

Clearly, one of the most significant obstacles charter cities face in challenging such legislation is the first prong of the *California Federal* test: demonstrating an "actual conflict" between the state statute and a charter cities' home rule authority. Cities face this conundrum because, in theory, a charter city can always elect to forego state funding and preserve its authority to regulate the activity at issue, obviating any "actual conflict." While this argument by the State has superficial appeal, it runs contrary to the judicially-recognized maxim that the State may not do indirectly what it is prohibited from doing directly.[30]

This principle was recognized and applied by the California Supreme Court in *Sonoma County Organization of Public Employees v. County of Sonoma* (*SCOPE*).[31] *SCOPE* involved a challenge to a state statute conditioning the distribution of post-Proposition 13 "bail-out" money on local agencies' agreement to withhold from employees cost-of-living raises in excess of the raises given to state employees.

The *SCOPE* Court concluded that the law violated charter cities' home rule authority to provide for the compensation of their employees. In reaching this conclusion, the Court noted that "while the state may impose conditions upon the granting of a privilege, including restrictions upon the expenditure of funds distributed by it to other government bodies … 'constitutional power cannot be used by way of a condition to attain an unconstitutional result….'"[32]

"One source courts may examine is federal precedent addressing Congress's ability to impose conditions on the receipt of federal funding under the Spending Clause."

While the *SCOPE* decision appears directly on point, proponents of SB 7 claim that the case is distinguishable because it addressed an unconstitutional impairment of contracts, not a violation of home rule principles. Consequently, courts may choose to look elsewhere for guidance in evaluating the constitutionality of SB 7 and similar legislation.

One source courts may examine is federal precedent addressing Congress's ability to impose conditions on the receipt of federal funding under the Spending Clause.[33] These cases, however, appear to set a rather high bar: a party challenging Congress's exercise of its spending authority must demonstrate what amounts to coercion—in some cases, this means that there is so much money on the line that the states cannot, as a practical matter, say no.[34]

This view of "coercion" is not necessarily helpful on a facial challenge to a law such as SB 7 because the question of whether the legislation amounts to impermissible coercion is both highly factual, and ultimately subjective.[35] Some cities could not reasonably give up state construction funds; others may be in a position to do so, even if it would be financially painful. In each case, it depends on how much funding is involved, the importance of future projects, and the cost of complying with the state demand.

Ultimately, the coercion analysis misses the point. The proper focus is whether the government—or, more precisely for purposes of this article, the State—has the authority to regulate the underlying activity in the first instance, not how much money is at stake. Indeed, as *California Federal* and *City of*

Vista make clear, for state law to permissibly intrude upon a charter city's home rule authority it must be both designed to address a matter of statewide concern and narrowly-tailored to accomplish that end.

Consequently, any time the State demands that a city relinquish home rule powers under threat of losing state funding for unrelated projects, the presumption should be that the State is attempting to impermissibly regulate a matter that the Constitution reserves for local control. Only if the State can demonstrate a legitimate statewide concern justifying its otherwise unlawful interference with purely municipal affairs, should the regulation be allowed to stand.

This proposed test is consistent with the California Supreme Court's *SCOPE* decision. It also mirrors the "preemption" doctrine federal courts use to assess the extent to which the National Labor Relations Act (NLRA) displaces state and municipal regulations on matters related to labor-management relations—a doctrine that involves the same type of balancing of governmental interests that is at the heart of the home rule doctrine.[36]

Under the NLRA preemption doctrine, whether state or local government regulations are preempted turns on whether the agency is acting to regulate matters that are encompassed by the NLRA. If the government is attempting to regulate labor-management relations already covered by the NLRA, then such regulations are preempted. This is true regardless of whether the government agency is attempting to regulate matters directly through its police powers, or indirectly through its spending powers.[37]

However, if the government is merely acting to protect its own proprietary interest, then the regulations are not preempted. In evaluating whether a government agency is acting as a "market participant," courts will examine (1) whether the challenged action essentially reflect the agency's own interest in its efficient procurement of needed goods and services, and (2) whether the narrow scope of the challenged action defeats any inference that its primary goal was to encourage a general policy, rather than address a specific proprietary problem.[38]

The federal "preemption" doctrine strikes a proper balance in determining when and how state regulation may be preempted with respect to matters that the Constitution expressly reserves for local control. In particular, the doctrine—including the market participant exception—ensures that the State has sufficient "skin in the game" in the underlying activity that it would otherwise be prohibited from regulating directly.

Specifically with regard to SB 7, this approach would require that the underlying public works projects be funded, in whole or in part, with state money before the State would be allowed to regulate what would otherwise qualify as purely municipal affairs. This approach would preserve the division of governmental authority established by constitutional home rule principles.

VI. CONCLUSION

Charter powers are a double-edged sword. While, in the case of SB 7, they are being asserted in the service of what some would view as a conservative principle, many of the most cutting-edge local programs rely on charter powers. Clearly, local governments are better equipped than the State to address issues related to the control of local budgets, employee costs, and the structure of the local government itself. Consequently, charter powers matter, and the mechanism employed by SB 7 to eviscerate those powers is troubling.

The line between statewide concerns and municipal affairs protected by the home rule doctrine is already tricky, and the added wrinkle of using state funding as a "carrot" or "stick" further muddies the equation. If SB 7 and similar legislation is allowed to stand, we can expect the politics of state government to further encroach into the practical realities of local governments.

*Jonathan V. Holtzman is a founding partner of Renne Sloan Holtzman Sakai LLP, the Public Law Group. He is former Chief Deputy San Francisco City Attorney and practices government and labor law. Randy Riddle, also a partner with the firm, is the former Chief Counsel for the California Secretary of State. He specializes in government and election law issues. Steve Cikes is senior counsel with the firm and represents cities, counties and special districts on a broad range of public law issues.

Endnotes

1 54 Cal. 4th 547 (2012).

2 *See*, e.g., *Adams v. Wolf*, 84 Cal. App. 2d 435, 441 (1948) ("The charter of a city is comparable to the Constitution of the state and governed by the same principles").

3 *See City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 605 (1949).

4 Article XI, section 5(b) of the California Constitution provides some examples of "municipal affairs," including (1) "the constitution, regulation, and government of the city police force," (2) "subgovernment in all or part of a city," (3) "conduct of city elections," and (4) "the manner in which municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal and for their compensation." This list is not exhaustive. Indeed, whether an activity qualifies as a "municipal affair" is a legal determination for courts to resolve. *See Pacific Tel. & Tel. Co. v. City and County of San Francisco*, 51 Cal. 2d 766, 771 (1959.).

5 *Smith v. City of Glendale*, 1 Cal. App. 2d 463, 465 (1934).

6 *Simons v. City of Los Angeles*, 63 Cal. App. 2d 595, 605 (1949).

7 *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal. 2d 516, 521 (1939).

8 *See*, *e.g.*, *Baggett v. Gates*, 32 Cal. 3d 128, 137-139 (1982) (holding that the Peace Officers Procedural Bill of Rights Act, establishing basic rights and protections for peace officers, does not violate charter cities' home rule authority to regulate police force and to provide for compensation, qualifications, or removal of employees); *People ex rel. Seal Beach Police Officers' Ass'n v. City of Seal Beach*, 36 Cal.3d 591, 597-601 (1984) (holding that meet-and-confer requirement of the Meyers-Milias-Brown Act does not conflict with charter city's authority to propose charter amendments under the California Constitution).

9 54 Cal. 3d 1 (1991).

10 *Id.* at 16.

11 *Ibid.*

12 *Ibid.*

13 *Id.* at 17.

14 *Ibid.*

15 *See*, *e.g.*, *Johnson v. Bradley*, 4 Cal. 4th 389, 400-411 (1992) (upholding a charter city's right to enact local campaign financing laws irrespective of the State's conflicting scheme); *Traders Sports, Inc. v. City of San Leandro*, 93 Cal. App. 4th 37, 43-49 (2002) (holding that provision in statewide initiative requiring two-thirds vote of local governing body before a tax ordinance could be placed on election ballot, did not override inconsistent provisions of city charter and municipal code requiring only a majority vote by the city council).

16 54 Cal. 4th at 553.

17 *Ibid.*

18 *Id.* at 553-554.

19 *Id.* at 558-559.

20 *Id.* at 559-560.

21 *Id.* at 563-564.

22 *Id.* at 566.

23 Stats 2013, c. 794 (S.B. 7) § 2.

24 Cal. Labor Code § 1782(b).

25 *Id.* at § 1782(b).

26 *City of El Centro, et al. v. Lanier, et al.*, Santa Diego County Superior Court, Case No. 37-2014-00003824-CU-WM-CTL.

27 *See* Superior Court's 8/6/14 Tentative Ruling, p. 2.

28 *City of El Centro v. Lanier, et al.*, Fourth Appellate Dist., Case No. D066755.

29 30 Cal. 4th 278 (2003).

30 *See*, *e.g.*, *County of Los Angeles v. Riley*, 6 Cal. 2d 625, 626-627 (1936), *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 378-379 (2007).

31 23 Cal.3d 296 (1979).

32 *Id.* at 319 (internal citations omitted).

33 The Spending Clause of the United States Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the "general Welfare," including by funding particulate state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure that are used in the manner Congress intends. *See Rust v. Sullivan*, 500 U.S. 173, 195 n. 4 (1991) ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

34 *National Fed. of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2321 (2012) ("Congress may use its spending power to create incentives for the States to act in accordance with federal policies. But when 'pressure turns into compulsion, ... the legislation runs contrary to our system of federalism.").

35 Arguably, SB 7 amounts impermissible "coercion" since it extends to public works projects that are not being funded by the State. *See National Fed. of Independent Business v. Sebelius*, *supra*, 132 S.Ct. at 2604 ("Conditions that do not ... govern the use of the funds ... cannot be justified [as a legitimate exercise of the federal government's spending authority]. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the State to accept policy changes.").

36 *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Int'l Assn. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1976).

37 *See Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 (1986).

38 *See Building & Construction Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Massachusetts Rohde Island, Inc.*, 507 U.S. 218, 231-232 (1993).

Public Law Journal
www.calbar.ca.gov/publiclaw

CO-EDITORS
David H. King
dking@hensleylawgroup.com
Hensley Law Group

Elizabeth G. Pianca
elizabeth.pianca@cco.sccgov.org
Deputy County Counsel, Santa Clara County

ASSISTANT EDITORS
Melissa M. Crosthwaite
mcrosthwaite@cityofhawthorne.org
Assistant City Attorney, Hawthorne

K. Scott Dickey
Deputy County Counsel, Alameda County

Kenneth J. Price
kprice@bakermanock.com
Baker Manock & Jensen PC

Tiffani L. Shin
U.S. Army Corps of Engineers,
Los Angeles District, Los Angeles

Scott C. Smith
scott.smith@bbklaw.com
Best Best & Krieger LLP

Rachel H. Sommovilla
Rachel_Sommovilla@ci.richmond.ca.us
Assistant City Attorney
Richmond

Design & Production
Documation, LLC
www.documation.com

Submissions

We solicit original manuscripts on public law topics. Authors are encouraged to communicate with editors about a topic prior to preparing and submitting an article.
Manuscripts should be no more than 3,000 words. The editorial staff reserves the right to edit submitted manuscripts as necessary. Edited manuscripts will be sent to authors for approval only where extensive revision might affect an article's substance. Manuscripts should be sent to the editor at address above. MCLE self-study credit up to 12.5 hours may be available to published contributing authors.

Reprints and Subscriptions

Inquiries regarding reprints and subscriptions should be addressed to Kristina Robledo, State Bar of California, Kristina.Robledo@calbar.ca.gov, (415) 538-2467.

Disclaimer

The statements and opinions here are those of editors and contributors and not necessarily those of the State Bar of California, the Public Law Section or any government body. This publication is designed to provide accurate and authoritative information regarding the subject matter covered, and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Public Law Section

– Mission Statement –

The mission of the Public Law Section is to ensure that laws relating to the function and operation of public agencies are clear, effective and serve the public interest; to advance public service through public law practice; and to enhance the effectiveness of public law practitioners. The Section focuses on addressing issues related to administrative law, constitutional law, municipal law, open meeting laws, political and/or election law, education law, state and federal legislation, public employment, government contracts, tort liability and regulations, land use/environment issues, and public lawyer ethics.

The Section provides topical educational programs, seminars and resource materials; works to enhance the recognition of, and participation by, public law practitioners in the State Bar; presents its annual Ronald M. George Public Lawyer of the Year award to public law practitioners who have made significant and continuous contributions to the profession; and publishes the quarterly Public Law Journal.

– Executive Committee Roster –

CHAIR
K. Scott Dickey
Oakland

TREASURER
John M. Appelbaum
Sacramento

SECRETARY
Elizabeth G. Pianca
San Jose

IMMEDIATE PAST CHAIR
David H. Hirsch
San Luis Obispo

MEMBERS
Ryan M. Baron
Santa Ana

Nelson H. Chan
Elk Grove

Melissa M. Crosthwaite
Hawthorne

Bernadette S. Curry
Fairfield

Christopher J. Diaz
Walnut Creek

Nina F. Dong
Martinez

Michelle Marchetta Kenyon
Oakland

David H. King
Torrance

Kenneth J. Price
Fresno

Randy E. Riddle
San Francisco

Tiffani L. Shin
Los Angeles

Scott C. Smith
Irvine

Rachel H. Sommovilla
Richmond

– Advisors & Staff –

Saul Bercovitch
Sections Legislative Representative
San Francisco

Jodi L. Cleesattle
San Diego

Justine R. Block
Los Angeles

Glenda Corcoran
Board Liaison
Sacramento

Caroline Fowler
Santa Rosa

Bonnie C. Maly
CEB Liaison
Oakland

Donna R. Mooney
Vallejo

Michael Mullen
Web Coordinator
San Francisco

Bryan M. Otake
Los Angeles

Kristina Robledo
Section Coordinator
San Francisco

Luis J. Rodriguez
Board Liaison
Los Angeles

Brian E. Washington
Oakland

Tricia Horan
Director Office of Education
San Francisco