THOMAS F. COLEMAN

Attorney at Law

1800 North Highland Avenue, Suite 106
Los Angeles, CA 90028 · (213) 464-6666

February 7, 1979

Mr. John Rice
Deputy City Attorney
17th Floor
City Hall East
Los Angeles, CA 90012

Re: Proposed non-discrimination ordinance

Dear Mr. Rice:

I am attaching a copy of a legal memorandum which may be of assistance to you in your research concerning a non-discrimination ordinance. This memo was done by a San Francisco attorney in connection with the proposal in that city to adopt a similar ordinance. It seems to answer many of the questions I posed to you in my letter of February 6.

While the memo supports the authority of the City of Los Angeles to adopt an ordinance prohibiting discrimination for reasons of sexual orientation, it seems to negate any authority to adopt a more comperhensive ordinance covering other classifications which are already covered by state law, e.g. race, religion, color, sex, etc. However, your research may contradict this memo.

The memo does not address whether a local ordinance prohibiting discrimination in public accomodation and housing would be preempted by state law. The Unruh Act does not specifically mention "sexual orientation" and the Rumford Fair Housing Act likewise does not mention "sexual orientation." However, courts have said that Unruh prohibits all arbitrary discrimination. Also, Unruh seems to apply to housing and public accomodations. Therefore, there is already a private cause of action for arbitrary discrimination under state law. The question arises, is sexual orientation discrimination in public accomodation or housing "arbitrary?" If sexual orientation discrimination in housing and public accomodations is covered by Unruh, does this preempt a local ordinance prohibiting such discrimination? These questions have not been answered by any Court of Appeal decision directly on point. There is only dicta to rely on for any authority.

I would therefore like to venture an opinion in this regard.

It would appear that the City of Los Angeles definitely has the authority to adopt a local ordinance prohibiting discrimination by private employers for reasons of sexual orientation. Expanding an employment ordinance to cover other categories such as race, sex, religion, etc. would be risky because of preemption problems.

The City of Los Angeles may or may not have the authority to prohibit sexual orientation discrimination with respect to housing and public accomodations. If sexual orientation discrimination is already covered by Unruh (which is only a matter of court dicta at this point) then a local ordinance may be void because of preemption. However, if Unruh does not prohibit public accomodation and housing discrimination for reasons of sexual orientation, then the city probably can pass a local ordinance to fill the void. I think that public accomodations and housing should be included in the proposed ordinance. The worst that could happen would be that at sometime in the future a court would declare those portions of the ordinance void as pre-empted by state law (of course the ordinance should have an explicit severability clause to save the employment provision should such a court opinion ever be issued). I'm sure that gays would be delighted to have a court void the housing and public accomodations portions because gays are protected by state law (such a local loss would be a statewide victory).

I hope that these thoughts will help you in formulating your opinion.

Very truly yours,

Thomas F. Coleman

THOMAS F. COLEMAN

Enclosure

I.

INTRODUCTION

This memorandum will set out the legal basis for the proposed San Francisco Gay Rights Ordinance. (See Appendix A for the revised text of the Ordinance.) The Ordinance is a comprehensive civil rights law. It prohibits discrimination against gays in employment, housing and public accommodations. It reaches discrimination by private individuals as well as discrimination by governmental agencies. It provides for enforcement by private lawsuits as well as by complaint to the District Attorney.

The provisions which prohibit private (non-governmental) discrimination and those which allow for private enforcement are unusual, and raise questions about the powers of a charter city in California. This memorandum will focus on the particular problems raised by these provisions, and on the question of whether or not federal or State law has preempted this type of enactment. More particularly, the memorandum will address the following issues:

(1) May a municipality enact legislation which alters private civil relationships?

(2) If so, may rights and duties created by a municipal ordinance be enforced by a private civil action in State court?

(3) If so, what remedies are available?

(4) Is this ordinance preempted by:

a. The Federal Civil Rights Law (42 U.S.C. § 2000e), or

b. The California Fair Employment Practices Act (Lab. C. §§ 1410, et seq.)?

II.

POWERS OF A CHARTER CITY

A. May a Charter City Enact Legislation Which Alters Private Civil Relationships?

A leading authroity on the law of municipal corporations has stated that a municipal ordinance may not ordinarily serve as the basis for an action by a private individual. McQuillan, Municipal Corporations, § 27.05 at Vol. 9, pp. 606-607. That statement is based on the widely accepted notion that a municipality may not enact "private laws" to govern civil relationships between private parties. See, e.g., Marshall Howe, Inc. v. Rent Review & Grievance Bd. of Brookline (1970) 357 Mass. 709, 713; and see Smith v. Home Echo Club (Ohio App. 1943), 69 N.E.2d 414-417 (this latter case is McQuillan's sole authority).[1/] Courts which have so hele explain that municipalities, as creations of the Legislature, have no inherent powers. They have only those powers granted them by the Legislature, and in the absence of enabling legislation authorizing them to alter private relationships, they may not do so. See Ambassador East, Inc. v. Chicago (1948) 399 Ill. 359, 365-67 [77 N.E.2d 803].

1/ McQuillan bases his statement on dicta which negates the use of a municipal ordinance to set standards of care in a tort action. 69 N.E.2d at 417. This doctrine has been expressly rejected by the courts of California. See, e.g., Finnegan v. Royal Realty (1950) 35 Cal.2d 409 [218 P.2d 17].

Whatever the la elsewhere, in Californi the Constitution has granted charter cities inherent police power. Cal. Const. Art. 11, §§ 5a, 7. And in Birkenfield v. City of Berkeley (1976) 17 Cal.3d 129, 142-43 [130 Cal.Rptr. 465, 550 P.2d 1001] the California Supreme Court expressly held that Article 11, § 7 of the California Constitution empowers a charter city to make legislation which alters private civil relationships. The Constitution, the Court said, limits a charter municipality's police power in just two ways: (1) it may be exercised only within a city's own territory; and (2) it is subject to preemption by State law. The Court expressly denied the existence of any "private law" exception to the municipal police power, and declared that in the absence of preemption by State law, a charter city's police power is as broad as that of the State Legislature. Birkenfield v. City of Berkeley, supra, 17 Cal.3d at 140-143.

A municipality's power is as broad as that of the Legislature, not only in terms of the types of legislation it may enact, but also in terms of subject matter. That is, the subject matter of municipal legislation need not be "local" in nature.[2/] Any matter

---

[2/] If the subject matter of a municipal enactment were properly characterized a "municipal affair," then the local ordinance would prevail over any contrary State law; i.e., the local ordinance would preempt State law. Cal. Const., Art. 11, § 5. See Birkenfield v. City of Berkeley (1976) 17 Cal.3d 129, 141, n. 9 [130 Cal. Rptr. 465, 550 P.2d 1001].

///

///

properly the subject of State action is a proper subject for charter city legislation, absent preemption. Bishop v. City of San Jose (1969) 1 Cal.3d 56, 62 [81 Cal.Rptr. 465, 460 P.2d 137]. (Bishop expressly overrules contrary language in Abbot v. City of Los Angeles (1960) 53 Cal.2d 674, 681 [3 Cal.Rptr. 158, 349 P.2d 974] at p. 62 of 1 Cal.3d, n. 5.)

The State Legislature may use its police power to pass civil rights laws which regulate private conduct. Greenberg v. Western Turf Ass'n (1903) 140 Cal. 357, 360-61 [73 P. 1050], aff'd 204 U.S. 359 [27 S.Ct. 384, 51 L.Ed. 520]; see also Orloff v. Los Angeles Turf Club (1951) 36 Cal.2d 734, 739 [227 P.2d 449].

Since there is no "private law" restriction on a charter city's police power, and since a charter city's police power is as broad as that of the State Legislature, a charter city may enact civil rights laws which regulate private civil relationships. See Birkenfield v. City of Berkeley (1976) 17 Cal.3d 129, 140-143 [130 Cal.Rptr. 465, 500 P.2d 1001]; see also District of Columbia v. Thompson Co. (1952) 346 U.S. 100, 108-09 [73 S.Ct. 1607, 97 L.Ed. 1480].

B. May Rights and Dicta Protected by a Municipal Ordinance Be Enforced by a Private Civil Action In State Court?

It is not the type of private civil right discussed above which is enforced when a local district attorney brings a criminal action for violation of a municipal civil rights law. Although the district attorney seeks redress for violation of roughly the

same general "duty" (in this case, the duty not to discriminate), he enforces the principal right to outlaw discrimination in the city, not a private civil right to be free from such discrimination. See McQuillan, Municipal Corporations, § 24.430, Vol. 7, pp. 405-06.

A municipality could enact a civil rights law which prohibited discrimination and provided for enforcement by the district attorney even if it lacked the power to enact "private" laws or to effect private civil relationships. Compare Bloom v. City of Worcester (1973) 363 Mass. 136, [293 N.E.2d 268-275] with Marshall House, Inc. v. Rent Review and Grievance Bd. of Brookline (1970) 357 Mass. 709-713 [260 N.E.2d 200]; and see McQuillan, Municipal Corporations, § 24.430, Vol. 7, pp. 405-06.

Here, the issue is whether, granted that the City can create a private civil right to be free of discrimination, the State has vested the courts with the authority to enforce municipally-created private rights.

California courts have held themselves to be so empowered. In Sapiro v. Frisbie (1928) 93 Cal.App. 299 [270 P. 280], the Court considered a municipal ordinance which prohibited the establishment of a business in an area zoned residential, and made no provision for a remedy. The plaintiff, a homeowner in a residential zone, sought damages for the defendant's operation of a funeral parlor in close proximity to his residence. The Court reversed the dismissal of his complaint and said:

///

///

> "It is a well established and commonly recognized general rule that where a right is given by statute or municipal ordinance to a particular class of persons and for their special protection, and not merely for the protection of the public at large, a liability is thereby created in favor of such particular class as against any person who violates such right . . . which liability may be enforced by means of a civil action or civil remedy appropriate to the circumstances peculiar to the particular case." 93 Cal.App. at 305-06.

To the same effect are McIvor v. Mercer-Fraser Co. (1946) 76 Cal.App.2d 247, 253-54 [172 P.2d 758](allowing a civil action for damages for excavation work in violation of a city ordinance) and Milliron v. Dittman (1919) 180 Cal. 443, 445-46 [181 P. 779] (permitting a direct action against a liability insurer, the liability created by a municipal ordinance where none existed at State law).

Although the courts have occasionally allowed private enforcement of a municipal ordinance on the theory that it established a standard of care or a defense in a State-created cause of action (usually nuisance or negligence)(see, e.g., Finnegan v. Royal Realty (1950) 35 Cal.2d 409 [218 P.2d 17]), the Court in Sapiro v. Frisbie (1928) 93 Cal.App. 299 [270 P. 280] expressly denied any reliance on that doctrine. Said the Court,

> "[n]either in point of fact nor of law was there negligence in the acts charged here against the defendants. The right of action in this case is based upon a wrong flowing from the breach of a statutory duty owing by all other persons to the plaintiffs as members of a class of persons for whose protection only the ordinance involved herein was and is designed." 93 Cal.App. at 308.

(See also the lan[illegible]age in McIvor v. Mercer-[illegible]aser Co. (1946) 76 Cal.App.2d 247, 253-54 [172 P.2d 758] (violation of ordinance ". . . constituted an actionable wrong against each member of the community for whose particular welfare the ordinance was enacted, . . .").)

The theory behind allowing private enforcement in State courts of municipally created private rights is that the courts of California have the inherent power to enforce any duly created right. See River Garden Farms, Inc. v. Superior Court (1972) 26 Cal.App.3d 986, 1001 [103 Cal.Rptr. 498, 509]; C.C.P. § 1428; 2 Witkin, California Procedure, Actions, § 3, p. 881. Given that the municipality can validly create the right (see above, p. 4), it would be logical to deny enforcement only if there were something peculiar and limited about rights created by municipalities under their police power. The courts of California have specifically rejected that notion. Sapiro v. Frisbie (1928) 93 Cal.App. 299, 309 [270 P. 280]; and see Birkenfield v. City of Berkeley (1976) 17 Cal.3d 129, 140 [130 Cal.Rptr. 465, 473] (municipal police power is as broad as the power of the Legislature itself).

Provided the San Francisco ordinance is not limited to enforcement by the District Attorney, it may be enforced by a civil action.

///

///

///

///

C. May the Rights and Duties Created by a Municipal Ordinance Be Enforced by the Type of Specific Remedies Provided for in the Proposed San Francisco Ordinance (Damages and Injunction)?

The proposed San Francisco Gay Rights Ordinance allows any court in which an action based upon it is brought to award compensatory damages or, in a proper case, injunctive relief.

Even if the San Francisco Ordinance were silent on remedies, it could be enforced by an action for damages. See McIvor v. Mercer-Fraser Co. (1946) 76 Cal.App.2d 247, 253-54 [172 P.2d 894].

Similarly, since the Superior Court is vested with general equitable jurisdiction, it may issue an injunction to enforce the private rights created by a municipal ordinance in a proper case, even in the absence of any provision for enforcement. Sapiro v. Frisbie (1928) 93 Cal.App. 299, 303-05 [270 P. 280] (municipal ordinance -- see above, p. 5); and see Paxton v. Paxton (1907) 150 Cal. 667, 670-71 [89 P. 1083, 1084] (Civ. C. § 206).

And again, whenever fraud, oppression or malice is shown in an action not based on a contract, exemplary damages may be awarded regardless of whether the underlying cause of action is based on statute or common law, and despite the fact that the statute upon which it is based is silent on remedies. Civ. C. § 3294; and see Aweeka v. Bonds (1971) 20 Cal.App.3d 278, 281 [97 Cal.Rptr. 650] (allowing an affirmative cause of action and a claim for exemplary damages on the basis of Civ. C. §§ 1941, 1942).

Since the proposed San Francisco Gay Rights Ordinance could

be enforced by a private civil action for compensatory damages or, in a proper case, exemplary damages or an injunction, a State court could award the remedies provided for in the Ordinance.

III

PREEMPTION

A. In General

Even though a municipality has the authority to enact a given ordinance, it will be void under the Supremacy Clause of the United States Constitution (Art. VI) or the comparable provision of the State Constitution (Art. 11, § 7) if it is "preempted" by federal or State legislation.

There are two ways in which a municipal ordinance may be preempted by State or federal law. First, municipal enactments are preempted if they are in direct conflict with State or federal legislation. Second, municipal enactments are preempted, even though they deal with conduct not covered by other laws, if Congress or the Legislature has evidenced an intent to "occupy the entire field" and preclude any local legislation on the subject.

California courts hold further that local legislation is preempted by State law if it duplicates the requirements of State law and creates a "conflict in jurisdiction." Under none of these doctrines is the proposed Gay Rights Ordinance preempted.

B. The Employment Provisions

(1) Direct Conflict

Any local enactment which directly conflicts with a State or

federal law is void. See Galvan v. Superior Court (1969) 70 Cal.2d 851 [76 Cal.Rptr. 642, 645, 452 P.2d 930].

A direct conflict occurs where: (1) a municipal ordinance sanctions an activity prohibited by higher law; or (2) a municipal ordinance bans an activity expressly permitted by higher law. See, e.g., La Franchi v. City of Santa Rosa (1937) 8 Cal.2d 331, 335 [65 P.2d 1301, 110 A.L.R. 639].

The applicable federal statute on employment discrimination is the 1965 Civil Rights Act, 42 U.S.C. § 2000e-2. The applicable State statute is the Fair Employment Practices Act, Lab. C. § 1410, et seq.

There is no direct conflict of the first type between the proposed Gay Rights Law and either of these statutes. The 1964 Civil Rights Act, in detailed provisions very similar to those contained in the proposed San Francisco Ordinance, prohibits employment discrimination based on race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. The Fair Employment Practices Act bans discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, mental condition, marital status, or sex. Lab. C. § 1410. The proposed San Francisco Gay Rights Law does not sanction discrimination of any kind. See proposed San Francisco Human Rights Law, Appendix A.

There is no direct conflict of the second type. The proposed San Francisco Gay Rights Law prohibits employment discrimination based on sexual orientation. Proposed San Francisco Municipal Code, Part II, Chapter VIII, Article 33, beginning at Section 3301.

Neither the federal Civil Rights Law nor the Fair Employment Practices Act sanctions any type of discrimination. See 42 U.S.C. § 2000e-2; Lab. C. §§ 1410, et seq.

(2) Occupation of the Field

Whenever the scope and purpose of federal or State legislation evidences an intent to adopt a single scheme of regulation for a particular field of activity, supplementary or additional local legislation is preempted and void. Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624 [93 S.Ct. 1854]; In re Lane (1962) 58 Cal.2d 99 [22 Cal.Rptr. 857, 859, 372 P.2d 897].

Typically, neither Congress nor the State Legislature indicates whether or not it intends a particular piece of legislation to preempt local law, so the courts must discern the intent by examining the legislation. But where the legislation expressly states that it is to be exclusive or nonexclusive, the courts will abide by the Legislature's determination. Pipoly v. Benson (1942) 20 Cal.2d 366, 371-72 [125 P.2d 482]; Ex parte Daniels (1920) 183 Cal. 636; 641-42 [192 P. 442]; and see Local 246 Util. Wkrs. v. Southern Calif. Edison (C.D. Cal. 1970) 320 F.Supp. 1262-1264.

The federal Civil Rights Act (Title VII) is explicitly not preemptive. 42 U.S.C. § 2000e-7 provides that absent direct conflict, Title VII does not preempt any State or local laws. See also 42 U.S.C. § 2000h-4. Since Congress has expressly declared that it does not wish to occupy the field, there can be no federal preemption. See, e.g., Prudential Ins. Co. v. Benjamin (1946)

328 U.S. 408 [66 S.Ct. 1142].

The California Fair Employment Practices Act is explicitly preemptive. Lab. C. § 1432 prohibits cities and counties from creating administrative bodies with jurisdiction over employment discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status or sex.[3/] This provision does not preempt the proposed

---

3/ Lab. C. § 1432 provides:

"The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex.

"Nothing contained in this part shall be deemed to repeal or affec the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this part becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this part.

"Nothing contained in this part relating to discrimination on account of sex or medical condition shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or acturially sound underwriting practices."

Although the pertinent part (paragraph 2) is written as an explicit nonpreemption, its effect was to prohibit local civil rights commissions one year after the date of enactment.

(continued on page 13)

San Francisco Gay Rights Ordinance because the proposed Ordinance applies only to discrimination based on sexual orientation, a type of discrimination not mentioned in Lab. C. § 1432.

Unlike the federal Act, the California Law does not indicate a legislative intent to approve local acts which neither conflict with the State law nor fall within the terms of its explicit preemption. Since the Fair Employment Practices Act is silent on local laws like the proposed San Francisco Ordinance, a Court would have to determine whether or not the Legislature intended to occupy the broad field of employment discrimination to the exclusion of local legislation. Galvan v. Superior Court (1969) 70 Cal.2d 851, 859 [76 Cal.Rptr. 642, 452 P.2d 930].

The California Supreme Court has devised three tests for determining when a particular field has been preempted. They are: (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 a paramount State concern will not tolerate

---

(Continuation of footnote 3/)

The scope of the prohibition is determined by the phrase "such discrimination" in the first sentence which refers back to the first paragraph. That paragraph states that the discrimination with which the provision is concerned is discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status or sex. Thus the explicit prevention of local legislation with respect to "such discrimination" applies only to these enumerated categories. The Act is silent on discrimination based on sexual orientation.

further or additional local action; (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. In re Hubbard (1964) 62 Cal.2d 119, 128 [41 Cal.Rptr. 393, 396 P.2d 309].

In Galvan v. Superior Court (1969) 70 Cal.2d 851, 860-63 [76 Cal.Rptr. 642, 452 P.2d 930], the Court upheld a San Francisco gun registration ordinance under all three tests. The plaintiff, citing over 80 State statutes on gun control, argued that the field of gun control was "completely covered" by the general law. The Court made two points in rejecting the claim: (1) that since some of the statutes contained limited explicit preemptions which would have been unnecessary had the field been covered, the Legislature probably did not think it had preempted the entire field; and (2) that despite the many statutes, the Legislature had done little with respect to the specific problem of registration. Galvan v. Superior Court (1969) 70 Cal.2d 851, 860-63 [76 Cal.Rptr. 642, 452 P.2d 930].

Similarly here, the limited preemption of Lab. C. § 1432 indicates that the Legislature did not believe it had preempted all municipal legislation on employment discrimination, and the fact that the Legislature has done nothing with respect to employment discrimination based on sexual orientation should prevent the F.E.P.A. from being labelled "complete." See also In re Hubbard (1964) 62 Cal.2d 119, 123-27 [41 Cal.Rptr. 393, 396 P.2d 309]

numerous State gambling statutes do not "cover" the field of gaming, since some activities are unregulated) and Bell v. City of Mountain View (1977) 66 Cal.App.3d 332 (State licensing of ambulances does not preclude local licensing of "non-emergency" ambulances where that precise category is not covered by State law).

In rejecting Galvan's attack under the second Hubbard standard (partial legislation couched in terms which indicate that paramount State concerns prohibit local regulation), the Court stressed two factors: (1) terminology which indicated a belief by the Legislature that local regulation was prohibited, and (2) whether local needs have been adequately dealt with at the State level. Galvan v. Superior Court, supra, 70 Cal.2d at 863-64.

As noted above, the fact that the Legislature felt a need (in Lab. C. § 1432) to expressly prohibit certain types of municipal legislation indicates that it did not believe all local employment discrimination was prohibited by virtue of the fact that it was an issue of paramount State concern. And far from dealing "adequately" with the local problem of discrimination based on sexual orientation, the State has done nothing about it.

Finally, the proposed San Francisco Gay Rights Ordinance would place little or no burden on transients. It places restrictions on labor unions, employment agencies, and employers, none of which are likely to be individuals passing through the City. See Galvan v. Superior Court (1969) 70 Cal.2d 851, 864-65 [76 Cal.Rptr. 642, 452 P.2d 930].

Since the Legislature has not explicitly prohibited this type

of ordinance, and since it has not indicated any intent to prevent local regulation of this activity which it has left unregulated, the proposed San Francisco Gay Rights Ordinance is not preempted.

IV

CONCLUSION

The proposed San Francisco Gay Rights Ordinance is not an attempt to control the State courts or to interfere with matters which can only be addressed by the State Legislature. California charter cities have the power to create private civil rights, and the State has empowered its courts to enforce any duly created right.

The Ordinance is not an attempt to interfere with an exclusive State scheme for regulating employment discrimination. The Legislature has indicated the kinds of local action it will not tolerate, and this proposal does not fall within them.

The proposed legislation addresses a serious problem ignored by the State and federal governments. As a charter city, San Francisco has the necessary power to fill this vacuum.

Dated: February 1, 1978

MATTHEW COLES
for the GAY RIGHTS COMMITTEE
of THE BAR ASSOCIATION OF SAN FRANCISCO