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OPINION	:	No. 83-308
of	:	MAY 11, 1983
JOHN K. VAN DE KAMP Attorney General	:	
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THE HONORABLE NEIL B. VAN WINKLE, COUNTY COUNSEL FOR THE COUNTY OF MONO, has requested an opinion on the following question:

May the board of supervisors of a general law county lawfully remove an incumbent from the office of county counsel before the expiration of the term without the grounds or the hearing prescribed by Government Code section 27641?

CONCLUSION

The board of supervisors of a general law county may not lawfully remove an incumbent from the office of county counsel before the expiration of the term without the grounds or hearing prescribed by Government Code section 27641.

ANALYSIS

Before the revision of article XI[1] in 1970, article XI, section 5, provided in part:

> "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, townships, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. . . ."

In June 1970, article XI was revised by voter approval of Assembly Constitutional Amendment 29 incorporating recommendations of the Constitution Revision Commission. The provisions concerning county officers was incorporated in article XI, section 1(b), which then read as follows:

> "(b) The Legislature shall provide for county powers and an elected governing body in each county and prescribe compensation of its members. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees."

Article XI, section 1(b), was amended in November 1970 to insert a new sentence following the first, concerning compensation of the governing board. The first sentence was amended in June 1978 to include an elected county sheriff. As a result of these amendments article XI, section 1(b), now reads:

> "(b) The Legislature shall provide for county powers, an elected county sheriff, and an elected governing body in each county. Except as provided in subdivision (b) of Section 4 of this article, each governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum. The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body. The governing body shall provide for the number, compensation, tenure, and appointment of employees."

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[1] Article references are to the California Constitution and section references are to the Government Code unless otherwise indicated.

Article XI, section 13, provides in part:

> "The provisions of Sections 1(b) (except for the second sentence), 3(a), 4, and 5 of this Article relating to matters affecting the distribution of powers between the Legislature and cities and counties, including matters affecting supersession, shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment, and as making no substantive change. . . ."

Article XI, section 13, was adopted as part of the June 1970 revision of article XI and has not been changed. Thus the parenthetical exception for the second sentence refers to the second sentence of the June 1970 version of article XI, section 1(b), i.e., to the sentence which reads: "The Legislature or the governing body may provide for other officers whose compensation shall be prescribed by the governing body" which now appears as the third sentence of the current version of article XI, section 1(b).

The new article XI, section 1(b), treats officers and employees separately. The first sentence requires the Legislature to provide for an elected governing body and an elected sheriff for each county. The third sentence authorizes both the Legislature and the governing body to provide for other county "officers." The last sentence empowers the governing body to provide for "employees." A county counsel appointed pursuant to Government Code section 27640 is a county officer within the meaning of the Constitution rather than a county employee. (*Ogle* v. *Eckel* (1942) 49 Cal.App.2d 599, 602.) Thus, our analysis focuses on the third sentence of article XI, section 1(b).

The 1970 revision of article XI changed the manner in which county officers are to be "provided for." Construing former article XI, section 5, the Supreme Court in *County of El Dorado* v. *Meiss* (1893) 100 Cal. 268, 274 held:

> "The duty of providing for the election or appointment of the particular officers named in section 5 of article XI of the constitution, 'and such other county officers . . . as public convenience may require,' and to prescribe their duties and fix their terms of office, is by this section vested exclusively in the legislature of the state, and can be exercised by no other body."

The words "[t]he Legislature *or* the governing body may provide for other officers" (emphasis added) in revised article XI, section 1(b), clearly ended the exclusiveness of the Legislature's power to provide for other officers. While we have found no cases construing article XI, section 1(b), on this point, we observed in 54 Ops.Cal.Atty.Gen. 51, 53 (1971)

that "the Legislature no longer has the exclusive right to occupy the area of designation of county officers."

In support of our earlier conclusion that the revision of article XI removed the exclusiveness of the Legislature's power to provide for other county officers we note the comments of the Constitution Revision Commission which drafted article XI, section 1(b). Those comments read in part:

> "The Legislature and the governing body are each authorized to provide for other officers which only the Legislature may do under existing provisions."

Similarly the argument in favor of Proposition 2 (the proposition to revise art. XI) appearing in the ballot pamphlet sent to the voters for the June 1970 election stated in part:

> "Counties can establish new departments without legislative approval, while only the Legislature can establish these departments under the present constitution."

Law revision commission comments and statements appearing in ballot pamphlets on measures approved by the courts often provide indications of legislative intent relied on by the courts in the interpretation of doubtful language. (See *Davis* v. *Cordova Recreation & Park Dist.* (1972) 24 Cal.App.3d 789, 796 and *Amador Valley Joint Unified Sch. Dist.* v. *State Board of Equalization* (1972) 22 Cal.3d 208, 245-246.)

While both the Legislature and the governing body of a county may "provide for" other county officers, the extent of the power each legislative body has in this regard is not explained in article XI, section 1(b). Looking to the language of that section alone, the power granted to the governing body would appear to be identical to that of the Legislature since the power is granted to each by the same language. The implications of such an interpretation are troublesome, however. "The power to legislate includes by necessary implication the power to amend existing legislation" (*City of Sausalito* v. *County of Marin* (1970) 12 Cal.App.3d 550, 564) and by extension includes the power to repeal existing legislation. If the power of a county's governing board were truly identical to that of the Legislature on a given subject, then the county would have the power to amend the existing law on that subject though it is embodied in a state statute. But if one county has such power, all counties have the same power. The power of one county to amend or repeal the law in other counties seems patently absurd. We avoid the absurdity by confining the application of a county governing body's legislation to the territorial jurisdiction of the county. But by so doing we demonstrate that the legislative power of the governing board is not identical to that of the Legislature. It may be urged that while the county's legislative

power is confined to its boundaries, its legislation upon the subject forms an exception to the state law on the same subject which the Legislature cannot amend or repeal. But if the Legislature cannot amend or repeal the county's legislation on the subject, the county's power to legislate on the subject becomes exclusive for that county. The language of article XI, section 1(b), is no more susceptible of granting exclusive legislative power to the county's governing board than to the Legislature. One interpretation which would resolve the dilemma is to give effect to the latest legislation on the subject, state or county, with respect to each county. This could preserve the equality of the respective legislative powers as between the Legislature and the governing board for that county. But the prospect of each legislative body rushing to undo the latest legislation of the other seems nearly as absurd as permitting one county to legislate for another. Such implications force us to reexamine the premise that the legislative powers granted by article XI, section 1(b), to the Legislature and the governing body of the county are identical.

> "Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results." (*Carman* v. *Alvord* (1982) 31 Cal.3d 318, 327.) Further, "[i]t is a cardinal rule of construction that words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions of the Constitution bearing on the same subject. [Citation.] The goal, of course, is to harmonize all related provisions if it is reasonably possible to do so without distorting their apparent meaning, and in so doing to give effect to the scheme as a whole." (*Fields* v. *Eu* (1976) 18 Cal.3d 322, 328.)

Thus we should not consider the words "[t]he Legislature or governing body may provide for other officers" in article XI, section 1(b), in isolation but must consider them in the context of other constitutional provisions relating to legislative powers and county government. We note first that article IV, section 1, provides that "[t]he legislative power of this State is vested in the California Legislature. . . ." In *Pacific Legal Foundation* v. *Brown* (1981) 29 Cal.3d 168, 180, the court stated:

> "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers *which are not expressly*, *or by necessary implication denied to it by the Constitution*. [Citations.] . . . Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's

> power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations [imposed by the Constitution] are to be construed strictly*, *and are not to be extended to include matters not covered by the language used*.' [Citations.]"

On the other hand article XI, section 1(a), describes counties as "legal subdivisions of the State." In *Younger* v. *Board of Supervisors* (1979) 93 Cal.App.3d 864, 870, the court observed:

> "Since counties constitute merely political subdivisions of the state [citations], they have independently only such legislative authority that has been expressly conferred by the Constitution and laws of the state. If the latter sources are silent in regard to the delegation of such authority, the authority must still rest with the Legislature."

The constitutional grant of limited legislative powers to local governments creates the opportunity for conflicts between local law and state law. This has given rise to the so-called rule of preemption. The rule was explained in *Abbott* v. *City of Los Angeles* (1960) 53 Cal.2d 674, 682, as follows:

> "The denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion."

In the case of local legislation enacted under the police powers, the rule of preemption is express. Article XI, section 7, provides:

> "A county or city may make and enforce within its limits all local, policy, sanitary and other ordinances and regulations *not in conflict with general laws*." (Emphasis added.)

The rule of preemption is not confined to local laws enacted under the police power however. In *Eastlick* v. *City of Los Angeles* (1947) 29 Cal.2d 661, plaintiff sued the city for damages arising from injuries sustained in a fall on a city street claimed to be defective. Plaintiff filed the claim required for such action by the Claim Statute of 1931 but the city asserted that certain of its charter requirements for such claims were not met. The court held that the city's liability for defective streets was a matter of state concern and that "with regard to such a matter local regulations may be enforced only if they are not in conflict with general law." (*Id.*, at 665.) At page 667 the court noted: "No considerations with respect to the city's exercise of its police power enter here." (See also *Tolman* v. *Underhill*

(1952) 39 Cal.2d 708, 712 (local oath requirements for public employees preempted by state law).)

In 54 Ops.Cal.Atty.Gen. 51 (1971) we were asked if a board of supervisors of a nonchartered county could separate the offices of county clerk and clerk of the board of supervisors and appoint a person other than the elected county clerk to the office of clerk to the board of supervisors. In providing a negative answer to that question we observed:

> "Even though the Legislature no longer has the exclusive right to occupy the area of designation of county officers, the fact remains that it has fully acted in the area of the county clerk and the duties he should perform as clerk of the board of supervisors. We find nothing in the Constitution or the statutes which indicates any intent to abrogate the doctrine, that where the legislature has fully occupied the field local governmental entities cannot enact a conflicting ordinance superseding legislative mandate. 'The difficult question in such cases is whether the state law was intended to occupy the entire field. Where the statute contains language indicating that the Legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied. [Citing cases.] Conversely, where the statute contains express provisions indicating that the Legislature intends its regulations to be exclusive within a certain field, the courts have given effect to this intention.' *Pipoly* v. *Benson*, 20 Cal.2d 366, 371-372 (1942); *In re Hubbard*, 62 Cal.2d 119, 125 (1964).
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> "Although these pre-emption cases did not involve a situation where the Constitution itself provided that the "Legislature *or* the governing body" may act, in our opinion the basic pre-emption theory has to be applied. Otherwise, there would be tremendous conflict between state and local government. Suppose, for example, a county wanted to do away with or materially alter the duties of the district attorney, or sheriff. The Legislature has acted in those areas as explicitly as in the county clerk field. To permit the counties to act in individual ways would create confusion."

We therefore construe article XI, section 1(b), to authorize both the Legislature and the governing board to provide for other county offices, however, where county law conflicts with state law on a particular provision the state law governs to the extent of such conflict and to that extent the county law is void because it is preempted by the state law. Such construction avoids the absurdities and confusion attending the more literal "identical power" interpretation while at the same time accords both the Legislature and the governing bodies of the counties the fullest range of legislative power in the matter

of providing for other county officers consistent with our constitutional scheme of state and local government.

Finally we turn to the manner in which the Legislature and the Board of Supervisors have provided for the office in question. Government Code section 24000 provides in part:

> "The officers of a county are:
>
> ". . . . . .
>
> "(t) An administrative officer.
>
> "(u) Such other officers as are provided by law."

Government Code section 27640 provides:

> "In any county a county counsel may be appointed by the board of supervisors."

Government Code section 27641 provides:

> "The county counsel shall serve for four years from the time of his appointment and until his successor is appointed, subject to the following:
>
> "(a) He may be removed at any time by proceedings under Article 3 (commencing at Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code.
>
> "(b) He may be removed at any time by the board of supervisors for neglect of duty, malfeasance or misconduct in office, or other good cause shown, upon written accusation to be filed with the board of supervisors, by a person not a member of the board, and heard by the board and sustained by a three-fifths vote of the board. When an accusation has been so filed with the board, the board may direct the district attorney to investigate and present the accusation or may employ private counsel for that purpose. All testimony before the board shall be under oath or affirmation administered by the board. The board is hereby vested with the power to compel the attendance of witnesses and the production of books, papers and testimony and shall make such processes available to the accused. A copy of the accusation shall be personally served upon the accused and he shall be given not less than 10 days' time in which to file a written answer to the accusation. If, after

hearing, it appears to the satisfaction of the board that the accusation has been substantiated, the board shall so notify the accused by mail. Such notice shall specifically state the findings and judgment of the board, and the board shall thereupon forthwith remove the accused from office and shall immediately appoint his successor."

We are advised that the board of supervisors of a general law county enacted an ordinance which reads:

"There is created, pursuant to the provisions of Government Code section 27640, the office of County Counsel/Administrative Assistant to be filled by the Board of Supervisors. The County Counsel/Administrative Assistant serves at the pleasure of the Board of Supervisors."

We are further advised that on June 1, 1980, the board of supervisors appointed an attorney to the office of county counsel/administrative assistant following enactment of the ordinance. In February 1983 the board of supervisors by a three to two vote acted to remove the attorney from said office effective May 27, 1983, without any hearing or stated cause. We are asked whether the board's action was legally effective to remove the attorney from such office.

It is clear from the ordinance that the board of supervisors created the office of county counsel pursuant to Government Code section 27640. We do not address the questions whether the ordinance also created the separate position of administrative assistant and whether such position could lawfully be consolidated with the office of county counsel. (Cf. 40 Ops.Cal.Atty.Gen. 138 (1962).)

Having created the office of county counsel pursuant to state law, the other "provisions for" that office prescribed by state law necessarily attached thereto including the term of office and removal provisions of Government Code section 27641. The second sentence of the ordinance purporting to make the county counsel serve at the pleasure of the board of supervisors is in direct conflict with Government Code section 27641 and for that reason is void.

We conclude that the board's February 1983 action to remove the attorney without hearing or stated cause was not legally effective to remove the attorney from the office of county counsel.

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