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FILED
SAN MATEO COUNTY

DEC 15 2011

Clerk of the Superior Court
By 
DEPUTY CLERK

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN MATEO**
10

11 ULYSSES S. GRANT EARLY IV, et al.,

12 Plaintiffs,

13 vs.

14 COUNTY OF SAN MATEO,

15 Defendant.
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Case No. 509185

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER**

Hearing:

April 24, 2012
Date: ~~March 5, 2012~~
Time: 9:00 a.m.
Dept: Law and Motion

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1 **I. INTRODUCTION**

2 Plaintiffs, two individuals who have been issued licenses to carry concealed firearms (and an
3 organization with which they are affiliated) ("Plaintiffs"), have filed this action claiming California law
4 preemption of a County Ordinance (Section 3.68.080) that generally prohibits possession of all
5 dangerous weapons in County parks.

6 Specifically, Plaintiffs allege that Section 3.68.080 is preempted by Section 12050 of the
7 California Penal Code because Section 3.68.080 does not contain an explicit exemption for persons who
8 have been issued licenses to carry concealed firearms. Plaintiff's position should be rejected. Local
9 regulations are only preempted if the California Legislature intended to preempt them. Plaintiff can point
10 to nothing that would indicate that the Legislature had intent to preempt local regulation when it enacted
11 Section 12050. In addition, no case has even suggested that local weapons regulations like Section
12 3.68.080 are preempted. And the Supreme Court of California (arguably in dicta) has already concluded
13 that Section 12050 does not preempt local regulations' prohibiting possession of firearms on public
14 property. Accordingly, the action is ripe for a demurrer.

15 **II. BACKGROUND**

16 As noted above, the individual plaintiffs are two men, Ulysses S. Grant Early IV and Gene
17 Hoffman who are "licensed under state law to carry a loaded and concealable firearm on [their] person
18 pursuant to the California Penal Code § 12050." Complaint ¶¶ 3-4. One individual alleges that he was
19 licensed by San Mateo County, the other by Sacramento County. Both individuals claim to regularly
20 enjoy San Mateo County parks. *Id.* Both individuals are affiliated with the entity defendant, Calguns,
21 Inc. *Id.*

22 **III. DISCUSSION**

23 The Supreme Court succinctly set-out the standard governing demurrers in *Blank v. Kirwan* as
24 follows:

25 In reviewing the sufficiency of a complaint against a general demurrer, we
26 are guided by long-settled rules. We treat the demurrer as admitting all
27 material facts properly pleaded, but not contentions, deductions or
28 conclusions of fact or law. We also consider matters which may be
judicially noticed. Further, we give the complaint a reasonable
interpretation, reading it as a whole and its parts in their context. When a
demurrer is sustained, we determine whether the complaint states facts
sufficient to constitute a cause of action. And when it is sustained without

1 leave to amend, we decide whether there is a reasonable possibility that the
2 defect can be cured by amendment: if it can be, the trial court has abused
3 its discretion and we reverse; if not, there has been no abuse of discretion
4 and we affirm. The burden of proving such reasonable possibility is
squarely on the plaintiff. 39 Cal. 3d 311, 318 (1985) (quotations and
citations omitted) (emphasis added).

5 **A. The County Has An Ordinance That Generally Prohibits Possession Of Dangerous**
6 **Weapons In Parks**

7 As noted above, Plaintiffs challenge County Ordinance Section 3.68.080, which does generally
8 prohibit possession of all dangerous weapons in County Parks. Section 3.68.080(o) provides as follows:

9 Firearms and Dangerous Weapons. Except as provided in subsection (p)
10 and subsection (q), no person shall have in his possession within any
11 County Park or Recreation area, or on the San Francisco Fish and Game
12 Refuge, and no person shall fire or discharge, or cause to be fired or
discharged, across, in, or into any portion of any County Park or Recreation
area, or on the San Francisco Fish and Game Refuge, any gun or firearm,
spear, bow and arrow, cross bow, slingshot, air or gas weapon or any other
dangerous weapon.

13 Title 3 Public Safety, Morals & Welfare, Chapter 3.68 County Park & Recreation Rules, Section
14 3.68.080 General Protective Regulations.² A prohibition substantively identical to that of Section
15 3.68.080(o) was first adopted by the County of San Mateo back in 1934.³ It is of note that Section
16 3.68.080(o) is not limited to firearms—it prohibits all dangerous weapons—and makes no express
17 reference to concealed weapons. Further it is of note that while Plaintiffs observe that violation of
18 Section 3.68.080 is a misdemeanor they do not allege that they or any other person has ever been charged
19 with a violation of it. Finally, this prohibition on firearms is not uncommon—similar ones can be found
20 in many other jurisdictions. *See, e.g.*, Santa Clara County Ordinance Code Sec. B14-31.1. - Firearms and
21 Weapons; Los Angeles County Ordinance Code 17.04.620 Firearms and other weapons; Daly City

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23
24 ¹ The County has filed a request for judicial notice of Section 3.68.080 concurrently herewith.

25 ² Subsections (p) and (q) address shooting ranges and archery ranges. There are other additional
exceptions not relevant to this litigation.

26 ³ Ordinance 415 (1934) provided that in County recreation areas, “[i]t shall be unlawful for any person to
27 have firearms in their possession.” It is interesting that the earliest version of Section 12050 of the Penal
28 Code was enacted almost 20 years later. The County has filed a request for judicial notice of Ordinance
415 concurrently herewith.

1 Ordinance Code 12.36.050 - Prohibited Acts.⁴

2 **B. Section 12050 Provides For Issuance Of A License To Carry A Concealed Firearm**

3 Plaintiffs' lawsuit is limited to their contention that Section 12050 of the Penal Code preempts the
4 Section 3.68.080(o). Section 12050 of the Penal Code gives county sheriffs and municipal police chiefs
5 (located within a county with a population exceeding 200,000) extremely broad discretion whether to
6 issue licenses to carry a concealed firearm. *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801 (2001);
7 Section 12050 (a)(1)(A)(i) & (B)(i). The Sheriff "may" issue the license if the person has completed a
8 course of training and demonstrates that they are good moral character and that there is good cause for
9 issuance. Section 12050(a)(1)(A). A license may "include any reasonable conditions which the issuing
10 authority deems warranted, including restrictions as to the time, place, manner, and circumstances under
11 which the person may carry a pistol, revolver, or other firearm capable of being concealed upon the
12 person." Section 12050(b). There is no language within Section 12050 which remotely suggests an
13 intent by the Legislature to preempt local regulation by legislative bodies of additional "time, place,
14 manner" restrictions on concealed weapons.

15 **C. Courts Are Reluctant To Find Local Regulations Preempted**

16 "A county or city may make and enforce within its limits all local, police, sanitary, and other
17 ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. Whether a local
18 regulation is in conflict, *i.e.*, preempted by state law is a question of law. *City of Riverside v. Inland*
19 *Empire Patient's Health and Wellness Center, Inc.* ("Health and Wellness Center"), 200 Cal. App. 4th
20 885 (2011). The California Supreme Court in *Great Western Shows, Inc. v. County of Los Angeles*, 27
21 Cal.4th 853 (2002) (holding that an ordinance sale of firearms on county property, even property within a
22 City, is not preempted by California law) succinctly summarized the general principles governing
23 preemption analyses as follows:

24 If otherwise valid local legislation conflicts with state law, it is preempted
25 by such law and is void. A conflict exists if the local legislation duplicates,
26 contradicts, or enters an area fully occupied by general law, either
expressly or by legislative implication. Local legislation is duplicative of
general law when it is coextensive therewith.

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28 ⁴ The County has filed a request for judicial notice of these sections concurrently herewith.

1 Similarly, local legislation is contradictory to general law when it is
2 inimical thereto.

3 Finally, local legislation enters an area that is fully occupied by general law
4 when the Legislature has expressly manifested its intent to fully occupy the
5 area, or when it has impliedly done so in light of one of the following
6 indicia of intent: (1) the subject matter has been so fully and completely
7 covered by general law as to clearly indicate that it has become exclusively
8 a matter of state concern; (2) the subject matter has been partially covered
9 by general law couched in such terms as to indicate clearly that a
10 paramount state concern will not tolerate further or additional local action;
11 or (3) the subject matter has been partially covered by general law, and the
12 subject is of such a nature that the adverse effect of a local ordinance on the
13 transient citizens of the state outweighs the possible benefit to the locality.

14 *Id.* at 860-61 (quotations omitted).

15 The Court must presume, “absent a clear indication” to the contrary, that a local regulation is not
16 preempted. *Health and Wellness Center*, 200 Cal. App. 4th 885 at *3. And, the Courts are reluctant to
17 find local regulations preempted, especially impliedly and especially in the area of gun regulation. *Id.* at
18 9 (“This court rarely finds implied preemption[.] We are reluctant to invoke the doctrine of implied
19 preemption. Since preemption depends upon legislative intent, such a situation necessarily begs the
20 question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the
21 Legislature has done many times in many circumstances... Indeed, preemption will not be implied
22 where local legislation serves local purposes, and the general state law appears to be in conflict but
23 actually serves different, statewide purposes.”) (quotation and citation omitted; emphasis added);
24 *Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000) (“The California cases teach that when examining the
25 preemption issue in the field of gun control, courts are to look narrowly at the specific conduct at
26 issue.”). Finally, the party claiming that general state law preempts a local ordinance has the burden of
27 demonstrating preemption. *Health and Wellness Center*, 200 Cal. App. 4th 885 at *3

28 It is unclear from the Complaint what theory of preemption is being advanced by Plaintiff so all
of the factors considered by the courts will be addressed briefly below. However, it is of note that courts
have repeatedly explained that, with respect to firearms, the Legislature specifically intended NOT to
preempt local regulation. *Great Western*, 27 Cal. 4th at 861. More important only one case has ever
directly addressed the preemptive effects of Section 12050. In that case, *Nordyke v. King*, the Supreme
Court addressed a question certified to it by the Ninth Circuit Court of Appeals: “Does state law

1 regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun
2 possession on county property?" 27 Cal. 4th 875, 880 (2002). The Supreme Court held that the
3 ordinance was not preempted. *Id.* In so holding, it specifically concluded that Section 12050 does not
4 prevent local public entities from prohibiting possession of firearms on public property.⁵ It explained:

5 The dissent contends that Penal Code sections 12031, 12050, and 12051
6 conflict with the Ordinance, apparently based on the presumption that these
7 and other state statutes preempt the field of gun possession to such an
8 extent that they impliedly prohibit counties from regulating gun possession
9 on their own property. As explained more fully in *Great Western*, however,
the Legislature has not indicated an intent to so broadly preempt the field
of gun regulation. (See also Pen.Code, § 12050, subd. (b) [gun licensing
subject to reasonable local time, place, and manner restrictions].)

10 *Nordyke*, 27 Cal. 4th at 883 n.1.

11 **1. Section 3.68.080 does not duplicate or contradict Section 12050**

12 A local ordinance can only duplicate or contradict state law if it addresses the exact same subject
13 matter of the state law. *Great Western*, 27 Cal. 4th at 860 & 861 & 866 (discussing *Galvan v. Superior*
14 *Court*, 70 Cal. 2d 851 (1969) and explaining that in *Galvan* "we distinguished between licensing, which
15 signifies permission or authorization, and registration, which entails recording 'formally and exactly' and
16 therefore declined to find express conflict between the statute and the ordinance.") (explaining that in
17 order to contradict state law a regulation must "*mandate what state law expressly forbids, [or] forbid*
18 *what state law expressly mandates.*") (emphases added). Section 3.68.080 addresses a completely
19 different and more general subject than Section 12050 of the Penal Code-weapons in parks. Section
20 12050, as described above, is a licensing scheme. It sets out a process, by which local law enforcement
21 official can issue licenses to carry concealed weapons.

22 Section 3.68.080 has nothing to do with licensing. It does not prevent individuals from obtaining
23 licenses. Nor does it prevent a law enforcement official from issuing a license. Nor does it purport to
24 create new or different requirements for obtaining a license. All it does is prohibit non-public officials
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27 ⁵ The Supreme Court's analysis of this issue is arguably *dicta*. Earlier in the opinion, the Supreme Court
28 observed that the ordinance at issue had a "carve-out" for persons issued licenses pursuant to Section
12050 of the Penal Code. *Nordyke*, 27 Cal. 4th at 881.

1 from bringing dangerous weapons onto specific County property: parks. As the Supreme Court in
2 *Nordyke* explained: “[t]he Ordinance does not duplicate the statutory scheme. Rather, it criminalizes
3 possession of a firearm on county property, whether concealed, loaded or not, and whether the individual
4 is licensed or not. Thus, the Ordinance does not criminalize precisely the same acts which are prohibited
5 by statute.” *Nordyke*, 27 Cal. 4th at 883-84 (“the fact that certain classes of persons are exempt from
6 state criminal prosecution for gun possession does not necessarily mean that they are exempt from local
7 prosecution for possessing the gun on restricted county property.”); *see also Great Western*, 27 Cal. 4th
8 869 (“Government Code section 23004, subdivision (d), gives a county the authority to manage, sell,
9 lease, or otherwise dispose of its property as the interests of its inhabitants require. To “manage”
10 property must necessarily include the fundamental decision as to how the property will be used.”).

11 **2. Section 12050 of the Penal Code does not impliedly preempt Section 3.68.080**

12 In upholding the County of Los Angeles’ prohibition against gun sales on county property, the
13 *Great Western* case also provides significant guidance on why implied preemption should be rejected in
14 our case. First, it quickly disposed of the first and second implied preemption factors (“general law
15 occupying the field” and “legislation couched in terms indicating no tolerance of local regulation”),
16 extensively reviewing the precedential history and legislative history of gun regulation and explaining
17 that “[a] review of the gun law preemption cases indicates that the Legislature has preempted discrete
18 areas of gun regulation rather than the entire field of gun control.” *Great Western*, 27 Cal. 4th at 861.
19 Like the gun possession legislation addressed in *Great Western*, Section 12050 is not a general law and
20 does not speak to regulation of dangerous weapons on public property. Section 12050 is also not
21 “couched in terms” that indicate that the Legislature would not tolerate local action. Rather, the
22 inclusion of Section 12050(b), is directly to the contrary. As the Supreme Court observed in *Nordyke*,
23 that sub-section specifically contemplates local restrictions on concealed weapons licenses. Section
24 12050(b) (“a license may include any reasonable restrictions or conditions...including restrictions as to
25 the time, place, manner and circumstances under which the person may carry a pistol”). It would make
26 no sense to allow a local law enforcement official in Sacramento issuing licenses to prohibit licensees to
27 carry concealed weapons in Sacramento County parks, but not allow the County of San Mateo Board of
28 Supervisors to include a similar prohibition with respect to County parks.

1 The Supreme Court's analysis of the third (and final) category of implied preemption (adverse
2 effect on transients) is also dispositive. *See Great Western*, 27 Cal. 4th at 867 (explaining that with
3 respect to gun regulation, "there is a significant local interest to be served that may differ from one
4 locality to another.") ("laws designed to control the sale, use or possession of firearms in a particular
5 community have very little impact on transient citizens, indeed, far less than other laws that have
6 withstood preemption challenges.").

7 *Great Western's* analysis, and that of the prior precedent it approved, is no doubt why almost
8 every case that has addressed arguments of California law preemption has concluded that local firearm
9 regulation is not preempted. *Galvan*, 70 Cal. 2d 851 (holding that a firearm local regulation requiring
10 firearm registration was not preempted by California gun laws) (superseded by statute); *Olsen v.*
11 *McGillicuddy*, 15 Cal. App. 3d 897 (1971) (holding that a prohibition on possession of "BB" guns by
12 minors was not preempted by California gun laws) (superseded by statute); *California Rifle & Pistol*
13 *Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302 (1998) (holding that a local regulation banning
14 "Saturday Night Specials" was not preempted by California gun laws) ("[T]he Legislature has studiously
15 avoided comprehensive preemption of such local laws despite several legislative opportunities to enact a
16 complete preemption."); *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (1997) (holding that local
17 regulation limiting where gun stores could locate was not preempted by California gun laws)⁶; *Olsen v.*
18 *McGillicuddy*, 15 Cal. App. 3d 897 (1971). This is especially true of regulation like that here, which is
19 focused on county property because, as the Supreme Court in *Nordyke* recognized, counties have been
20 given almost unlimited discretion to regulate activity on their own property.

21 The County has located only two somewhat recent cases that have found local firearm-related
22 regulation to be preempted and both are easily distinguishable. In *Doe v. City and County of San*
23 *Francisco*, 136 Cal. App. 3d 509 (1982) the Court of Appeal found preemption of a city regulation that
24 prohibited firearms possession unless the person first obtained a Penal Code Section 12050 license. The
25 Court of Appeal concluded that this regulation was expressly preempted by Section 53071 of the
26

27 ⁶ A very small portion of the regulation at issue in *Suter* (dealing with firearm storage) was found to be
28 preempted.

1 Government Code and 12026 of the Penal Code because those Sections prohibited local licensing of
2 firearms and forbid requiring a license for someone to have a firearm in their home or business. In
3 addition to the fact that Plaintiff here is not alleging that these state statutes are at issue, *Doe* is
4 distinguishable both because our Section 3.68.080 is not a licensing requirement and because it does not
5 affect the right of a person to have a firearm in their home or business. In *Fiscal v. City and County of*
6 *San Francisco*, 158 Cal. App. 4th 895 (2008) the Court of Appeal found preemption of a city regulation
7 that prohibited possession and sale of handguns within the City. Again, the Court of Appeal found the
8 prohibition of possession preempted by Section 12026 and Section 53071 for functionally the same
9 reasons, *i.e.*, Section 12026 and 53071 evince an intent to preempt regulation that totally bans handgun
10 ownership, rejecting the city's argument that *Doe* was wrongly decided. Accordingly, *Fiscal* is similarly
11 easily distinguished. *Id.* at 915, 908 ("The City is not simply imposing additional restrictions on state
12 law to accommodate local concerns; but instead, it has enacted a total ban on an activity state law allows.
13 This difference was recognized in *Great Western*, which noted that total bans are not viewed in the same
14 manner as added regulations, and justify greater scrutiny.") ("Given the presumption of the Legislature's
15 awareness of *Doe* during the three times it has reenacted Penal Code section 12026 since the *Doe*
16 decision, it is reasonable to assume that if the Legislature intended to reopen this area of regulation to
17 local units of government, it would have addressed the issue specifically by repealing or amending Penal
18 Code section 12026.").

19 Finally, the recent amendment to Section 12050 is significant. As Plaintiff alleges in the
20 Complaint, Penal Code Section 12050 has been repealed as of January 1, 2012 and replaced with Section
21 25650. The Legislature, aware of the Supreme Court's conclusion in *Nordyke* back in 2002 that Section
22 12050 did not preempt prohibitions of firearms on public property, could easily have taken the
23 opportunity when recodifying the Section to explicitly preempt such regulations. Its failure to do so is a
24 strong indication that it did not intend to (impliedly) preempt them. *Great Western*, 27 Cal. 4th 862
25 (explaining that the legislature's failure to explicitly preempt gun regulation when given an opportunity
26 to do so, further undermines an argument for implied preemption) ("Thus once again the Legislature's
27 response was measured and limited, extending state preemption into a new area in which legislative
28 interest had been aroused, but at the same time carefully refraining from enacting a blanket preemption of

1 all local firearms regulation.”) (*citing Olsen, supra*).

2 **IV. CONCLUSION**

3 For the foregoing reasons, and because the infirmities of Plaintiffs’ complaint are incurable, the
4 County asks that its Demurrer be SUSTAINED with prejudice and without leave to amend.
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6 Dated: December 15, 2011

Respectfully submitted,

7 JOHN C. BEIERS, COUNTY COUNSEL
8

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10 David A. Silberman, Deputy

11 Attorneys for Defendant
12 COUNTY OF SAN MATEO
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