STATE OF CALIFORNIA

Memorandum

To: SUE GERANEN, Executive Officer
Veterinary Medical Board

Date: December 1, 2004
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From: **Department of Consumer Affairs**
Legal Office

Legal Op. No. 04-04

Subject: Business and Profession Code section 460; Restriction of Licensed Practice by City

The Board has inquired whether the Veterinary Medicine Practice Act (Bus.& Prof. Code § 4800 et seq.) "supersedes" or preempts a local ordinance. Specifically, the following question is addressed:

Question

Is a local ordinance that imposes a ban on the "declawing" of domestic cats preempted by the State's licensing law that regulates the practice of veterinary medicine?

Conclusion

A local ordinance that imposes a ban on the "declawing" of domestic cats is preempted by the State's licensing law regulating the practice of veterinary medicine.

Background

In 2003, the City of West Hollywood enacted an ordinance prohibiting the veterinary medical procedure of onychectomy (declawing) or flexor tendonectomy, except for defined "therapeutic" purposes, on any animal within the city limits. Section 9.49.020 of the West Hollywood Municipal Code provides:

> "No person, licensed medical professional or otherwise, shall perform or cause to be performed an onychectomy (declawing) or flexor tendonectomy procedure by any means on any animal within the city, except when necessary for a therapeutic purpose. "Therapeutic purpose" means the necessity to address the medical condition of the animal, such as an existing or recurring illness, infection, disease, injury or abnormal condition in the claw that compromises the animal's health. "Therapeutic purpose" does not include cosmetic or aesthetic reasons or reasons of convenience in keeping or handling the animal. In the event that an onychectomy or flexor tendonectomy procedure is performed on any animal within the city in violation of this section, each of the following persons shall be guilty of a violation of this section: (1) the person or persons performing the procedure,

> (2) all persons assisting in the physical performance of the procedure, and (3) the animal guardian that ordered the procedure. (Ord. 03-65 6 § 1 (part), 2003.)"

The codified findings underlying this ordinance identifies and cites the legal authority for the ordinance:

> "The City of West Hollywood enacts this ordinance pursuant to the authority vested in the city by Article XI, Section 7 of the California Constitution allowing a city to make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (City of West Hollywood Municipal Code §9.49.010h.)

In addition the City Council's findings state:

> "The State Legislature has not endeavored to regulate, or delegate to any specified agency the authority to regulate, the types of veterinary procedures that may be performed within the State of California. Until the Legislature chooses to regulate these procedures, local governments are free to limit the types of procedures that may be performed within their jurisdiction for the protection of the public health, safety and general welfare." (City of West Hollywood Municipal Code § 9.49.010i.)

Analysis

A municipality "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XL, § 7). However, pursuant to this provision, "local legislation in conflict with general law is void." *(People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484; see also *Robillwayne Corp. v. City of Los Angeles* (1966) 241 Cal.App.2d 57, 60.) Consequently, if local legislation conflicts with state law, it is preempted. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. *(Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) Local legislation is "duplicative" of general law when it is coextensive therewith. *(In re Portnoy* (1942) 21 Cal.2d 237.) Similarly, local legislation is "contradictory" to general law when it is inimical thereto. *(Ex Parte Daniels* (1920) 183 Cal. 636, 642-645.) Finally, a conflict exists if the local legislation enters an area fully occupied by general law, either expressly or by legislative implication. *(People ex rel. Deukmejian v. County of Mendocino,* supra 36, Cal.3d 476, 484; *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 886.) The Attorney General concluded in a published 1979 opinion that a local ordinance contradicts a state law if it attempts to permit what the state law prohibits or to prohibit what state law permits. (62 Ops.Cal.Atty. Gen. 90, 95 citing *Monterey Oil Co. v. City Court* (1953) 120 Cal.App.2d 31, 36; *Markus v. Justice's Court* (1953) 117 Cal.App.2d 391, 396; and 59 Ops.Cal.Atty.Gen. 461, 478 (1976).)

In addition to the aforementioned case law concerning state preemption and relevant to this specific inquiry, Section 460 of the Business and Professions Code provides:

"No city or county shall prohibit a person, authorized by one of the agencies in the Department of Consumer Affairs by a license, certificate, or other such means to engage in a particular business, from engaging in that business, occupation, or profession ***or any portion thereof.*** Nothing in this section shall prohibit any city or county or city and county from levying a business license tax solely for revenue purposes nor any city or county from levying a license tax solely for the purpose of covering the cost of regulation." [Emphasis added.]

Thus, Section 460 precludes a city or county from prohibiting those licensed by one of the agencies of the Department of Consumer Affairs, including the Veterinary Medical Board, from practicing their professions and occupations within the scope of their respective licenses without further regulation by a city or county except for a business tax for revenue purposes.

The City of West Hollywood's ordinance specifically states in its "findings" that the "State Legislature has not endeavored to regulate, or delegate to any specified agency the authority to regulate, the types of veterinary procedures that may be performed within the State of California." However this codified finding of the West Hollywood City Council is factually incorrect. The practice of veterinary medicine is highly regulated in California.

The Veterinary Medicine Practice Act (Act) specifically regulates the practice of veterinary medicine. The State Legislature has delegated to the Veterinary Medical Board authority with carrying out and enforcing the provisions of the Act. (Bus. & Prof. Code §§ 4800 et seq. and 4808.) Section 4825 of the Act makes it "unlawful for any person to practice veterinary medicine or any branch thereof in this State unless at the time of so doing, such person holds a valid, unexpired, and unrevoked license." In relevant part, pursuant to Business and Professions Code section 4826(d) the practice of veterinary medicine is defined to include any person who "performs a surgical or dental operation upon an animal." Similar to other "professional medical practice acts," the Act does not delineate or specify a comprehensive listing of all medical practices or procedures that are specifically restricted or authorized. However, the Act authorizes and restricts certain specific medical procedures conducted by registered veterinary technicians and unregistered assistants (unlicensed persons). (Bus. & Prof. Code §§ 4840 and 4840.2.)

Both an "onychectomy" (declawing) and "flexor tendonectomy" are common surgical procedures employed by veterinarians upon felines and the practice of this veterinary surgical procedure is restricted to appropriately licensed persons. Our reading of Business and Professions Code section 460 is that a city cannot prohibit a licensed veterinarian from practicing any aspect of veterinary medical work that falls within the perimeter of the state license.[1] Under this interpretation, a city

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[1] *Stacy & Wibeck, Inc. v. City and County of San Francisco (1995)* 36 CaLApp.4th 1074; and see 73 Ops.Cal.Atty.Gen. 28, 40 (1990): "This section would preclude a [municipality] from prohibiting those licensed by the Contractors State License Board from practicing their professions and occupations within the scope of their respective licenses without further regulation by the [municipality] except for a business tax for revenue purposes.")

cannot prevent a licensed medical professional from practicing his or her profession with respect to third parties.

The West Hollywood ordinance entered an area fully occupied by general law. Preemption (by implication) of an area of law to the exclusion of local regulation will be found where "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local law on the transient citizens of the state outweighs the possible benefit to the municipality." *(People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, *485,* quoting *In re Hubbard* (1964) 62 Cal.2d 119, 128.)[2]

Section 9.49.020 of the West Hollywood Municipal Code concerns a subject matter (prohibiting the veterinary medical procedure of onychectomy (declawing) or flexor tendonectomy) that is fully and completely covered by general law restricting the practice of veterinary medicine as to clearly indicate that it has become exclusively a matter of state concern. The West Hollywood ordinance, itself, acknowledges that such medical procedures are valid for "therapeutic purpose" necessary to address the medical condition of the animal, such as an existing or recurring illness, infection, disease, injury or abnormal condition in the claw that compromises the animal's health. As standard veterinary medical procedures, onychectomy and flexor tendonectomy fall within the "portion" of veterinary practice which local municipalities are proscribed from prohibiting under Business and Professions Code section 460. Historically, surgical declawing is often necessary because of a severe medical or behavioral condition and has often been used as an alternative to abandonment or euthanasia.

The West Hollywood ordinance specifically defines "therapeutic purpose" so as to not include "cosmetic or aesthetic reasons or reasons of convenience in keeping or handling the animal." The decision to declaw a cat is typically made by the owner of the cat while consulting with a licensed veterinarian. According to the California Veterinary Medical Association, "licensed veterinarians are skilled professionals who have undertaken the necessary education and training affording them the ability to diagnose medical and behavioral problems. Veterinarians usually do not recommend surgical declawing to their clients without first recommending some form of behavioral modification training."[3] Regardless of whether or not the decision to declaw is based on a medical "therapeutic purpose" or for reasons of "aesthetics or convenience," the procedure itself is a standard veterinary procedure. It cannot be regulated by local jurisdictions because it "is of such a nature that the adverse effect of a local law on the transient citizens of the state outweighs the possible benefit to the municipality." Such local regulation of veterinary practice in different jurisdictions would ultimately create a chaotic and confusing situation where it would

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[2]This remains the current test for determining whether state law has preempted local regulation by implication and the standard has been reiterated by the California Supreme Court in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.

[3]See Bill Analysis, AB 395, as amended April 10, 2003, Assembly Committee on Business and Professions.

be difficult for licensed veterinarians to know which veterinary procedures are legal or not depending on the jurisdiction. For local jurisdictions to regulate this aspect of veterinary practice is akin to local authorities imposing bans on physicians performing cosmetic surgery on people. Such a balkanization of professional practice ultimately would lead to different standards of practice throughout the state. Having different authorized and illegal veterinary medical practices throughout the state will inevitably make it very difficult for the Board to enforce the Veterinary Medicine Practice Act.

The city ordinance also does not accomplish its stated purpose of preventing the practice of onychectomy or flexor tendonectomy for non-medical reasons. Owners may freely go to a neighboring city and have the operation performed there and bring the cat back into the city. In this manner, the ordinance only adversely impacts the veterinarians in the City of West Hollywood. Whether the practice of performing an onychectomy or flexor tendonectomy for non-medical reasons should be prohibited or not is ultimately a state policy question that should be addressed before the State Legislature. Interestingly, there was legislation introduced in 2003 (AB 395, Koretz) that specifically addressed this subject and initially proposed to amend the Veterinary Medicine Practice Act in a manner similar to the objective of the West Hollywood ordinance. The bill originally applied to all domestic cats but was subsequently amended to only apply to native wild and exotic cats. Ultimately, this bill failed to pass out of the Legislature during its 2003-2004 session.

There is legal authority supporting the notion that where local legislation enters an area that is not "fully occupied" by general law local authority may use its police power to regulate those aspects not specifically addressed by general law. (See *California Rifle and Pistol Association, Inc. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302.) However, in such cases courts have found that the legislature had not expressly or by implication preempted local laws. In the *California Rifle and Pistol Association, Inc.* case, the Court of Appeal found that the Legislature enacted narrowly drawn legislation designed to regulate certain specific areas of firearms sales while preserving other areas, unregulated by state law, for local regulation according to local standards. In contrast, the practice of veterinary medicine is solely regulated by the California Veterinary Medicine Practice Act that grants jurisdiction to the Board to carry into effect the Act's provisions. Unlike the complicated regulation system of firearms sales, where state and local authorities share jurisdiction and authority, Business and Professions Code section 460 expressly preempts the City of West Hollywood's "declawing" ordinance.

We trust this is responsive to the Board's inquiry.

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