

2nd Civ. No. B215265

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

RICHARD HOPP,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES,

Defendants and Respondents.

NO. B215265

(Los Angeles County Superior
Court No. BC401887)

(Hon. Malcolm Mackey, Judge)

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION.

Appellant, Richard Hopp appeals from the order entering judgment in favor of respondent, City of Los Angeles¹ following an order granting City's motion for judgment on the pleadings as entered on March 3, 2009 in Department 55 of the Los Angeles County Superior Court, the Honorable Malcolm Mackey, presiding. (AA:129)² Judgment was entered on March 3, 2009, and Notice of Entry of Judgment was served on March 12, 2009. (AA:133) Hopp filed a timely notice of appeal on April 8, 2009. (AA:138)

II. STATEMENT OF FACTS.

Hopp is an avid collector of books, documents, and ephemera as a hobby. (AA:001 at ¶ 3) He does not hold himself out as being in the business or occupation with respect to his collecting or hobby activities whether with respect to books or the other items such as documents, ephemera, etc. He has not engaged in, conducted, managed, or carried on the "business" (as defined by City's ordinance) of buying, selling, exchanging or otherwise dealt in secondhand books.³

City's employees who are responsible for enforcing various City

¹ For convenience, appellant shall be referred to as "Hopp" and respondent, City of Los Angeles shall be referred to as "City."

² References to the Appellant's Appendix shall be made by use of the letters "AA" followed by the page number, and where applicable a paragraph number. References to the Reporter's Transcript shall be made by use of the letters "RT" followed by the page number.

³ City has failed to address any issues relating to the applicability of the secondhand dealer's license to Hopp's collecting activities, despite the fact that certain items which Hopp also collects, such as documents, transcripts, and ephemera clearly do not fall within the definition of books. See, *fn.* 5.

ordinances relating to the conduct of various businesses have threatened to arrest Hopp for violation of one or more ordinances if he fails to secure a secondhand book dealer's permit. Accordingly, Hopp filed the instant action seeking a declaration of his rights, duties, and obligations (if any) pursuant to City's current ordinances.

City filed a motion for judgment on the pleadings as to Hopp's complaint. The motion was brought pursuant to Code of Civil Procedure section 438 on the ostensible grounds that the complaint fails to state facts that constitute a cause of action against City, inasmuch as City asserted that the challenged ordinance (Los Angeles Municipal Code § 103.310) is valid, constitutional, and **"applies to the activities of Plaintiff Richard Hopp ("Hopp")** as alleged in his complaint." City's motion at p. 2:1-4.

Hopp argued that irrespective of whether the ordinance(s) in question are constitutional, or whether such ordinances have been preempted by state law, the ordinances do not apply to his collecting activities, and thus, the complaint properly states a cause of action for declaratory relief.

In Respondent's brief, City concedes that Hopp is not engaged in business and does not engage in sales of books.⁴

⁴ City's counsel misrepresented the facts during the course of the oral hearing when he argued that "Mr. Hopp provides a service of advertising that he has books for sale." See, RT at p. 2:27-28. This statement apparently swayed the court which as expressed in the court's tentative ruling had recognized that factual issues were present that precluded a judgment on the pleadings (e.g. whether Hopp is engaged in business, and sells his books). In the instant case, it is abundantly clear that the court went beyond the allegations of the complaint and those matters that would be subject to judicial notice by accepting that Hopp was doing something other than as alleged in his complaint. See, RT at p. 3:15-28. In the context of a motion for judgment on the pleadings, it is not for the court to determine the facts, but rather to look only at the allegations of the complaint and those matters that are properly subject to judicial notice.

In the instant case, it is clear that the court went beyond the allegations of the complaint and those matters that would be subject to judicial notice. See, RT at p. 2:18 - 4:2; see also, *fn.* 4. It wasn't for the court to determine the facts, but rather to look only at the allegations and those matters that were subject to judicial notice.

III. STANDARD OF REVIEW.

City concedes that Hopp has advanced the proper standard of review applicable to an appeal from an order granting judgment on the pleadings as *de novo*; that is, the court must exercise its independent judgment about whether the complaint states a cause of action as a matter of law. *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 146, *affd.* (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed 2d 25. City certainly does not argue that a different standard of review should apply.

Like a demurrer, a moving defendant is entitled to judgment on the pleadings only if the plaintiff's complaint does not state a cause of action. In considering a motion for judgment on the pleadings, the court generally must look only to the face of the pleading under attack. *Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal. App. 4th, 679, 685. All facts alleged in the complaint are admitted for purposes of the motion, and the court determines whether those facts constitute a cause of action. *Id.* However, as with a demurrer, the court may consider matters which are subject to judicial notice. *Id.*

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IV. RULES OF STATUTORY CONSTRUCTION.

As City pointed out in its moving papers (AA:015), in order to understand the ordinance at issue, one must first understand the rules of statutory construction. City and Hopp have little, if any, dispute regarding the applicable rules of statutory construction which apply equally to ordinances. *County of Madera v. Superior Court* (1974) 39 Cal. App. 3d 665. In short, the rules of statutory construction may be summed up by the following:

"Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (Citation) We begin by examining the statutory language, giving the words their usual and ordinary meaning. (Citation) If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. (Citation) If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (Citations) In such circumstances, 'we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" *Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272.

"Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.

"[A] construction making some words surplusage is to be avoided." *Watkins v. Real Estate Commissioner* (1960) 182 Cal.App.2d 397, 400.

Again, City has no argument that Hopp has correctly identified to applicable rules of statutory construction.

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V. A PERSON WHO MERELY COLLECTS BOOKS SOLELY AS A HOBBY IS NOT ENGAGED IN BUSINESS AS A SECONDHAND BOOK DEALER AS DEFINED BY LAMC SECTION 103.310.

In his complaint, Hopp alleged that he is and has been an avid collector of books, documents, and ephemera as a hobby, and that items he purchases are for his personal use and not for resale. (AA:001 at ¶ 3) He also alleged that he does not hold himself out as a business or occupation with respect to his collecting and hobby activities. (AA:002 at ¶ 3) Hopp further alleged that City's employees who are charged with enforcing its ordinances have asserted that he is required to obtain a secondhand book dealer's permit in order to continue purchasing books as part of his book collecting activities, and have threatened him with arrest if he does not comply.⁵ (AA:001 at ¶¶ 8, 9 and 12)

By way of his complaint, Hopp asserted that since he was not engaged in business, he did not fall under the provisions of City's ordinances which purport to regulate secondhand book dealers or secondhand dealers of goods. He further asserted that the ordinance which City argued was applicable to him was preempted by state law, and otherwise unconstitutional.

Shortly after filing its answer, City filed a motion for judgment on the pleadings. In its motion, City argued that Hopp (and presumably any other person who collects used books) is subject to its secondhand book

⁵ Since documents and ephemera are not books, to the extent that Hopp were required to obtain a secondhand book dealer's permit for the sole purpose collecting previously owned books, City would likely demand that he also obtain a secondhand dealer's permit which is applicable to persons who are in the business of dealing in secondhand or rebuilt or reconditioned goods, wares and merchandise. See, LAMC § 103.311(a)(1). (AA:114) See discussion, *infra*.

dealer permit requirements. City quoted the portion of Section 103.310, subd. (a)(1) which provides: "'SECONDHAND BOOK DEALER' means a person engaging in, conducting, managing or carrying on **the business of** buying, selling, exchanging or otherwise dealing in secondhand books..."⁶ (Emphasis added.) (AA:114)

In its motion for judgment on the pleadings, City argued that the definition of the word "business" was critical to the determination of the issues (i.e., whether Hopp was not subject to regulation by City's ordinance he is merely a collector, and thus, not engaged in business); and that the definition of the word "business" is fundamental to the statutory construction of the ordinance.⁷

City apparently has abandoned its attempt to expand the standard dictionary definition of business that it argued to the court. See, AA @ p. 21:12-14 (including *fn.* 3). City now concedes that the word "business" is defined within its own statutory scheme to wit: "Business means any

⁶ The definition of a secondhand book dealer also applies to those engaged in the business of buying, selling or otherwise dealing in "secondhand magazines, secondhand text books or secondhand educational materials."

⁷ In its motion, City proceeded to refer to a standard dictionary for a definition of the word "business" despite the fact that the word is also defined (albeit in more restrictive terms) in Black's Law Dictionary. Despite its reference to a standard dictionary, City also acknowledged that the word "business" is defined within its own statutory scheme to wit: "Business means any **occupation, trade, establishment or concern**, regardless of form, **which provides** services, **products** or entertainment for which a permit is required under this article, whether or not a permit has been granted, sought, applied for, denied, revoked or suspended. (Emphasis added.) LAMC § 103.01. City proceeded to adopt an untenable position that the term "business" as covered by its ordinance includes any person carrying on the "function" of buying secondhand books. AA at p. 21:24-25. City's argument failed to conform with the rules of statutory construction for all the reasons set Appellant's Opening Brief.

occupation, trade, establishment or concern, regardless of form, **which provides services, products** or entertainment for which a permit is required under this article, whether or not a permit has been granted, sought, applied for, denied, revoked or suspended. (Emphasis added.) LAMC § 103.01.

However, City continues to advance the untenable position that the term "business" as covered by its ordinance includes any person carrying on the "function" of buying secondhand books (and presumably secondhand goods other than books as well).

A. THE USUAL AND ORDINARY LANGUAGE OF THE LOCAL ORDINANCE CLEARLY EXCLUDES THOSE WHO LIMIT THEIR ACTIVITIES TO BUYING OR COLLECTING FOR PERSONAL USE.

Section 103.310, subd. (a)(1) defines a secondhand book dealer to include any person:

- engaging in the business;
- conducting the business;
- managing the business; or
- carrying on the business;

of buying, selling, exchanging or otherwise dealing in secondhand books.

City ignores the words "engaging in, conducting, managing or carrying on the business" as found in its ordinance, but instead focuses on the word "dealing" in the context of second hand books. The definition of "business" as used in City's ordinance means "any occupation, trade, establishment or concern, regardless of form, **which provides services, products** or entertainment..." (Emphasis added.) LAMC § 103.01.

(AA:108) Despite the existence of the limited definition with in its

ordinance City continues to argue that a person could be in the business of "buying" or otherwise "dealing" with books and covered by the ordinance irrespective of whether such person does not engage in any occupation or trade, or operate an establishment or concern which provides services, products or entertainment. Respondent's brief at p. 3-4.

It is abundantly clear that Hopp's activities relating to his collecting books (or other goods) for his personal use constitute neither an occupation nor a trade. There is nothing in the pleadings to the contrary. Moreover, Hopp does not operate an establishment or concern "**which provides services, products or entertainment...**"

City ignores the words "engaging in, conducting, managing or carrying on the business" and the definition of business as found in its ordinances, because its argument is nonsensical otherwise.⁸

Although City took exception to Hopp's citation to the definition of the word business, the definition of the word "business" offered by Hopp is found in Black's Law Dictionary is consistent with California case law which has addressed the meaning of the word "business." *Union League Club v. Johnson* (1941) 18 Cal. 2d 275, 278 [the word "business" as used in similar statutes "ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood"]; *City of Los Angeles v. Cohen* (1954) 124 Cal. App. 2d 225, 228 ["Business is defined as that which occupies the time, attention, or labor of men for the purpose of profit or improvement."]. City argues that the foregoing case law cited

⁸ City recognizes the folly of its argument, by arguing further that [LAMC] section 103.310 does not seek to regulate "businesses" at all. Respondent's Brief at p. 5.

by Hopp is also inapplicable, ostensibly because it relates to taxation issues.⁹ However, aside from the fact that the foregoing cases may have related to taxation issues, each was dependent on the definition of "business;" a definition that City concedes is critical to the enforcement of its ordinance. In any event, City has failed to cite any contrary authority, choosing instead to insert its own self-serving definition (i.e. "A person carrying on *the function of buying* [emphasis in original] secondhand books is a secondhand book dealer under the ordinance.").

City further suggests that the word "dealer" should be ignored despite that fact that City's ordinance refers to a "secondhand book dealer." Division 9 of City's ordinance which includes Section 103.310 applies generally to "Dealers" and "Sales." Black's Law Dictionary defines "dealer" as follows: "In the popular sense, one who buys to sell, not one who buys to keep, or makes to sell." City has made no effort to offer a definition of the word "dealer," or to reconcile the definition of "business" with any definition of the word "dealer" as used in the ordinance. The rules of statutory construction require that a court give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. *Curle v. Superior Court*, supra at p. 1063. A construction making some words surplusage is to be avoided." *Watkins v. Real Estate*

⁹ While mentioning the issue of taxation, it should be noted that City's statutory scheme allows for the denial of a secondhand book dealer's permit for a number of reasons, including without limitation, the fact that the business for which the permit is sought has failed to comply with all City business tax and parking occupancy laws. See, LAMC § 103.31 subd. (a)(10). Yet, there is nothing in the business tax ordinance to suggest that a person who purchases books, documents, or ephemera for his or her own use is subject to City's business tax. See, LAMC § 21.00 et. seq.

Commissioner, supra at p. 400. Thus, the use of the word "dealer" in City's ordinance cannot be ignored when the issues before the court require the court to decide whether the definition of "secondhand book dealer" would include a person whose only conduct is purchasing books solely for his own use.

B. THE STATUTORY OBJECTIVES MILITATE AGAINST INCLUSION OF THOSE WHO LIMIT THEIR BOOK BUYING ACTIVITIES TO COLLECTING FOR PERSONAL USE.

As discussed, supra, City has argued that the term "business" is defined in the broadest possible sense, so that virtually any activity relating to secondhand books, including the function of buying books, requires a secondhand book dealer permit pursuant to its ordinance. Like the plain meaning of the word "business," the statutory scheme suggests otherwise.

Section 103.310 which is part of Chapter X of City's municipal code is entitled "Business Regulations." The entire statutory scheme is clearly intended to provide for regulation of various business operations which may (or may not) be perceived as requiring the devotion of an inordinately high percentage of police resources. There are 51 types of business listed which include among others, dance halls, escort halls, massage parlors, massage businesses (off premises), pawnbrokers, swap meet operators, etc. That the statutory scheme applies to those engaged in commercial operations is evident by the various sections of City's Municipal Code.¹⁰

¹⁰ It is worth noting that garage sales are not included among the types of activities which require a permit to operate as a "business." In fact, although City requires secondhand dealers of goods to obtain a permit (LAMC § 103.311), City exempts sellers of similar goods where such sales are conducted at a garage sale. See, LAMC § 12.03 (under the definition of "Accessory Use"). (AA:82-84)

As discussed, *supra*, by the definition found in City's ordinance, "Business means any occupation, trade, establishment or concern, regardless of form, **which provides services, products** or entertainment for which a permit is required under this article, whether or not a permit has been granted, sought, applied for, denied, revoked or suspended. (Emphasis added.) LAMC § 103.01. Moreover, "No person may operate, engage in, conduct, manage or carry on **the business** of secondhand book dealer without first obtaining a permit issued by the Board of Police Commissioners. (Emphasis added.) LAMC § 103.310(b).

The statutory scheme allows for the denial of a permit for a number of reasons, including without limitation, the fact that the business for which the permit is sought has failed to comply with all City business tax and parking occupancy laws. See, LAMC § 103.31 subd. (a)(10). However, there is nothing in the business tax ordinance to suggest that a person who purchases books, documents, or ephemera for his or her own use is subject to City's business tax. See, LAMC § 21.00 et. seq.

It is also notable that the specific section in question refers to a secondhand book "dealer." Indeed, Division 9 of City's ordinance which includes Section 103.310 applies generally to "Dealers" and "Sales." See discussion, *supra* at p. 9-10.

As City concedes, in construing the statute, if there is ambiguity as to the **usual and ordinary** meaning of the words used, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute. In view of the overall scheme of the ordinance, it is clear that the permit requirements relate solely to commercial activities.

C. INCLUDING THOSE WHO LIMIT THEIR BOOK BUYING ACTIVITIES TO COLLECTING FOR PERSONAL USE WOULD BE AN INTERPRETATION THAT LEADS TO ABSURD CONSEQUENCES.

As noted, *supra*, where the court must attempt to construe a statute or ordinance, the court must also try to avoid an interpretation that would lead to absurd consequences. *Day v. City of Fontana*, *supra*.

If the court were to include those who collect books as a hobby within the definition of secondhand book dealer, it would lead to absurd consequences. Every person located within the City of Los Angeles who desired to purchase a used book, irrespective of whether the purchase was of a single book or 1,000 books, would be required to obtain a permit under City's construction of the ordinance unless the purchase was exempt (i.e. purchased from another person or business who held a secondhand book dealer's permit). LAMC § 103.310, subd. (i). Thus, any private party located within the City of Los Angeles who wished to exchange a used paperback book with a friend would be required to obtain a permit. If both parties were located within the City of Los Angeles, both parties would be required to obtain a permit prior to exchanging their respective paperback books.

The absurdity of City's position is further demonstrated when considering the permit of a secondhand dealer.¹¹ By City's definition, a "'Secondhand Dealer' means a person engaging in, conducting, managing or carrying on the business of buying, selling or otherwise dealing in secondhand or rebuilt or reconditioned goods, wares, and merchandise."

¹¹ Since Hopp buys secondhand documents and ephemera in addition to secondhand books, City presumably would require him to obtain a secondhand dealer's permit as well.

LAMC § 103.311(a). (AA:117) Like a secondhand book dealer, a secondhand dealer must obtain a permit prior to engaging in business. LAMC § 103.311(b). (Of course, secondhand books would fall within the definition of "secondhand goods, wares, or merchandise.) Yet, Section 103.311 exempts "Any person engaging in, conducting, managing, selling, exchanging, displaying or offering for sale or exchange, secondhand personal property at a swap meet..." LAMC § 103.311(i). It is notable that Section 103.311(i) does not exempt buyers at a swap meet. Thus, if City's definition of business were applied consistent with the definition City suggests, anyone engaged in the activity of "buying" secondhand (or used) goods, wares and merchandise within the City of Los Angeles would be required to first obtain a secondhand dealer's permit, irrespective of whether such person was buying for his personal use, and irrespective of whether such person purchased such secondhand goods at a rummage sale, swap meet, garage sale, or private advertised sale. Such a scheme is clearly an absurd consequence that results from the untenable definition of "business" suggested by City.

VI. CITY'S SECONDHAND BOOK DEALERS ORDINANCE IS PREEMPTED BY STATE LAW.

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." California Const. Art. XI, Sec. 7. If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. *O'Connell v. City of Stockton* (2007) 41 Cal. 4th 1061, 1067. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully

occupied by general law, either expressly or by legislative implication. *O'Connell v. City of Stockton*, supra; *Sherwin Williams v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897.

A local ordinance "duplicates" state law when it is coextensive with state law (e.g. local ordinance purporting to impose the same criminal prohibition imposed by general law). *O'Connell v. City of Stockton*, supra at p. 1067; *Sherwin Williams v. City of Los Angeles*, supra at p. 897-898.

A local ordinance "contradicts" state law when it is inimical to or cannot be reconciled with state law (e.g. a local ordinance that sets the maximum speed limit for vehicles below that set by state law). *O'Connell v. City of Stockton*, supra at p. 1068; *Sherwin Williams v. City of Los Angeles*, supra at p. 898.

A local ordinance "enters a field fully occupied" by state law in either of two situations --- when the Legislature "expressly manifests its intent to occupy the legal area or when the Legislature impliedly occupies the field. *O'Connell v. City of Stockton*, supra at p. 1068; *Sherwin Williams v. City of Los Angeles*, supra at p. 898. Where the legislature has manifested an intention, expressly or by implication, wholly to occupy the field, municipal power to regulate in that area is lost. *Id.*

When the Legislature has not expressly stated its intent to occupy an area of law, the court must look to whether it has impliedly done so. *Id.* Preemption by implication occurs in three situations when: (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 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 ordinance on the transient citizens of the state outweigh the possible benefit to the locality. *Id.*

In accordance with the foregoing principles, the California Supreme Court has held that a local ordinance providing for the forfeiture of vehicles used to commit certain acts made criminal by state law since the illicit commercial activities (prostitution and trafficking in controlled substances) are matters of statewide concern that the Legislature has comprehensively addressed through various provisions of this state's Penal and Vehicle Codes, leaving no room for further regulation at the local level. *O'Connell v. City of Stockton*, supra at p. 1076.

A. CITY'S ORDINANCES PURPORTING TO REGULATE "SECONDHAND BOOK DEALERS IS EXPRESSLY PREEMPTED AT LEAST IN PART BY STATE LAW.

The Legislature has enacted a comprehensive statutory scheme regulating those engaged in the dealing of secondhand goods. Business and Professions Code, Chapter 9 commencing with § 21500. Article 4 of Chapter 9 commencing with Section 21625 specifically applies to those whose business is the buying, selling, trading, auctioning, etc. of secondhand tangible personal property. Section 21625 evidences the Legislature's intent to preempt all local regulation by stating:

"Further, it is the intent of the Legislature that this article **shall not be superseded or supplemented** by the provisions of any ordinance or charter of any city, county, or city and county." (Emphasis added.)

Section 21626, subd. (a) defines a secondhand dealer as "any person,

copartnership, firm, or corporation whose business includes buying, selling, trading, taking in pawn, accepting for sale on consignment, accepting for auctioning, or auctioning secondhand tangible personal property. Irrespective of any difference in the definition of secondhand dealer between Section 21626 and LAMC section 103.311(b), except as expressly authorized, the Legislature has clearly evidenced an intent to regulate the buying, selling, etc. of secondhand tangible personal property to the exclusion of local laws. Business and Prof. Code § 21625.

City attempts to distinguish secondhand books from secondhand goods by arguing that secondhand books are not "tangible personal property" as defined in section 21627(a) of the Business and Professions Code which provides in pertinent part:

"As used in this article, 'tangible personal property' **includes, but is not limited to**, all secondhand tangible personal property which bears a serial number or personalized initials or inscription or which, at the time it is acquired by the secondhand dealer, bears evidence of having had a serial number or personalized initials or inscription." (Emphasis added.)

City's argument that secondhand books are "non-tangible personal property" because secondhand books do not bear serial numbers defies logic as well as the rules of statutory construction including the legal distinction between tangible and intangible property, and further, assumes without supporting facts or authority that no books have serial numbers.¹²

"Tangible property is that which is visible and corporeal, having substance and body as contrasted with incorporeal property rights such as franchises, choses in action, copyrights, the circulation of a newspaper,

¹² Such reasoning ignores the possibility that certain limited editions may be numbered in a manner similar to other limited art works.

annuities and the like." *Roth Drug, Inc. v. Johnson* (1936) 13 Cal. App. 2d 720, 734. Tangible personal property has also been defined as "personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." Revenue and Taxation Code § 6016.

Thus, although the content of a book subject to a copyright may be an intangible, the book itself (whether new or secondhand) is tangible personal property. Since Business and Professions Code section 21627(a) **includes, but is not limited to**, all secondhand tangible personal property which bears a serial number, etc. within its definition of "tangible personal property," it cannot be viewed as excluding secondhand books.

Further confirmation that "tangible personal property" is not limited to property containing serial numbers is found in Business and Professions Code section 21628(d) which requires that person engaged in business as a secondhand dealer of tangible personal property report all purchases, and include in such report, "A complete and reasonably accurate description of nonserialized property, including, but not limited to, the following: size, color, material, manufacturer's pattern name (when known), owner-applied numbers and personalized inscriptions and other identifying marks or symbols." If the state's statutory scheme were limited to property containing a serial number (or personalized initials or inscription), such a provision would be superfluous.

City's reliance on *Malish v. City of San Diego* (2000) 84 Cal. App. 4th 725 is misplaced. First and foremost, although *Malish* upholds local regulation generally, it invalidated the local ordinance to the extent such ordinance was inconsistent with state law. *Malish v. City of San Diego*,

supra at p. 737-738. Thus, while City's ordinance may require a secondhand dealer to obtain a permit, the separate secondhand book dealer permit is invalid to the extent that it is inconsistent with state law.

Thus, City is correct that Business and Professions Code section 21637 authorizes local authorities to adopt local ordinances regulating secondhand dealers to the extent such laws are not inconsistent with state law. However, Section 21637 specifically precludes any ordinance to the extent that it purports to alter the identification, holding, or reporting requirements for the acquisition of tangible personal property, other than as specifically allowed by specified state statutes. Bus. and Prof. Code §§ 21637(b), 21638(b). These authorizing statutes are found in Bus. and Prof. Code §§ 21628, 21630, 21633 and 21636, as well as Financial Code § 21208. Thus, to the extent that City's ordinance purports to alter the identification, holding, or reporting requirements for the acquisition of tangible personal property, except as specifically allowed by state statute, the ordinance is invalid.

City's ordinance relating to the identification of secondhand books is invalid because it alters the identification requirements set forth in the state statutes. City's ordinance provides that "The secondhand book dealer shall immediately upon purchasing or receiving in exchange any such secondhand books or materials stamp, write, print or otherwise permanently affix to each article so purchased or received the number of the bill of sale covering said articles." LAMC § 103.310(g). No such identification requirement is found in the state statutory scheme.

Moreover, the only exemption provided in City's ordinance relating to purchases exempts only those purchases of secondhand books from

another secondhand book dealer. LAMC § 103.310(i). This provision is invalid in that state law exempts purchases of tangible personal property which have been acquired in a nonjudicial bulk sale; acquired in a sale made by any public officer in his official capacity, trustee in bankruptcy, executor, administrator, or receiver; or acquired as the surplus property of governmental authorities in addition to acquisitions of such property from other secondhand dealers. Business and Professions Code § 21629. City's ordinance invalid to the extent its ordinance narrows the scope of exempt transactions which it clearly does.

B. THE ADVERSE EFFECT OF CITY'S ORDINANCE RELATING TO SECONDHAND BOOK DEALERS ON THE TRANSIENT CITIZENS OF THE STATE OUTWEIGH THE POSSIBLE BENEFIT TO THE LOCALITY.

Although City's secondhand book dealer ordinance is presumed to apply only to those who engage in the regulated conduct within City's territorial limits, a strict reading of the ordinances might suggest otherwise. See, LAMC § 103.02, 103.310, 103.311. Any attempt to regulate business activity conducted outside its borders would surely be prohibited by Article XI, Section 7 of the California Constitution. In Respondent's Brief, City concedes that its ordinance is not applicable to transactions outside of City's territorial limits. Respondents Brief at p. 22.

Assuming for the sake of discussion only the definition of a secondhand book dealer that has been proffered by City is correct; requiring a secondhand book dealers permit for those whose only activity is purchasing books within or around the City of Los Angeles is an adverse effect of a local ordinance on the transient citizens of the state that

outweighs the possible benefit to the locality.

Transient citizens whose only activity is purchasing books, even those who held a valid secondhand dealer's license issued pursuant to state law, would need to first obtain a permit from the Police Commission, or otherwise be cognizant of the boundary lines of the City of Los Angeles so that their purchases could be made outside of the City of Los Angeles, particularly given the number of local communities within the City of Los Angeles that suggest a separate city (e.g. Encino, Hollywood, North Hollywood, Northridge, Chatsworth, Eagle Rock, Sherman Oaks, Van Nuys, etc.). Thus, it would be required that the transient citizen be cognizant of separate distinct cities such West Hollywood from various districts within the City of Los Angeles, such as Hollywood and/or North Hollywood.

Such effects are clearly outweighed by any possible benefit to City. There is no revenue that might accrue to City by any such purchase (other than a portion of the sales tax collected by the seller, and/or a gross receipts tax paid by the seller). Requiring a person who is not engaged in business, and whose sole activity is buying to obtain a permit confers no benefit on City other than the permit fees it hopes to collect.

City argues that a collector such as Hopp could become a "legal fence" if allowed to purchase books without a secondhand book dealer's permit. However, to the extent that any collector wished to purchase books without obtaining the secondhand book dealer's permit, such transaction could be conducted outside the City's territorial limits. Moreover, a "fence" commonly refers to a person who receives and disposes of stolen goods. Typically, such a person will reap part of the profit from the stolen

property. Yet, there is nothing in the record to suggest that Hopp has ever received any stolen goods, or disposed of any stolen goods (whether by sale, gift, destruction, or otherwise).

C. CITY'S SECONDHAND BOOK DEALERS LAW IS UNCONSTITUTIONAL.

City argues that because state law does not regulate secondhand books, its ordinance is constitutionally sound. Respondent's Brief at p. 23. City's argument ignores the fact that state law does serve to regulate persons engaged in the business of buying, selling, trading, etc., tangible personal property which by definition includes secondhand books.

California's Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." California Const. Art. XI, Sec. 7.

As discussed, *supra*, City's secondhand book dealers ordinance conflicts with existing state law, particularly as it relates to exemptions from reporting requirements, including without limitation, purchases which are exempt from reporting, and/or the identification requirements applicable to secondhand books. Moreover, the purported narrowing of the exemption found within City's ordinance cannot be reconciled with state law (e.g. by judicially expanding the exemption set forth in the ordinance). Since City's secondhand book dealers ordinance conflicts with existing state law (as discussed *supra*) it is unconstitutional, and thus, void in its entirety.

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VII. CONCLUSION.

For all the reasons set forth herein, Hopp's complaint stated one or more causes of action against City, and thus, City's motion for judgment on the pleadings should have been denied.

Wherefore, plaintiff/appellant Richard Hopp respectfully requests that this court reverse the judgment of dismissal and remand the case to the trial court with instructions to deny the motion for judgment on the pleadings, and enter judgment with the decision of this court.

Respectfully submitted,

Dated: December 28, 2009

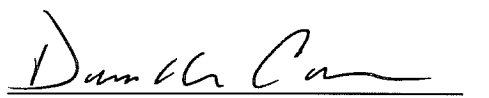


DAVID A. CORDIER
Attorney for Appellant, RICHARD
HOPP

CERTIFICATE RE: LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.204, I certify that this Appellant's Opening Brief on Appeal contains no more than 5,350 words.

Dated: December 28, 2009



DAVID A. CORDIER
Attorney for Appellant, RICHARD
HOPP

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 466 Foothill Blvd., No. 300, La Cañada, California 91011.

On December 28, 2009 I served the document entitled: **APPELLANT'S REPLY BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BY U.S. MAIL TO:

BY EXPRESS DELIVERY TO:

LOS ANGELES CITY ATTORNEY
GABRIEL S. DERMER (DEPUTY CITY
ATTORNEY)
200 N. MAIN ST., ROOM 916
LOS ANGELES, CA 90012

SUPREME COURT OF CALIFORNIA
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300 S. SPRING ST. 2ND FLOOR
LOS ANGELES, CA 90013
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LOS ANGELES COUNTY SUPERIOR COURT
DEPARTMENT 55
111 N. HILL ST.
LOS ANGELES, CA 90012

(BY MAIL)

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(BY EXPRESS MAIL) I deposited such envelope in the mail at Glendale, California.

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(BY PERSONAL SERVICE) I delivered the above-referenced document to the office of the addressee.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 28, 2009 at Glendale, California.



DAVID A. CORDIER