No. S123659

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BIG CREEK LUMBER COMPANY, et al.,

Plaintiffs and Appellants,

v.

COUNTY OF SANTA CRUZ, et al.,

Defendants and Appellants.

After Decision by the Court of Appeal, Sixth Appellate District, No. H023778

On Appeal from the Superior Court of Santa Cruz County, Nos. 134816, 137992

BRIEF OF RESPONDENTS BIG CREEK LUMBER COMPANY AND HOMER T. MCRARY

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INTRODUCTION

> Notwithstanding this section or any other provision of state law, any county which regulated the growing or harvesting of timber or the conduct of timber harvesting operations pursuant to an ordinance, rule, or regulation in effect on January 1, 1982, may continue fully to enforce the ordinance, rule or regulation until July 1, 1983. On and after that date, *all such local ordinances*, rules and regulations, unless adopted pursuant to this section, *shall be null, void, and have no force or effect.*

Cal. Stats. 1982, ch. 1561, § 3 (emphasis added).

With this statutory language, the Legislature unambiguously delineated the preemptive effect of California's Forest Practice Act ("FPA") on local ordinances. Counties, such as petitioner Santa Cruz County, that had been regulating timber harvesting could continue to do so until July 1983. But after that date, *all* such local regulation became "null, void, and [of] no force or effect" by express command of state law.

This explicit statutory mandate disposes of Santa Cruz County's arguments. This is not a case, as the County seeks to portray it, in which the statutory language is ambiguous, leaving the Court to the vagaries of statutory construction to try to divine the Legislature's intent. Nor is it a case only of implied preemption, in which the Court must try (in the absence of express guidance from the Legislature) to discern from the overall statutory structure and other sources whether the Legislature left room for local regulation. Instead, this is a case of express preemption, in which the Legislature has explicitly and unambiguously preempted local authority. In section 4516.5(d) of the Public Resources Code, the Legislature provided that, with limited exceptions not applicable here (but

which confirm the statute's preemptive scope), "counties shall not . . . regulate the conduct of timber operations." And in the provision first quoted above, which was enacted at the same time as part of this same statutory preemption section, the Legislature made clear precisely what this preemption provision means: any local ordinance that regulates "the growing or harvesting of timber or the conduct of timber harvesting operations" is "null, void and [of] no force or effect" because it is preempted by the FPA. The County ordinances at issue here fall squarely within this preemptive language.

The County never comes to grips with this express statutory mandate. Instead, it argues its case as though the Legislature had not spoken on the subject. It rehearses its general police power to enact zoning ordinances and invokes a supposed presumption against preemption of such ordinances. It relies extensively on various other state statutes—including principally the Timberland Productivity Act ("TPA")—that it claims shed light on whether the FPA really preempts local zoning authority. It asserts that the legislative history shows that the Legislature was concerned only with duplicative forest practice rules and was indifferent to whether counties happened to allow harvesting in particular areas.

The County's reliance on these arguments is unfounded. First, resorting to such things as general police power, supposed implications from other statutes and legislative history cannot override the Legislature's own express statutory direction as to the scope of state preemption.

Second, rather than supporting the County's interpretation, the materials on which the County relies only confirm that the County's

regulation here is preempted. As we show below, the structure of the FPA, its numerous provisions prescribing the narrow circumstances in which counties may exercise authority, the legislative history showing that the FPA was amended to stop the very kind of local control that the County seeks to exercise here, and the Legislature's express provision in the FPA of the method for addressing local needs of the type the County asserts here all show that counties do not have the authority to prohibit timber operations on timberlands governed by the FPA.

Indeed, even the County ultimately admits the FPA broadly preempts local zoning authority. The County's only argument is that the FPA carved out and saved from preemption one aspect of that authority—the authority to dictate "where" timber harvesting may be conducted. If that had actually been the Legislature's intent, it would have been a simple matter for the Legislature to so provide. But there is nothing in the statute carving out such local authority (even though the Legislature saved other kinds of narrow local authority). Instead, there is only the broad statutory language preempting local authority and rendering null and void any local regulation "of the growing or harvesting of timber or the conduct of timber harvesting operations."

Because the County's ordinances here are precisely this kind of invalid regulation, and because permitting the County's ordinances would frustrate the FPA's fundamental purposes, the decision of the court below finding those ordinances preempted should be affirmed.

STATEMENT OF THE CASE

A. Forest Practice Act.

The FPA was enacted in 1973 as the Z'berg-Nejedly Forest Practice Act ("FPA"), Public Resources Code § 4511 et seq. The Legislature's declared intent was to create an

> effective and comprehensive system of regulation and use of all timberlands so as to assure that:
>
> > (a) Where feasible, the productivity of timberlands is restored, enhanced, and maintained.
> >
> > (b) The goal of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment.

Pub. Res. Code § 4513.

1. Comprehensive state regulation.

To accomplish its objectives, the FPA creates a comprehensive scheme of state regulation, administered by the State Board of Forestry and Fire Protection ("Board"). The Board is required to adopt forest practice rules and regulations that are consistent with the FPA's policies. Pub. Res. Code § 4551. These rules are to apply to all aspects of "timber operations" (*id.* § 4551.5), which the statute defines broadly as the "cutting or removal or both of timber or other solid wood forest products, including Christmas trees, from timberlands for commercial purposes, together with all the work incidental thereto." *Id.* § 4527. In fulfillment of this statutory mandate, the Board has adopted a comprehensive set of rules to govern timber operations. *See* 14 Cal. Code Regs. §§ 895-1115.4.

The FPA also requires that persons conducting timber operations have filed a timber harvesting plan with the Department of Forestry and Fire Protection. Pub. Res. Code § 4581. The plan must be prepared by a registered professional forester (*id.*), be specific to the property on which the operations will occur (*id.* § 4582.5), and show compliance with the FPA and all the forest practice rules adopted by the Board. *Id.* §§ 4582, 4582.7, 4582.75. Public notice is to be given of the plan before it is approved or rejected, and the plan is to be available for public inspection. *Id.* §§ 4582.3, 4582.6.

2. Removal of authority for local regulation.

As originally enacted, the FPA allowed individual counties, "within the reasonable exercise of their police power, to adopt rules and regulations by ordinance or resolution which are stricter than those provided under this chapter and its regulations." *See* Cal. Stats. 1973, ch. 880 § 4 (adding Pub. Res. Code § 4516).

In 1982, however, the Legislature amended the statute to delete this county authority and replace it with a system in which counties could "recommend that the board adopt additional rules and regulations for the content of timber harvesting plans and the conduct of timber operations to take account of local needs." Pub. Res. Code § 4516.5(a). The Board is required to adopt such rules, provided that they are "[c]onsistent with the intent and purposes" of the FPA and "[n]ecessary to protect needs and conditions of the county recommending them." *Id.* § 4516.5(b)(1), (2). Counties for which such rules have been adopted are given special rights to

a hearing and to appeal the approval of a timber harvest plan. *Id.* §§ 4516.6, 4582.6(d). Santa Cruz is one such county.

Subject to two exceptions, county authority over timber operations is limited solely to this authority to make recommendations to the Board. After setting out the counties' authority to make such recommendations, the FPA provides:

> [I]individual counties shall not otherwise regulate the conduct of timber operations, as defined by this chapter, or require the issuance of any permit or license for those operations.

Pub. Res. Code § 4516.5(d). This provision does not merely "bar counties from enacting regulations that impose the same type of restrictions on timber harvesting that the [State Board] itself imposes," as the County contends (Br. 2), but prohibits *all* county regulations, subject to stated exceptions. The only exceptions are: (1) that the Board may delegate to counties the power to require performance bonds or other surety for the protection of roads (*id.* § 4516.5(e)); and (2) that section 4516.5 "does not apply to timber operations on any land area of less than three acres and which is not zoned timberland production" (*id.* § 4516.5(f)).

The 1982 amendments contained a sunset provision for local ordinances, permitting a brief transition period in which counties that had been regulating timber operations could continue to do so:

> Notwithstanding this section or any other provision of state law, any county which regulated the growing or harvesting of timber or the conduct of timber harvesting operations pursuant to an ordinance, rule, or regulation in effect on January 1, 1982, may continue fully to enforce the ordinance, rule or regulation until July 1, 1983. On and after that date, all such local ordinances, rules and regulations, unless

> adopted pursuant to this section, shall be null, void, and have no force or effect.

Cal. Stats. 1982, ch. 1561, § 3. In 1984, with this transition period having expired and all local ordinances having thus become "null, void, and hav[ing] no force or effect," the Legislature amended the statute to eliminate this last vestige of county authority. Cal. Stats. 1984, ch. 1446, § 1.

Consistent with these explicit provisions, the history of the 1982 amendments is replete with indications that the Legislature's purpose was to "eliminate[] the authority of individual counties to regulate timber harvesting operations, and establish[] instead a procedure for the Board of Forestry to adopt rules to cover local concerns." County's Request for Judicial Notice ("County RJN"), Exh. 7 (Enrolled Bill Memorandum to Governor). The Department of Forestry's Enrolled Bill Report noted that the legislation was proposed because of actions by various counties (including Santa Cruz County) to restrict harvesting: "In some instances, county ordinances have essentially prevented the harvest of timber, contrary to the intent of the FPA." *Id.*, Exh. 5. The bill's author stated that the bill "seeks to eliminate duplicative regulations at the state and county levels by removing county permit authority over logging and replacing it with a procedure where counties recommend rules to the Board of Forestry which accommodate local concerns." *Id.*, Exh. 8. The purpose of the amendments was thus to "take away [local] power by preempting counties from exercising local control." Big Creek's Request for Judicial Notice

("Big Creek RJN"), Exh. 2 (Conference Committee Report No. 017294 on SB 856).

B. Santa Cruz County's Ordinances.

Beginning in 1997, Santa Cruz County adopted a series of ordinances that regulated the conduct of timber operations. Two of these ordinances are the subject of the present petition. The first, Ordinance No. 4577, prohibits timber harvesting in any zones other than Timber Production (TPZ); Parks, Recreation and Open Space; and Mineral Extraction. CT 1631, 1633-40. Because essentially no private timberland is found in either of the latter zones, the ordinance is effectively a county-wide ban on timber harvesting on any land except TPZ lands.

The second ordinance, Ordinance No. 4572, prohibits the use of helicopters for timber harvesting unless the staging, loading or service area (1) is on the parcel on which the timber is harvested or a contiguous parcel, (2) is within a parcel that is zoned to allow timber harvesting, and (3) is within the boundaries of the timber harvest plan ("THP") as approved by the Department of Forestry and Fire Protection. CT 1605, 1647.

The County also enacted ordinances that: (1) imposed additional criteria, beyond those specified in the statute, for re-zoning land to TPZ, and (2) prohibited cutting and removal of trees within any riparian corridor. CT 1601, 1648. The County does not seek review of the court of appeal's ruling that these ordinances are preempted.

Significantly, the County adopted these ordinances even though the State Board had *rejected* the County's efforts to have many of the same regulations added to the state Forest Practice rules. For example, in 1998,

the County recommended to the Board a rule that would have imposed a 300-foot buffer zone around all residences on properties not zoned TPZ. In the same package, the County also proposed a riparian buffer zone and restrictions on helicoptering. Although the Board adopted a number of other County-proposed rules intended to address harvesting near residential areas, it did not adopt these proposals. *See* Second County Administrative Record ("SCAR") 374, 375 (explaining that proposed riparian buffer zone was rejected because it would have "unnecessarily restricted all harvesting from a significant portion of timberland in the County imposing a substantial burden on affected persons").

Undeterred, the County resubmitted the same rules in 1999, in the express hope that new Board members appointed by the newly elected governor might be "more favorably inclined" to the County's position. SCAR 2246. The Board again rejected the County's proposals. SCAR 2247.

With the Board having thus twice found the rules to be inappropriate, the County simply circumvented the Board's decisions by enacting essentially the same regulations as local ordinances. The County's Planning Department concluded that the Board's action was not "adequate" and the County should adopt the ordinances even though they were "not presently being recognized" by the Board or the Department of Forestry. SCAR 2261. Noting that its proposed residential buffer zone was the "most controversial" of the rules rejected by the State, the County concluded that it should drop that proposal and instead adopt an even more draconian measure—*i.e.*, "strictly regulating the zone districts where timber

harvesting is allowed" by prohibiting harvesting in all but three districts. SCAR 2261.

C. Proceedings Below.

Big Creek Lumber Company and the Central Coast Forest Association filed suit in the Santa Cruz County Superior Court to invalidate the County's ordinances as preempted by the FPA. CT 1, 843, 1010. Big Creek is a family-owned timberland owner and operator and has received numerous awards and commendations for its responsible forestry practices. CT 844-45.[1] It has been in business for over fifty years in Santa Cruz County, where it and its principal owners, Homer McCrary (also a petitioner below) and Frank McCrary, own more than 3,000 acres of timberland. *Id.*

The superior court struck down as preempted by state law the ordinances restricting timber operations in riparian corridors, placing limits on the use of helicopters for timber harvesting, and imposing additional requirements for rezoning land to TPZ. CT 1794-96, 1843-43A. However, the court upheld the County's ban on timber harvesting in non-TPZ lands on the ground that it was a permissible regulation of "where" harvesting could occur. CT 1794-96.

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[1] In 1995, Big Creek received the California Department of Fish & Game's Private Sector Award "in recognition of outstanding wildlife achievement." In 1996, Big Creek became the first forest products company operating in a redwood forest to be awarded the "Well Management Forest" certification by the Forest Conservation Program of Scientific Certification Systems (SCS), the oldest and largest independent organization to certify environmental claims made by businesses.

On appeal, the Sixth District ruled that each of the County's ordinances is preempted. The court rejected the County's argument that the FPA draws a distinction between regulating "where" harvesting occurs and regulating "how" it occurs. The court held that the ordinary meaning of "conduct" is the "'act, manner, or process' of carrying out a task," which extends not only to how something is done but also to the act of doing it all. Slip Op. 37-38. The court concluded that "local measures that forbid logging in certain locations 'regulate the conduct of timber operations' in the most fundamental way imaginable—by prohibiting it outright." *Id.* The court further recognized that permitting counties to prohibit the conduct of timber operations in certain locations would be contrary to the Legislature's clear intent in enacting the 1982 amendments to eliminate local control and vest it instead in the State Board. *Id.*

In so holding, the Sixth District rejected *Big Creek Lumber Co. v. County of San Mateo*, 31 Cal. App. 4th 418 (1995) ("*Big Creek I*"). In *Big Creek I*, the First District had ruled that the FPA does not preempt counties from all regulation of timber harvesting. The First District concluded that preemption extends only to county regulation of "how" timber operations are conducted, leaving counties free to dictate "where" they may be conducted. The Sixth District declined to so limit the scope of the FPA's preemption. The court observed that the First District had relied primarily on the TPA. The Sixth District concluded, however, that this reliance was mistaken because, far from broadly endorsing local discretion, the TPA "severely circumscribes local zoning authority with respect to timberlands." Slip Op. 37. But even "more fundamentally," the Sixth District concluded

that the First District's "differentiation between *how* and *where* timber operations take place" was contrary to the ordinary meaning of the statute's language and contrary to the "clear intent" of the Legislature. *Id.* at 37-38.

ARGUMENT

I. THE FPA PREEMPTS COUNTIES FROM REGULATING THE "LOCATION" OF TIMBER OPERATIONS.

The decision of the court below was correct. All of the guideposts of statutory interpretation—the language of the provision at issue, the remainder of the statutory scheme, and the legislative history—point to the single conclusion that the Legislature expressly preempted counties from regulating the conduct of timber operations in all respects, including both how they are done and where they are done.

A. Section 4516.5(d) Expressly Preempts All Local Regulation of the Conduct of Timber Operations.

The Court's "primary task" in a preemption analysis is to determine the Legislature's intent. *Grupe Development Co. v. Superior Court,* 4 Cal. 4th 911, 919 (1993). "In determining intent, we look first to the language of the statute, giving effect to its 'plain meaning.'" *Kimmel v. Goland,* 51 Cal. 3d 202, 208-09 (1990).

Here, the statutory language is unambiguous. Section 4516.5(d) states that, with certain exceptions the County admits are not applicable here,

> individual counties shall not . . . regulate the conduct of timber operations, as defined by this chapter.

As noted above, the FPA defines "timber operations" as "cutting or removal or both of timber . . . from timberlands for commercial purposes,

together with all the work incidental thereto." Pub. Res. Code § 4527. "Timberlands" is defined as land "which is available for, and capable of, growing a crop of trees of any commercial species used to produce lumber." *Id.* § 4526. There is no dispute that the County's ordinance applies to timberlands as so defined. Nor can there be any question that the County is regulating the "cutting or removal . . . of timber . . . from timberlands" by purporting to dictate on which parcels such cutting and removal can permissibly occur. Under the FPA's plain language, this local regulation of timber operations is preempted.

If there were any room for doubt on this issue, it is eliminated by the Legislature's own specification of the statute's preemptive effect in the statute's sunset provision. As noted above, in that provision the Legislature declared to be "null, void and [of] no force or effect" all county ordinances that "regulated the growing or harvesting of timber or the conduct of timber harvesting operations." Cal. Stats. 1982, ch. 1561, § 3. The County's zoning ordinance dictating where harvesting may be conducted is precisely the kind of regulation of the "growing or harvesting of timber or the conduct of timber harvesting operations" that the Legislature temporarily preserved. And it is precisely the kind of regulation that became "null, void and [of] no force or effect" when the transition period expired on July 1, 1983.

The County argues that the word "conduct" limits section 4516.5(d)'s preemptive effect to precluding only county regulation of "how" timber operations are conducted, leaving undisturbed local authority to regulate "where" they are conducted. This argument cannot withstand

scrutiny. As the County itself recognizes, the ordinary meaning of "conduct" is the "act, manner or process" of carrying out a task. Br. 22; s*ee also* Slip Op. 37-38. Nothing in this definition is limited only to "how" something is done and not "where" it is done. To "conduct" timber operations simply means to carry them out or to do them. When a county dictates that timber operations may be conducted only in certain areas and not others, it is regulating the carrying out or doing of those operations.

The County contends that this definition is "over-inclusive." Br. 22. In fact, however, the County's contrary definition is *under*-inclusive. After recognizing that conduct refers to the "act, manner or process" of carrying out a task, the County inexplicably focuses solely on "manner" or "process," and ignores the "act" part of the definition. Br. 24-25. Even taking "manner" or "process" by themselves, the County does not explain why the manner or process of doing something refers only to "how" and not "where" it is done. But even if manner or process were so limited, the "act" of doing something is not. Properly defined, "conduct" is an inclusive term that on its face refers to all aspects of doing something—when, where, who and how. The County does not contend that it retains any authority to dictate "who" may conduct timber operations or "when" they may conduct them. Any such regulation would be preempted, just as the County concedes that regulation of "how" timber operations are conducted is preempted. "Where" timber operations are conducted falls just as squarely within the statutory language.

Contrary to the County's assertion (Br. 23), this interpretation of the statute does not render the word "conduct" superfluous, but instead gives

effect to its full meaning. As the United States Supreme Court has recognized, "the draftsmen of statutes do not usually limit the application of the chosen word to only some of its common meanings without indicating their purpose to do so." *Keegan v. United States*, 325 U.S. 478, 501-02 (1945). Here, there is no indication that the Legislature had any purpose to limit the common meaning of the word "conduct." Thus, it is improper for the County to "arbitrar[ily] select[] one of its dictionary meanings to the exclusion of others which are equally applicable." *Id.*[2]

In addition to being contrary to the ordinary understanding of the word conduct, the County's argument requires that the Court assume that the Legislature took an extraordinarily indirect and obscure path to accomplish its supposed intended result. *Cf. Unisys Corp. v. California Life & Health Ins. Guar. Ass'n,* 63 Cal. App. 4th 634, 639 (1998) (rejecting a construction of statutory language that would have been a "remarkably convoluted way for the Legislature to make a point that could readily be stated with utmost clarity"). If the Legislature had wanted to preserve local authority to regulate where harvesting may occur, it would have been a simple matter for it to say so, as it has done in other contexts.[3] The

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[2] The County engages again in this improper selectiveness when it quotes another dictionary as defining "conduct" as "the way a person acts, especially from the standpoint of morality and ethics." Br. 24. This is only part of the definition. The same dictionary also defines "conduct" as the "*act* of directing or controlling; management." The American Heritage Dictionary of English Language (4th ed. 2000) (emphasis added).

[3] *See, e.g.*, Bus. & Prof. Code § 23790 (preserving county and city authority to apply zoning ordinances to prohibit alcohol sales in certain locations); *Mussalli v. City of Glendale,* 205 Cal. App. 3d 524 (1988)

(continued . . .)

Legislature made the preemption specified in section 4516.5(d) subject to the exceptions in section 4516.5(e), and the Legislature could have easily added a statement there that counties may regulate the permissible location of harvesting through their zoning ordinances. But no such language appears. The County's argument that the Legislature accomplished that same result by packing all of that meaning into the single world "conduct" in section 4516.5(d) strains credulity. That one word simply "cannot bear the weight the [County] puts on it." *United States v. Williams*, 514 U.S. 527, 534 (1995).

The County's interpretation of the word "conduct" also cannot be reconciled with the language of the sunset provision, in which the Legislature described the statute's preemptive effect as extending to any regulation of "the growing or harvesting of timber." The County does not—and cannot—contend that a local ordinance that governs where timber may be harvested is anything other than a regulation of the "harvesting of timber." Even if the County were correct that the Legislature used the word "conduct" in the phrase "the conduct of timber operations" to preserve local regulation of "where" operations are done, the phrase "growing or harvesting of timber" contains no such alleged limitation. Thus, construing "conduct" in the manner the County urges would mean that the preemptive scope of section 4516.5(d) is narrower than that prescribed in the sunset provision. Under this interpretation, although all of the County's

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(invalidating as preempted a local ordinance that did not comply with section 23790's requirements).

ordinances became "null, void and [of] no force and effect" as of July 1, 1983, one aspect of that nullified authority—the power to regulate location—sprang back to life at some later date under section 4516.5(d).

No basis exists for that interpretation. The purpose of the sunset provision was to give effect to section 4516.5(d) by describing its effect on counties like Santa Cruz that had in place ordinances regulating harvesting. There is no basis for concluding that the Legislature intended section 4516.5(d) to have a narrower meaning than the provision prescribing its effect. Properly construing section 4516.5(d) according to its plain meaning—rather than the cramped meaning the County assigns to it—avoids that implausible result, and renders that provision consistent with the sunset provision and the remainder of the statutory scheme.[4]

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[4] The fact that the sunset provision referred to both the "growing or harvesting of timber" as well as to the "conduct of timber operations" is consistent with the legislative history, in which those two formulations were used interchangeably without any indication that the Legislature intended to give to the word "conduct" the specialized meaning the County ascribes to it. County RJN, Exhs. 5 (Enrolled Bill Report, Dept. of Forestry) ("regulate timber harvesting operations"), 7 (Enrolled Bill Memorandum) (same), 14 (Assembly Comm. Analysis) ("state v. local regulation of timber harvesting activities"; "conduct of timber harvesting operations"; "regulation of timber harvesting"); Big Creek RJN, Exhs. 3 (Legislative Analyst 4/26/82) ("bill . . . provides that the growing and harvesting of timber . . . shall be regulated solely pursuant to state law and regulations"; "county rules and regulations governing timber harvesting"), 4 (Senate Democratic Caucus Minutes) ("bill would require the growing and harvesting of timber . . . to be regulated solely pursuant to state statutes and regulations"), 5 (Conference Comm. Report Form) ("bill would prohibit county from regulating timber operations"), 6 (Assembly Third Reading) ("state v. local regulation of timber harvesting activities"; "prohibits the regulation of the conduct of timber operations by individual counties"; "growing and harvesting of timber . . . be regulated solely

(continued . . .)

The County's interpretation of "conduct" is unfounded for other reasons as well. "Conduct" must be viewed in the context of the phrase in which it is used—"conduct of timber operations." The governing definition of "timber operations" in section 4527 makes clear that the "conduct of timber operations" includes where they occur—*i.e.*, "*from timberlands*." Pub. Res. Code § 4527 (emphasis added). The County's definition of "conduct" as "how" things are done rather than "where" things are done unreasonably separates timber operations from timberlands. The County asserts that "timber operations" means "on-the-ground, physical activities involved in harvesting trees." Br. 25. But that assertion only proves the point. When the County dictates that forest landowners can harvest only on certain timberlands and not others, it is regulating the "on-the-ground, physical activities involved in harvesting trees"—the very thing that section 4516.5(d) says it cannot regulate.[5]

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pursuant to state statutes and regulations"), 7 (8/2/82 Board of Forestry Letter) ("bill would prohibit regulation of timber harvesting operations"), 8 (6/29/82 County of Santa Cruz Letter) ("[b]ill would essentially eliminate any local ability to regulate or control timber harvesting operations"), 9 (Enrolled Bill Report, Cal. Coastal Comm'n) ("regulation of the conduct of specified timber operations"), 10 (Enrolled Bill Report, Finance) ("regulate timber harvesting operations").

[5] The County also notes that "timber operations" are defined as including all "work" incidental to harvesting, arguing that this shows that the Legislature did not conceive "of zoning decisions as falling within the ambit of timber operations." Br. 25. The question, however, is not whether zoning decisions are timber operations. Clearly they are not—and no one is arguing otherwise. The question is instead whether cutting and removing trees is timber operations. Clearly it is.

The County attempts to obscure the issue by contending that a "definitional subsection of the FPA that does not even mention zoning" cannot preempt the Planning and Zoning Law. Br. 25. Big Creek is not claiming that the statutory definition of "timber operations" itself preempts the County's ordinance. It is section 4516.5(d) that prohibits counties from regulating timber operations. The point is that the proper interpretation of that section is informed by the related provisions of the same statute. Nor is Big Creek claiming that section 4516.5(d) "preempts" the Planning and Zoning Law, another state statute. *See infra*, p. 41-42. Section 4516.5(d) preempts *local ordinances*, like the County's, that regulate the conduct of timber operations.

The County also ignores that the phrase "conduct of timber operations" is used throughout the FPA to refer generally to all aspects of growing and harvesting timber, not just how it is done. Just as local governments are barred from regulating "the conduct of timber operations" (Pub. Res. Code § 4516.5), the Board is required to adopt rules governing "the conduct of timber operations." *Id.* § 4551.5. Similarly, a timber harvest plan must be submitted and approved before any person may "conduct timber operations." *Id.* § 4581. The FPA expressly requires that timber harvest plans (which must be approved by the Department of Forestry and Fire Protection) describe not only how the harvesting will be conducted but where it will be conducted. *Id.* § 4582(c) (plan must contain a "description of the land on which the work is proposed to be done").

Given these provisions, if the County were correct that "conduct of timber operations" refers only to the manner (and not the place) of timber

harvesting, the corollary would be that the State Board's authority (described using the same phrase) would likewise be limited to regulating the manner of timber harvesting, and not its location. The County understandably does not endorse that contention, as it would dramatically curtail the Board's longstanding unquestioned authority.

The Board's actions demonstrate the state's interest in determining the locations where timber operations may be conducted. The Board has enacted numerous rules that govern the harvesting activities that may be conducted on particular locations. *See, e.g.*, 14 Cal. Code Regs. §§ 916-916.12 (watercourse and lake protection), 917.4 (regulating treatment of slash around permanently located structures), 919.1 (regulating snag retention around structures maintained for human habitation), 921-921.9 (Coastal Commission special treatment areas). And the Board exercised its regulatory authority over location in acting upon the County's proposed "locational" rules here—including its proposed rules for a residential buffer zone. As discussed above (at 9), the Board rejected the County's rules on the ground that they would have "unnecessarily restricted all harvesting from a significant portion of timberland in the County." SCAR 375.

Thus, even if it were true, as the County asserts, that section 4516.5(d) was intended only to bar "counties from enacting regulations that impose the same type of restrictions on timber harvesting that the State Board of Forestry . . . itself imposes" (Br. 2), that would not help the County, because restrictions on where timber harvesting occur fall squarely within the Board's authority. But the even more fundamental point is that the County is once again impermissibly rewriting the statutory language.

Just as the Legislature did not provide that counties are preempted only from regulating "how" timber operations are conducted, it did not preempt counties only from imposing the same types of restrictions imposed by the State Board. Instead, it broadly preempts all local regulation of the conduct of timber operations, without any of the qualifiers and limitations the County now seeks to impose.

B. The Statutory Scheme Confirms that Counties are Preempted from Regulating Where Timber Operations are Conducted.

The foregoing refutes the County's suggestion that the statutory language is plausibly susceptible to the County's interpretation and that the Court must therefore resort to "extrinsic aids to ascertain legislative intent." Br. 25. The only reasonable interpretation of the statutory language is that section 4516.5(d) expressly preempts all county regulation of the conduct of timber operations, including where timber operations are conducted as well as how they are conducted. But even if a "broader examination" (Br. 25) were needed, it only confirms that the Legislature intended to preempt the County's regulation.

1. The limited and inapplicable exclusions from preemption.

The FPA specifies limited exceptions to the scope of its preemptive effect—and county authority to broadly prohibit harvesting through zoning ordinances does not fall within any exception. Under the principle *expressio unius est exclusio alterius,* the specification of certain exceptions but not others is strong evidence that no other exceptions were intended. *See Grupe Development,* 4 Cal. 4th at 922 (exclusion of some local taxes

from preemptive state statute supported holding that other taxes were not excluded).

Here, the FPA contains only very narrow exceptions:

- Under section 4516.5(f), counties may regulate timber operations on parcels of less than three acres that are not zoned TPZ.[6]
- Under section 4516.5(e), where delegated authority from the Board, counties may "require performance bonds or other surety for the protection of roads."
- Under section 4584(j)(4), timber operations are required to "conform to . . . city or county zoning ordinances" when the Board exercises its power under that section to exempt the operations from the FPA.

The exception permitting county regulation on non-TPZ parcels of three acres or less is particularly significant. It confirms that preemption is addressed to the location as well as the manner of harvesting—*i.e.*, the only *location* to which preemption does not apply is non-TPZ lands of less than three acres. The County's position is that local interests require that the County be able to prohibit timber harvesting on *any* non-TPZ parcels. If that were the case, however, the statute would have provided that counties could apply their zoning ordinances to prohibit harvesting not only on three-acre parcels but on any parcel. Instead, the statute broadly preempts

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[6] As discussed below (at 44), TPZ refers to timber production zone, a zoning designation that imposes special restrictions on property as a condition of the property owner being given favorable tax treatment under the TPA.

any county regulation on any timberlands, excluding only parcels less than three acres not zoned TPZ.

Consistent with its limited exceptions to preemption, the FPA does not include any general savings clause for local authority. Section 4514 lists four specific powers that are not limited by the FPA. Significantly, one of these powers is the power of cities and counties "to declare, prohibit and abate nuisances." Pub. Res. Code. § 4514(a). However, despite recognizing this one type of limited power to address conflicts with surrounding uses, the Legislature did not preserve any county power to adopt zoning ordinances that prohibit timber harvesting. This "limited grant of reserved power to local entities is by implication a denial of the grant of any greater jurisdiction." *Danville Fire Prot. Dist. v. Duffel Fin. & Constr. Co.*, 58 Cal. App. 3d 241, 247 (1976).

2. The Legislature's specification of the means for addressing local concerns.

Preemption is also shown by the statute's provision prescribing the means by which local concerns of the kind advanced by the County are to be addressed. As discussed above, where "local needs" exist (such as the mixed forest-suburban environment the County claims exists in Santa Cruz), counties are directed to recommend that the Board adopt "additional rules and regulations . . . to take account" of those local needs. Pub. Res. Code § 4516.5(a). If such rules are necessary and consistent with the purposes of the FPA, the Board is required to adopt them. *Id.* § 4516.5(b)(1), (2). If a county believes the Board has improperly rejected a proposed rule, the county may seek judicial review of the Board's

decision, as Santa Cruz County did in *County of Santa Cruz v. State Board of Forestry*, 64 Cal. App. 4th 826 (1998).

These provisions completely answer the County's argument that giving effect to the plain language of section 4516.5 would preclude all local zoning control over timber operations and mean that counties would be powerless to prevent "commercial logging in residential districts." Br. 37 (quoting *Big Creek I*, 31 Cal. App. 4th at 427). That subject is fully addressed by the "comprehensive system of regulation" adopted by the FPA. As discussed above (at 20), the Board's rules already contain numerous provisions that address the conduct of timber operations in and around residential areas. And any county in which timberlands are located in or around residential areas is free to recommend to the Board that it adopt additional rules to address that "local need." Pub. Res. Code § 4516.5(a). Moreover, as noted above (at 22), counties retain the authority to regulate timber operations on parcels of less than three acres that are not zoned TPZ. Any residential area would be expected to have lot sizes of substantially less than three acres. Counties also retain authority under the FPA to abate nuisances when timber operations in fact are inappropriately interfering with the enjoyment of property. *See supra*, p. 23. In this manner, the Legislature has guaranteed that local concerns are met, while at the same time ensuring that the State's purposes in enacting the FPA are not frustrated.

Indeed, the County has availed itself of the power to propose rules to the Board, and many rules have been so adopted. *See* 14 Cal. Code Regs. §§ 926-926.25. One of these rules provides for expanded requirements for

notice to adjoining property owners, who would then have the right to object to the proposed timber harvest plans. *Id.* § 926.3.

The County contends that the rules the Board adopted "did not address the County's concerns regarding compatibility of logging operations with nearby residential land uses." Br. 10. And it notes that the Board has not adopted rules banning harvesting from occurring in particular zone districts. Br. 61. But these contentions only betray the impropriety of the County's actions. Its complaint is that it disagrees with the Board's exercise of its authority and wants to impose stricter limitations on timber harvesting than the Board has found appropriate in the exercise of the Board's authority under the FPA to strike the appropriate balance between timber harvesting and other values. But that is precisely why the Legislature amended the statute in 1982 to take away local authority after counties like Santa Cruz had effectively banned timber harvesting as supposedly incompatible with local circumstances. If the County believes the State rules are inadequate, the statutorily mandated procedure is for it to recommend to the Board additional rules (and to seek judicial review of the Board's decision if it is still dissatisfied).

As the County acknowledges, the Legislature designed section 4516.5(d) "to prevent counties from performing an 'end-run' around the permit prohibition" by "preempt[ing] ordinances regulating the conduct of timber operations that could have the same preclusive effect." Br. 30. When the Board rejected the County's rules as inconsistent with the FPA, the County performed just such an end-run by simply passing its own ordinances. The FPA vests ultimate authority in the Board, *not* in the

counties. The Board is the entity authorized to adopt or reject regulatory measures, and it must do so in a manner consistent with the intent and purposes of the FPA. Pub. Res. Code § 4516.5(b); *County of Santa Cruz*, 64 Cal. App. 4th at 838 (the Board is the entity designated to "achieve [the] sound balance" contemplated by the FPA). In this manner, the Legislature acted to ensure that timber harvesting—a matter of state-wide concern—not be subject to local regulation that may be contrary to the state's overall interests.

3. The Legislature's declaration of intent.

The Legislature's declaration that it intended in enacting the FPA to "create and maintain an effective and comprehensive system of regulation and use of all timberlands" also shows preemption. Pub. Res. Code § 4513. This declaration is important for at least two reasons. First, by referring specifically to "regulation *and use*" the Legislature made clear that the FPA extends to zoning of all timberlands, as well as to forest practice rules governing how timber operations are to be conducted. As this Court has stated, "[t]he purpose of a zoning law is to regulate the *use* of land. (See 1 Longtin's Cal. Land Use (2d ed. 1987) §§ 3.02-3.03, pp. 234-236.)" *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 750 (1994) (emphasis in original).

Second, the declaration shows the Legislature's intent to include "all timberlands" within the FPA's scope. By contrast, the County's position is that only "some" timberlands are subject to the FPA's comprehensive system of regulation and use—*i.e.*, only those timberlands on which an individual county might happen to decide to allow harvesting.

Indeed, so comprehensive is the FPA's regulation of timberlands that no person who owns timberlands may convert those timberlands to uses other than the growing of timber unless that person first obtains the approval of the Board. *See* Pub. Res. Code § 4621. The County's assertion that it can unilaterally decree that certain timberlands are unsuitable for timber operations and bar any such operations is irreconcilable with this scheme.

Construing section 4516.5(d) as preempting local control is thus consistent with the underlying purposes of the FPA. As noted earlier, the FPA was enacted to ensure, where feasible, that "the productivity of timberlands is restored, enhanced, and maintained" and that the "goal of maximum sustained production of high-quality timber products is achieved" while giving consideration to recreation, watershed, aesthetic enjoyment and other values. Pub. Res. Code § 4513. The State Board is required to adopt rules that "assure the continuous growing *and harvesting* of commercial forest tree species." *Id.* § 4551 (emphasis added). To ensure that the state's important interests in timber production are not frustrated, the Legislature has vested regulatory authority solely in a single state-wide regulatory body.

The County's position is fundamentally inconsistent with these basic purposes. By asserting that counties are free to prohibit timber harvesting on non-TPZ lands, the County suggests that the State is indifferent as to whether harvesting occurs on those lands and that its interest is only in ensuring that—should any county happen to allow harvesting to occur—the harvesting be done in the manner the state directs. But the Legislature's

intent was not so limited. If counties are given carte blanche to ban harvesting on non-TPZ timberlands, no comprehensive system of regulation will exist and the State will be deprived of its ability to assure the continuous growing and harvesting of timber. Once a county unilaterally decides that no harvesting will occur, the state regulatory scheme is rendered superfluous and any opportunity to enhance or maintain timber productivity on those parcels is gone. Because that is what the County has done in this case, its ordinance is preempted by the FPA.

Indeed, if accepted, the County's argument would extend beyond even prohibiting harvesting. As the County's attempt to justify its helicopter regulation vividly demonstrates (*see infra*, pp. 49-51), if local zoning ordinances were permitted, counties could impose all manner of regulation on timber operations, not simply on where the operations are conducted but on how they are conducted. Virtually any restriction can be formulated into a locational requirement. For example, if the County wanted to prohibit the use of chainsaws, it could simply designate parcels of land as "no-chainsaw" zones. It defies credulity to assert that, when it acted in 1982 to "eliminate" local authority and "take away [local] power" because counties like Santa Cruz were "essentially prevent[ing] the harvest of timber, contrary to the intent of the FPA" (*see supra*, p. 7), the Legislature in fact intended to preserve sweeping authority in the counties to continue to do through their zoning ordinances the very things that the 1982 amendments were enacted to prevent.

C. The Legislative History and the "Evils to be Remedied" by Eliminating County Authority Also Show that Regulation of Location is Preempted.

The legislative history also confirms the FPA's broad preemptive scope. As discussed above (at 7-8), the history of the 1982 amendments is replete with indications that the Legislature's purpose was to "eliminate[] the authority of individual counties to regulate timber harvesting operations, and establish[] instead a procedure for the Board of Forestry to adopt rules to cover local concerns." County RJN, Exh. 7 (Enrolled Bill Memorandum to Governor). The Department of Forestry's Enrolled Bill Report explains,

> In some instances, county ordinances have essentially prevented the harvest of timber, contrary to the intent of the FPA. Reasons for these actions vary. Some seem opposed to development in any form. They have apparently attempted to prevent logging out of a fear that logging roads would precede subdivision and home development. Others have simply wanted to preserve scenery without going to the expense of purchasing scenic easements. *The counties will lose this leverage under this bill*.

Id., Exh. 5, at 2 (emphasis added). Significantly, in adopting its zoning ordinances at issue here, the County relied on precisely this same concern about logging roads preceding development—*i.e.*, the same concern that the Legislature determined should be addressed solely by the State Board and not be the subject of county leverage. *See* SCAR 2261-62. The purpose of the amendments was to "take away [local] power by preempting counties from exercising local control." Big Creek RJN, Exh. 2 (Conference Committee Report No. 017294 on S.B. 856).

The County suggests that the Legislature's concern had nothing to do with county zoning ordinances, but only with county permit denials and overly stringent "substantive regulations." Br. 5, 26-27. But ultimately the County is forced to concede that the "evil to be remedied" was precisely what the County has been doing here. The County acknowledges that the problem was that counties were using their "permit and regulatory authority to essentially preclude owners of timberland from logging their property." Br. 3. The County likewise concedes that the legislative history "make[s] abundantly clear" that the Legislature "sought to preempt counties from . . . adopting regulations that had the effect, directly or indirectly, of barring timber operations." *Id.* at 26-27. And the County recognizes that the various county ordinances (including Santa Cruz's) "had the effect of precluding logging" or "substantially interfere[d] with the ability to log commercially" in certain locations because of onerous permitting requirements, citing these examples as evidence of the "'evil to be remedied' by section 4516.5(d)." *Id.* at 27.

The fact that the County seeks to accomplish this same result in the guise of a locational zoning ordinance rather than a permit denial or a "substantive regulation" is irrelevant. A zoning ordinance that bans harvesting in a given location "precludes owners of timberland from logging their property" (Br. 3) just as effectively as a permit denial. Indeed, the Monterey County ordinance cited by the County as an example of the "evils to be remedied" by the 1982 amendments was itself a zoning ordinance. County RJN, Exh. 3. And the other county ordinances that restricted timber harvesting at the time, whether or not expressly

denominated as an exercise of zoning power, derived from the same regulatory power over land use that the County now invokes to justify its current ordinances.

Perhaps as significant as what it does say is what the legislative history does not contain. In contrast to the numerous broad statements recognizing that the amendments would take away local power and eliminate local control, there is no discussion of counties nonetheless retaining authority to prohibit harvesting through zoning ordinances. If the Legislature intended to make such a significant exception to preemption, one would expect to find at least some discussion or mention of that exception. None exists. Instead, all that is found are statements making clear that the counties retain no such authority.

The County contends that its ordinance is not a county-wide ban on timber harvesting because its own "statistical analysis" allegedly shows that a large percentage of timber harvesting before the enactment of the ordinance occurred in zones where its ordinance allows timber harvesting. Br. 37-38. In fact, it is estimated that the County's ordinance effectively precluded timber harvesting by 60% of the timberland owners in the county who could harvest prior to 1998. SCAR 2409-2410. But regardless of the actual number of parcels on which harvesting is prohibited, the County's ordinance is preempted because, as the County itself concedes (Br. 37), "it cannot[] prohibit timber harvesting" at all. Nothing in the FPA or its legislative history indicates that the preemption provision applies only to total bans of timber harvesting by the counties. Rather, the Legislature expressly sought to "take away [local] power by preempting counties from

exercising local control" over the conduct of timber operations, whether it concerned all or some of the timberland in a county. *See* RJN, Exh. 5 (Conference Committee Report No. 017294 on S.B. 856). As the County acknowledges, the former county ordinances that were the "evils to be remedied" by section 4516.5(d) did not necessarily involve county-wide bans but did have "the effect, directly or indirectly, of barring timber operations." Br. 27.[7]

D. Local Regulation, Even When Based on Police Power, Is Void When It Conflicts with State Law.

Unable to support its position from the statute itself or its legislative history, the County resorts to invoking a purported "presumption" against preemption, which it claims protects "traditional land use authority." Br. 15. This argument is both irrelevant and wrong.

It is irrelevant because, even if such a presumption exists, it has been overcome here by the Legislature's express preemption of all local authority over the conduct of timber operations. The County does not dispute that "[l]ocal legislation in conflict with general law is void." *Lancaster v. Municipal Court,* 6 Cal. 3d 805, 807 (1972). Indeed, the same constitutional provision that the County invokes as the source of its

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[7] Because timber operations are inextricably connected to the land on which the timber is located, the County's analogy to zoning regulations governing the location of factories (Br. 37) is unavailing. Prohibiting a factory on a given parcel does not necessarily prevent the business owner from building the same factory on another parcel. But prohibiting harvesting on a given parcel absolutely prevents the property owner from harvesting the trees on that parcel. That is why the Legislature broadly preempted local authority of such issues and vested exclusive authority in the State Board to govern the harvesting of timber from timberlands.

"traditional" authority explicitly qualifies that power by dictating that local law must "not [be] in conflict with general laws." Cal. Const., art. XI, § 7. Nor is there any dispute that local law conflicts with state law when the local law regulates a matter that the Legislature has expressly prohibited local governments from regulating. S*ee, e.g. Rumford v. City of Berkeley*, 31 Cal. 3d 545 (1982) (Vehicle Code provision that "no local authority shall enact or enforce any ordinance on the matters covered by this code" preempts city installation of traffic barriers). In such circumstances, no amount of "presumption" can save the local regulation from the express command of state law.[8]

Aside from its irrelevance, the County's presumption contention is also wrong. The County cites no authority recognizing such a presumption in a case like this involving an express statutory preemption provision. To the contrary, this Court and others have frequently found local law to be preempted without applying any presumption in favor of local regulation. *E.g.*, *Grupe Development*, 4 Cal. 4th at 919-21; *Los Angeles Lincoln Place Investors Ltd. v. City of Los Angeles*, 54 Cal. App. 4th 53, 59-66 (1997); *Briseno v. City of Santa Ana*, 6 Cal. App. 4th 1378, 1381-82 (1992); *Karrin v. Ocean-Aire Mobile Home Estates*, 1 Cal. App. 4th 1066, 1071-73 (1991); *L.I.F.E. Comm. v. City of Lodi*, 213 Cal. App. 3d 1139, 1143-49 (1989);

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[8] There is no merit to the County's assertion that the court below applied an improper test for preemption. Br. 50-52. The court correctly recognized that local law is void to the extent it conflicts with state law. Slip Op. 32-35. Applying that test, it concluded the County's ordinances conflict with state law because "they purport to regulate the conduct of timber operations, which is forbidden by the" FPA. Slip Op. 38. This is precisely the conclusion that mandates a finding of express preemption.

Mussalli v. City of Glendale, 205 Cal. App. 3d 524, 527 (1988); *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 515-18 (1982); *City of Los Angeles v. Dept. of Health*, 63 Cal. App. 3d 473, 479-80 (1976).

In the implied preemption section of its brief, the County refers to cases indicating that preemption "may not lightly be found." Br. 46 (quoting *People ex rel. Deukmejian v. County of Mendocino,* 36 Cal. 3d 476, 484 (1984)). But to the extent this language was intended to create any kind of presumption, it has been limited to the implied preemption context, not to the circumstance where (as here) the Legislature has expressly spoken on the subject and the question is giving effect to that express pronouncement. S*ee Doe v. City and County of San Francisco*, 136 Cal. App. 3d at 518 n.2 ("presumption in favor of validity of the local ordinance . . . applies to implied preemption, not to express preemption or conflict between state or local law"). Moreover, even in the implied preemption context, the courts have frequently found preemption of local regulation, thus dispelling any suggestion that local police power is entitled to any extraordinary protection. *E.g.*, *Morehart*, 7 Cal. 4th at 751-65; *Wells Fargo Bank v. Town of Woodside*, 33 Cal. 3d 379, 381 (1983); *Home Gardens Sanitary Dist. v. City of Corona*, 96 Cal. App. 4th 87 (2002); *Water Quality Ass'n v. County of Santa Barbara*, 44 Cal. App. 4th 732, 742-45 (1996); *Mobilepark West Homeowners Ass'n v. Escondido Mobilepark West*, 35 Cal. App. 4th 32, 43-47 (1995).[9]

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[9] Other cases cited by the County did not involve preemption challenges all. For example, in *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (1997), the court found that a presumption of validity applies to local (continued . . .)

The County argues that local ordinances should be presumed valid against an attack of state preemption at least where there is a "significant local interest to be served" that differs from other localities. Br. 47. Again, however, the cases cited by the County involve implied rather than express preemption. Moreover, a separate inquiry into local interests is unnecessary here because, as discussed above (at 24-26), the FPA specifically provides the means for addressing local needs.

The County's suggestion that this Court should adopt the "presumption against preemption" used in federal preemption analysis (Br. 19 n.6) is also unfounded. The County cites to no authority suggesting that this presumption has any relevance in state express preemption analysis. The presumption in federal preemption analysis arises from "federalism concerns." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). No such federalism concerns arise in the state preemption context because "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in

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zoning ordinances in the context of a due process challenge to the ordinance. *Id.* at 1131. The court did not hold that such a presumption would apply in analyzing a preemption challenge. Likewise, in *Bownds v. City of Glendale*, 113 Cal. App. 3d 875, 885-86 (1980), the court found that, in the context of a challenge to a city's general plan as not complying with the permissive guidelines of the State Department of Housing, a presumption of validity attached to the city's actions. At the same time, however, the court recognized that local "decision-making power in the area of land use and planning . . . [must] be exercised *within the constraints prescribed by enactments of the state Legislature*." *Id.* (emphasis added).

the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). In fact, "[t]he relationship of the States to the Federal Government could hardly be less analogous" to the relationship of counties to the state. *Id.*[10]

E. Preemption Principles, and the FPA's Preemption Provision, Apply Fully to Local Zoning Ordinances.

The foregoing discussion applies fully to local zoning and land use decisions. The County invokes local government's "historic authority" to control land uses through zoning. Br. 18. Zoning decisions, however, enjoy no special immunity from state preemption. Like any other exercise of local police power, local zoning authority must give way to the overriding mandates of state law. Thus, this Court and others have routinely found local zoning and land use regulation to be preempted by state law on the same basis as other local regulations. *E.g.*, *Morehart*, 7 Cal. 4th at 751-65 (zoning ordinance); *Wells Fargo Bank*, 33 Cal. 3d at 381 (local subdivision ordinance); *People v. Minor*, 96 Cal. App. 4th 29, 39-44 (2002) (land use ordinance); *Los Angeles Lincoln Place Investors, Ltd.*, 54 Cal. App. 4th at 59-66 (demolition permits); *Mobilepark West*,

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[10] The general home rule provision of the California Constitution grants greater authority to charter cities (Const. Art. XI, § 5), and state preemption analysis differs with regard to laws enacted by charter cities. Santa Cruz County does not fall within the home rule provision. However, even if that analysis applied here, the County's ordinance would not be entitled to a presumption against preemption. In those cases, "[w]hen there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state." *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 681 (1960), criticized on another point in *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62 n.5 (1969).

35 Cal. App. 4th at 43-47 (rent control); *Briseno*, 6 Cal. App. 4th at 1381-82 (occupancy ordinance).

The County asserts that the Legislature has not exercised its preemptive authority here because the statute supposedly lacks an "express statement of legislative intent to do so." Br. 21-22. For the reasons discussed above, that assertion cannot withstand scrutiny. The statute unambiguously expresses the Legislature's intent to preempt all local authority over the conduct of timber operations. Moreover, to the extent the County is suggesting that a statute cannot preempt local zoning unless it specifically refers to zoning, that argument is wrong for at least two reasons.

First, no such requirement exists. The cases that have found local zoning to be preempted have reached that conclusion even in the absence of specific reference to zoning ordinances. *See, e.g.*, *Morehart*, 7 Cal. 4th at 751-65; *People v. Minor*, 96 Cal. App. 4th at 39-44. Indeed, even the County admits that its zoning ordinances are preempted here to the extent the County seeks to dictate "how" timber operations are done. It makes only the unfounded argument that the Legislature—despite directing that all local regulation be "null, void and have no force or effect"—intended to preserve County authority to regulate "where" they are done.

Second, even if the statute were required to specifically reference zoning, the FPA does so. It specifically refers to zoning regulations when it states that it creates a "comprehensive system of regulation *and use* of all timberlands." Pub. Res. Code § 4513 (emphasis added). *See Morehart*, 7 Cal. 4th at 750 ("The purpose of a zoning law is to regulate the *use* of

land.") (emphasis in original). Likewise, it specifically refers to zoning when it expressly authorizes the exercise of zoning authority but limits its to narrow circumstances not present here. *See, e.g.,* Pub. Res. Code § 4584(j)(4) (exempt timber operations must comply with "city or county zoning ordinances"). And it also refers to zoning when it excepts from preemption county regulation on any land area of less than three acres not zoned TPZ. *See id.* § 4516.5(f).

Far from supporting the County, this Court's decision in *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal. 4th 81 (1991), only shows why the County's ordinances are preempted. Br. 21, 40-41. Unlike the FPA, the allegedly preemptive statute there—the Hazardous Waste Control Act—contained an express savings clause stating that "[n]o provision of this chapter shall limit the authority of any state *or local agency* in the enforcement or administration of *any provision of law* which it is specifically permitted or required to enforce and administer." Health & Safety Code § 25105 (emphasis added). The statute also provided that, "[e]xcept as expressly provided in Section 25149, it is not the intent of this article to preempt local land use regulation of existing hazardous waste facilities." *Id.* § 25147. Given these savings clauses, the Court understandably concluded that the statute could not be construed as impliedly preempting local land use regulation. *IT Corp.*, 1 Cal. 4th at 95. The only preemption provision at issue in the case was Health & Safety Code section 25149(a), which preempts local ordinances that "prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous wastes." The Court concluded that this provision was not

violated because the local regulation at issue did not "prohibit or unreasonably regulate" treatment of hazardous wastes. 1 Cal. 4th at 97-102. This holding is irrelevant here because the FPA contains no savings clause for local regulation, and its preemption provisions preclude *any* regulation of timber operations, not just "unreasonable" regulation.

People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476 (1984), is also not relevant here. The Court's ruling was based on an express provision in the relevant statute requiring that permitted operations comply "with the law and regulations." *Id.* at 483 (emphasis omitted). The Court construed this reference to include local law, in part because the statute specifically authorized local officials to issue permits and provided that local officials should take local concerns into account when doing so. *Id.* at 486-88. No such provisions exist here.

The County's related assertion that the courts have recognized that local zoning of "where" land use may occur is not preempted even when state law preempts zoning of "how" the land may be used (Br. 41-43) is similarly unfounded. The cited cases were not decided on the basis of any such distinction. Instead, they rested on the fact that the state or federal law at issue either expressly reserved county zoning authority (*Korean Am. Legal Advocacy Found. v. City of Los Angeles*, 23 Cal. App. 4th 376, 392 (1994) (analyzing preemption under Bus. & Prof. Code § 23791 which provides "[n]o retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city"); *Floresta, Inc. v. City Council*, 190 Cal. App. 2d 599, 604

(1961) (same)), or did not contain a provision expressly preempting all local regulation like the statute here (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority*, 72 Cal. App. 4th 366, 380 (1999); *Desert Turf Club v. Bd. of Supervisors*, 141 Cal. App. 2d 446, 452 (1956)).

The County relies particularly on *Desert Turf Club*. But the state statute at issue there did not expressly prohibit county regulation of the conduct of horse racing like the FPA expressly states that counties shall not regulate the conduct of timber operations. Nor did *Desert Turf Club* involve a sunset provision rendering all county horse racing regulations null and void with the passage of the state statute, like the FPA does. Nor did the statute contain provisions delineating circumstances in which the county retains authority, like the FPA's provisions allowing counties to continue to abate nuisances and regulate timber harvesting on parcels less than three acres. Instead, the *Desert Turf Club* statute merely granted to the Horse Racing Board jurisdiction over horse racing, without saying anything about local authority. *See* Bus. & Prof. Code § 19420. The court of appeal's discussion of the scope of implied preemption under this statute is irrelevant to the scope of express preemption here. And even the court's comment (on which the County relies) about the effect of the implied preemption there on local zoning authority was dicta, because the court's actual ruling was that the county's permit denial was preempted because it intruded on matters entrusted to the Horse Racing Board. *Desert Turf Club*, 141 Cal. App. 2d at 451-54. That is exactly what the County's ordinance here does.

The County is also not helped by its reliance on the Planning and Zoning Law (Govt. Code § 65000 et. seq.). Nothing in that statute even remotely suggests that local zoning power is free from the limitations imposed by other state law. The numerous cases finding zoning authority to be preempted under other laws establish the contrary.

The County's assertion that the Planning and Zoning Law does not make timber harvesting "exempt from local government's traditional zoning authority" (Br. 20) is similarly misguided. There is no need for such an "exemption" to be stated in the Planning and Zoning Law. The preemption of local regulation is contained in the FPA, which is where one would expect to find it. As noted above (at 36-37), local zoning has been held preempted by state law in a wide variety of circumstances. In each of those instances, the preemption provision was found in the other law, rather than in the Planning and Zoning law itself.

Nor does the Planning and Zoning Law repeal the FPA's express preemption of local regulation. When the Legislature intended the Planning and Zoning Law to trump the provisions of another statute, it specifically so provided. *See* Govt. Code § 65457(a) (providing for an exemption from CEQA). The cases on which the County relies confirm this point. Timber operations were found to be subject to the California Environmental Quality Act in *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.*, 59 Cal. App. 3d 959 (1976), because the FPA is "silent" on the applicability of CEQA to timber harvesting. *Id.* at 965. The FPA,

however, is not "silent" on the issue of local regulation. It expressly preempts it.[11]

Unable to find any authority supporting its position, the County relies on a 1969 Attorney General opinion that construed the version of the FPA then in force as not invalidating local zoning ordinances. Br. 30 (citing *County Zoning Ordinances*, 52 Op. Att'y Gen. Cal. 138 (1969)). That decision is irrelevant here, however, as it was construing a prior version of the statute that was repealed in 1973 and that did not include the express preemptive provision and other language added to the current statute in 1982. The opinion found that the then-existing preemption provision in the FPA was "not so broad as to invalidate a zoning ordinance which *prohibits* logging." 52 Op. Att'y Gen. Cal. at 140 (emphasis in original). By contrast, the current preemption provision (section 4516.5(d)) was designed to stop counties from "essentially preventing" timber harvesting, as explicitly shown by its plain language and legislative history. *See supra*, p. 29-30.

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[11] The County also refers to provisions of the Planning and Zoning Law directing counties to include land use elements for "natural resources" and "forests" or to include TPZ parcels in a land use category in their general plan that provides for timber production. Br. 20 (citing Govt. Code § 65302(a), (d)). But these general provisions do not grant any authority to counties over timber harvesting, let alone suggest that counties are free to ban or otherwise regulate timber harvesting on timberlands in violation of the express provisions of the FPA preempting them from doing so.

F. The TPA, Which Was Enacted to Further Encourage Timber Production, Does Not Authorize Zoning Ordinances That the FPA Preempts.

As did the court in *Big Creek I*, the County relies heavily on the TPA, Govt. Code § 51100, et seq., asserting that the TPA "recognize[s] and even encourage[s] the exercise of county zoning authority." Br. 32.[12] The TPA, however, does not support the County. To the contrary, it only further shows the Legislature's broad preemptive intent in this area.

As the court below recognized, far from deferring to or encouraging local authority, the TPA "severely circumscribes it." Slip Op. 37. The TPA was enacted to permit alternative tax treatment for timberlands dedicated to long-term timber production. Under prior law, timberland was subject to ad valorem taxes, which created an incentive for forest property owners to convert their land to other uses or to prematurely cut their trees to pay their taxes. The TPA avoids these disincentives by permitting qualifying parcels to be assessed a "yield tax" payable when the timber is harvested, rather than annually while it is growing.[13]

To comply with a constitutional requirement that property subject to this alternative tax treatment be restricted as to its use (Cal. Const. art. XII, § 3(j)), the TPA adopted a scheme for zoning timberland to timber

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[12] The TPA was originally enacted in 1976 as the Z'berg-Warren-Keene-Collier Forest Taxation Reform Act (Cal. Stats. 1976, ch. 176) and then renamed in 1982 (Cal. Stats. 1982, ch. 1489).

[13] *See* W. Unkel & D. Cromwell, *California's Timber Yield Tax,* 6 Ecology L. Q. 831 (1978); *see also State of California v. County of Santa Clara,* 142 Cal. App. 3d 608 (1983); *Clinton v. County of Santa Cruz,* 119 Cal. App. 3d 927 (1981).

production zone ("TPZ"). Parcels so zoned are restricted in their use to growing and harvesting timber. Govt. Code § 51115. Other uses may be permitted only to the extent they are compatible with such timber operations. *Id.* §§ 51104(h), 51115.

As the County concedes (Br. 38), the TPA mandates that local governments implement these zoning requirements. The TPA *requires* counties to zone land to TPZ upon petition by the landowner if the land meets the statutory criteria. Govt. Code § 51113(a), (c), (d). By March 1, 1977, counties were required to identify and rezone all qualifying timberland to TPZ, subject only to certain narrow exceptions. Govt. Code §§ 51110, 51110.1, 51112(a), (b), (c). After that date (and continuing to the present), any property owner with qualifying timberland that had not been rezoned could apply for rezoning. *Id.* §§ 51113, 51113.5. The local board is *required* to grant such petitions, provided that the land meets the statutory criteria for rezoning. *Id.* § 51113(a). The County is not permitted to impose any criteria beyond those specified in the statute. *Id.* § 51113(c). Even back in 1977, when the initial rezoning was completed, the TPA permitted exclusions of qualifying timberland only in very narrowly defined circumstances. *See* Slip Op. 15.

Thus, instead of "reaffirming" local authority over zoning (Br. 17) or granting counties "significant discretion" (Br. 7), the TPA overrides county zoning authority and largely eliminates county discretion. *See State of California v. County of Santa Clara*, 142 Cal. App. 3d 608 (1983) (invalidating county ordinance that sought to impose additional prerequisites to rezoning to TPZ). Nor is there any basis for the County's

assertion (Br. 34) that the TPA gives it broad discretion in defining "compatible uses." Instead, the statute strictly defines compatible uses and requires that counties follow this definition. Govt. Code § 51104(h).

But even if it were true that the TPA reaffirmed "local government's traditional authority over zoning" (Br. 14) when in fact it substantially circumscribes it, that would do nothing to eliminate the independent preemptive scope of the FPA. Denying rezoning of a parcel to TPZ under the TPA simply means that the parcel will not be restricted solely to timber production (and compatible uses) and thus will not qualify for alternative tax treatment. It does not mean that the property ceases to be timberlands or ceases to be subject to the FPA such that the County is free to ban harvesting on that parcel in violation of the FPA.

Indeed, the County's reliance on the TPA turns the legislative purpose on its head. The point of the TPA was not to decrease the protection from local regulation afforded by the FPA for non-TPZ properties or to enable counties to prohibit timber harvesting on such parcels through their zoning power. To the contrary, it was to grant additional incentives to timber production by allowing certain parcels to qualify for alternative tax treatment. It cannot properly be concluded that this statute, enacted to encourage preservation of timberland and responsible timber harvesting (*see* Govt. Code § 51101(a), (c)), was actually a vehicle by which the Legislature granted to counties the sweeping authority to entirely prohibit timber harvesting on broad swaths of the state's timberland.

The County asserts that by "restricting timber harvesting" to TPZ districts, it is furthering the intent of the TPA to encourage timberland owners to rezone their property to TPZ. Br. 34. But the County may not restrict timber harvesting on timberlands in contravention of the FPA in an alleged attempt to further the purpose of the TPA. The County is failing to give effect to the independent operation of the FPA, which protects *all* timberlands regardless of whether they are zoned TPZ or otherwise. In enacting the TPA, and expressing a policy in favor of qualifying timberland being zoned TPZ, the Legislature did not abrogate the protections of the FPA—and it certainly did not give counties the authority to take it upon themselves to do so. As the County itself points out (Br. 31-32), implied repeals of one state statute by another are disfavored because "two statutes touch[ing] upon a common subject . . . 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.'" *Devita v. County of Napa*, 9 Cal. 4th 763, 778-79 (1995). Construing the statutes together here and giving effect to each requires that parcels qualifying for TPZ status be zoned TPZ on the owner's application but that all parcels, regardless of zoning, remain subject to the FPA's comprehensive system of regulation and use that applies to all timberlands.

Moreover, just as the TPA does not repeal the FPA, neither does the FPA condition its protection on rezoning to TPZ. Rezoning to TPZ is simply a mechanism for landowners to obtain alternative tax treatment, on condition that they agree to a restriction on the use of their property for at least ten years. The fact that a given parcel may not be zoned TPZ under the TPA may reflect nothing more than that the property owner elected not

to seek the alternative taxation method offered by the TPA and did not petition for rezoning. But the property remains timberland by definition and the FPA is clear that it applies to *all* timberlands, regardless of whether they are zoned TPZ.

The County argues that the provision in the TPA allowing counties to deny TPZ zoning to parcels of less than 80 acres (Govt. Code § 51113(d)(1)) shows the Legislature's intent to preserve a local role in zoning as to parcels likely to be located in areas where harvesting is incompatible with surrounding uses. Br. 34-35, 59. The County cites nothing in support of this assertion. In fact, the legislative history shows that the Legislature was not concerned with the compatibility of harvesting with surrounding uses but enacted this provision to prevent small forest landowners who had no intention of ever harvesting their timber from obtaining the favorable tax treatment the statute created to foster timber harvesting.[14] But even if the County's unsupported interpretation were correct, it would do nothing to sustain the County's ordinance here. The 80-acre provision simply affects rezoning to TPZ. It does not eliminate the preemptive scope of the FPA as to any parcel.

The County also relies on the provision of the TPA directing counties to apply to land excluded from TPZ an alternate zone whose primary use is other than timberland. Br. 35. Because county authority to exclude qualifying timberlands from TPZ long ago expired, this provision

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[14] *See* Big Creek RJN, Exh. 12, p. 6. As enacted in 1976, the TPA allowed counties to impose a minimum of 160 acres. The statute was amended in 1982 to change this to 80 acres.

is inoperative now. But even if it were operative, it would not mean that land so alternatively zoned ceases being timberland, that the FPA no longer applies, or that counties may ban timber harvesting on that timberland in violation of section 4516.5(d).

The TPA is not a regulatory statute. It does not provide for any forest practice rules, or THP requirements or licensing requirements or any other similar regulation of timber harvesting. The regulatory statute for all timberland is the FPA, which is the governing "comprehensive system of regulation and use of all timberlands" (Pub. Res. Code § 4513), regardless of whether they are TPZ or something else. And it is the FPA that prohibits any local regulation of the conduct of timber operations, whether by zoning ordinance or otherwise.

G. The Court Need Not Resort to Implied Preemption Principles Because the County's Ordinance is Expressly Preempted.

Because the County's ordinance is expressly preempted, the Court need not analyze whether it is also impliedly preempted. As the CCFA demonstrates in its brief, however, the FPA's comprehensive regulatory scheme also impliedly preempts the County's ordinance. Big Creek adopts CCFA's implied preemption arguments. Even if it were true that the Legislature had not expressly spoken on the subject of local control, the FPA's "comprehensive system of regulation and use," as implemented by the State Board in rejecting the purported "locational" rules that the County unilaterally adopted here, precludes local regulation.

II. THE COURT OF APPEAL'S RULING THAT THE COUNTY'S HELICOPTER REGULATION IS PREEMPTED IS SIMILARLY CORRECT.

The County's arguments regarding its helicopter regulation are largely a repeat of the County's other arguments and are groundless for the reasons stated above.

First, the County's regulation is precisely the kind of regulation of "timber operations" that the FPA preempts. Timber operations are the "cutting or removal or both of timber . . . together with all the work incidental thereto . . . but excluding preparatory work such as treemarking, surveying, or roadflagging." Pub. Res. Code § 4527. The County's regulation falls squarely within this provision. The County is regulating the use of helicopters to "remove" timber. By expressly referring to the "removal" of timber, the Legislature could not have made more clear its intent to preempt local regulation of such things as helicoptering, which is one of a limited number of ways that timber is removed from timberlands.

Indeed, the County's ordinance itself explicitly states that it applies to "*timber operations* involving the use of helicopters." CT 1605 (emphasis added). It is difficult to imagine a clearer admission that the County is engaging in impermissible regulation of timber operations.

That the County has impermissibly entered an area of exclusive state authority is also evidenced by the fact that using helicopters to remove timber is expressly contemplated and regulated by the Board's rules. Indeed, at the County's request, the Board has adopted a rule applicable to Santa Cruz County that imposes special notice requirements to property owners before helicopter yarding may be undertaken. 14 Cal. Code Regs.

§ 926.3. Among other things, the rule requires that the notice identify the location of "helicopter log landing and service area sites" (*i.e.*, the very issues the County's rule also purports to regulate), as well the "approximate duration of helicopter yarding activities." *Id.* § 926.3(a)(2). The rule also recognizes that the use of helicopters is subject to approval by the director of the state Department of Forestry and Fire Protection, who may impose conditions on helicoptering as part of the approval. *Id.* § 926.3(h). These conditions include measures to protect residents from noise or other impacts from helicopter activities and to ensure compliance with all applicable federal aviation requirements. *See* County Administrative Record ("CAR") 49-50.

Consistent with the exclusive authority of the Board and the Department to regulate timber operations involving the use of helicopters, the County submitted its current ordinance to the Board to be adopted as a state forest practice rule. The Board refused to approve the rule, however, on the ground that it was inconsistent with the purposes of the FPA. SCAR 374, 2246-47, 225. The County is now trying to circumvent that determination by adopting the same rule on its own. The court of appeal correctly rejected that attempt.

The County argues that this ordinance is necessary to address local concerns, such as the "citizens' fears created by helicopters 'transporting . . . multi-ton logs by air over or near their neighborhoods' and citizen concerns with 'throbbing' and 'unbearable' noise." Br. 39. But as discussed above, "local police power" is not a talisman that, whenever invoked, defeats preemption. Like any other authority of local government,

police power must yield to the overriding dictates of state law. Moreover, the County again ignores the statutory scheme created by the Legislature for addressing local concerns. If any attribute of Santa Cruz County warrants additional regulation that is consistent with the purpose of the FPA, the prescribed procedure is for the County to request that the Board adopt rules necessary to address that local issue and to seek judicial review of any denial where appropriate.

In these circumstances, the County's assertion that its ordinance is a valid "locational" regulation only confirms the invalidity of that justification as the basis for upholding any of the County's ordinances. What the County is doing here—whether it is restricting harvesting to certain districts, or dictating where helicopters may be used—is regulating the conduct of timber operations. If the County's arguments are upheld, virtually no aspect of timber harvesting would be free from local regulation or prohibition.

CONCLUSION

For the foregoing reasons, the decision of the court of appeal should be affirmed.

Dated: November 5, 2004.

Respectfully submitted,

JONES DAY

By: _____
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