

MEMORANDUM

August 12, 2024

BY EMAIL

TO: American Recyclable Plastic Bag Alliance

FROM: Mayer Brown LLP

RE: SB 1053 & AB 2236 Preemption Analysis

Executive Summary

This memorandum contains our analysis of legal issues pertaining to preemption of existing local ordinances under the requirements of SB 1053 and AB 2236. These bills may lead to serious operational issues for municipalities, as the bills aim to change existing law to prohibit stores from providing reusable plastic bags, but do not create a mechanism by which municipalities can amend their own local ordinances to come into compliance with the new rules. As currently drafted, SB 1053 and AB 2236 do not repeal or amend sections of the current law which prohibits municipalities from enforcing or implementing new ordinances related to reusable grocery bags, nor do the bills address ordinances that were already in effect. As such, the proposed bills may be unworkable and mostly unenforceable, especially in regards to municipalities whose ordinances were exempted under the previous SB 270 (Stats. 2014, Ch. 850). We make no findings nor do we offer an opinion about the merits or goals of the bills.

I. Background

Under current law, the Attorney General, and city and county prosecutors are responsible for enforcement of provisions of the state's single-use carryout bag ban.¹ Every store, as defined in statute,² throughout California must comply with the requirements of the law, regardless of

¹ CA PUB RES § 42285(a).

² Proposed Rule, CA PUB RES § 42280(f) defines a "store" as a "retail establishment that meets any of the following requirements: (1) A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000) or more that sells a line of dry groceries, canned goods, or nonfood items, and some perishable items; (2) Has at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code; (3) Is a convenience food store, foodmart, or other entity that

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where the store is located.³ Moreover, existing law preempts local governments from adopting their own ordinances on carry out bags with the exception of the approximately 100 cities and counties which had adopted plastic bag ordinances before SB 270 was enacted in 2014. Under Section 42287, cities and counties that have already adopted their own reusable grocery bag ordinances are allowed to continue enforcing their own ordinances, provided the ordinance was passed before September 1, 2014.⁴ However, municipalities that are exempted under Section 42287 are prevented from making any amendments to their local ordinances, except to increase the amount that a store can charge for a plastic grocery bag.⁵ Further, any local government that had not adopted a carryout bag ordinance by September 1, 2014 is prohibited from adopting or implementing any new ordinance relating to reusable grocery bags, and instead fell under the purview of SB 270.⁶ As currently drafted, SB 1053 and AB 2236 would dramatically change definitions in existing law concerning the sale, distribution or provision of recyclable plastic bags. In addition to banning single use plastic carryout bags, the bills would ban the sale, distribution or provision of all “bags” at stores except for recycled paper bags. This broad ban includes popular reusable washable grocery totes and a broad variety of bags made with some plastic content that are used for trash, food storage, insulated food transportation, as well as personal tote bags like backpacks and purses. Significantly, the bills would not amend or repeal Section 42287 and do not expressly address the issue of preemption and operation of existing local plastic bag bans and thus face serious legal questions of how the bills will be implemented and enforced if enacted. We note that the cities and counties with plastic carryout bag ordinances that are grandfathered under current law cover the vast majority of the state’s most populous regions where plastic waste is generated.

II. Effect of State Preemption on Issues of Statewide Concern

In the section addressing state preemption of local ordinances on single use plastic carryout bags, SB 270 states that the regulation is of “statewide interest” and the statute is

is engaged in the retail sale of a limited line of goods, generally including milk, bread, soda, and snack foods, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control; (4) Is a convenience food store, foodmart, or other entity that is engaged in the retail sale of goods intended to be consumed off the premises, and that holds a Type 20 or Type 21 license issued by the Department of Alcoholic Beverage Control.”

³ CA PUB RES § 42287(a) (“this chapter is a matter of statewide interest and concern and is applicable uniformly throughout the state.”).

⁴ CA PUB RES § 42287(c) (“A city, county, or other local public agency that has adopted, before September 1, 2014, an ordinance, resolution, regulation, or rule relating to reusable grocery bags, single-use carryout bags, or recycled paper bags may continue to enforce and implement that ordinance, resolution, regulation, or rule that was in effect before that date.”).

⁵ *Id.*

⁶ CA PUB RES § 42287(b) (“a city, county, or other local public agency shall not enforce, or otherwise implement, an ordinance, resolution, regulation, or rule, or any amendment thereto, adopted on or after September 1, 2014, relating to reusable grocery bags”).

intended to preempt the entire field of regulation for reusable grocery bags, single-use carryout bags, and recycled paper bags.⁷ Given this language, it is clear that the legislature intended to preempt local control of the issue. This raises questions of implementation and enforcement, especially in the case of charter cities and counties, which are generally free of state legislative intrusion and are permitted to enforce their own ordinances in respect to municipal affairs (“home rule”).⁸ However, by invoking “statewide interest,” a general state law may overrule a charter city’s home rule, particularly if, as is the case here, the intent of the law is to occupy the field of regulation.⁹

However, Section 42287 creates a narrow exception to the preemption assertion by allowing municipalities to retain and enforce their own ordinances, if the ordinance was passed before September 1, 2014. Thus, even if this regulation preempts home rule by charter cities, charter cities, as well as general law cities, will be unaffected by the bills as long as the city has their own ordinance from before September 1, 2014.

III. Impact of Statutory Amendment on Preemption Provision

If enacted, SB1053 and AB 2236 as currently drafted will not be operative or enforceable in the most populous regions of the state, as numerous cities and counties have adopted single use carry out bag ordinances under Section 42287. As discussed, Section 42287 creates narrow exceptions that allow those ordinances to be grandfathered in. However, SB 1053 and AB 2236 do not expressly amend or repeal Section 42287, despite making substantial amendments to other related sections of the single-use carryout-bag ban enacted in SB 270. As such, it is unlikely that courts would deem Section 42287 to have been implicitly amended or repealed.

Under the general rules of statutory enforcement, when a legislature amends a statute, the courts presume that the legislature was fully aware of the prior judicial construction, and the legislature is presumed to have acted intentionally when it amends one statutory provision but not another.¹⁰ Here, the drafters of SB 1053 and AB 2236 left the provisions of section 42287 untouched despite making extensive amendments to critical sections of the statute (i.e. changing

⁷ CA PUB RES § 42287(a) (single-use carryout bag ban is “a matter of statewide interest and concern and is applicable uniformly throughout the state. Accordingly, this chapter occupies the whole field of regulation of reusable grocery bags, single-use carryout bags, and recycled paper bags.”)

⁸ *California Constitution, article XI, section 5* (with regard to a charter city, “[i]t shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs”).

⁹ *City of Santa Clara v. Von Raesfeld*, 3 Cal. 3d 239, 246 (1970) (“As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine).”).

¹⁰ *See Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 3 Cal. 5th 1118, 1156 (2017); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 174 (2009).

the definition of reusable grocery bag). As such, courts are likely to presume that the legislature intended to leave the preemption provision of Section 42287 unamended, and thus continue in effect.

Courts may sometimes find that a later law may implicitly repeal a prior law if it is apparent that the legislature did not intend the former act to remain in force.¹¹ However, as a general rule, repeals by implication are generally disfavored,¹² and there is a strong presumption against repeal by implication.¹³ Despite this presumption, courts have found that an implicit repeal may be found where (1) “the two acts are so inconsistent that there is no possibility of concurrent operation,” or (2) “the later provision gives undebatable evidence of an intent to supersede the earlier’ provision.”¹⁴ This is not the case, however, with SB 1053 and AB 2236. First, the amendments under the bills are not so inconsistent that they are unworkable alongside section 42287. By leaving the preemption section unamended or repealed, these bills simply preserve the exceptions previously allowed. The ordinances exempted under the bills would remain in effect, and would operate as they had under the previous law. Second, there is no language in SB 1053 and AB 2236 to indicate any legislative intent to assert a separate preemption clause.

Thus, as there is no legislative intent to suggest that SB 1053 and AB 2236 intended to repeal the preemption provision of Section 42287, it is likely that a court will uphold the legal effect of the provision.

IV. Issues of Implementation with Existing Ordinances

In addition to issues of preemption, the bills raise operational issues for cities that have adopted their own ordinances on plastic bags. As discussed, the language of Section 42287 prohibits municipalities from amending their existing ordinances after September 1, 2014, except to increase the price charged for bags. Because there is no ability under the statute to amend, municipalities are either stuck with their decade-old ordinance, or must repeal their ordinance and fall under the regulation of SB 1053 and AB 2236. This creates a hindrance for cities who wish to amend their ordinance, perhaps to make them more environmentally friendly, but who may feel that language in SB 1053/AB 2236 that bans stores from selling, distributing, or providing “bags” at checkout counters, kiosks, curbside delivery or via home delivery, with exception of those made of recycled paper, are too restrictive. By preserving this limitation on

¹¹ *United Milk Producers of Cal. v. Cecil*, 47 Cal. App. 2d 758, 776 (1941) (“An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act.”).

¹² *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 1 Cal. App. 5th 452, 466 (2016).

¹³ *Tuolumne Jobs & Small Bus. All. v. Superior Ct.*, 59 Cal. 4th 1029, 1039 (2014).

¹⁴ *Wishnev v. The Nw. Mut. Life Ins. Co.*, 8 Cal. 5th 199, 211 (2019).

August 12, 2024
Page 5

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amendments, the bills leave the grandfathered ordinance localities with only two options. First, localities may repeal their ordinances and allow the restrictive ban to govern, which would invite litigation as those seeking to enforce and comply with the statute grapple with the ambiguous wording of the bill.¹⁵ Second, localities may keep their existing ordinances, which may be less environmentally friendly. In either case, the bills present a conundrum for the state's most populous cities and counties when deciding how to reduce plastic waste.

Conclusion

As currently drafted, SB 1053 and AB 2236 will face serious legal and operational issues in the cities and counties that have adopted their own valid ordinances on single use plastic carryout bags and/or recyclable plastic bags. The bills would prohibit stores from selling, distributing or providing a "bag" other than a recycled paper bag, without preempting existing local ordinances on plastic carry out bags or creating a mechanism by which cities and counties can amend their local ordinances to comply with the new law. Consequently, the bills, if enacted, will not be enforceable in the state's most populous cities and counties unless those government bodies repeal existing ordinances adopted under Section 42227. Moreover, the current framework of the bills may lead to litigation over whether the preemption provisions of the current statute remain in effect, or if the legislature intended to repeal those sections of the current law. As such, the proposed law will likely face legal and enforcement obstacles in many of California's largest cities and counties which have adopted plastic bag regulation ordinances under section 42227 and where the threat of plastic pollution is the highest.

¹⁵ For an analysis of legal issues pertaining to compliance with and enforcement of the requirements of SB 1053 and AB 2236, see Mayer Brown's memo, "SB 1053 & AB 2236 Analysis," August 2, 2024.