CIVIL LAW AND MOTION CALENDAR

Final Decisions

May 15, 2012

(4) Save the Plastic Bag Coalition v. City of Carpinteria

Demurrer of City of Carpinteria to Complaint

Ruling:

For the reasons set forth herein, the demurrer of defendant City of Carpinteria to the complaint is overruled. Defendant shall file and serve its answer to the complaint on or before June 15, 2012.

Background:

On March 12, 2012, the City of Carpinteria adopted Ordinance No. 655 (the "Ordinance"), enacting chapter 8.51 in the Carpinteria Municipal Code entitled "Single-Use Bag Regulations."

"The purpose of these provisions is to promote:

"A. The protection of unique coastal resources found in Carpinteria and identified for protection in policies of the City's General Plan/Local Coastal Plan, including the Carpinteria 'El Estero' Salt Marsh, Beaches, Tidelands, and Offshore Reefs, Harbor Seal Hauling Grounds, and Creekways and Riparian Habitat;

"B. Compliance with federal and state mandates for Clean Water (including National Pollutant Discharge Elimination System Permit Program and waste stream reduction (AB 939 and AB 341));

"C. A reduction in the amount of plastic and paper material that is manufactured, transported, handled/processed, and discarded, and the impacts associated with such activities.

"D. A reduction in the amount of waste/debris in City parks, public open spaces, creeks, estuary, tidelands and the ocean, and the amount of material going to landfills;" (Carpinteria Mun. Code, § 8.51.020.)

The Single-Use Bag Regulations prohibit the dispensing of single-use bags as follows:

"A. Commencing on July 11, 2012 large commercial establishments are prohibited from dispensing to any customer at the point of sale a single-use bag.

"B. Commencing on April 11, 2013 small commercial establishments are prohibited from dispensing to any customer at the point of sale a single-use bag, except gift bags or paper bags, as defined in this chapter." (Carpinteria Mun. Code, § 8.51.040.)

Under the Single-Use Bag Regulations, a "'Large Commercial Establishment' is a commercial establishment with over $5,000,000 in annual gross retail sales volume" or is a grocery store of greater than 500 square feet in area. (Carpinteria Mun. Code, § 8.51.030, subds. (A), (B), (F).) A "'Small Commercial Establishment' is a food provider or a commercial establishment that does not qualify as a large commercial establishment." (§ 8.51.030, subd. (C).) "Food providers" include restaurants. (§ 8.51.030, subd. (D).)

When the prohibitions become effective, both large and small commercial establishments are prohibited from dispensing "a single-use bag" "at the point of sale."

"'Single-Use Bag' means any bag that is provided to customers for carryout purchases by a commercial establishment, excluding gift bags, product bags, and reusable bags …."

"'Point of Sale' means the location in the commercial establishment where purchase is made."

A "Reusable Bag" is a bag that is "specifically designed and manufactured for multiple reuse" and is made of cloth or other machine washable fabric or is made of other durable material "including plastic that is at least 2.25 mils thick."

"'Paper Bag' means any paper bag that has a post-consumer recycled content of at least 40 percent and is 100 percent recyclable."

On March 20, 2012, plaintiff Save the Plastic Bag Coalition, an unincorporated association, consisting of suppliers of plastic bags to restaurants and other food facilities in Carpinteria, filed its complaint for invalidation of the Ordinance based upon preemption by the California Retail Food Code. Plaintiff alleges: "[T]he Ordinance is invalid as it bans plastic bags at restaurants and other 'food facilities' as defined by H&S Code § 113789. The Ordinance intrudes into an area that the State of California has reserved to itself."

Defendant City of Carpinteria ("City") demurs to plaintiff's complaint. City argues that plaintiff does not state a cause of action in its complaint because the Ordinance is not preempted by the Retail Food Code. Plaintiff opposes the demurrer, arguing that the California Supreme Court in *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177 explained the scope of preemption by the Retail Food Code as including "how food should be handled or transported" and that the Ordinance is therefore preempted.

Analysis:

"The function of a demurrer is to test the sufficiency of the complaint alone and not the evidence or other extrinsic matters." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1283.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.

[Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, internal quotation marks omitted.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.)

Request for Judicial Notice

City requests that the court take judicial notice of four documents: (Exhibit A) the Ordinance; (Exhibit B) a copy of the City's Staff Report for City Council Meeting on December 12, 2011; (Exhibit C) a copy of the City's Staff Report for City Council Meeting on February 27, 2012; and (Exhibit D) a copy of the City's Staff Report for City Council Meeting on March 12, 2012. The court will grant City's request as to Exhibit A, the Ordinance, which is also attached as exhibit A to plaintiff's complaint. (Evid. Code, § 452, subds. (b), (c).)

Plaintiff objects to judicial notice being taken of exhibits B, C and D. City states that the purpose for its request for judicial notice of these exhibits is that the "Staff Reports will assist the Court in interpreting the intent of City Council in adopting the single-use bag regulations." (RJN, at p. 2.) The court notes that city staff reports may, like other legislative history, be the subject of judicial notice to ascertain the purpose of the legislative enactment. (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 404-405.) However, the purpose of the Ordinance, to the extent it is relevant, is stated in the Ordinance directly. This stated purpose is not disputed by plaintiff in this demurrer. The staff reports elaborate on this stated purpose, but the staff reports do not provide any additional material that is relevant or useful to the court's disposition of this demurrer. The City's request for judicial notice of exhibits B, C and D will be denied. (See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

Plaintiff's Cause of Action

Plaintiff styles its complaint as seeking "invalidation of plastic bag ban ordinance based on state retail food code for preemption; request for declaratory and injunctive relief." (Complaint, at p. 1, capitalization altered.) In its prayer for relief, the first remedy plaintiff seeks is a "judgment declaring that the Ordinance is invalid as it is preempted and prohibited by the California Retail Food Code." (Complaint, at p. 9.) Although plaintiff does not expressly cite the statute, it appears from these statements in the complaint that plaintiff seeks declaratory relief pursuant to Code of Civil Procedure section 1060.

"Any person ... who desires a declaration of his or her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises ...." (Code Civ. Proc., § 1060.) "It is well established that parties may seek declaratory relief with respect to the interpretation and application of local ordinances." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1250.)

"A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties … and requests that these rights and duties be adjudged by the court." (*Maguire v. Hibernia Sav. & Loan Soc.* (1944) 23 Cal.2d 719, 728.) "If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration." (*Tiburon v. Northwestern P. R. Co.* (1970) 4 Cal.App.3d 160, 170.)

The California Retail Food Code

Plaintiff's complaint alleges that the Ordinance is invalid because it is preempted by the California Retail Food Code, Health and Safety Code section 113700 et seq. The Retail Food Code's preemption provision is set forth in Health and Safety Code section 113705, which provides:

"The Legislature finds and declares that the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that the food will be pure, safe, and unadulterated. Except as provided in Section 113709, it is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities."

Section 113709 provides narrow exceptions: "This part does not prohibit a local governing body from adopting an evaluation or grading system for food facilities, from prohibiting any type of food facility, from adopting an employee health certification program, from regulating the provision of consumer toilet and handwashing facilities, or from adopting requirements for the public safety regulating the type of vending and the time, place, and manner of vending from vehicles upon a street pursuant to its authority under subdivision (b) of Section 22455 of the Vehicle Code." By their terms, these exceptions do not apply to the Ordinance as challenged by plaintiff in its complaint.

Plaintiff argues, and City does not appear to contest, that "retail food facilities" as defined by the Retail Food Code include "food providers" as defined in the Ordinance. (Health & Saf. Code, § 113789, subd. (a); Carpinteria Mun. Code, § 8.51.030, subd. (D).) Plaintiff cites to a number of provisions in the Retail Food Code to demonstrate that the Retail Food Code regulates the single-use bags prohibited by the Ordinance, including:

"'Single-use articles' mean utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use, after which they are intended for discard." (Health & Saf. Code, § 113914.)

"Single-use articles shall not be reused." (Health & Saf. Code, § 114081, subd. (d).)

"Materials that are used to make single-use articles shall not allow the migration of deleterious substances or impart colors, odors, or tastes to food, and shall be safe and clean." (Health & Saf. Code, § 114130.2.)

"'Utensil' means a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single-service, or single-use, gloves used in contact with food, temperature sensing probes of food temperature measuring devices, and probe-type price or identification tags used in contact with food." (Health & Saf. Code, § 113934.)

Because plastic bags are used in the transportation of food, plaintiff argues, these above-quoted sections apply to preempt local standards, including an outright ban, on plastic bags.

The *California Grocers* Case

Both parties cite to the California Supreme Court's decision in *California Grocers Assn. v. City of Los Angeles*, *supra*, 52 Cal.4th 177 as supporting their respective arguments. At issue in *California Grocers* was an ordinance adopted by the City of Los Angeles that required grocery stores of a specific size that undergo a change of ownership to retain current employees and take certain actions during a 90-day transition period. Plaintiff California Grocers Association filed an action seeking to invalidate the ordinance on various grounds, including preemption under the Retail Food Code. The trial court and the court of appeal agreed that the ordinance was preempted by the Retail Food Code. The Supreme Court, however, reversed, finding no preemption.

In reaching this conclusion, the Supreme Court began its discussion of preemption under the Retail Food Code by stating general principles:

"Local ordinances and regulations are subordinate to state law. [Citation.] Insofar as a local regulation conflicts with state law, it is preempted and invalid. [Citations.] 'A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication."' [Citations.]" (*California Grocers*, *supra*, 52 Cal.4th at p. 188, internal quotation marks omitted.) "Only the last of these bases for conflict, field preemption, is at issue here. 'Local legislation enters an area "fully occupied" by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent.' [Citation.] ... Express field preemption turns on a comparative statutory analysis: What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap?" (*Id.* at p. 188.)

The Court then summarized the sweep of preemption under the Retail Food Code: "Thus, the state alone may adopt 'health and sanitation standards for retail food facilities.' [Citation.] The remainder of the statutory scheme demonstrates by way of example the precise scope of exclusive state regulation, comprehensively detailing standards for, e.g., employee training on health matters ([Health & Saf. Code], §§ 113947–113947.3), employee health and hygiene (*id.*, §§ 113949–113978), food transportation, storage, and preparation (*id.*, §§ 113980–114057.1),

food display and service (*id.*, §§ 114060–114083), food labeling (*id.*, §§ 114087–114094), the design and sanitizing of food preparation areas and utensils (*id.*, §§ 114095–114185.5), and the design and cleanliness of food facilities (*id.*, §§ 114250–114282)." (*California Grocers*, *supra*, 52 Cal.4th at p. 189, footnote omitted.)

The Court focused upon the scope of the field of exclusivity, rejecting the argument that the purpose in enacting the local ordinance determines preemption: "We may accept for the sake of argument that the promotion of health and safety was one of the City's purposes in passing the Ordinance. That the Ordinance is preempted does not, however, follow. Purpose alone is not a basis for concluding a local measure is preempted. While we and the Courts of Appeal have occasionally treated an ordinance's purpose as relevant to state preemption analysis [citations], we have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself." (*California Grocers*, *supra*, 52 Cal.4th at p. 190, footnote omitted.)

Applying these principles, the Court reasoned that the Los Angeles ordinance was not preempted: "The Retail Food Code does not preempt all laws that have as their purpose the promotion of food health and safety; it preempts only those that establish 'health and sanitation standards' for retail food establishments, so as to ensure uniformity for such facilities. [Citation.] The Retail Food Code itself dictates those uniform standards, but does not specify by whom they are to be carried out; as far as state law is concerned, a retail food store may employ whomever it likes, so long as those it employs comply with the state's standards for distributing food in a safe and healthful manner. For its part, the Ordinance ... regulates only who may be hired to engage in certain work, and though it may have been intended in part to reduce violations of state law by those workers, it does not itself add to or subtract from the state's uniform standards of conduct for whoever engages in that work." (*California Grocers*, *supra*, 52 Cal.4th at pp. 191-192.) "The Retail Food Code establishes standards for what certain employees, particularly one certified owner or supervising food service employee, must know or be taught, but does not regulate who must be hired; the Ordinance regulates the pool of nonsupervising, nonmanagerial employees from which a new owner temporarily must hire, but imposes no standards concerning what the hired employees must know or be taught about food safety." (*Id.* at p. 192.)

Both parties find support in the *California Grocers* opinion. Plaintiff relies upon the statements that the Retail Food Code exclusively governs food transportation, storage, and preparation. City relies upon the statements that no preemption existed because the Los Angeles ordinance imposed no standards concerning health and sanitation. City thus argues that the "Ordinance simply regulates the bags a cashier can provide at check-out, and does not set any health and sanitation standard for retail food facilities." (Demurrer, at p. 10.)

Purpose of the City's Ordinance

City goes to some length to discuss and argue the importance of the Ordinance in addressing environmental concerns of significant local concern. As discussed above in the context of the request for judicial notice, the Ordinance itself sets forth those concerns as being a basis for its enactment. The stated purpose of the Ordinance is not challenged by plaintiff. However, as

California Grocers makes clear, the legal analysis to determine whether or not state law expressly preempts local law depends upon the scope of the state's exclusivity. "To rest preemption analysis solely on considerations of purpose would generate the anomalous circumstance, rejected by the United States Supreme Court, that one jurisdiction's measure might survive preemption, while another identical measure passed in a different jurisdiction might fall, 'merely because its authors had different aspirations.'" (*California Grocers*, *supra*, 52 Cal.4th at p. 190, fn. 4, quoting *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.* (2010) 559 U.S. ___, ___ [130 S. Ct. 1431, 1441, 176 L. Ed. 2d 311].)

Preemption Analysis

Where, as here, the issue is express field preemption, the court must answer three questions: "What field of exclusivity does the state preemption clause define, what subject matter does the local ordinance regulate, and do the two overlap?" (*California Grocers*, *supra*, 52 Cal.4th at p. 188.)

The field of state preemption defined by the Retail Food Code is "health and sanitation standards for retail food facilities." (Health & Saf. Code, § 113705.) "[T]he standards set forth in this part … shall be exclusive of all local health and sanitation standards relating to retail food facilities." (*Ibid.*)

The subject matter of the Ordinance is the prohibition of dispensing to consumers at the point of sale a single-use bag, as defined therein. (Carpinteria Mun. Code, § 8.51.040.)

The final question then is whether the state's health and sanitation standards for retail food facilities overlap the City's prohibition of dispensing plastic bags. Plaintiff argues that there is overlap between the Ordinance's prohibitions and the Retail Food Code because the state alone may regulate "food transportation, storage, and preparation," "how food should be handled or transported," and "food display and service." These statements, repeated from *California Grocers*, are accurate generalizations, but are not sufficient by themselves to determine overlap. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152-1157 [extent of the field of express preemption determined by scope and interpretation of preempting statutes].) Instead, the question of overlap can be most simply addressed by determining in the first instance whether both the Retail Food Code and the Ordinance contain standards that regulate point of sale bags.

Point of sale bags fall within two definitions set forth in the Retail Food Code. The Retail Food Code defines a "utensil" as "a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food." (Health & Saf. Code, § 113934.) A bag is a container. (Webster's 3d New Internat. Dict. (1986) p. 162 [definition of "bag"].) A point of sale bag, as discussed herein, is used in the sale of food. Thus, at least to the extent there is "food-contact," a point of sale bag is a "utensil." For example, if a customer bought an apple and the seller put the apple in a plastic bag at the point of sale for transportation of the apple home, that bag would be a "utensil" under the Retail Food Code. At the same time, the bag, if made of single-use plastic, would be a "single-use bag" as defined and prohibited by the Ordinance.

A wrinkle in this example of buying an apple is the timing and purpose of the use of the bag. The Ordinance excludes "product bags" from the definition of "single-use bag." (Carpinteria Mun. Code, § 8.51.030, subd. (K).) A "Product Bag" is "any bag provided to a customer within a commercial establishment for the purposes of transporting items to the point of sale." (*Id.*, subd. (H).) If the apple in the above example is first put into a bag and that bag is given to the customer to take to the cashier (i.e., the point of sale), that bag would be a "product bag" and not prohibited by the Ordinance even if the bag were made of plastic. However, if at the point of sale the product bag were placed inside another single-use bag, the outer bag would be subject to the prohibitions of the Ordinance, but the inner bag would not.

The second definition applicable to point of sale bags is "single-use articles." The Retail Food Code defines "single-use articles" as "utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use, after which they are intended for discard." (Health & Saf. Code, § 113914.) The bag used to carry the apple in the first example would qualify as a "utensil" and therefore that single-use bag would fall within the definition of "single-use articles."

The definition of "single-use articles" encompasses more items than "utensils" and specifically includes "bags." (Health & Saf. Code, § 113914.) "Utensil," as defined in Health and Safety Code section 113934, is by its terms limited to items in contact with food. However, "single-use articles" include items such as "placemats" which by their nature do not necessitate direct or immediate contact with food. Moreover, placemats, like plastic bags dispensed by restaurants, mitigate the impact of post-sale food spillage. (See Complaint, ¶¶ 21-24.) Consequently, the definition of "single-use articles" is sufficiently broad to include single-use bags dispensed by food providers at the point of sale.

The Retail Food Code provides standards for materials that are used to make single-use articles, namely, that the materials must be safe, clean and do not affect the food. (Health & Saf. Code, § 114130.2.) Thus, for example, it would be a violation of the Retail Food Code if the type of plastic used in a bag gave off a noxious odor permeating the food contained in the bag.

The Ordinance also provides standards for materials that used to make "single-use bags." Where the Retail Food Code states its standards both affirmatively (safe and clean) and negatively (may not impart colors, odors or tastes to food), the Ordinance provides standards only negatively: No "single-use bags" may be dispensed by small establishments except for gift bags and paper bags. "'Paper bag' means any paper bag that has a post-consumer recycled content of at least 40 percent and is 100 percent recyclable." (Carpinteria Mun. Code, § 8.51.030, subd. (I).) The effect of the Ordinance is to regulate the materials used to make "single-use bags" by permitting some materials and by prohibiting other materials.

Returning to the central question of whether there is overlap between the Retail Food Code and the Ordinance, the above discussion demonstrates that in some respects the Ordinance provides standards for materials used in statutorily defined "single-use articles" that are different from the standards provided in the Retail Food Code. Under the Ordinance, single-use plastic bags are

never allowed; paper bags are allowed only if they contain sufficient post-consumer recycled content. The Retail Food Code allows single-use plastic bags and paper bags, but only if the materials used in those bags meet the qualitative requirements set forth in the statute. Consequently, the Retail Food Code and the Ordinance contain overlapping standards for acceptable materials used in making "single use articles."

In order to state a cause of action for declaratory relief, plaintiff must allege a justiciable controversy. The court concludes that plaintiff has alleged a substantial controversy as to whether the Ordinance is in some part preempted by the Retail Food Code. Plaintiff has therefore adequately alleged a cause of action for declaratory relief and the City's demurrer will be overruled.

The Extent of This Disposition

The court must emphasize that City's demurrer raises the issue only of whether or not plaintiff has alleged a judicially recognizable cause of action. The court's determination that plaintiff has sufficiently alleged a cause of action does not determine whether plaintiff is ultimately entitled to a favorable declaration. The court notes, for example, that neither party has argued or provided legislative history that may shed further light on the intended scope of preemption set forth in the Retail Food Code.

The court recognizes that the parties argue important public policy questions regarding health, safety and the environment in support of their respective positions. Public policy choices, such as whether or not a plastic bag ban is a good idea, are inherently legislative decisions made in the political process and are not judicial decisions to be made in court. "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, internal quotation marks and citation omitted.) As a consequence, "[c]ourts do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature." (*Estate of Horman* (1971) 5 Cal.3d 62, 77.) The court's role here is strictly limited to applying the law to this controversy.