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FRESNO COUNTY SUPERIOR COURT

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

COUNTY OF SANTA CRUZ, ET AL.,)	Case No. 19CECG01224
)	
Plaintiffs,)	ORDER
)	
V.)	
)	
BUREAU OF CANNABIS CONTROL, ET)	
AL.)	
)	
Defendants.)	
)	
)	

Plaintiffs are numerous localities throughout California that have regulated or prohibited cannabis businesses, including cannabis deliveries, within their boundaries. Plaintiffs request declaratory and injunctive relief concerning the validity of Title 16, section 5416, subdivision (d), of the California Code of Regulations (hereinafter "Regulation 5416(d)"), which provides that "[a] delivery employee may deliver [cannabis] to any jurisdiction within the State of California." Defendant Bureau of Cannabis Control ("BCC") is the agency responsible for promulgating Regulation 5416(d).

Plaintiffs seek judicial declarations that: (1) Regulation 5416(d) is invalid and may not be enforced; (2) the BCC has exceeded

1 its authority and has no authority to preempt local control over
2 commercial cannabis activities within each jurisdiction, including
3 as to deliveries to addresses within the local jurisdiction's
4 boundaries; and (3) the regulation does not effectuate the purpose
5 of and in fact violates Proposition 64 and MAUCRSA.

6 Concerned that these issues may not be ripe for adjudication,
7 the court requested additional briefing on the issue, which has
8 been provided.

9
10 The challenger of the validity of a regulation may bring a
11 declaratory relief action against the state agency that adopted the
12 regulation in accordance with the Code of Civil Procedure section
13 1060. (Gov't. Code, § 11350, subd. (a).) However, under the Code of
14 Civil Procedure section 1060, a party seeking a declaration of
15 rights and duties with respect to another may only do so in cases
16 where there is an "actual controversy relating to the legal rights
17 and duties of the respective parties." (Code Civ. Proc., § 1060.)
18 Courts therefore should decline to exercise their power where a
19 "declaration or determination is not necessary or proper at the
20 time under all the circumstances." (Code Civ. Proc., § 1061.)
21 Declaratory judgments and injunctive remedies are discretionary,
22 and "courts traditionally have been reluctant to apply them to
23 administrative determinations unless these arise in the context of
24 a controversy 'ripe' for judicial resolution." (*Pacific Legal*
25 *Foundation v. Cal. Coastal Comm.* (1982) 33 Cal.3d 158, 171.)
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1 "[A] basic prerequisite to judicial review of administrative
2 acts is the existence of a ripe controversy." (*Pacific Legal*
3 *Foundation v. Cal. Coastal Comm., supra*, 33 Cal.3d 158 at p. 169.)
4 The ripeness doctrine prevents the courts from issuing purely
5 advisory opinions or engaging in premature adjudication of abstract
6 disagreements. (*Ibid.*) "The controversy must be definite and
7 concrete, touching the legal relations of parties having adverse
8 legal interests. [Citation.] It must be a real and substantial
9 controversy admitting of specific relief through a decree of a
10 conclusive character, as distinguished from an opinion advising what
11 the law would be upon a hypothetical set of facts. [Citation]."
12 (*Id.* at pp. 170-71.) "A controversy is 'ripe' when it has reached,
13 but has not passed, the point that the facts have sufficiently
14 congealed to permit an intelligent and useful decision to be made."
15 (*Cal. Water & Telephone Co. v. County of L.A.* (1967) 253 Cal.App.2d
16 16, 22.) "[T]he ripeness doctrine is primarily bottomed on the
17 recognition that judicial decision-making is best conducted in the
18 context of an actual set of facts so that the issues will be framed
19 with sufficient definiteness to enable the court to make a decree
20 finally disposing of the controversy." (*Pacific Legal Foundation v.*
21 *Cal. Coastal Comm., supra*, 33 Cal.3d 158 at p. 170.)

22 Plaintiffs' challenge to Regulation 5416(d) is not ripe under
23 the two-pronged test set forth by the California Supreme Court in
24 *Pacific Legal*, which calls on a court to evaluate (1) the fitness
25 of the issues for judicial decision, and (2) the hardship to the
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1 parties of withholding court consideration. (*Pacific Legal*
2 *Foundation v. Cal. Coastal Comm., supra*, 33 Cal.3d 158 at p. 171;
3 see also *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167
4 Cal.App.4th 531, 540 [courts will not intervene merely to settle a
5 difference of opinion; there must be an imminent and significant
6 hardship inherent in further delay].)

7 Under California preemption doctrine, a "conflict" exists,
8 sufficient to establish preemption, if the local ordinance (1)
9 duplicates the state statute; (2) contradicts the statute; or (3)
10 enters an area fully occupied by general law. (*Kirby v. County of*
11 *Fresno* (2015) 242 Cal.App.4th 940, 954.)

13 Plaintiffs contend that Regulation 5416(d) directly
14 contradicts State law and plaintiffs' local ordinances. Plaintiffs
15 argue repeatedly throughout their briefs that their local ordinances
16 are preempted by and in direct conflict with Regulation 5416(d). "...
17 Regulation 5416(d) directly interferes with the Plaintiffs' local
18 control over cannabis delivery within their boundaries. ... These
19 local ordinances directly prohibit what Regulation 5416(d) demands,
20 such that simultaneous compliance is impossible, sufficient to
21 allege preemption." (Plaintiffs' Reply Brief re Standing and
22 Ripeness at 15:2-7, citation omitted.) In arguing that the
23 controversy is not hypothetical or speculative, plaintiffs argue
24 that Regulation 5416(d) denies local jurisdictions the authority to
25 regulate or ban deliveries within their jurisdiction. "Depriving
26 localities of their statutorily preserved local control through
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1 5416(d) per se damages California localities ... The Regulation
2 removes local regulatory power." (Plaintiffs' Reply Trial Brief at
3 24:11-18.) "... Regulation 5416(d) ... purports to preempt and strip
4 localities of their statutorily protected regulatory authority
5 **Regulation 5416(d)'s preemption presents the controversy, the**
6 **specificity, and the harm."** (*Ibid.* at 26:22-24, emphasis added; see
7 also Plaintiffs' Reply Brief re Standing and Ripeness at 6:6-12,
8 10:7-8, 11:23-24, 16:22-23, 17:21-24, 18:19; Plaintiffs' Reply
9 Trial Brief at 6:15-17, 9:19-21, 10:10-11, 23:19, 23:27-24:1, 26:24,
10 27:4.)
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12 "A local ordinance contradicts state law when it is inimical
13 to or cannot be reconciled with state law." (*O'Connell v. City of*
14 *Stockton* (2007) 41 Cal.4th 1061, 1068.)

15 [A] local ordinance is not impliedly preempted by conflict
16 with state law unless it "mandate[s] what state law
17 expressly forbids, [or] forbid[s] what state law
18 expressly mandates." (*Great Western Shows, Inc. v. County*
19 *of Los Angeles* [(2002) 27 Cal.4th 853,] 866, 118
20 Cal.Rptr.2d 746, 44 P.3d 120.) That is because, when a
21 local ordinance "does not prohibit what the statute
22 commands or command what it prohibits," the ordinance is
23 not "inimical to" the statute. (*Sherwin-Williams Co. v.*
24 *City of Los Angeles* (1993) 4 Cal.4th 893, 902, 16
25 Cal.Rptr.2d 215, 844 P.2d 534.)

26 (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th
27 1139, 1161.)

28 In its supplemental brief on ripeness, the BCC argues that
Regulation 5416(d) does not directly contradict or preempt
plaintiffs' local ordinances because the regulation does not command

1 local jurisdictions to do anything, and does not prohibit them from
2 doing anything. The court agrees.

3 In *Communities for a Better Environment v. California Resources*
4 *Agency* (2002) 103 Cal.App.4th 98, the question of whether California
5 Environmental Quality Act (CEQA) Guidelines adopted by the
6 California Resources Agency violated CEQA statutes. The
7 environmental groups' challenge of the Guidelines was ripe for
8 adjudication because public agencies were required to follow the
9 Guidelines when implementing CEQA. (*Id.* at p. 106.)

11 Here, the issue is not ripe for decision because Regulation
12 5416(d) does not command local jurisdictions to do anything or
13 preclude them from doing anything. Plaintiffs are not subject to
14 the regulation. Specifically, it does not command local
15 jurisdictions, including plaintiffs, to permit delivery. Nor does
16 it override their local ordinances prohibiting or regulating
17 delivery. As the BCC points out, the delivery regulation applies to
18 state licensees, not local jurisdictions like plaintiffs. Any
19 application of the delivery regulation would be an exercise of
20 discretion by the BCC *relative to a state licensee*. Regulation
21 5416(d) does not impact the rights of any of the plaintiffs to
22 regulate cannabis or cannabis delivery. The regulation merely sets
23 forth, for the BCC's purposes, what the BCC permits as far as
24 delivery: "A delivery employee may deliver to any jurisdiction
25 within the State of California" Because the regulation has no
26 application to plaintiffs, the court agrees with the BCC that
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1 Regulation 5416(d) and plaintiffs' ordinances do not occupy the
2 same field and are not in conflict.

3 Local jurisdictions can impose regulatory and health and safety
4 standards that are stricter than state laws. The standards
5 established by the BCC are the minimum standards for licensees
6 statewide, and "local jurisdiction[s] may establish additional
7 standards, requirements, and regulations." (Bus. & Prof. Code, §
8 26201.) The BCC is not required to enforce plaintiffs' local
9 ordinances. (See Bus. & Prof. Code, § 26200, subd. (b).) As the BCC
10 points out, contradiction with the regulation cannot be established
11 merely because plaintiffs' local ordinances impose constraints that
12 the state law does not. "[T]he absence of statutory restraint is
13 the very occasion for municipal initiative." (*Fisher v. City of*
14 *Berkeley* (1984) 37 Cal.3d 644, 707.)
15

16 Accordingly, as the BCC contends, because Regulation 5416(d)
17 applies to licensees and not local jurisdictions, it does not
18 preempt or conflict with any ordinance of plaintiffs, whether the
19 ordinance bans all commercial deliveries, bans cannabis deliveries
20 by non-local businesses, requires local licenses for delivery, or
21 regulates local delivery in some other way.
22

23 Plaintiffs point out that the BCC took a position inconsistent
24 with that taken in the matter of *East of Eden v. County of Santa*
25 *Cruz* ("*East of Eden*"). In *East of Eden*, a cannabis retailer licensed
26 by the BCC alleged that Regulation 5416(d) preempted Santa Cruz
27 County's local authority to regulate deliveries within its
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1 jurisdictional boundaries. (RJN Exh. 36.) The BCC intervened in
2 *East of Eden*, and argued that the County of Santa Cruz ordinance
3 prohibiting cannabis delivery is inconsistent with Regulation
4 5416(d), which authorizes delivery throughout the State. The BCC
5 sought to enjoin the County of Santa Cruz from enforcing a local
6 law that violated Regulation 5416(d). (See RJN Exh. 40, BCC
7 Complaint-in-Intervention, ¶¶ 2, 22-24.) That is the opposite
8 position that the BCC takes in this action.
9

10 The BCC vehemently objects to the court taking judicial notice
11 of the *East of Eden* action and the position that BCC took therein.
12 The court grants the judicial notice of the existence of the action
13 and its filings, and considers the BCC's inconsistent position
14 solely for purposes of determining whether the BCC should be
15 estopped from taking a contrary position in this action.
16

17 Plaintiffs argue that "the BCC may not now legitimately claim
18 that Regulation 5416(d) does not preempt the Plaintiffs'
19 ordinances." (Plaintiffs' Reply Brief re Standing and Ripeness at
20 8:7-8.) But plaintiffs fail to explain why this is so or offer any
21 relevant authority. The only basis for preventing the BCC from
22 changing its position in this manner would appear to be the doctrine
23 of judicial estoppel, which comes into play
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25 when "(1) the same party has taken two positions; (2)
26 the positions were taken in judicial or quasi-judicial
27 administrative proceedings; (3) the party was
28 successful in asserting the first position; (4) the two
positions are completely inconsistent; and (5) the
first position was not taken as a result of ignorance,
fraud, or mistake."

1 (County of Imperial v. Superior Court (2007) 152 Cal.App.4th 13,
2 34.)

3 All conditions for judicial estoppel are satisfied in this
4 case except the third - the BCC was not successful in asserting the
5 first position in the *East of Eden* case, which was voluntarily
6 dismissed by the parties, including the BCC, without a resolution
7 in favor of BCC on the merits of the its preemption argument. (RJN
8 Exhs. 42, 44.) Accordingly, judicial estoppel does not bar the BCC
9 from taking an inconsistent position in this action, and the BCC's
10 prior inconsistent position is not relevant for purposes of this
11 action.
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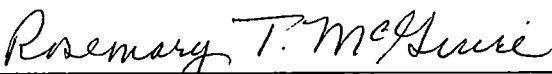
13 With judicial estoppel principles in mind, the court wishes to
14 make clear that it is persuaded by, agrees with and adopts the BCC's
15 argument that Regulation 5416(d) is not inconsistent with and does
16 not preempt plaintiffs' local ordinances regarding adult-use
17 cannabis delivery, nor does it preclude plaintiffs from enforcing
18 such ordinances. On the basis of that conclusion, the court finds
19 that this matter is not ripe for adjudication, and dismisses the
20 action as to all plaintiffs.
21

22 The court notes that plaintiffs emphasize that Government Code
23 section 11350 authorizes the form of action brought by plaintiffs,
24 when a regulation is inconsistent with the governing statute.
25 However, this contention depends on plaintiffs' incorrect
26 assumption that Regulation 5416(d) commands that plaintiffs allow
27 cannabis delivery contrary to their local ordinances. As noted
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1 above, the regulation does not have such an effect. The regulation
2 states what the BCC, for its purposes, permits. It commands or
3 prohibits nothing of the cities, and therefore is not necessarily
4 in conflict with Business & Professions Code sections 26200,
5 subdivision (a)(1) or 26090, subdivision (e), pursuant to which
6 plaintiffs contend they retain authority to regulate and/or ban
7 cannabis delivery within their jurisdictions.
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9 Finally, the court notes that all requests for judicial notice
10 are all granted, though for the most part those records have little
11 to no bearing on the grounds for dismissal of the action.

12 DATED this 17th day of November, 2020.
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16 Rosemary T. McGuire
17 Judge of the Superior Court
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