



April 12, 2021

Tomás J. Aragón, M.D., Dr.P.H.
Director and State Public Health Officer
California Department of Public Health

Sent Via Email: regulations@cdph.ca.gov

RE: Syringe Exchange Program Regulatory Consistency

Dear Mr. Aragón:

The League of California Cities (Cal Cities)¹ and the Rural County Representatives of California (RCRC)² oppose the proposed deletion of the requirement that syringe exchange program (SEP) applicants provide a signed statement to the California Department of Public Health (Department) attesting to compliance with “local ordinances” in California Code of Regulations, Title 17, Section 7002(a)(13)(A), and encourages the Department to correct several misstatements in the Initial Statement of Reasons (ISOR).

Cities and counties’ ability to regulate land uses for the benefit of the health, safety and welfare of their communities is a power long recognized by the federal courts and enshrined in the California Constitution. Therefore, Cal Cities and RCRC have a substantial interest in this rulemaking as their members will be directly impacted by its outcome.

The actual legal effect of deleting this requirement is unclear; however, the ISOR explains the proposed change is intended to express the Department’s position that local land use ordinances regulating or prohibiting SEPs are preempted and unenforceable against SEPs licensed pursuant to Health and Safety Code section 121349(c). To the extent the change to Section 7002(a)(13)(A) intends such preemption or indicates the Department’s intent to issue licenses to SEPs that would operate in violation of local ordinances, the change is both beyond the Department’s legal authority and represents bad public policy.

¹ Cal Cities is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.

² RCRC is an association of thirty-seven rural California counties that champions policies on behalf of those counties and seeks to promote a greater understanding about the unique challenges that face California's small population counties.

To the Extent the Regulation Interprets Health and Safety Code Section 121349(c) as Preempting Local Land Use Ordinances, it is Inconsistent with State Law

Administrative regulations must be both clear and consistent with existing statutes, court decisions, or other provisions of law. (Gov. Code § 11349 *et seq.*) Unfortunately, the proposed change to Section 7002(a)(13)(A) meets neither of these criteria.

On page 3, under the heading “Unintended Conflict Between Law and Regulation” the Department states that Health and Safety Code Section 121349(c) “specifically provides preemption language to make clear state authorization under HSC 121349 overrides any other laws.”³ This is simply not the case. Health and Safety Code Section 121349(c) provides no such “preemption language,” and lacks any statement of intent that would indicate the phrase “notwithstanding any other law” constitutes “preemption language.”

“The statutory phrase ‘notwithstanding any other provision of law’ has been called a ‘term of art’ [citation] that declares the legislative intent to override all *contrary* law.’ [Citation.]” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 983 [emphasis in original].) “Accordingly, the prefatory phrase ‘notwithstanding any other provision of law’ has a broad sweep. But it renders inapplicable ‘only those provisions of law that conflict with the act’s provisions’ and not ‘every provision of law.’” (*People v. Taylor* (2021) 60 Cal.App.5th 115 [quoting *Arias v. Superior Court*, supra 46 Cal.4th 969].)⁴

The requirement that a business obtain a license to operate and the requirement that a business comply with local land use regulations are not in conflict. Rather the two requirements operate side-by-side.

For nearly one hundred years, the United States Supreme Court has “broadly sustained the power of local municipalities to use . . . land-use regulation to meet the encroachments of urbanization upon the quality of life of their citizens.” (*Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 73 (citing *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 386-387 [*Euclid*]).) From the start, the Court recognized “the very practical consideration underlying the necessity for such power”:

³ Notably, this assertion is diametrically opposed to the position the Department took in its 2013 rulemaking for the existing regulations. (Syringe Exchange Program Certification Initial Statement of Reasons (September 6, 2012), p. 8 at https://web.archive.org/web/20150921145317/http://www.cdph.ca.gov/services/DPOPP/regs/Documents/2_11-021SEP_ISORI.pdf [“Subsection (a)(13), Subparagraph (A) is necessary to elicit a commitment from the applicant to comply with SEP-related law and regulations at the state level, as well as SEP-related ordinances at the local level, such as those pertaining to zoning or sharps waste disposal, which may differ in different jurisdictions.”].)

⁴ The Department’s overbroad interpretation of the phrase “notwithstanding any other law” in Section 121349(c) would lead to absurd results. Under the Department’s interpretation, state-licensed SEPs would presumably be exempt from compliance with any law, including labor laws, environmental laws, anti-discrimination laws, etc. As Section 121349(c) does not provide, “notwithstanding any other *local* law,” applying the Department’s reasoning to the actual text of the statute would result in Section 7002(a)(13)(A)’s requirement that SEP applicants demonstrate compliance with state law also creating an “unintended conflict between law and regulation.”

“[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.” (*Euclid* at 386-387.)

Thus, cities and counties—acting through their democratically elected city councils or county boards of supervisors—have broad authority to enact land use ordinances to protect the public health, safety and welfare. (*Berman v. Parker*, 348 U.S. 26, 32-33 (1954).) And “[t]he concept of the public welfare is broad and inclusive.” *Id.* at 33. To that end, the Supreme Court has long recognized that “[t]he police power is one of the least limitable of governmental powers.” *Queenside Hills Realty Co., Inc. v. Saxl*, 328 U.S. 80, 83 (1946).

In California, local police powers are not only recognized by the common law, they are enshrined in the California Constitution. (Cal. Const. art. XI, § 7 [“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”].) And the California Supreme Court has acknowledged that local land use ordinances are an essential aspect of local police powers, serving “to impose reasonable regulations upon private property rights to serve the larger public good.” (*Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 146; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 [“The power of cities and counties to zone land use in accordance with local conditions is well entrenched.”].)

“[A] city’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.” (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.) In fact, while “[t]he Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 *et seq.*),” it has also “carefully expressed its intent to retain the maximum degree of local control (see, e.g., *id.*, §§ 65800, 65802).” (*IT Corp. v. Solano County Bd. of Supervisors*, *supra*, 1 Cal.4th 81, 89.) “The thrust of the statutory scheme embodied in the state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of [the] process.” (*Bownds v. City of Glendale* (1980) 113 Cal. App. 3d 875, 880.)

The extensive role and protections of local control reflect both the public and the legislature’s recognition that local governments are best positioned to determine whether, when, where, and how certain land uses can be introduced into their communities. Local flexibility allows cities and counties to develop regulatory regimes for particular land uses at the right time, and with the right components, to meet the unique needs of their residents. Further, the assurance of local control promotes community trust and acceptance of certain uses, particularly uses—like SEPs—that may have consequential impacts on the public generally.⁵

⁵ In the particular case of SEPs, the need for local control is paramount. Cities and counties statewide have confronted the widespread proliferation of intravenous drug use. Such drug use has resulted in increased risk to public safety and welfare through murders, assaults, burglaries, robberies, illegal narcotics sales, driving under the influence, teen substance abuse, and other crimes and public nuisances. In particular, nearby schools, businesses, churches, and residential areas suffer due to intravenous drug use. While the legislature has determined that under

Of course, a city cannot act where the California State Legislature has enacted laws that completely occupy the field. (Cal. Const. Art. XI, § 7.) However, there is a strong presumption against preemption of local land use regulations. (*Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374.) “[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.” (*People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.) “[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute.” (*Id.* at p. 1149.) Indeed, the California Supreme Court has “been particularly ‘reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.’” (*Big Creek Lumber Co. v. County of Santa Cruz, supra*, 38 Cal.4th at p. 1149 [quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707].)

In accordance with these presumptions, a city’s broad constitutional police power to enact local land use ordinances is subject to state preemption only if the local law duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by implication. (Cal. Const. art. XI, § 7; *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067.) A local law contradicts general law if it is inimical to state law. (*Id.* at p. 1068.) “[L]ocal legislation enters an area that is ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to ‘fully occupy’ the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: ‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the’ locality [citations].” (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.)

Contrary to the assertions in the ISOR, no such preemption occurred with the passage of AB 604 (2011). AB 604 merely established two, co-equal ways to become licensed to operate an SEP: (1) through the CDPH, or (2) through a county or city. Although Section 121349(c) authorizes the Department to issue licenses to SEPs under certain circumstances, it does not exempt state-licensed SEPs from compliance with local land use ordinances.

The distinction between the authority to license business activity and the authority to regulate land uses is well established in California law. For example, the State Department of Alcoholic Beverage Control has the exclusive power to license businesses wishing to sell alcohol in California (Bus. & Prof. Code § 23950 *et seq.*), yet a state-licensed bar cannot operate in a

certain circumstances SEPs may have the effect of reducing some of these negative consequences, cities, counties, and their residents have a strong interest in ensuring that placement of SEPs within their community is appropriate and that SEPs provide services in a way that reduces the negative consequences of intravenous drug use.

residential neighborhood in violation of local land use ordinances. There is no indication in Health and Safety Code 121349 that a contrary result could occur with state-licensed SEPs.

In short, to the extent that proposed Section 7002(a)(13)(A) “interprets” Health and Safety Code section 121349(c) as preempting local regulation of state-licensed SEPs, that interpretation is unreasonable and inconsistent with state law.

The Proposed Change to Section 7002(a)(13)(A) is Not Actually as Clear as the ISOR Might Suggest, And Thus Harms Both the Public and the Regulated Community

Aside from its legal defects, the proposed deletion of “local ordinances” in Section 7002(a)(13)(A) also represents bad public policy, which will ultimately harm SEPs, the general public, and local governments. The only real effect of the change will be to induce false reliance by state-licensed SEPs, which will be led to believe they may operate in violation of local ordinances. Even the most wishful legal analysis must recognize the plausible prospect that the Department’s interpretation of Health and Safety Code section 121349(c) will not survive challenge, and that courts will continue to uphold local land use ordinances regulating SEPs. In the meantime, however, SEPs will have made investments in reliance upon this supposed exemption from local regulation – money and effort that SEPs can ill-afford to waste. They will also be exposing themselves to substantial penalties, legal actions, and other business and personal consequences the moment they begin to operate in violation of local ordinances. Meanwhile, local governments may have expended valuable public resources enforcing lawfully enacted local ordinances.

In light of these consequences, Cal Cities and RCRC believe that the Department should give serious thought to the limited value in deleting the requirement that SEP applicants provide a signed statement to the Department attesting to compliance with “local ordinances” in Section 7002(a)(13)(A).



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