PRESENTED AT

21st Annual Land Use Conference

April 6-7, 2017
Austin, Texas

NEW LAND USE DECISIONS

James L. Dougherty, Jr.

Author Contact Information:
James L. Dougherty, Jr.
Attorney at Law
Houston, TX

jim@jldjr.com
713-880-8808

NEW LAND USE DECISIONS

James L. Dougherty, Jr.
Attorney at Law
Houston, Texas

Presented to
Land Use Conference
University of Texas CLE
April 2017

TABLE OF CONTENTS

I. CONFLICT & PREEMPTION (state and federal law)

Background. Both state and federal law can effectively invalidate local land use regulations in case of conflict (or prohibition), or by so occupying the field that the superior law "preempts" local regulation. For example, the Texas Supreme Court ruled that the Texas Clean Air Act ("TCAA") preempted a City of Houston ordinance in *Southern Crushed Concrete, LLC v. City of Houston,* 398 S.W.3d 676 (Tex. 2013). The City's ordinance imposed location restrictions on concrete-crushing operations that were tighter than TCAA restrictions. The court ruled that the City ordinance could not

"nullify" actions authorized by state law, citing a TCAA provision proclaiming that a local ordinance "may not make unlawful a condition or act approved or authorized under [the TCAA] or the [C]ommission's rules or orders." It did not matter that the City's ordinance was intended to regulate land use rather than air quality. For an example of a federal statute that can preempt local regulations, see the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 U.S.C. § 332 (wireless telecommunications facilities).

Updates. After *Southern Crushed Concrete, supr*a, the Texas Supreme Court ruled that registration and enforcement provisions in a City of Houston air-quality ordinance were preempted by Texas Clean Air Act. *See BCCA Appeal Group, Inc. v. City of Houston*, No. 13-0768, 2016 Tex. LEXIS 352 (Tex. 2016). The San Antonio Court of Appeals ruled that the state's Solid Waste Disposal Act preempted a plastic bag ordinance adopted by the City of Laredo. *See Laredo Merchants Association v. City of Laredo, Texas,* 2016 Tex. App. LEXIS 8901, 04-15-00610-CV (Tex. App—San Antonio 2016, pet filed). Also, the Attorney General issued an opinion that the § 113.054 of the Texas Natural Resources Code preempts and supersedes local ordinances, orders, or rules regulating liquified petroleum gas (LPG), which is generally subject to regulation by the Texas Railroad Commission.

In December 2016, the Federal Communications Commission issued a notice entitled "COMMENT SOUGHT ON STREAMLINING DEPLOYMENT OF SMALL CELL INFRASTRUCTURE BY IMPROVING WIRELESS FACILITIES SITING POLICIES; MOBILITIE, LLC PETITION FOR DECLARATORY RULING (WT Docket No. 16-421)." The Commission was invited public comment on "potential Commission actions to help expedite the deployment next generation wireless infrastructure by providing guidance on how federal law applies to local government review of wireless facility siting applications and local requirements for gaining access to rights of way."

II. FIRST AMENDMENT (signs, content neutrality)

Background. Many local ordinances regulate the size and placement of signs and outdoor advertising, both noncommercial and commercial. Courts have upheld reasonable regulations, especially for commercial signs. However, in 2015, the United States Supreme Court emphatically confirmed that a "content-based" sign restriction--no matter how reasonable it might be otherwise--will be subjected to "strict scrutiny" under the First Amendment. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (U. S. 2015). Under strict scrutiny analysis, a content-based regulation is subject to invalidation unless the government proves that the restriction: (i) furthers "a compelling governmental interest" and (ii) "is narrowly tailored to achieve that interest." In *Reed,* the Court invalidated an Arizona town's ordinance that regulated three types of signs differently, based on their content. According to the Court, the Town failed to prove that the differential restrictions furthered a compelling governmental interest and were narrowly-tailored, so they were invalidated. The Court commented that the decision "will not prevent governments from enacting effective sign laws," and not every restriction is subject to strict scrutiny, just content-based restrictions.

Update. In 2016, a Texas Court of Appeals relied on the *Reed* decision and invalidated state regulations of signs along state highways. *See Auspro Enterprises, LP v. Texas Department of Transportation,* 506 S.W.3d 688 (Tex.App.—Austin 2016)(op. following rehearing). In that case, a small business on State Highway 71 had displayed a political sign (supporting Ron Paul) longer than the time allowed by rules of the Texas Department of Transportation (TxDOT). TxDOT rules allowed political signs to the erected not earlier than 90 days before an election, and they had to be removed within 10 days after the election. TxDOT had adopted the rules under the Texas Highway Beautification Act, Chapter 391, TEX. TRANSP. CODE. As summarized by the court:

> The Act's provisions regulating outdoor advertising essentially mirror the federal act, banning all signs located (1) within 660 feet of a right-of-way if the advertising is visible from the interstate, and (2) beyond 660 feet of a right-of-way if the advertising is visible from the highway and erected for the purpose of having its message seen from the highway. The Act then *sets forth a number of exemptions to the ban*, including exemptions for signs located in commercial and industrial areas; signs advertising as for sale or for lease the property on which the sign is located; signs advertising natural wonders or historic attractions; signs advertising activities that will take place on the property where the sign is located; signs that have as their purpose the protection of life and property; and, specifically implicated here, signs on private property that "relat[e] solely to a public election." (emphasis added)

TEXAS TRANSP. CODE § 391.032 authorized TxDOT to adopt rules to regulate outdoor advertising in certain "commercial and industrial areas" which were exempted from the general ban in the Act. *See* adopted rules in Title 43, Texas Administrative Code, summarized by the court as follows:

> Those rules, stated generally, require that all signs located within the same imaginary corridor as that in the Act have a Department-issued permit or be subject to a fine and removal, *unless the sign qualifies under one of several exemptions*. The rules' exemptions include those set forth in the Act—e.g., election signs and signs with the purpose of protecting life or property—as well as those for public-service signs, signs of nonprofits or other charitable organizations, neighborhood subdivision or homeowners-association signs, and signs showing the names of ranches. Here, because Auspro's property was located in a commercial-zoned area, its sign was required to have a permit or qualify for a permit exception, which it did not. (emphasis added)

The content-based exemptions—with differential regulations—triggered "strict scrutiny." According to the court:

> Like the Town of Gilbert's sign ordinance, the Texas Act and the related Department rules restrict speech in different ways based on the communicative content of the sign. For example, a sign advertising a presidential candidate's fundraising event at the site where the sign is displayed would be allowed at any time under the Texas Act, while a sign that merely expresses the view that one should vote for that same presidential candidate would be banned during all but the small window around an election. Likewise, and more to the point here, Auspro's election sign for Ron Paul is treated differently under the Department rules (promulgated under the Act) than are signs conveying other messages and ideas, including, for example, a sign by a nonprofit organization advertising an event by that organization. Under *Reed*'s framework, the Texas Act's outdoor-advertising regulations and associated Department rules are, on their face, content-based regulations of speech.

The content-based exemptions—with differential regulations--failed to survive strict scrutiny. Apparently, TxDOT acknowledged that it could not show that the differential regulations: (i) furthered a compelling interest and (ii) were narrowly tailored to do so. The primary problem was that the exemptions were "underinclusive."

After finding the regulations unconstitutional, the court struggled with how much of the Act to strike down (or how much was severable). The dilemma was that striking all the exemptions would leave a blanket ban in place, prohibiting signs the Legislature apparently did not intend to prohibit, *e.g.*, "for sale" and "for lease" signs, "on-premise" signs, warning signs. According to the court, that approach could not meet the second prong of the severability test, which was that the remaining law be "capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected." Therefore, the court held the core provisions of the Texas Highway Beautification Act unconstitutional: TEX. TRANSP. CODE §§ 391.031(b), 391.037,114, 391.061(c), and 391.070.115. According to the court:

> This would leave standing, with respect to the substantive provisions of the Act's ban on outdoor advertising, only section 391.031(a)'s prohibition against signs within the imaginary federal corridor and two [*28] exemptions: one for signs erected in industrial or commercial areas (subject to state permitting rules); and the other for signs erected before October 22, 1965.

Title search: New Land Use Decisions

Also available as part of the eCourse
2017 Land Use eConference

First appeared as part of the conference materials for the
21st Annual Land Use Conference session
"New Land Use Decisions"