LAND USE UPDATE

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I. CONFLICT & PREEMPTION (state-law preemption)

Background. State laws can invalidate or "preempt" local regulations. In 2013, 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.

The Texas Supreme Court has also ruled that other City of Houston air-quality regulations were preempted by Texas Clean Air Act. *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, TEX. HEALTH & SAFETY CODE Chapter 361, preempted a plastic bag ordinance adopted by the City of Laredo. *Laredo Merchants Association v. City of Laredo, Texas,* 2016 Tex. App. LEXIS 8901, 04-15-00610-CV (Tex. App.--San Antonio 2016, pet granted). Other cases have held that the Water Code preempts local regulations. *See, for example, Dos Republicas Coal Partnership v. Saucedo*, 477 S.W.3d 828 (Tex. App.--Corpus Christi-Edinburg 2015), which held that the Water Code did not allow a local floodplain administrator to consider water quality. A landmark state statute adopted in 2015, House Bill 40, 84th Leg., Reg. Sess., preempted municipal regulations of oil and gas operations--including "fracking"--but carved out some "aboveground activity" that municipalities may continue to regulate. *See* TEX. NAT. RES. CODE § 81.0523.

Updates. The 2017 Legislative sessions saw a flurry of bills to preempt local regulation on such diverse subjects as municipal boundaries (annexation), transportation networks (*e.g.,* Uber and Lyft), bathrooms, tax levies, vested rights, trees, manufactured housing, cellular telephone facilities and more.

Senate Bill 1004, 85th Leg., Reg. Sess. 2017, sharply curtailed municipal regulation of wireless "network nodes," poles, cables, etc. in public rights of way. It adopted Chapter 284 of the Texas Local Government Code. Chapter 284 sets detailed, prescriptive rules, and it imposes low limits on fees and compensation cities may charge. It overrides most ordinances and restrictions. In an early challenge to Chapter 284, the court denied an injunction, but the case is still pending. *See City of Austin v. Texas,* 2017 U.S. Dist. LEXIS 141140, 2017 WL 2703585 (W.D.Tex., June 22, 2017), where the City of Austin had argued that Chapter 284 is itself preempted by provisions of the federal Telecommunications Act: 47 U.S.C. § 253 and § 332. In a separate rulemaking proceeding, the Federal Communications Commission has announced its intent to "streamline the deployment of next-generation wireless facilities" and that it had begun "to identify instances in which regulatory review imposes needless burdens and slows infrastructure deployment." *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330 (2017), WT Docket No. 17-79. A report and order to clarify and modify procedures for historic and environmental review of wireless infrastructure deployments is on the Commission's calendar for March 22, 2018. *See also* the FCC's WT Docket No. 16-421, *Streamlining Deployment of Small Cell Infrastructure*.

Senate Bill 6, 85th Leg., 1st C.S. 2017, restricted municipal annexation and extensively amended TEX. LOC. GOV'T CODE Chapter 43. New restrictions fall most heavily upon "Tier 2 municipalities," defined as cities "wholly or partly located in" a county with a population of 500,000 or more or that propose to annex areas in such a county. In most cases, Tier 2 municipalities must comply with new requirements for voter approval of annexations, by petition or election. This statute reversed state policy, in effect for many years, to allow large, home-rule cities to annex unilaterally.

House Bill 7, 85th Leg., 1st C.S. 2017, codified as TEX. LOC. GOV'T CODE § 212.905, restricted municipal authority to regulate trees. Under the law, a person may not be required to pay a "tree mitigation fee" for removing a tree that: "(1) is located on a property that is an existing one-family or two-family dwelling that is the person's residence; and (2) is less than 10 inches in diameter at the point on the trunk 4.5 feet above the ground." The law allows mitigation fees for removing other trees, but the municipality must grant certain credits for tree planting, and a municipality may not prohibit, or impose a mitigation fee for, removal of a tree that is "diseased or dead" or that poses "an imminent or immediate threat to persons or property." The law does not apply to property "within five miles of a federal military base in active use as of December 1, 2017." In an opinion issued shortly before adoption of House Bill 7, the Texas Attorney General had opined--in general--that a municipal tree ordinance could result in a

taking requiring compensation under Article I, Section 17 of the Texas Constitution if it interferes too much with property rights. *See* OP.TX.ATT'GEN, KP-0155 (2017).

A request filed in October 2017 seeks an opinion from the Texas Attorney General about the "extent the Texas Commission on Environmental Quality may consider a recommendation from a local government to deny a permit for a facility because the facility is incompatible with the local governments zoning or land use ordinances." *See* Request No. RQ-0185-KP.

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 sign regulations, especially for commercial signs. However, in 2015, the United States Supreme Court emphatically confirmed that a "content-based" sign regulation--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). The Court invalidated an Arizona town's ordinance that regulated three types of signs differently, based on message content. In 2016, the Austin 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). Like the ordinance invalidated in *Reed*, the state sign regulations exempted some signs based on message content and treated them differently. These included signs in commercial and industrial areas, for-sale or for-lease signs, signs advertising natural wonders or historic attractions; signs advertising on-site activities, signs to protect life and property and election signs. Because of the differential treatment based on content of signs, the court held the core provisions of the Texas Highway Beautification Act unconstitutional, including TEX. TRANSP. CODE §§ 391.031(b), 391.037,114, 391.061(c) and 391.070.115.

Updates. Shortly after the *Auspro* decision, the Texas Legislature adopted Senate Bill 2006, 85th Leg., Reg. Sess. 2017. It overhauled the Texas Highway Beautification Act, making major amendments to TEX TRANSP. CODE Chapters 391 and 394. The amendments changed key terms, e.g., "commercial signs" rather than "outdoor advertising" and "signs" rather than "advertising." The new law defines "commercial sign" as a sign that is either "(A) intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or (B) located on property owned or leased for the primary purpose of displaying a sign." The new law provided exemptions from penalties for certain signs in industrial or commercial areas and removed content-based exemptions, *e.g.,* election signs, for-sale signs.

However, in the same Legislative session, Senate Bill 312, 85th Leg., Reg. Sess. 2017, a so-called "sunset bill" reauthorizing the Texas Department of Transportation ("TxDOT"), added a new section to Chapter 391 that only applied to a sign "existing on March 1, 2017, that was erected before that date." For those signs, the new section set a special 85-foot height limit, double the previous 42.5-foot limit. It allowed those signs to be rebuilt, without a permit, "at the same location where the sign existed on March 1, 2017, and at a height that does not exceed the height of the sign on that date." According to TxDOT, "This change to the height restriction required the department to take a look at the current maximum height requirement to determine how to address the discrepancy between signs erected in violation of the current rules, those that had complied with the maximum height and those that will be built in the future." *Texas Register*, Vol. 43, No. 10, pp. 1329-1530 (March 9, 2018).

The Department proposed a rule change, and thousands of comments poured in. After sifting through the comments, TxDOT explained: (i) SB 312's validation of higher signs "results in the older signs continuing to benefit from their violations," a "significant height advantage for the validated signs that will extend into the future." (ii) TxDOT did not believe that SB 312's validation of higher signs

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