MUNICIPAL REGULATION OF GOVERNMENTAL USES

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I.

Introduction

In day-to-day municipal land use practice, attorneys and planning staff often are required to address and evaluate whether a city's land use regulations apply to other governmental entities. While we generally assume municipal zoning powers do not apply to the United States, state or county governments, and there is limited authority relative to public schools, is that actually correct? Are there exceptions in the law that perhaps allow some limited municipal control? And even if municipal control is constitutionally or statutorily preempted, in practice do cities nevertheless have input in the land use decision? The purpose of this paper, and the accompanying presentation, is to provide an overview of the legal aspects of municipal regulation of governmental uses—which term is defined as "uses involving public functions conducted by a governmental entity"[1]—as well as address practical issues when cities must deal with land use issues involving other governmental entities. Last, we will address whether a city is exempted from either following or enforcing its own zoning and land use ordinances.

II.

Municipal Regulation of Federal Land Uses

When we think about dealing with agencies of the federal government, the term "noblesse oblige" comes to mind: "the obligation of anyone who is in a better position than others—due, for example, to high office or celebrity—to act respectably and responsibly."[2] That phrase, in a nutshell, expresses how the federal government usually treats municipal land use regulations—"we will do what you city officials request if we deign it to be in our best interests, and if we deem it is not too expensive to comply!"

While the foregoing may appear dismissive of municipal land use authority by the federal government, there are strong constitutional and statutory bases for federal preemption of municipal land use ordinances and regulations. First and foremost, the Supremacy Clause of Article VI of the United States Constitution provides, in part, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

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[1] *See* Ziegler, *Rathkopf's The Law of Zoning and Planning* § 76:1 at 76-3 (2019) (hereinafter referred to as "*Rathkopf's*").

[2] *See* Noblesse Oblige | Definition of Noblesse Oblige by Merriam-Webster (merriam-webster.com).

land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As a consequence, any land owned or leased by the United States or an agency of the federal government for purposes authorized by Congress is immune from and supersedes state and local laws in contravention thereof.[3] The only exception to that rule is where there is "clear and unambiguous" congressional authorization allowing for state and local legislation to apply which, not surprisingly, is very rare.[4]

The Texas zoning regulatory scheme similarly unambiguously recognizes federal preeminence over local land use regulations. Section 211.013(c) of the Texas Local Government Code specifically provides that municipal zoning power "does not apply to a building, other structure, or land under the control, administration, or jurisdiction of a . . . federal agency." While the authors are unaware of any federal land use-related statute that "clearly and unambiguously" defers to the land use authority of Texas municipalities, most play revolves around the question to what extent a federal statute or regulation allows a municipality to assert some municipal land use regulatory authority.

With the construction of post offices in local communities, for example, applicable federal guidelines provide that

> [a]s a federal entity, the Postal Service enjoys immunity from state and local regulation except where Congress has waived such immunity. However, despite this immunity, the Postal Service complies with local zoning, planning, and building codes to the extent practical and consistent with Postal Service operational needs in acquiring interests in real property.[5]

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[3] *Rathkopf's* § 76:23 at 76-88. As discussed in note 1 on that page, and not surprisingly, much of the tension between state and local authority versus federal authority has surfaced over the location of post offices.

[4] *Id*. at 76-89 n.2 (citing applicable federal and state case law for the proposition that congressional authorization must be clear and unambiguous). The United States Supreme Court has noted, however, that land use is a "quintessential state and local power" and that "[w]e ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (and cases cited therein).

[5] Handbook RE-1, *U.S. Postal Service Facilities Guide to Real Property Acquisitions and Related Services* (October 2015), subpart 331 at 7 (emphasis added), found at https://about.usps.com/handbooks/re1.pdf.

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