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Locke Lord QuickStudy: The Texas Regulatory Consistency Act: ?Overdue Relief From Excessive Regulation or an ?Affront to Local ?Control??

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Passing broad-based legislation that would preempt or make unlawful local government regulations has long been a goal of Texas Governor Greg Abbott's administration.[1] H.B. 2127, the Texas Regulatory Consistency Act, seeks to do just that. Signed into law by Governor Abbott on June 13, 2023, and effective starting on September 1, 2023, H.B. 2127 strips the authority of Texas cities and counties to enact local ordinances, orders, or rules that exceed or conflict with numerous Texas codes—unless expressly allowed by another statute. Supporters of the legislation argue that businesses and entrepreneurs need relief from the burden of navigating myriad, overlapping regulatory schemes; its critics counter that the law will corrode local control and chill innovation at the city and county levels. But what cannot be denied is that H.B. 2127 represents a significant shift in the relationship between the Texas Legislature and local governments, whose implications may not be fully understood for years to come.

How We Arrived At this Point.

In recent years, cities and counties in Texas have attempted to drive economic and social policy by setting standards higher than what state law requires. From paid sick leave mandates for private employers, fracking and plastic grocery bag bans, or "sanctuary city" status, local governments increasingly have asserted greater control over public affairs, creating, in Governor Abbott's words, "a patchwork quilt of bans and rules and regulations that are eroding the Texas model."[2] The Legislature has successfully overridden select local laws to maintain statewide uniformity in matters of energy production, environmental protection, economic regulation, and other areas. Nevertheless, many state lawmakers and members of the business community have insisted that broad-based legislation that would completely pre-empt inconsistent local regulations is superior to a "rifle-shot" approach of preempting local regulations one-by-one.

Brief Primer on the Powers of Local Governments and Preemption Principles.

Home-rule municipalities in Texas possess the full power of local self-government.[3] But the Texas Constitution provides that home-rule city ordinances must not "contain any provision inconsistent with the Constitution of the State, or of the general laws of this State."[4] While home-rule cities have all the power not denied by the Constitution or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law.[5] The same principles apply to Texas counties.[6] As the Texas Supreme

Court recently observed in a case involving a local antilitter ordinance prohibiting merchants from providing "single use" plastic and paper bags to customers, "[d]eciding whether uniform statewide regulation or non-regulation is preferable to a patchwork of local regulations is the Legislature's prerogative. The question is not whether the Legislature *can* preempt a local regulation … but whether it *has*."[7]

Statutory preemption of local laws may be express or implied, but Texas courts generally require the Legislature to make its intent to preempt such laws unmistakably clear.[8] This means that the mere entry of the state into a field of legislation does not automatically preempt that field from local regulation.[9] Instead, absent an express limitation, if the general law and local regulation can coexist harmoniously, courts will try to give both laws effect or find the latter invalid only to the extent of any inconsistency with the former.[10]

What the Statute Does and Does Not Do.

The centerpiece of H.B. 2127 are provisions that expressly prohibits a municipality or county from adopting, enforcing, or maintaining an "ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision" of certain state codes, unless expressly authorized by another statute. On its face, the bill inserts a broad preemption clause in the following Texas codes:

(1) Agriculture Code;

(2) Business and Commerce Code;

(3) Finance Code;

(4) Insurance Code;

(5) Labor Code;

(6) Natural Resources Code;

(7) Occupations Code; and

(8) Property Code.

Although the preemption clauses facially forbid local regulation in any of these areas, H.B. 2127 gives special attention to employment law practices. The bill specifies that the regulatory field occupied by the Labor Code includes "employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than a municipality or county." This provision would preempt new municipal ordinances mimicking those passed by Austin and San Antonio in 2018, which made employers provide their workers with paid sick leave. The Third Court of Appeals struck down the Austin ordinance as unconstitutional in November 2018[11] and in June 2020 the Texas Supreme Court denied Austin's appeal of that ruling in a one-line order.

Yet H.B. 2127 also preserves local government authority in several important regulatory fields. For example, the

Finance Code preemption language would seemingly preserve existing payday lending ordinances (pending litigation outcomes), but preempts cities and counties from adopting new payday lending ordinances, or amending existing ones going forward. Moreover, cities and counties would appear to be able to regulate in multiple areas of local concern including building and maintaining roads; levying taxes; conducting public awareness campaigns; and supervising and regulating local government employees. Notably, the bill did not touch the Health and Safety Code, meaning that cities and counties can continue to regulate matters to the extent allowed by that statute.

Creation of a Private Cause of Action to Challenge Local Government Rules and Restrictions.

While H.B. 2127 is meant to shield businesses and individuals from onerous and duplicative local regulation, the bill also could be used as a sword. The bill creates a private cause of action conferring standing on a person or trade association to sue a city or county for an ordinance, order, or rule that violates one of the above-mentioned field preemption clauses. Plaintiffs suing under this provision must provide a city or county with three months' notice of a claim before filing suit. Further, the bill waives governmental immunity to suit and entitles a successful plaintiff to recover both court costs and reasonable attorney's fees. On the other hand, a late amendment to the bill provides that a city or county may recover its legal costs and reasonable attorney's fees if a court finds a plaintiff's action to be frivolous (*i.e.*, a lawsuit lacking legal or factual merit or one brought solely to harass, annoy, or delay the opposing party).

Looking Ahead.

The bill's sweeping preemption language will raise many questions—and disputes—over its exact scope. As noted above, it prohibits local governments from regulating conduct under the enumerated codes "unless expressly authorized by another statute." Determining whether a different state law authorizes specific local ordinance, rule, or regulation, could prove a challenging and time-consuming task for city and county officials and the regulated community alike.

Moreover, one provision in the legislation (to be codified at Section 51.002 of the Local Government Code) states that "the governing body of a municipality may adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state." This would target, for example, proposed municipal ordinances banning landscaping companies from using gas-powered equipment and requiring banks to disclose lending activity to the city government. Moreover, rural Texas counties have considered placing moratoria on the development of wind and solar energy facilities within their jurisdictions—often based on claims involving counties' police powers or their general authority over county roads. H.B. 2127 casts serious doubt on the legality of those measures.

Yet whether a local law is "consistent" with state law is seldom immediately clear. If a state law and local regulation can coexist without stepping on each other's toes, courts generally try to give effect to both laws or will invalidate a local regulation only to the extent it is "inconsistent with state law." But what, precisely, does it mean for a local regulation to be inconsistent with or conflict with a state law? Does one need to prove an actual conflict or show that compliance with both state and local law is impossible? Or can one argue that a local law creates an unacceptable obstacle to the operation of the enumerated codes? Expect both sides to contest such issues with vigor. In any event, individuals and businesses will need to scrutinize the language of H.B. 2127 and myriad other statutes to determine whether a local regulation is vulnerable to legal challenge.

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[1] Texas Governor's Budget 2018-2019 at p. 12 ("In a pro-business state like Texas, the greatest threat to economic growth is not the state's already reasonable regulatory regime – it is overreaching local regulations that strangle business and drag out even simple permitting processes for unimaginable amounts of time. Consequently, the state must act to restrict cities, counties, and special districts from maintaining and expanding this unseemly patchwork quilt of bans, rules, and regulations that are eroding the Texas model…. The legislature must enact critically necessary reforms that will restrict local government regulatory regimes from micromanaging business and threatening private property.")

[2] "The Brief: Jan. 9, 2015," *The Texas Tribune*

[3] Tex. Loc. Gov't Code § 51.072(a).

[4] Tex. Const. art. XI, § 5(a).

[5] *See, e.g.*, *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016) ("Home-rule cities possess the power of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority.")

[6] *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003) ("Though they are creatures of the Texas Constitution, counties and commissioners courts are subject to the Legislature's regulation."); *Childress County v. State*, 92 S.W.2d 1011, 1015 (1936) ("The county is merely an arm of the state. It is a political subdivision thereof. In view of the relationship of a county to the state, the state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties.")

[7] *City of Laredo v. Merchants Ass'n*, 550 S.W.3d 586, 592-593 (Tex. 2018) (emphasis in original).

[8] *City of Laredo*, 550 S.W.3d at 593.

[9] *Id*.

[10] *Id*.

[11] *Texas Association of Business v. City of Austin*, 565 S.W.3d 425 (Tex.App.—Austin 2018), petition denied (No. 19-0025).

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