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TEXAS

I. Summary of Home Rule in Texas

- Charter cities with populations of more than 5,000 residents have broad authority to pass local legislation in all areas not preempted by the State Legislature or the Constitution.
- While the State Legislature is able to write explicit statewide laws preempting local ordinances, courts generously interpret statutes in favor of municipalities when there is no clear legislative intent to preempt local governments.
- Texas does not recognize field-preemption, and courts typically give deference to municipalities when there are laws that could reasonably be interpreted to work together. If conflicts exist between state and local legislation, courts will attempt to reconcile the difference "if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect."[1] For a state law to preempt a home rule city's law, the legislature must reveal its intention with "unmistakable clarity."[2]
- Texas counties are considered subdivisions of the state and do not have home rule authority to enact substantive legislation.[3]

II. Source of Municipal Home Rule Authority

Texas Const. Art. XI, §5 allows cities with more than 5,000 inhabitants to adopt or amend their charters by popular vote. This process does not happen automatically, and cities whose populations drop below 5,000 inhabitants may still vote to amend their charters.

Additionally, Texas Const. Art. III, §56(a) states: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . regulating the affairs of counties, cities, towns, wards or school districts." This provision does not confer authority to localities directly and is discussed in section VII below.

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[1] *Cooke v. City of Alice*, 333 S.W.3d 318, 323 (Tex. App.--San Antonio 2010)(citations omitted).
[2] *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) ("While a home rule city thus has all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter, TEX. CONST. art. XI, § 5, these broad powers may be limited by statute when the Legislature's intention to do so appears 'with unmistakable clarity.'") (citation omitted); *see also City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007) ("[Home rule] cities derive their powers from the Texas Constitution, not the Legislature. They have 'all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter.' . . . The question thus is not whether any statute *grants* home-rule cities immunity from suit, but whether any statute *limits* their immunity from suit. Such limits exist only when a statute speaks with 'unmistakable clarity.'") (citations omitted) (emphasis in original).
[3] *See* Tex. Const. art. XI, §1.

III. Scope of Municipal Home Rule Authority

Home rule cities have wide-ranging powers to legislate as long as local laws do not directly conflict with statewide legislation or the Constitution.

"A home-rule city derives its power from the Texas Constitution, operates by its charter, and 'possess[es] the full power of self government and look[s] to the Legislature not for grants of power, but only for limitations on their power.'"[4]

"The adoption or amendment of charters is subject to . . . limitations . . . prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature."[5]

Charter cities may levy taxes as authorized by law or their charters, with annual limits of "two and one-half per cent. of the taxable property of such city."[6] Cities may not alter, amend, or repeal their charters more than once every two years.[7]

IV. Preemption

Texas localities have vast home rule authority to legislate in areas not specifically preempted by the State Legislature or Constitution. Texas courts do not generally recognize field preemption, and instead look to specific state-level legislative intent to preempt local governments before ruling against a local ordinance.

Even when a home-rule city ordinance *appears* to be in conflict with a state statute, a court still has the "duty . . . to reconcile the two 'if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect.'"[8]

Texas courts apply the "unmistakable clarity" or "clear and unmistakable" standard generally when analyzing whether a state statute preempts a local ordinance passed by a home-rule municipality. That is, courts do not clearly distinguish among different theories of preemption such as field preemption and conflict preemption in this context. The Texas Supreme Court recently acknowledged that it has "never delineated the distinction" between an "express limitation" on the power of home-rule cities and one "arising by implication."[9] "[T]he critical

[4] *Perez v. Turner*, 01-16-00985-CV, 2019 WL 5243107, at *6 (Tex. App.--Hous. [1st Dist.] Oct. 17, 2019) (quoting *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016)).
[5] Tex. Const. art. XI, § 5(a)
[6] *Id.*
[7] *Id.*
[8] *Cooke*, 333 S.W.3d 318 at 323 (citation omitted).
[9] *BCCA App. Group, Inc. v. City of Houston,* 496 S.W.3d 1, 7 (Tex. 2016)(citation omitted).

inquiry in determining whether an ordinance is preempted is whether the Legislature expressed its preemptive intent through clear and unmistakable language . . . ."[10]

V. County Home Rule

Tex. Const. art. IX, § 3 provided for County Home Rule Charters and was repealed in 1969. Counties lack home rule authority, and "the powers conferred upon them are rather duties imposed than privileges granted."[11]

VI. Local Legislative Immunity

The Texas Supreme court has "recognized that individuals acting in a legislative capacity are immune from liability for those actions."[12] This "immunity derives largely from the Speech and Debate Clauses of the Texas and federal constitutions, which, in turn, embody fundamental separation-of-powers tenets."[13]

Courts have extended legislative immunity doctrine beyond federal and state legislators and included local legislators.[14] This extension includes a "legislator's aides" due to the critical nature of their assistance in the legislative process.[15]

VII. Other Relevant Considerations

Limits on Property Taxes

Art. VIII, § 9(a) of the Texas Constitution limits any "county, city or town" from levying "a tax rate in excess of Eighty Cents (80¢) on the One Hundred Dollars ($100) valuation in any one (1) year for general fund, permanent improvement fund, road and bridge fund and jury fund purposes." The legislature is allowed to authorize an additional "Fifteen Cents (15¢) on the One Hundred Dollars ($100) valuation" property tax with voter approval "for the further maintenance of the public roads."[16]

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[10] *Id*. at 8 (Tex. 2016); *see also City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964) ("Although the broad powers granted to home rule cities . . . may be limited by acts of the Legislature, it seems that should the Legislature decide to exercise that authority, its intention to do so should appear with unmistakable clarity.").
[11] *Orndorff v. State ex rel. McGill*, 108 S.W.2d 206, 209 (Tex. Civ. App.--El Paso 1937) (citations omitted).
[12] *In re Perry*, 60 S.W.3d 857, 859 (Tex. 2001) (citing *Bogan v. Scott–Harris*, 523 U.S. 44, 46, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998)).
[13] *Id.*
[14] *Clear Lake City Water Auth. v. Salazar*, 781 S.W.2d 347, 350 (Tex. App.--Hous. [14th Dist.] 1989) (noting that "[a] court has no . . . authority to investigate the motives of local legislators . . . ." and finding that not granting immunity to local water board for their legislative actions "would not only violate the general rule of Article II, § 1, the specific rule of the Speech and Debate clause, and the holding of *Sosa v. City of Corpus Christi*, but it would also prove an extremely difficult doctrine to contain.")
[15] *Id.*
[16] Tex. Const. art. VIII, § 9(c).

Constitutional ProvisionAagainst "Local or Special Laws"

The Texas Constitution bars the state legislature from passing any "local or special laws" and specifically enumerates 30 examples, including a ban on laws

- "regulating the affairs of counties, cities, towns, wards or school districts"[17]
- "incorporating cities, towns or villages, or changing their charters"[18]
- "creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts"[19]

A local law is any law that is "limited to a specific geographic area of a state," while a special law is "a law limited to a particular class of persons distinguished by some characteristic other than geography."[20]

The purpose of Section 56 is to "prevent the granting of special privileges and to secure uniformity of law throughout the State as far as possible" and to "prevent[] lawmakers from engaging in the 'reprehensible' practice of trading votes for the advancement of personal rather than public interests."[21] In practice, this has led to bills being written in a manner that targets cities or counties without specifically naming them.[22]

A law that facially names a city or county can survive a constitutional challenge "if persons or things throughout the state are affected . . . or if it operates on a subject in which the people at large are interested."[23] Alternately, a law that does not name a specific region by name can be held to violate the local law provision if the legislation is drafted in a manner that only a specific region is impacted and the classifications are not reasonably related to a legitimate state purpose.[24]

In addition, Tex. Const. art. III, § 57 establishes a requirement that any local or special law must be "published in the locality" affected, and the State Supreme Court has ruled that any special or local law passed without publication is "unconstitutional and void."[25]

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[17] Tex. Const. art. III, § 56(a)(2).
[18] Tex. Const. art. III, § 56(a)(11).
[19] Tex. Const. art. III, § 56(a)(14).
[20] *Williams v. Houston Firemen's Relief and Ret. Fund*, 121 S.W.3d 415, 432 (Tex. App.--Hous. [1st Dist.] 2003).
[21] *Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996) (quoting *Miller v. El Paso County*, 150 S.W.2d 1000, 1001 (Tex. 1941)).
[22] *See Bexar County v. Tynan*, 69 S.W.2d 193, 194 (Tex. Civ. App.--San Antonio 1934), *writ granted, aff'd*, 97 S.W.2d 467 (Tex. Comm'n App. 1936) (bill applied "only to counties having more than 290,000 and less than 310,000 inhabitants, according to the last preceding federal census.")
[23] *In re Commitment of Polk*, 187 S.W.3d 550, 554 (Tex. App.--Beaumont 2006) (Legislation setting "Montgomery County" as venue for sexually violent predator commitment proceedings did not violate constitution as the issue was of statewide interest and county was adjacent to state penitentiary.)
[24] *City of Austin v. City of Cedar Park*, 953 S.W.2d 424, 433 (Tex. App.--Austin 1997) ("General terms … that have no rational link to an eligible area … are unreasonable and violate … the Texas Constitution.")
[25] *Bexar County,* 69 S.W.2d at 194.

Single Subject Rule:

Tex. Const. art. III, § 35 requires all bills (excluding general appropriations bills) to contain only one subject.

Nature of State Emergency Powers

The Texas Disaster Act of 1975, Tex. Gov't Code Ann. § 418.001 *et seq*., provides for a broad range of powers and duties involving the governor, state agencies, local government, and others in order to respond to emergencies affecting the state.

The governor, for example, is empowered to "issue executive orders, proclamations, and regulations" with the "force and effect of law."[26] Section 418.016 of the Texas Disaster Act outlines the governor's powers to suspend certain laws and rules.[27] These include the power to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster." The state's Attorney General has advised that statutes concerning deadlines and timing for special elections fall under that category,[28] but case law and regulations do not appear to further clarify this language.

Political subdivisions fall within the jurisdiction of a local or interjurisdictional agency responsible for "disaster preparedness and coordination of response."[29] Counties are also charged with maintaining "an emergency program" or "participat[ing] in a local or interjurisdictional emergency management program."[30] Local declarations of emergency operate to activate the appropriate emergency management plans.

Apart from the powers outlined broadly above, local governments have various emergency powers under state law regarding particular issues, including, for example:

- Municipalities may establish a rent control ordinance if their governing body finds that "a housing emergency exists due to a disaster as defined by Section 418.004," and the governor approves the ordinance.[31]

- The presiding officer or governing body of a municipality may declare a local state of disaster, after which a county judge or mayor "may control the ingress to and egress from a disaster area . . . and control the movement of persons and the occupancy of premises in that area."[32]

[26] Tex. Gov't Code Ann. § 418.012.
[27] Tex. Gov't Code Ann. § 418.016.
[28] Tex. Att'y Gen. Op. KP-0191 (2018).
[29] Tex. Gov't Code Ann. § 418.101.
[30] Tex. Gov't Code Ann. § 418.102.
[31] Tex. Loc. Gov't Code Ann. § 214.902(a).
[32] Tex. Gov't Code Ann. § 418.108.

- Municipalities may adopt fair housing ordinances that are "substantially equivalent to those granted under federal law," and the enforcement mechanisms for those ordinances may differ from state or federal law.[33]

Private Law Exception

An additional consideration in assessing whether a local government has the authority to adopt a particular policy is whether state law recognizes a "private law exception." Private law can generally be defined as law that "establishes legal rights and duties between and among private entities."[34] Some states, either by constitutional provision, statute, or case law, prohibit municipalities from regulating private law. This can take the form of a "subject-based" exception prohibiting any regulation of "private law" or a narrower exception prohibiting private rights of action.[35]

Texas law does not appear to prohibit home rule municipalities from enacting "private law." A review of Texas case law did not identify court opinions adhering to a private law exception. Texas law does not clearly prohibit a local government from creating a private right of action.[36]

Unfunded Mandates

There do not appear to be limitations under Texas law with respect to the State Legislature's ability to impose unfunded mandates on localities.

[33] Tex. Loc. Gov't Code Ann. § 214.903.

[34] Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 688 (1973).

[35] *See* Paul A. Diller, *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109 (2012).

[36] *Id*. at 1170 (noting that Texas has "[n]o case law of significance").