BCCA v. City of Houston

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The purpose of this presentation is to review the Texas Supreme Court decision in *BCCA V City of Houston* ("BCCA") and its analysis of municipal home rule ordinances under the Texas Constitution. The concept of local home rule government is an important aspect of American Government, going back to Alexis de Tocqueville observations about American local government.

> "The native of New England is attached to his township because it is independent and free: his co-operation in its affairs ensures his attachment to its interest; the well-being it affords him secures his affection; and its welfare is the aim of his ambition and of his future exertions: he takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms which can alone ensure the steady progress of liberty; he imbibes their spirit; he acquires a taste for order, comprehends the union or the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights." *Democracy In America Alexis de Tocqueville 1831- The American System Of Townships And Municipal Bodies*

In the nineteenth Century two schools of thought developed about the proper role of local governmental corporations, beginning with Chief Justice Marshall's opinion in *Trustees of Dartmouth College v Woodward*, 17 U.S. 250, 4 Wheat. 652 on the scope of the Contract Clause and a private corporate charter. The two leading American municipal jurists, John Dillon and Thomas Cooley set out the theoretical analytical frameworks for the role and relationship of municipalities to their respective state governments.

Dillon's rule generally still stands in relation to the power of Texas general law municipalities.

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.[1]

However, a different rule applies where a city organized under Article 11, Section 5 of the Texas Constitution exercises its constitutional power of local self government; it is subject only the provision that no charter or any ordinance passed under its charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature. Today's analysis and measure of what constitute inconsistency and what is the scope of home rule constitutional power are the latest iteration of the proper role and justification for local self government. The competing theories of how to determine the proper role of an home rule city have a long history, with even some early decisions of the Texas Supreme Court turning back to Dillon's Rule in construing Texas home rule authority.[2]

In general, however, the Texas Supreme Court has reviewed challenges to such constitutional power on the principle that home-rule cities possess the power of self-government and only look to the Legislature

[1] John F Dillon, The Law of Municipal Corporations (2d rev. ed. New York, James Cockroft & Co 1873)

[2] See City of Arlington v. Lilliard, 294 S.W. 829 (Tex. 1927); The Constitution of the State of Texas: An Annotated and Comparative Analysis, George D. Braden, et al. Texas Advisory Commission on Intergovernmental Relations (Austin 1972) p. 683-4. https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf

not for grants of authority, but only for limitations on their authority. The test for such limitations has been whether the Texas Legislature has with "unmistakable clarity" preempted a challenged ordinance or charter by its general laws.[3]

In the BCCA v City of Houston case, the Texas Supreme Court has made its latest pronouncement on jurisprudence of Texas home rule government, focusing in particular on the issue of the appropriate elements of what constitutes a reasonable construction of an overlapping general law and city ordinance, to the end that both might be enforced under the Texas home rule amendment.[4]

History – Litigation

BCCA, the Business Coalition for Clean Air, brought suit to challenge two City of Houston ordinances enacted in 2007 and 2008 that sought to regulate air pollution within the City. BCCA's challenge was that the ordinances were pre-empted by state law- the Texas Clean Air Act ("the Act"), and that provisions of the Texas Water Code ("TWC", "Water Code") that govern enforcement of the Act had granted exclusive regulatory power to the Texas Commission on Environmental Quality ("TCEQ"). The District court granted summary judgment for BCCA, and the First Court of Appeals (Houston) reversed and rendered judgement for the City. The Court of Appeals held that the Ordinances were neither expressly nor impliedly inconsistent with the TCAA and were therefore constitutional under Texas Constitution Home Rule Amendment, Article XI, section 5. The Texas Supreme reversed and rendered judgment for BCAA, holding the Ordinances were inconsistent with TCAA, the TWC and TCEQ regulations and therefore unconstitutional. The City's Motion for Rehearing is pending.

The Texas Supreme Court Ruling

> We must decide whether the Texas Clean Air Act (the Act) and the Act's enforcement mechanisms in the Texas Water Code preempt a Houston air-quality ordinance, and whether the Houston ordinance can incorporate Texas Commission on Environmental Quality (TCEQ) rules in their current form and as amended in the future. Because the Houston ordinance's enforcement provisions are inconsistent with the statutory enforcement requirements, and the ordinance's registration requirement makes unlawful what the Act approves, we reverse the judgment of the court of appeals as to preemption and render judgment for BCCA Appeal Group

The Act and the TWC provisions.

In 1967, the Texas Legislature enacted the Act, now codified as Texas Health and Safety Code Chapter 382. Tex. Health & Safety Code §§ 382.001–.510. Under the Act the TCEQ is to administer and enforce the Act. Section 382.011; Tex. Water Code §§ 5.001(2), .013(a)(11). Additionally, the Legislature authorized the TCEQ to adopt rules for regulating air quality. Tex. Health & Safety Code § 382.017(a). The TCEQ adopted the rules found at 30 Tex. Admin. Code §§ 1.1–351.104

Air Pollution Control in Houston History

[3] Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall., 852 S.W.2d 489, 490–91 (Tex.1993)

[4] Dall. Merch's & Concessionaire's Ass'n, 852 S.W.2d at 494; See: INTRASTATE PREEMPTION, Boston University Law Review 2007, 87 B.U. L. Rev. 1113: THE PROMISE OF COOLEY'S CITY: TRACES OF LOCAL CONSTITUTIONALISM University of Pennsylvania Law Review, January, 1999, 147 U. Pa. L. Rev. 487

For a number of years, the City of Houston contracted and cooperated with the TCEQ in the enforcement of state air pollution law through its inspection of permitted emissions sources and the referral of enforcement cases to the TCEQ, as well as pursuing civil enforcement actions under the TWC. Tex. Health & Safety Code Sec. 382.111; Tex. Health & Safety Code Sec..382.0622(d) In 1992, the City enacted an air quality ordinance to regulate facilities (dry cleaners and certain service stations) not regulated under the Act. In 2005, the City's contract with the TCEQ ended as well as its cooperation with the TCEQ.

In 2007, in response the City amended its 1992 Ordinance and established its own air quality regulatory program due to what the city perceived to be "…TCEQ' s lax enforcement efforts" [5]. City of Ordinance 2007-208 was passed February 14, 2007, (the "Ordinance") and amended the 1992 ordinance to provide:

1. An expansion of the 1992 Ordinance scope to include also the regulation of facilities and sources that were subject to TCEQ regulation under the Act.
2. Made it "unlawful" to operate a facility within the City unless it was registered with the City.
3. The incorporation of specific TCEQ rules promulgated by the Act, amending the prior section that had only referred to "air pollution control laws and regulations."
4. The incorporation included TCEQ rules as" *they are currently are and as they may be changed from time to time* " Section 21-164 of the Ordinance.

In 2008, the BCCA Appeal Group filed a declaratory judgment action attacking the 2007 amendment as unenforceable under the Act, the TWC and the Texas Constitution.[6]

The City amended the Ordinance on May 7, 2008, to provide:

1. A violation of the (City's incorporated-by-reference) TCEQ rules shall be unlawful, and would be prosecuted in municipal court with fines between $250 and $2,000 per day of each violation.

2. The 2008 amendment made it an "affirmative defense to prosecution under this section that the prosecuted condition or activity has been: (1) Approved or authorized by the Act, state rule or state order; and (2) That the facility is in compliance with any such approval or authorization." § 21–164(d

3. It made it an "affirmative defense" to prosecution under this section that the prosecuted condition or activity has been: (1) Approved or authorized by the Act, state rule or state order; and (2) That the facility is in compliance with any such approval or authorization." § 21–164(d

The BCCA amended its pleadings to include the Ordinance as amended in its challenge. Cross motions for summary were submitted by the City and BCCA, and in 2011 the trial court granted judgment for

[5] See- DON'T MESS WITH HOUSTON, TEXAS: THE CLEAN AIR ACT AND STATE/LOCAL PREEMPTION, 88 Tex. L. Rev. 639, February, 2010

[6] The Court described the BCCA as follows: BCCA Appeal Group members operate integrated chemical manufacturing plants and refineries in the Houston area. Those plants are extensively regulated by the TCEQ pursuant to the Act. See TEX. HEALTH & SAFETY CODE §§ 382.011, .023, .051–.059

BCCA that the Ordinance violates the Texas Constitution and is preempted by the Act, and was therefore unenforceable.

On appeal, the First Court of Appeals reversed and rendered judgment for the City. The Appeals Court concluded that the Ordinance was consistent with the Act and the TWC. Additionally, it upheld the Ordinance against BCCA's challenge that it violated the non-delegation doctrine by incorporating future amendments to the TCEQ rules.

Standard of Review- Powers of a Home Rule City

The Court begins its analysis with a recognition of the Constitutional basis for the home-rule self-government:

> 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. Tex. Loc. Gov't Code § 51.072(a); *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall*., 852 S.W.2d 489, 490–91 (Tex.1993). The Texas Constitution mandates that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). Therefore, a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter. *Dall. Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491.

The Court then acknowledges it's the established rule to reconcile the exercise of local home rule self government with general law by the exercise of reason.

> Of course, a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction...." *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (Tex.Com.App.1927). *Furthermore, "[t]he entry of the state into a field of legislation ... does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable.*" *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982).

Preemption- express and implied and the "unmistakable clarity" test.

The Court declined to adopt the distinction offered by BCCA between express and implied preemption and focused on the established Dallas Merchant's "unmistakable clarity" test for preemption.

> BCCA Appeal Group argues that the Ordinance is expressly preempted by section 382.113(b) of the Act and implicitly preempted by the comprehensive structure of the Act and its Water Code enforcement provisions. In Lower Colorado River Authority v. City of San Marcos, we stated that "[a] limitation on the power of home rule cities by general law ... may be either an express limitation or one arising by implication," but we have never delineated the distinction between the two. 523 S.W.2d 641, 645 (Tex.1975).

> Instead, we focus on whether the Legislature's intent to provide a limitation appears with "unmistakable clarity."5 See, e.g., Dall. Merch.'s & Concessionaire's Ass'n, 852 S.W.2d at 491, 494 (stating "if the Legislature chooses to preempt a subject matter ... it must do so with unmistakable clarity," and concluding "the express language of [the statute] compels this court to give effect to the Legislature's clear intent—the Ordinance is preempted"); Tyra v. City of Hous., 822 S.W.2d 626, 628 (Tex.1991) (stating "the [L]egislature must express its intent [to withdraw a subject from a home-rule city's domain] in clear and unmistakable language," and concluding "[t]he language of [the statute] is both clear and unmistakable"). Because the critical inquiry in determining whether an ordinance is preempted is whether the Legislature expressed its preemptive intent through clear and unmistakable language, we begin with statutory construction analysis. See Tex. Const. art. XI, § 5(a); Dall. Merch.'s & Concessionaire's Ass'n, 852 S.W.2d at 491

The Court reviewed the legislation and concluded that because the parallel enforcement mechanism was inconsistent with the state process, it was preempted.

> BCCA Appeal Group asserts that the Act and the Water Code lay out a comprehensive enforcement regime, endow the TCEQ with substantial statewide authority and discretion, and specifically address how cities may participate in enforcement. BCCA Appeal Group argues that the Ordinance's parallel enforcement mechanism is inconsistent and thus preempted. We agree.

To determine the Legislature's intent, the Court applied conventional statutory intent analysis.

> We review statutory construction de novo. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc*., 430 S.W.3d 384, 389 (Tex.2014). "In construing statutes our primary objective is to give effect to the Legislature's intent." *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010). We initially look to the plain meaning of the text as the sole expression of legislative intent, "unless the Legislature has supplied a different meaning by definition, a different meaning is apparent from the context, or applying the plain meaning would lead to absurd results." *Abutahoun v. Dow Chem. Co*., 463 S.W.3d 42, 46 (Tex.2015) (citing *Tex. Lottery Comm'n*, 325 S.W.3d at 635).

In reviewing the general law, the Court reviewed the Act and Water Code provisions to determine if preemption of the Ordinance had been expressed with unmistakable clarity.

> We must determine whether the Act and the Water Code reflect *unmistakably clear legislative intent* to limit the City's authority to enact an ordinance to enforce the state air-quality standards and, if so, whether the Ordinance's enforcement provisions are inconsistent with the statutory provisions. See Tex. Const. art. XI, § 5(a) (providing that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"); *Lower Colo. River Auth*., 523 S.W.2d at 645 (quoting *City of Sweetwater v. Geron,* 380 S.W.2d 550, 552 (Tex.1964), which states: "The intention of the Legislature to impose such limitations must 'appear with unmistakable clarity

The Role of Cities under the Act and TWC

The Act and the TWC provide a role for both municipalities and the State in the enforcement of the state's air pollution laws. The Court noted that

> The Act and Chapter 7 of the Water Code operate together to provide the enforcement mechanisms for a violation of the Act, TCEQ rule, order, or permit at both the state and local government levels. The Act provides:
>
> > (a) [A] municipality has the powers and rights as are otherwise vested by law in the municipality to:
> >
> > > (1) abate a nuisance; and
> > >
> > > (2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission's rules or orders.
> >
> > (b) An ordinance enacted by a municipality must be *consistent* with this chapter and the commission's rules and orders

TCEQ Administrative Discretion

In its analysis, the Court first noted the great range of discretion, granted to TCEQ by the Legislature:

> Chapter 7 of the Water Code provides that the TCEQ may pursue violations of the Act, TCEQ rules or orders, or a TCEQ-issued permit by assessing administrative penalties or authorizing a civil or criminal action. Tex. Water Code §§ 7.002, .051, .073, .101–.102, .105, .203. In each circumstance, the TCEQ is afforded great discretion to evaluate the violation and determine the appropriate penalty or remedy. Id. §§ 7.002, .053, .203; see Tex. Health & Safety Code § 382.025(a) ("If the [TCEQ] determines that air pollution exists, the [TCEQ] may order any action indicated by the circumstances to control the condition."). The Legislature has charged the TCEQ with the responsibility for administering the Act and has given the TCEQ "the powers necessary or convenient to carry out its responsibilities."

The Court then acknowledged that cities have civil enforcement powers under the Act and TWC.

> The TCEQ may, on its own accord, seek civil remedies through an action brought by the attorney general. See Tex. Water Code § 7.002 (TCEQ enforcement authority); id. §§ 7.101–.111 ("Subchapter D: Civil Penalties"). Alternatively, in a subchapter titled "Suit by Others," the Water Code authorizes a local government, though its own attorney, to institute a civil suit in district court for injunctive relief, civil penalty, or both, against a person who committed a violation. Id. § 7.351. To do so, the local government's governing body must first adopt a resolution authorizing the exercise of this power, and the TCEQ must be joined as a "necessary and indispensable party." Id. §§ 7.352–.353. The Legislature thus allows a city to bring an action while still ensuring the TCEQ's involvement in the civil enforcement proceedings.

However in its preemption analysis, the Court then assumes municipal inaction, in the form of a failure of a City to authorize a civil suit, to then describe the extensive administrative discretion granted to the TCEQ,

> *If a municipality has not instituted a lawsuit under the above provisions*, the TCEQ may assess an administrative penalty against the person who violated the Act, a TCEQ rule or order, or a permit issued by the TCEQ under the Act. Id. § 7.051(a). Section 7.073 of the Water Code states: "If a person violates any statute or rule within the [TCEQ's] jurisdiction, the [TCEQ] may: (1) assess against the person an administrative penalty under this subchapter; and (2) order the person to take corrective action." Id. § 7.073. The TCEQ may conduct a hearing and, by order, may: (1) find that a violation has occurred and assess a penalty; (2) find that a violation has occurred but that a penalty should not be assessed; or (3) find that no violation has occurred. Id. § 7.058; See Tex. Health & Safety Code § 382.023(b). Therefore, the TCEQ need not assess a penalty, even if it finds a violation. In determining whether a penalty should be assessed, the TCEQ must consider factors that include the nature, circumstances, extent, and gravity of the prohibited act; the history and extent of previous violations; the degree of culpability of the alleged violator; the demonstrated good faith of the alleged violator; the economic benefit gained through the violation; the amount necessary to deter future violations; and "any other matters that justice may require." Tex. Water Code §§ 7.053 (emphasis added), .058. In classifying a site's compliance history, the TCEQ's executive director categorizes violations as of major, moderate, or minor significance. 30 Tex. Admin. Code § 60.2(a), (d). A "major violation" includes "any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or a level of intent to secure the conviction." Id. § 60.2(d)(1)(E). *Thus, the TCEQ has the authority to determine whether a violation has in fact occurred and the discretion to decide whether that violation warrants an administrative penalty, considering various factors, including prior criminal history. If the TCEQ assesses an administrative penalty, payment of such penalty "is full and complete satisfaction of the violation for which the penalty is assessed and precludes any other civil or criminal penalty for the same violation."* Tex. Water Code § 7.068. In that instance, no other action can be sustained against the violator. See id. In summary, a local government may institute a civil suit in accordance with the statute, but if it does not and the TCEQ assesses an administrative penalty, the local government is precluded from any further action." (italics added)

Criminal law Enforcement

The Court also found that state law had provided an extensive criminal enforcement procedure under the Texas Water Code, including a TCEQ approval of any prosecution by a peace officer for a pollution violation. As noted below, exercise of civil jurisdiction by the Court to determine the validity of a criminal law is an issue raised by the City in its Motion for Rehearing.

> Regarding criminal enforcement, the Water Code provides that "[a] person commits an offense if the person intentionally or knowingly, with respect to the person's conduct, violates" various air permitting statutes or "an order, permit, or exemption issued or a rule adopted under [the Act, in] Chapter 382, Health and Safety Code." Id. § 7.177(a); see id. § 7.203 (relating to criminal prosecution of a permit-holder's alleged violation of the Act, TCEQ rules promulgated under the

> Act, or TCEQ orders or permits); § 7.001(2) (defining "permit" to include a "license, certificate, registration, approval, or other form of authorization")…

The Court then noted that the TCEQ is expressly granted the power to exercise prosecutorial discretion over any criminal pollution prosecution under the Water Code.

> Before a peace officer may refer an alleged violation to a prosecuting attorney, the peace officer "shall notify the [TCEQ] in writing of the alleged criminal environmental violation and include with the notification a report describing the facts and circumstances of the alleged criminal environmental violation." Id. § 7.203(b); see Tex. Code Crim. Proc. art. 2.12 (defining "peace officers"). As soon as practicable and no later than forty-five days after receiving that notice, the TCEQ "shall evaluate the report and determine whether an alleged environmental violation exists and whether administrative or civil remedies would adequately and appropriately address the alleged environmental violation." Tex. Water Code § 7.203(c). In deciding whether administrative or civil remedies would be appropriate, the TCEQ shall consider the factors listed in section 7.053 of the Water Code. Id. §§ 7.053, .203. If the TCEQ determines that civil or administrative remedies are appropriate, the TCEQ shall provide written notice to the peace officer "that the alleged environmental violation is to be resolved through administrative or civil means by the appropriate authorities." Id. § 7.203(d). If the TCEQ does not make a determination in forty-five days, or determines that an alleged violation exists and administrative or civil remedies are inadequate or inappropriate and provides notice to the peace office recommending criminal prosecution, only then may the prosecuting attorney proceed with criminal prosecution against the permit-holder."

Inconsistency between the Ordinance and State Law

The Court's analysis finds that the Ordinance's purpose of establishing criminal prosecution was an inconsistent substitute for the state "administrative and civil enforcement regime" under the Act and the Texas Water Code.

> The statute grants the TCEQ forty-five days to determine whether a violation actually exists and whether administrative or civil remedies would adequately and appropriately address the violation instead of criminal prosecution. Id. § 7.203(c). A local government may proceed with criminal prosecution only if (1) the TCEQ makes no enforcement mechanism determination during those forty-five days, or (2) the TCEQ decides that administrative or civil remedies would not adequately and appropriately address the violation and issues written notice recommending criminal prosecution. Id. § 7.203(c)(1), (d).
>
> The Ordinance, in contrast, allows criminal prosecution of an alleged violation without requiring a written report to the TCEQ, without giving the TCEQ an opportunity to review the report and determine whether a violation in fact exists, and without allowing the TCEQ to exercise its discretion to determine whether administrative or civil remedies are appropriate. See Houston, Tex., Code of Ordinances ch. 21, art. VI, div. 2, § 21–164(c)–(f). *Thus, the Ordinance converts what is primarily an administrative and civil enforcement regime under state law into a primarily criminal enforcement regime, removing primary enforcement authority from the agency that can ensure consistent enforcement across the state and placing that authority in the hands of the local*

> *health officer, city personnel, and municipal court judges. Although the Water Code allows local governments to bring civil suits for enforcement, requiring that TCEQ be joined as a party, the Ordinance ignores that enforcement authority and provides only for criminal enforcement without TCEQ involvement.*(italics added)

Affirmative Defense no defense to Inconsistency.

The City had urged that its 2008 Ordinance cured any inconsistency with state law by providing that an TCEQ permit or enforcement decision would be an affirmative defense to any City prosecution. The Court rejected the argument, deferring instead to the state administrative and civil enforcement.

> This does not resolve the inconsistency for two reasons. First, the statute requires that the TCEQ be given the opportunity to decide *whether* criminal prosecution is the appropriate enforcement mechanism before prosecution, not as a defense to prosecution. See Tex. Water Code § 7.203(b). Second, the affirmative defense does not protect a facility from prosecution under the Ordinance when the TCEQ, if given the chance, determines that civil or administrative remedies would appropriately address the situation. See id. § 7.068

Crushed Concrete and Mootness

The Court also cited its decision in *S. Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex.2013) where it protected a TCEQ permit from being rendered moot by local regulation.

> By authorizing criminal prosecution even when the TCEQ determines an administrative or civil remedy—or even no penalty at all—to be the appropriate remedy, the City effectively moots the TCEQ's discretion and the TCEQ's authority to select an enforcement mechanism. That is impermissible. See *S. Crushed Concrete, LLC*, 398 S.W.3d at 679 ("[T]he express language of section 382.11[3](b) compels us to give effect to the Legislature's clear intent that a city may not pass an ordinance that effectively moots a [TCEQ] decision."). And it stands in direct contravention to the Legislature's directive that "[a] prosecuting attorney may not prosecute an alleged violation if the [TCEQ] determines that administrative or civil remedies are adequate and appropriate." Tex. Water Code § 7.203(d)

TCEQ Discretion and statewide enforcement uniformity

One distinctive element of the Court's decision is its description of the legislative purpose for preemption of local home ordinance prosecution by the TCEQ state administrative and civil regime based on the need for administrative discretion to match better the remedies to the individual circumstances of each violation. The court asserted the importance of uniformity and found that:

> prosecution under the Ordinance results in a "criminal conviction, which require[s] the prosecutor to prove a culpable mental state," therefore escalating the violation to a "major violation" in the site's compliance history. 30 Tex. Admin. Code § 60.2(d)(1)(E); Houston, Tex., Code of Ordinances, § 1–6(b). Such history must be taken into consideration when the TCEQ determines the appropriate course of action for any future violation, and a "major violation" significantly escalates the penalty a site will receive. 30 Tex. Admin. Code § 60.2(g)(1)(A). The Ordinance,

therefore, thwarts the Legislature's intent that "uniformity shall prevail throughout the state." See City of Weslaco, 308 S.W.2d at 19–20

The City of Weslaco case, however, involved a challenge to a local ordinance requiring the pasteurization of milk as inconsistent with a state law that required the grading of milk under state law. In reviewing the uniformity required by state law for milk, the Supreme Court noted:

> "The statute itself demonstrates the intention on the part of the Legislature to provide for and establish grades of milk and specifications therefor as well as the labeling of the same *to the end that uniformity shall prevail throughout the State*. That intent is also revealed by reference to the emergency clause of the Act reading: 'The fact that there are no State standards for the use of milk labels indicating the safety, quality and food value of milk and milk products and the fact that such labels are being used to misrepresent these qualities to the detriment of the public health, creates an emergency * * *.' Acts 1937, 45th Legislature, p. 353, ch. 172." (italics added)
>
> We take this to mean that the City may not by ordinance vary the specifications or regulations or prescribe different standards from those established by the Act, otherwise confusion would prevail throughout the State as to quality and food value. *But a reasonable construction of this quoted provision leads to the further conclusion that a City may adopt any or all of the grades of milk named in the statute, and will be governed as to those so adopted by the specifications and regulations promulgated by the State Health Officer. The Weslaco Ordinance adopts word for word the short form of the milk ordinance requiring pasteurization as suggested and recommended by the United States Public Health Service..."*
>
> *Certainly the state pre-empted the field, by the enactment of this statute, so far as the grading and labeling of milk is concerned, but we find nothing in the statute that creates a conflict with the Weslaco Ordinance in banning the sale of some grades of milk that are named in the statute…"emphasis added.* 308 S.W.2d at 19–20. (italics added)

The Weslaco decision was therefore not decided for the general principle of statewide uniformity, but as authority in which the Texas Supreme Court successfully reconciled a local ordinance with a state law that expressly preempted related local regulations unrelated to the city ordinance.

Lack of uniform statewide discretionary enforcement as inconsistent with state law.

The Court found that the TCEQ administrative and civil discretion, based on "the numerous factors relating to the circumstances" was a clear expression by the Legislature that only the TCEQ is to determine the appropriate remedy in every case. The Ordinance would potentially moot the exercise of the TCEQ discretion as to enforcement, if any, appropriate to the violation and was therefore preempted.

> Through the various provisions requiring the TCEQ to consider numerous factors relating to the circumstances of each violation, including any "matters that justice may require," the Legislature expressed its clear intent to have the TCEQ determine the appropriate remedy *in every case*. See Tex. Water Code §§ 7.053 (listing the factors the TCEQ must consider), .058 (requiring the TCEQ to consider the factors listed in section 7.053). Moreover, by giving the TCEQ discretion to determine whether administrative or civil remedies are adequate and appropriate to address a violation, the Legislature expressed its *clear intent favoring consistent use of enforcement*

> *mechanisms across the state*. See id. §§ 7.002, .051, .068, .203(d). *The Ordinance is inconsistent with the legislative intent favoring statewide consistency in enforcement, which relies on TCEQ discretion to select an appropriate enforcement mechanism for each violation. See id. § 7.203(d). We conclude that the Ordinance's enforcement provisions, section 21–164(c) through (f), are inconsistent with the statutory requirements for criminal prosecution and the statutory scheme providing other enforcement options, and we therefore hold that the enforcement provisions of the Ordinance are preempted*. See Tex. Const. art. XI, § 5(a); Tex. Health & Safety Code § 382.113. (italics added)

Section 7.004 Texas Water Code, as cumulative

The City's urged that section 7.004 of the Water Code provided that its enforcement provisions were cumulative to the City's home rule authority for the enactment and enforcement of the Ordinance. Section 7.004. provides as follows:

> The remedies under this chapter are cumulative of all other remedies. Nothing in this chapter affects the right of a private corporation or individual to pursue any available common law remedy to abate a condition of pollution or other nuisance, to recover damages to enforce a right, or to prevent or seek redress or compensation for the violation of a right or otherwise redress an injury

The Court construed this provision to save only laws in effect at the time of the enactment of the Water Code provision. And specifically rejected an "un-preemption" effect to the provision:

> Courts applying a statutory cumulative-remedies provision, such as the one here, have applied it in reference to laws existing at the time of the statute's enactment. See, e.g., Union Cent. Life Ins. Co., 158 S.W.2d at 481 (holding that the "protest statute's" use of the word "cumulative" means the statute is in addition to the existing right of reimbursement for taxes wrongfully demanded, not intended to destroy that legal right). We have not said, however, that a cumulative-remedies provision can save an otherwise inconsistent ordinance from preemption. We cannot conclude that section 7.004 acts as an exception to preemption analysis; rather, it evinces the legislative intent that then-existing laws or otherwise lawfully created remedies are not abrogated by the Water Code provisions. See Tex. Water Code § 7.004.

Section 7.005 Other Law

The City argued that it had the authority to enact the Ordinance and seek civil remedies under Section 7.005 of the Water Code which provides:

> "This chapter does not exempt a person from complying with or being subject to other law."

The Court rejected this construction, holding that Section 7.005 did not authorize the enactment of an Ordinance inconsistent with state law. Specifically the Court held:

> This section, however, cannot be read as a grant of authority to enact other laws that are inconsistent with the Act or the Water Code. It instead explains that conduct violating the Act may also violate a separate and distinct body of law (e.g., common law nuisance). Even conduct

> complying with the Act may still constitute a nuisance or violate some other law, such as a municipal ordinance, and the violator would not be exempt from a lawsuit based on another cause of action simply because he was complying with the Act.

Express Preemption

In summary the Court held that the City was effectively expressly preempted under its construction of the Act and the Water Code.

> "A municipality … lacks power to enforce an air-quality ordinance inconsistently with the Act, TCEQ's rules or orders, or the Water Code's enforcement provisions. See id.; Tex. Health & Safety Code § 382.113. An ordinance that purports to grant a municipality such enforcement power cannot stand. The Ordinance in this case does just that by authorizing criminal prosecution without requiring notice to the TCEQ, without requiring that the TCEQ have forty-five days to determine whether a violation has occurred, and without regard to the TCEQ's discretion to determine whether criminal prosecution is the only adequate and appropriate remedy. Moreover, the Ordinance makes no provision for civil enforcement or enforcement through administrative remedies—mechanisms favored under the Act and TCEQ rules and orders. Because the Ordinance's enforcement provisions authorize the City to enforce the state's air-quality standards in a manner that is inconsistent with the statutory enforcement provisions, we conclude that those provisions of the Ordinance are preempted

Cooperation incomplete.

Similarly unavailing was the City argument that its 2008 amendment to the Ordinance directing City cooperation with the enforcement of the Ordinance rendered the Ordinance consistent with the Act and Water Code- because it did not include the city attorney in the officials who were to cooperate with the TCEQ.

> The cooperation mandate is directed only at the City health officer, requiring that person to cooperate in the enforcement of violations. See id. But nowhere does the Ordinance require other city officials or city attorneys, who prosecute violations under the Ordinance, to cooperate with the TCEQ. See id. ch.2, art. VII, div. 1, § 2–258 (providing that the city attorney is charged with representing the City in "all actions and proceedings before any court"; thus, the city attorney prosecutes violations under the Ordinance). Such a promise of cooperation hardly remedies the Ordinance's authorization of criminal enforcement, which is directly at odds with the statutory requirement that a city prosecuting attorney allow the TCEQ to exercise its discretion to determine if other remedies are appropriate. See Tex. Water Code § 7.203(d)

Reasonable Construction to leave the Ordinance in effect.

The Court also refused to accept the cooperation based on its apprehension

> We will hold an ordinance to be consistent with state laws if any "reasonable construction leaving both in effect can be reached." *Dall. Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491 (emphasis added). A construction that relies upon a city to opt out of the enforcement authority granted it under the ordinance–authority we hold is inconsistent with state law–is hardly

> reasonable, however. This is particularly true in a case such as this where, as the court of appeals recognized, the City enacted the Ordinance in response to a statutory scheme the City viewed as lax… We cannot rely on the City to decline to exercise its more stringent enforcement authority under the Ordinance—the very reason the Ordinance exists—to find consistency between the Ordinance and the statutory enforcement scheme.

Permits and Registration Fees.

Finally the Court invalidated the City permits and registration fees required under the Ordinance, relying again, on the reasoning in its decision in *Southern Concrete v City of Houston*.

> The City's requirement that a facility must register to operate lawfully effectively moots the effect of a TCEQ permit that has been issued and allows a facility to operate lawfully. Accordingly, the Ordinance's registration requirement is preempted by the Act.

Incorporation by Reference Upheld

The court did rule on one issue in the City's favor. Under the authority of Trimmier v Carlton, 296 S.W. 1070 (Tex. 1927) the court upheld the City's authority to incorporate by reference existing and future TCEQ regulations.

> When, as here, a statute recognizes a city's authority to enact ordinances consistent with an authorizing statute as well as an agency's rules and orders promulgated under the authorizing statute, an ordinance that incorporates that agency's rules as they exist and as they may be amended does not violate the non-delegation doctrine of the Texas constitution.

The Dissent

Mr. Justice Boyd dissented from that portion of the Opinion related to the Prosecution Provisions under the Ordinance.

Possible Reasonable Construction

> (A)s the Court notes, "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction." …*City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (1927)). And even if the ordinance cannot reasonably be construed to avoid an inconsistency, it is unenforceable "only to the extent that it is inconsistent with the statute." Ante at —— … *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489, 491 (Tex.1993)). In my view, the Prosecution Provisions can reasonably be construed as only permitting prosecutions that are consistent with state law. And to the extent they cannot be so construed, our precedents require us to invalidate them only to that extent. Because the Court renders a general declaration that the Prosecution Provisions are completely preempted and unenforceable, I respectfully dissent from that portion of the Court's opinion.*(italics added)

No Field Preemption-

The Dissent points out that a comprehensive state regulation does not automatically preempt a field.

> Home-rule cities have constitutional authority to enact ordinances. Id. at 490–91; see Tex. Const. art. XI, § 5. Unlike state statutes, which are unenforceable when federal laws indicate that Congress "intended the federal law or regulation to exclusively occupy the field," *BIC Pen Corp. v. Carter*, 346 S.W.3d 533, 537 (Tex.2011), city ordinances are not subject to state-law "field preemption." "The entry of the state into a field of legislation ... does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable." *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex.1982). Thus, that the Legislature has passed statutes and state agencies have enacted rules addressing air pollution does not automatically prohibit the City from adopting ordinances that do the same, even if the Legislature intended to "occupy that field" of law.

In BCCA, it is clear that the Legislature expressly did *not* preempt the field of air pollution regulation because the Act authorizes a City to enact and enforce air pollution ordinances, as long as there is no conflict with state law. The Dissent notes that:

> "… city ordinances are subject to "conflict preemption." The Texas Constitution expressly prohibits "any [ordinance] provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5. If an ordinance "attempts to regulate a subject matter [that] a state statute preempts," the ordinance is unenforceable, but only "to the extent it conflicts with the state statute." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex.2002). On the subject of air-pollution laws, the Legislature has expressly provided that cities can "enact and enforce an ordinance for the control and abatement of air pollution," so long as the ordinance is "not inconsistent" with state statutes or agency rules. Tex. Health & Safety Code § 382.113(a)(2).

The Dissent also points out that the Court emphasizes the inconsistency but fail to make an effort to find a more reasonable construction of the Prosecution Provisions

> The Court identifies numerous ways in which it believes the Prosecution Provisions are inconsistent with the state-law requirements. It makes no effort, however, to determine whether "any other reasonable construction" of the Prosecution Provisions would eliminate the alleged inconsistencies with the state-law requirements and thus "leav[e] both in effect," as our own precedent requires. *City of Beaumont*, 291 S.W. at 206. Properly construed, the Prosecution Provisions do not "require," "allow," or "authorize" many of the actions of which the Court complains. And even if the Provisions could be construed to require or authorize those actions, they can reasonably be construed to not permit or authorize the actions when doing so would be inconsistent with the state-law requirements. The Court ignores our own precedent that requires us to enforce both the state-law requirements and the Prosecution Provisions "if that be possible under any reasonable construction."

The Dissent supplies a reasonable construction of the Prosecution Provisions of the Ordinance, by construing it to permit prosecutions that are valid under the Act and the Water Code, after giving notice to TCEQ of the violation.

> The state statute permits criminal prosecution only when the TCEQ determines that administrative or civil penalties are inadequate or inappropriate, or the TCEQ fails to make a determination within forty-five days. Id. § 7.203(c)–(d). In light of the Ordinance's requirement that the City's air-pollution abatement program "shall include" the "dut[y]" to cooperate with the TCEQ and state officials in the "filing and prosecution" of criminal charges, Houston, Tex., Code of Ordinances ch. 21, art VI, § 21–146(3) (2008), the Prosecution Provisions can reasonably be construed to only permit prosecutions that are consistent with the state-law requirements. Nothing in the Prosecution Provisions mandates criminal prosecution for every violation—much less requires or authorizes criminal prosecution when state law forbids it.

Lack of TCEQ "Exclusive" Authority

The Dissent corrects what the Court erroneously describes as the clear intent of the Legislature to have the TCEQ exclusively determine the remedy in every case of air pollution violations.

> Although state laws grant the TCEQ great discretion in dealing with air-pollution violations, they do not give the TCEQ the exclusive authority to "determine the appropriate remedy in every case." Ante at ——. State law expressly authorizes cities to "enact and enforce an ordinance for the control and abatement of air pollution," so long as the ordinance is "not inconsistent" with state statutes or agency rules. Tex. Health & Safety Code § 382.113(a)(2). And as the Court itself notes, state law expressly permits a city to choose to file a civil suit against a violator seeking injunctive relief, civil penalties, or both, Tex. Water Code § 7.351(a), and expressly prohibits the TCEQ from assessing administrative penalties as long as the city is diligently pursuing that suit. Id. § 7.051(a)(2).

Statewide Uniformity of TCEQ exercise of discretion

The Dissent points out the lack of any indication that statewide consistency was a legislative purpose in enacting the Act and the Water Code.

> The Court asserts that the Prosecution Provisions undermine a legislative intent "favoring statewide consistency in enforcement, which relies on TCEQ discretion to select an appropriate enforcement mechanism for each violation." It is unclear where the Court finds this "legislative goal of statewide uniformity," as the Court fails to cite to the Health and Safety Code, the Water Code, or any statutory provision to support its conclusion that the Legislature favored "statewide uniformity of enforcement" in the manner the Court suggests.
>
> Accepting BCCA Appeal Group's arguments that the Prosecution Provisions are preempted by a "comprehensive structure,", and a "comprehensive enforcement regime," the Court concludes that "the Legislature has enacted a comprehensive and flexible regulatory regime for investigation ... and consistent enforcement of the state's air-pollution laws," that state agencies have "statewide authority and discretion" to implement the statutes and their rules, and that "plants are extensively regulated" by the state agencies under the statutes and rules.

Additionally, the Dissent points out again that, until BCCA, City ordinances are not subject to ”field preemption”

> Even if all of that were true, it would at best provide a basis for concluding that the Prosecution Provisions are preempted because the Legislature has expressed an intent to “occupy the field” of air-pollution enforcement. But city ordinances are not subject to such “field preemption” based on state laws. “The entry of the state into a field of legislation ... does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable.” *City of Brookside Vill., 633 S.W.2d at 796*; see also *City of Richardson v. Responsible Dog Owners of Tex., 794 S.W.2d 17, 19* (Tex.1990)

Reliance and reasonableness.

The Dissent points out that the Court has incorrectly analyzed its role in the construction of the reasonableness of a narrowing construction of the Ordinance that would limit the City to criminal enforcement after it complied with the Act and Water Code, by complying with the required 45 day notice.

> The Court asserts …we “cannot rely on the City to decline to exercise its more stringent enforcement authority under the Ordinance.” The Court asserts that any “construction that relies upon a city to opt out of the enforcement authority granted it under the ordinance ... is hardly reasonable.” These assertions demonstrate that the Court misunderstands our task in determining whether, and the extent to which, the Prosecution Provisions are inconsistent with the state-law requirements. By reasonably construing the Provisions to authorize prosecutions only in compliance with state law, we would confirm that the Ordinance does not grant the City any “more stringent enforcement authority.” We need not naively hope and rely on the City to do less than the Prosecution Provisions allow, because under a reasonable construction, the Prosecutions Provisions allow the City to do only that which is consistent with the state-law requirements

Constitutional home rule power- invalidation only to the extent of inconsistency

Finally, the Dissent points out the established precedent that an ordinance is to be invalidated only to the extent of the conflict. This narrowing construction is not re-writing the ordinance, it is recognizing the essential constitutional power of a home rule city to enact and enforce laws that are consistent with state law.

> Instead of invalidating the Prosecution Provisions in their entirety, our own precedent permits us to invalidate an ordinance “only to the extent it conflicts with the state statute.” Sanchez, 81 S.W.3d at 796; see *Dall. Merch's & Concessionaire's Ass'n,* 852 S.W.2d at 494. To the extent the Provisions permit the City to criminally prosecute a violator after the TCEQ received proper notice and timely determined that administrative and civil remedies would be inadequate or inappropriate, the Provisions are consistent with state law. Enforcing an ordinance only to the extent of consistency does not “rewrite” the ordinance, as the Court contends. Instead, it merely limits the effect of the ordinance to legally permissible applications, even if other applications would be inconsistent with state law and therefore invalid. *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec., LLC*, 324 S.W.3d 95, 103 (Tex.2010).

> Finally, enforcing an ordinance only to the extent of consistency properly acknowledges the City's constitutional powers as a home-rule city and presumes that the City acted within its authority by enacting a valid ordinance–as our precedents have required for decades. *City of Fort Worth*, 83 S.W.2d at 618 ("[W]e shall not presume that in the enactment of this measure the city commission passed a void measure. On the contrary, the presumption is that the city authorities intended to adopt a valid ordinance."); see also *In re Sanchez*, 81 S.W.3d at 796; City of Brookside Vill., 633 S.W.2d at 792–93; *City of Weslaco*, 308 S.W.2d at 21 ("The validity of an ordinance is presumed...."). Under our preemption precedent, we must uphold the Prosecution Provisions to the extent they are consistent with state law.

Motion for Rehearing

On June 15, 2016 the City filed its Motion for Rehearing. On August 15, 2016 the City filed its brief in support of its Motion with the following Points:

1. Whether, under Texas' bifurcated judicial system, a Texas civil court, like this one, having found City of Houston ("City"), Code of Ordinances ("Code") §§21-161(a), 21-162, 21-163, 21-164(c)-(f), and 21-166 criminal in nature, had subject matter jurisdiction to decide whether they were preempted without BCCA Appeal Group, Inc.'s ("BCCAAG") first having shown an irreparable injury to its members' vested property rights if these provisions were enforced?

2. Whether BCCAAG's associational standing encompasses claims requiring individualized proof of irreparable injury to a vested property right?

3. In the alternative, whether the Water Code provisions and Texas Commission on Environmental Quality ("TCEQ") permits on which this Court relied, none of which is actually encompassed by §382.113, could properly serve as grounds for preempting the ordinance's registration provisions?

4. In the alternative, whether this Court's reliance on the mere possibility that the City might implement the ordinance's registration and enforcement provisions in violation of state law and/or the language of the ordinance itself under certain circumstances was a too speculative and hypothetical "conflict" to sustain a facial challenge to the ordinance, holding those provisions preempted, when a long line of U.S. Supreme Court and Texas appellate decisions have held that such hypothetical conflicts cannot support preemption?

5. In the alternative, whether this Court's ruling, which does not resolve the question of retroactivity, should be prospective only?

Summary of the City Arguments in support of the Motion for Rehearing:

1. Lack of Criminal Jurisdiction-

Almost 60 appellate courts have reaffirmed that civil courts ordinarily lack jurisdiction to decide the validity of penal ordinances or enjoin their enforcement. Yet that is the relief BCCA sought and improperly obtained from this Court.

BCCA cannot have it both ways: it cannot file suit in civil court seeking interpretation and preemption of an ordinance's criminal provisions, yet escape the jurisdictional consequences of its strategy by claiming that the case's "essence" is civil. Under Texas law, when, following BCCA, this Court undertook to interpret and hold preempted "criminal" provisions, it destroyed whatever jurisdiction it might once have asserted.

2. Harm.

   BCCA showed only associational standing and not the required showing of individualized irreparable harm required for a civil challenge to an Ordinance.

3. Registration not invalid under Section 383.113 of the Water Code.

   Section 383.113 of the Water Code does not encompass TCEQ permits on which the Court relied in holding that the Ordinance registration provisions were preempted.

4. Hypothetical Facial Challenge.

   The Court's reliance on the mere possibility that the City might implement the ordinance's registration and enforcement provisions in violation of state law and/or the language of the ordinance itself under certain circumstances was a too speculative and hypothetical "conflict" to sustain a facial challenge to the ordinance, holding those provisions preempted, when a long line of U.S. Supreme Court and Texas appellate decisions have held that such hypothetical conflicts cannot support preemption.