WE CAN'T REGULATE THAT?

LIMITATIONS ON MUNICIPAL LAND USE REGULATION IN TEXAS

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I.

Introduction

As attorneys who regularly confront land use issues, we often encounter certain areas where local governmental regulatory authority is either completely or significantly circumscribed by state or federal statutory authority. As a result, local governments are not free to undertake regulation without facing the potential that they may have just acted contrary to state or federal law. The purpose of this paper is to address those areas where local government regulation is limited, either *in toto* or in part, ranging from broad issues like religious land use regulation to allowing propane gas tanks to be sold out front at the local convenience store. In no particular order, I have attempted to provide a synopsis of these diverse land use issues.[1]

II.

Religious Land Uses Under RLUIPA

The Religious Land Use and Institutionalized Persons Act ("RLUIPA" or "the Act") was signed into law by President Bill Clinton on September 22, 2000. The statute, although short in length but broad in application, addresses what Congress determined to be two areas in which the actions of state and local governments impose substantial burdens on religious liberty—state and local land use regulations and institutionalized persons in the custody of states and localities. While a detailed review of RLUIPA would take pages and is beyond the scope of this paper, I will focus on practical issues for local governments related to religious land uses; however, a brief overview of the statute—and the reasons underlying its adoption—follows.

A. The Federal Statute

RLUIPA is codified in Title 42, Section 2000cc *et seq.*, of the United States Code. To secure the rights of individuals to pursue and practice their religious beliefs, RLUIPA provides religious institutions protection from discrimination by local governments in land use regulations and the processing of applications for the construction of buildings to be used for religious purposes. Section 2(a) of RLUIPA establishes as a general rule that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

[1] I have opted to forego any discussion of the First Amendment's impacts on land use regulations as beyond the scope of this paper. Consequently, there is no discussion of topics such as sexually oriented businesses, donation bins, or sign regulations after *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest."[2]

In Section 2(a)(2) of the Act, this general rule is limited in scope by the following language, which specifies that this general rule applies in any case in which:

(A) the substantial burden is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[3]

Section 2(b) of RLUIPA contains non-discrimination and non-exclusion provisions that protect religious assemblies or institutions. Section 2(b)(1) provides that no state or local government "shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" and Section 2(b)(2) provides that these governmental entities shall not "impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[4] In addition, Section 2(b)(3) states that "[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction; or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[5]

RLUIPA authorizes private parties to challenge violations of these provisions, specifying that "[a] person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[6] In such suits,

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[2] 42 U.S.C.A. § 2000cc-2(a)(1).

[3] *Id*., § 2000cc-2(a)(2).

[4] *Id*., § 2000cc-2(b).

[5] *Id*.

[6] *Id*., § 2000cc-4(a).

"[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2," then the "government shall bear the burden of persuasion on any element of the claim," except that the plaintiff shall bear the burden on whether the law, regulation, or practice at issue "substantially burdens the plaintiff's exercise of religion."[7] Section 4(f) further provides that "the United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act."[8]

The impetus for Congress' passage of Section 2 of RLUIPA was a record of "widespread" state and local discrimination against religious institutions by means of zoning regulations. Witnesses presented "massive evidence" of a pattern of religious discrimination, impinging upon a core aspect of religious exercise—the ability to assemble for worship.[9] Specifically, Congress found that land use regulations implemented through a system of individualized assessments placed "within the complete discretion of land use regulators whether [religious] individuals had the ability to assemble for worship."[10] Congress further determined that "[r]egulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws,"[11] and that the "standards in individualized land use decisions are often vague, discretionary, and subjective."[12] Such discretion, Congress found, results in widespread discriminatory application of land use regulations to religious assemblies.[13]

Congress also received testimony that religious assemblies receive less than equal treatment when compared to secular uses. Specifically, Congress found that

> banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.[14]

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[7] *Id*., § 2000cc-4(b).

[8] *Id*., § 2000cc-4(f).

[9] *See* Cong. Rec. S7774, S7775; H.R. Rep. 106-219, at 21, 24.

[10] *See* H.R. Rep. 106-219, at 19.

[11] *Id.* at 20.

[12] *Id.* at 24.

[13] *Id.* at 23.

[14] *Id.* at 19-20.

Congress determined that these forms of discrimination are widespread.[15] Further, Congress found that individualized land use assessments readily lend themselves to discrimination against religious assemblies, yet make it difficult to prove such discrimination in any particular case.[16] In reaching this conclusion, Congress relied on statistical evidence from national surveys and studies of zoning codes, reported land use cases,[17] and the experiences of particular churches, all of which demonstrated unconstitutional government conduct.[18] Congress also relied on evidence and testimony regarding numerous specific examples of unconstitutional discrimination from across the country, examples that witnesses with broad expertise and experience testified were representative of unconstitutional discrimination that occurred generally.[19] Finally, Congress determined that it would be impossible to make separate findings about every jurisdiction, to target only those jurisdictions where discrimination had occurred or was likely to occur or, for constitutional reasons, to extend protection only to minority religions.[20]

As noted, RLUIPA creates a statutory test to determine whether a municipality may enforce its land use regulations against religious institutions. Essentially, the Act provides that no local government may impose a substantial burden upon a person's practice of religion unless such local government can show that the regulation at issue is in furtherance of a compelling governmental interest and that it has used the least restrictive means in achieving that interest.[21]

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[15] 146 Cong. Rec. at S7775; H.R. Rep. 106-219, at 18-24.

[16] *Id.*

[17] Congress took note that "[c]onflicts between religious organizations and land use regulators [over unconstitutional governmental actions] are much more common than reported cases would indicate." H.R. Rep. 106-219, at 24.

[18] *See* 146 Cong. Rec. S7775; H.R. Rep. 106-219, at 19-22.

[19] *Id.*

[20] *See* 146 Cong. Rec. S7775. The foregoing analysis was presented in *Unitarian Universalist Church of Akron, et al. v. City of Fairlawn, et al.*, Case No. 5:00CV3021, Memorandum of Law of Intervenor United States of America in Support of the Constitutionality of the Religious Land Use and Institutionalized Persons Act 2000, United States District Court for the Northern District of Ohio, at 5-7.

[21] 42 U.S.C.A. § 2000cc-2(a)(1).

B. What is "Religious Exercise"?

The Act protects the "religious exercise of a person, including a religious assembly or institution."[22] As many religious institutions expand their uses to include, for example, midnight basketball leagues, day care centers, summer camps and homeless shelters, the question will be raised whether these uses qualify as "religious exercises." The Act defines religious exercise as "any exercise of religion whether or not compelled by, or central to, a system of religious belief."[23] The Act further provides that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[24]

This definition clearly includes the construction, expansion or remodeling of a church or other place of worship as well as the use of a personal home or business property for worship, prayer meetings or other religious activities.[25] In addition, the scope of this broad definition can encompass other ancillary activities, such as church operation of a homeless shelter or soup kitchen. Nonetheless, RLUIPA also has language in its legislative history intended to limit the impact of this provision, making clear that "not every activity carried out by a religious entity or individual constitutes 'religious exercise.'" Religious institutions may use real property for purposes "comparable" to those of secular institutions, and these uses may provide revenue to support other sectarian activities of the institution. The record makes clear that RLUIPA is not intended to "automatically bring these activities or facilities within the bill's definition of 'religious exercise.'"[26] Thus, whether non-members use the facility, such as a day care center, and whether that use of property is open to anyone who pays a fee, are factors to consider when determining whether RLUIPA's provisions affect a local government's regulatory authority.

C. Practical Guidance for Municipal Regulation

Without delving into a detailed analysis of RLUIPA jurisprudence, in short, courts have found that general land use regulations do not substantially burden religious exercise. The burden must be more than an inconvenience on the religious institution; rather, the burden must be so significant that it renders the religious exercise effectively impractical. Reported cases that finding no significant burden include requirements to

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[22] *Id*., § 2000cc-2(a)(1).

[23] *Id*., § 2000cc-5(7)(A).

[24] *Id*., § 2000cc-5(7)(B).

[25] James L. Dam, *Churches Use New Federal Statute to Win Zoning Cases*, Lawyers Weekly USA, October 10, 2001.

[26] *Id*. at 109.

locate large places of assembly outside of residential areas, prohibitions of noncommercial or institutional uses in industrial or redevelopment areas, limits on the size and heights of buildings and signage, provision of adequate parking and buffers, and maintenance of harmony with existing nearby uses and congruence within historical districts. Similarly, the cost and time required to apply for and go through the approval process (such as a rezoning or specific use permit review) have been held not to be a substantial burden.[27]

In general, courts have found that the following constitute a substantial burden on religious exercise:

- Nowhere to locate in the jurisdiction;
- Inability to use property for religious purposes;
- Imposing excessive and unjustified delay, uncertainty or expense; and
- Religious animus expressed by municipal officials.

Conversely, courts have found the following generally do not constitute a substantial burden on religious exercise:

- Timely denial that leaves other sites available;
- Denial that has a minimal impact on the religious assembly;
- Denial where there is no reasonable expectation of an approval; and
- Personal preference, cost, or inconvenience.[28]

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[27] *See World Outreach Conference Center v. City of Chicago*, 591 F.3d 531 (7th Cir. 2009) (upholding refusal to allow the demolition of a landmark building when sufficient vacant land for the center was available onsite); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir. 2007) (upholding prohibition of religious uses in industrial area); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 642 (10th Cir. 2006) (upholding denial of variance for 100-child daycare center in a low density residential neighborhood); and *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel of Baltimore County*, 962 A.2d 404 (Md. 2008) (sign size limits apply to church), all cited in *Zoning Religious Land Uses* at https://canons.sog.unc.edu/zoning-religous-land-uses/ (hereinafter "*Zoning Religious Land Uses*").

[28] *See* Power Point Presentation, "Religious Land Use and Institutionalized Persons Act Claims, Strategies for Local Governments to Avoid and Defend RLUIPA Actions," Robinson & Cole (Feb. 22, 2017), Slide 1 (hereinafter "*RLUIPA Claims*") at http://www.rc.com/upload/Strafford-2017-Revised-2-21-17-Religious-Land-Use-and-

Texas local governments should consider the following when applying land use regulations to religious land uses:

- Use objective standards that apply equally to both secular and religious uses. If regulations differentiate between secular and religious uses, there must be a strong policy justification for excluding religious uses, such as creating a vibrant commercial core or preserving land for industrial use. It will be difficult to provide such justification if comparable uses, such as private clubs and fraternal organizations, are allowed, but religious uses are prohibited. Otherwise, the same density standards, bulk, area and dimensional requirements, off-street parking requirements, buffer requirements and similar regulations should apply to all religious and comparable institutional uses.

- Approval requirements for religious uses should not be more onerous than the approval requirements for secular uses. If so, the land use requirement may be subject to an RLUIPA challenge.

- Local governments should not assume that the usual presumption of validity for land use regulations will be applied. All decisions should be soundly supported by testimony and evidence, including recommendations from professional staff and the planning and zoning commission. Be wary of disregarding those recommendations.

- There should be reasonable alternatives available for religious expression. There should be documentation of the availability of alternative sites.

- Local governments should refrain from utilizing specific or conditional use permits for religious uses. With the SUP or CUP requirement, there exists the perceived authority to otherwise deny the religious use. The denial may lead to litigation.[29]

Institutionalize.pdf. *See also Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (denial of expansion plans at religious day school unsupported by facts); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (multiple denials at multiple sites); *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895 (7th Cir. 2005) (unjustified multiple denials of rezoning proposals), all cited in *Zoning Religious Land Uses, supra* note 27.

[29] One of the most recent federal cases involving a municipality's use of a conditional use permit is *The Church of Our Lord and Savior Jesus Christ v. City of Markham, Illinois*, No. 18-1432, decided on January 17, 2019, by the United States Court of Appeals for the Seventh Circuit. The city has been involved in years of litigation over whether a religious use is a permitted use or conditional use, with the Seventh Circuit

- At public hearings during the zoning process, the mayor, councilmembers and planning and zoning commissioners should inform the public that the focus of the public hearing is to evaluate the proposed land use and its impacts, and at no time are expressions of religious favoritism or religious intolerance permissible.[30]

III.

Cell Towers

The next federal statute which limits local government regulation involves the approval and siting of cell towers. While this authority prior to 1996 was viewed through the lens of standard zoning principles, in 1996 local approval and siting prerogatives were curtailed by the adoption by Congress of the Telecommunications Act of 1996. Local government regulation of approval and siting of cell towers has not been the same since.

A. The Federal Statute

After the adoption of the Telecommunications Act of 1996,[31] there was ambiguity regarding the extent to which local governments could regulate cellular towers; however, since that time, many courts have sided with local governments when those governments considered sites for cellular towers and addressed aesthetic and safety concerns regarding cellular towers. Nevertheless, under the Telecommunications Act of 1996, while preserving local authority over the siting and construction of wireless communications facilities, there are five limitations on local authorities when dealing with cell towers and telecommunications carriers. A local government:

(1) shall not prohibit or have the effect of prohibiting the provision of service[32];

(2) may not unreasonably discriminate between providers of functionally equivalent services[33];

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remanding the case to the trial court, writing that "the church has sustained a concrete injury resulting from the city's interpretation of which zoning uses are permitted. . . ." Slip Op. at 20.

[30] *See generally Zoning Religious Land Uses*, *supra* note 27, and *RLUIPA Claims*, *supra* note 28.

[31] 47 U.S.C. § 151 *et seq.*

[32] *Id*., § 332(c)(7)(B)(i)(II).

[33] *Id*., § 332(c)(7)(B)(i)(I).

(3) must act within a reasonable time after a request is filed[34];

(4) must issue a written opinion explaining its decision to deny a request, which decision must be supported by substantial evidence[35]; and

(5) that denies a request is subject to judicial review of that decision.[36]

It also should be noted that a determination whether to allow the placement of a telecommunications tower in a location may not be based on the alleged environmental effects of radio frequency emissions.[37] Additionally, although it is difficult to imagine this would occur in today's society, federal law specifically precludes local governments from adopting ordinances that prohibit or have the effect of prohibiting the provision of telecommunication services, including wireless services, and the Federal Communications Commission may preempt the enforcement of any local ordinance that does so.[38]

B. Substantial Evidence Required to Deny a Cell Tower Application

For purposes of the Telecommunications Act of 1996, "substantial evidence" "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[39] Further, this standard of review does not allow a court to substitute its judgment for that of the local government; instead, the court merely looks to see if there is a scintilla (an iota or trace) of evidence which would allow a reasonable mind to uphold the local government's action.[40]

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[34] *Id*., § 332(c)(7)(B)(ii).

[35] *Id*., § 332(c)(7)(B)(iii).

[36] *Id*., § 332(c)(7)(B)(v).

[37] *See id*., § 332(c)(7)(B)(iv) ("[n]o State or local government . . . may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions").

[38] *See id*., § 253.

[39] *New Par v. City of Saginaw*, 301 F.3d 390, 396 (6th Cir. 2002); *U.S. Cellular Corp. v. City of Wichita Falls, Texas*, 364 F.3d 250, 255 (5th Cir. 2004).

[40] *U.S. Cellular Corp.*, 364 F.3d at 255-56.

Generalized concerns about cell towers, such as their impact on aesthetics or property values, do not constitute substantial evidence.[41] Courts have generally concluded that while generalized aesthetic concerns are not substantial evidence to support a denial, specific and particular aesthetic objections do constitute substantial evidence. Thus, in *Michael Linet Inc. v. Village of Wellington*,[42] the court found that, while relying on mere blanket aesthetic objections would "eviscerate the substantial evidence requirement and unnecessarily retard mobile phone service development," the residents' aesthetic objections to a 120-foot tower coupled with testimony from the residents and a realtor of the tower's negative impact on property values constituted substantial evidence. The proponent's expert testimony to the contrary was properly rejected because it "was provided by a telecommunications executive who placed a tower in a different part of the community and a realtor who based his knowledge on condominium sales in a different county."[43] Similarly, in *Minnesota Towers, Inc. v. City of Duluth*,[44] the court found that the city's denial of an application for a 195-foot tower was supported by substantial evidence, for two reasons. First, a petition signed by 72 area citizens and the opinion of an area realtor constituted substantial evidence that the tower would have a negative impact on property values.[45] Second, the petition, as well as photographic evidence, provided substantial evidence of the tower's "unsightly visual impact" sufficient to support the city's finding that the tower was aesthetically objectionable.[46]

In *Omnipoint Communications, Inc. v. City of White Plains*,[47] the Second Circuit assessed whether the city based its "denial of Omnipoint's application for a permit to erect a 150-foot cellular communications tower (disguised as a large tree) on a local golf course" was supported by substantial evidence.[48] The appellate court, reversing the decision of the district court, held that the aesthetic impact of the tower was a permissible ground for denial. In doing so, the court found that the city was free to disregard Omnipoint's expert's visual impact study: the study was conducted without notice to the city or community, no observations were made from residences, and it

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[41] *Id*. at 256.

[42] 408 F.3d 757 (11th Cir. 2005).

[43] *Id.* at 761-62.

[44] 2005 WL 1593044 (D. Minn. July 1, 2005).

[45] *Id.* at *6-*7.

[46] *Id.* at *8.

[47] 430 F.3d 529 (2d Cir. 2005).

[48] *Id.* at 530.

failed to consider what the tower would look like in the city when the trees were bare. Moreover, the city was not obligated to counter Omnipoint's expert with a properly credentialed expert—it could rely on the "aesthetic objections raised by neighbors who know the local terrain and the sightlines of their own homes."[49]

A failure to conform to setback requirements also constitutes substantial evidence in support of a determination that a tower does not comply with a city's zoning requirement.[50] Courts also have found that if a local government board properly applies its own zoning laws, it has substantial evidence for its denial. In *MetroPCS, Inc. v. City and County of San Francisco*,[51] the Ninth Circuit succinctly held that "this Court may not overturn the Board's decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence (*i.e.*, more than a 'scintilla' but not necessarily a preponderance"."[52] In this case, the court found that the city properly relied on the planning code provision directing it to consider whether the proposed use is necessary or desirable, and that the evidence that the area was served by five other carriers was substantial evidence to support the city's conclusion that the facility was not necessary.[53]

So what factors would constitute "substantial evidence" such that an application for a cell tower could be denied? In brief, generalized concerns about property values and aesthetics alone will not be sufficient.[54] Thus, there must be more than "they're ugly" and "I think they will reduce my property values." Instead, the following has been held sufficient to meet the substantial evidence standard:

- Opinions of real estate professionals detailing how real estate prices may be impacted by the location of the cell towers[55];
- Opinions of the affected residents how the cell towers will impact them and property values[56];

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[49] *Id.* at 533-34.

[50] *See U.S. Cellular Corp.*, 364 F.3d at 256-57.

[51] 400 F.3d 715 (9th Cir. 2005).

[52] *Id*. at 725.

[53] *Id.* at 725-726.

[54] *See*, *e.g.*, *Alta Towers v. City of New Braunfels*, 2017 WL 2703585 at *4 (W.D. Tex. 2017).

[55] *Minnesota Towers* at *7.

[56] *Id*.

- The petition of the residents opposed to the cell towers should be introduced in support of the opposition[57];

- Sufficient photographic evidence of the unattractiveness of the proposed towers and the towers' visual height impact (where, in this case, the cell tower stood well above the tree line in a wooded residential neighborhood)[58];

- Again, "a blanket aesthetic objection does not constitute substantial evidence," but "[a]esthetic objections coupled with evidence of an adverse impact on property values or safety concerns can constitute substantial evidence"[59] and safety impacts on a neighboring school[60] constituted substantial evidence[61]; and

- It also is relevant whether a company can reasonably place a cell site in an alternative location and eliminate the residents' concerns.[62]

C. Cell Tower Siting Denials Must Be Written

Besides addressing what issues constitute "substantial evidence" that would permit a local government to deny the construction of a cell tower, local governments also must be cognizant of the timing in doing so as well as provide reasons in writing supporting the denial. In 2015, the United States Supreme Court in *T-Mobile South v. City of Roswell, Georgia*,[63] addressed these issues, holding that (1) local governments

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[57] *Id.*

[58] *Id*. at *8.

[59] *Michael Linet*, 408 F.3d at 761-62.

[60] While the cases generally refer to safety concerns being a valid consideration in denying a permit for cell tower siting, like the "property values" argument, a generalized concern about safety without further clarification of that safety concern probably would not constitute sufficient or substantial evidence. For example, if a residence is located within the "fall zone" surrounding a cell tower, that I believe would constitute a valid safety concern. Unfortunately, in *Michael Linet* the specifics of that safety concern were not discussed in the opinion.

[61] *Id*.

[62] *Id*. at 762.

[63] 135 S.Ct. 808 (2015).

must "provide reasons when they deny applications" to build cell phone towers,[64] but "these reasons need not be elaborate or even sophisticated, but rather . . . simply clear enough to enable judicial review"[65]; (2) while the reasons supporting such a denial must be in writing, but nothing in the text of the Telecommunications Act of 1996 "imposes any requirement that the reasons must be given in any particular form"[66]; and (3) a local government "must provide or make available its written reasons [denying a cell tower application] at essentially the same time as it communicates its denial."[67]

D. Cell Tower Applications Must Be Acted Upon "Within a Reasonable Period of Time"

The Supreme Court wrote in *T-Mobile South* that any application for a cell tower also must be acted upon "within a reasonable period of time,"[68] noting with approval that "the Federal Communications Commission has generally interpreted this provision to allow localities 90 days to act on applications to place new antennas on existing towers and 150 days to act on other siting applications."[69] Consequently, there are two timing components that must be taken into account by a local government: (1) act promptly upon an application for a cell tower; and (2) if denying the application, the written decision denying the application should be "essentially contemporaneous" with the city council meeting at which the action was taken.

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[64] *Id*. at 814.

[65] *Id*. at 815.

[66] *Id*. at 816. "Although the statute does not require a locality to provide its written reasons in any particular format, and although a locality may rely on detailed meeting minutes as it did here, we agree with the Solicitor General that 'the local government may be better served by including a separate statement containing its reasons.'" *Id*.

[67] *Id*. at 816.

[68] *Id*., citing 47 U.S.C. § 332(c)(7)(B)(ii).

[69] *Id*. at 817. Also, FCC regulations require local governments to approve some collocations at previously approved sites. This includes both wireless towers and base stations, as defined in 47 U.S.C. § 1455, with limitations on the physical dimensions of such towers and base stations. The FCC implementing regulations may be found at 47 C.F.R. § 1.40001. Local government attorneys should note that FCC "shot clock" regulations (that is, the amount of time a local government is authorized to review an application) do not apply when a local government is acting in a proprietary capacity—when a city is leasing its property for a cell tower and a collocation request on that property is made, for example.

Local governments should be aware of a recent FCC order that impact local regulation of small cell towers, recently determining that zoning and land use restrictions, and fees, among others, may prove to be an effective prohibition of telecommunication services. According to the FCC, local regulations such as undergrounding, aesthetic concerns and minimum spacing between towers must be reasonable, non-discriminatory, objective and published in advance so that carriers have notice.[70]

IV.

Group/Community Homes

A request to site a group home in a residential neighborhood is almost always problematic—often neighbors turn out at city council meetings and request that the council deny the request or take other action to prohibit a group home from locating nearby. In considering this matter, a local government must be aware of both state and federal legislation impacting decision-making about such group homes.

A. Federal Statutes

In 1988 the federal Fair Housing Act was amended to extend fair housing protections to the handicapped.[71] As a consequence, the list of discriminatory housing practices now includes discrimination on the basis of handicap.[72] Specifically, 42 U.S.C. § 3604(f)(1) makes it unlawful "[t]o discriminate or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap" of that individual, someone associated with that individual, or of a resident or potential resident.

These provisions also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. Congress found that while state and local governments have authority to

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[70] *See* FEDERAL COMMUNICATIONS COMMISSION, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment Declaratory Ruling and Third Report and Order, FCC 18-33, at ¶¶ 84-91 (2018). *See also* Negheen Sanjar, *Telecommunications-The Year in Review*, MUNICIPAL LAWYER (March/April 2019) at 30-31. A coalition of local governments have sued the FCC to halt implementation of the FCC order. *Id*.

[71] *See* 42 U.S.C. § 3601 *et seq*.

[72] The term "handicap," with respect to a person," is defined as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) has a record of having such impairment; or (3) being regarded as having such impairment"; however, "such term does not include current, illegal use of or addition to a controlled substance." 42 U.S.C. § 3602(h).

protect safety and health, and to regulate the use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.[73] The United States House of Representatives Judiciary Committee specifically intended that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Fair Housing Amendments Act of 1988 was intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.[74]

B. Texas State Law on Group/Community Homes

The reference point in Texas is Chapter 123 of the Texas Human Resources Code, entitled "Community Homes for Persons with Disabilities." The statute is short—it prohibits zoning restrictions against community homes, provides basic definitions, and addresses limitations on community homes.

Initially, a "community home" is defined first, as "a community-based residential home" operated by: (A) the Texas Department of Aging and Disability Services; (B) a community center organized under Chapter 534, Texas Health and Safety Code, that provides services to persons with disabilities; (C) an entity subject to the Texas Nonprofit Corporation Law as described by Section 1.008(d) of the Texas Business Organizations Code; or (D) an entity certified by the Texas Department of Aging and Disability Services as a provider under the ICF-IID[75] medical assistance program; or second, as "an assisted living facility licensed under Chapter 247 of the Texas Health and Safety Code, "provided that the exterior structure retains compatibility with the surrounding residential dwellings."[76]

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[73] *See* H.R. Rep. No. 711, 100th Cong. 2d Sess., reprinted in U.S.C.C.A.N. 2173, 2185 (1988).

[74] *Id*.

[75] Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions program, which provides residential and habilitation services to people with intellectual disabilities or a related condition. *See* https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/intermediate-care-facilities-icfiid.

[76] Tex. Hum. Res. Code § 123.004. In a 2011 paper written by Monte Akers and Jason D. King for the Fall Conference of the Texas City Attorneys Association, entitled "Municipal Regulation of Group Homes," they identify at least 24 types of homes, houses, centers and other facilities that may qualify as group homes: "agency foster

A community home must provide the following services to its disabled residents[77]: food and shelter, personal guidance, care, habilitation services and supervision.[78] In the zoning context, a community home operated pursuant to Chapter 123 of the Texas Human Resources Code "is authorized in any district [of a city] zoned as residential" and any "restriction . . . the relates to the use of property may not prohibit the use of the property as a community home."[79] Further, while community homes are restricted to not more than six persons with disabilities, regardless of the legal relationship with each other, and two supervisors at any one time,[80] a community home may not be established within one-half mile of an existing community home.[81]

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home," Tex. Hum. Res. Code ch. 42; "assisted living facility," Tex. Health & Safety Code ch. 247; "boarding home facility," Tex. Health & Safety Code ch. 260; "child-care facility," Tex. Hum. Res. Code ch. 42; "community corrections facility," Tex. Gov't Code ch. 509, including: (A) a restitution center; (B) a court residential treatment facility; (C) a substance abuse treatment facility; (D) a custody facility or boot camp; (E) a facility for an offender with a mental impairment, as defined by Tex. Health & Safety Code § 614.001; (F) an intermediate sanction facility; and (G) a "state jail felony facility" under Subchapter A of Tex. Gov't Code ch. 507; "community homes," Tex. Hum. Res. Code ch. 123; "community residential facility," Tex. Gov't Code § 508.119; "day-care center," Tex. Hum. Res. Code § 42.002; "family home," Tex. Hum. Res. Code ch. 42; "foster group home," Tex. Hum. Res. Code ch. 42; "foster home," Tex. Hum. Res. Code ch. 42; "group day-care home," Tex. Hum. Res. Code ch. 42; "halfway houses," Tex. Gov't Code § 508.118, whether operated by the state, local governments, religious organizations, non-profits, or private companies, including those for former prisoners, mentally handicapped, physically disabled, mental patients, post-addiction recovery, sex offenders, parolees, juvenile/troubled youth, and drug rehabilitation; "hospice," Tex. Health & Safety Code ch. 142; "personal care facilities," Tex. Health & Safety Code ch. 247; "special care facilities," Tex. Health & Safety Code ch. 248; and "residential AIDS hospices," Tex. Health & Safety Code § 248.029.

[77] According to Section 123.002 of the Texas Human Resources code, a "person with a disability" means a person whose ability to care for himself or herself, perform manual tasks, learn, work, walk, see, hear, speak, or breathe is substantially limited because the person has: (1) an orthopedic, visual, speech, or hearing impairment; (2) Alzheimer's disease; (3) pre-senile dementia; (4) cerebral palsy; (5) epilepsy; (6) muscular dystrophy; (7) multiple sclerosis; (8) cancer; (9) heart disease; (10) diabetes; (11) an intellectual disability; (12) autism; or (13) mental illness.

[78] *Id*., § 123.005.

[79] *Id*., § 123.003.

[80] *Id*., § 123.006.

[81] *Id*., § 123.008.

C. Practical Considerations

In addressing group/community homes, local governments should consider the following factors:

- Community homes are allowed in every residential zoning district, but all group homes are not community homes;

- Carefully define in a zoning ordinance any distinctions between the various types of group homes;

- Community homes should never be treated as commercial enterprises subject to traditional commercial zoning standards, such as parking requirements, landscaping, setbacks between adjacent residential and commercial uses;

- Do not require specific/special/conditional use permits for community homes, as defined by Chapter 123 of the Texas Human Resources Code; and

- If a group home is operated by a religious institution, consider the interplay between RLUIPA, state law and the local zoning ordinance.

V.

Municipal Regulation of Alcoholic Beverage Establishments

Texas statutes relative to the regulation of alcoholic beverages are detailed, complicated and often difficult to understand. My purpose in this section of the paper is not describe the legal parameters of alcoholic beverage sales in Texas; rather, my purpose is to focus on the general aspects of zoning alcoholic beverage establishments by local governments. Prior to 1977, alcoholic beverages were regulated in the State of Texas by the Texas Liquor Control Act. Numerous courts interpreting the Act held that it did not preempt home-rule cities from enacting more stringent regulations.[82] In 1977, the Texas Liquor Control Act was codified into the Texas Alcoholic Beverage Code ("TABC"). Section 1.06 of the TABC states that

[82] *See, e.g., City of Clute v. Linscomb*, 446 S.W.2d 377 (Tex.Civ.App.-Houston [1st Dist.] 1969, no writ); *Louder v. Texas Liquor Control Board*, 214 S.W.2d 336 (Tex.Civ.App.-Beaumont 1948, writ ref'd n.r.e.); *Eckert v. Jacobs*, 142 S.W.2d 374 (Tex.Civ.App.-Austin 1940, no writ).

> [u]nless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code.[83]

Nevertheless, subsequent to this codification, at least one court continued to hold that the statute did not preempt more restrictive municipal control.[84] In 1987, the Texas Legislature added Section 109.57 to the TABC. Section 109.57 was further amended in subsequent legislative sessions and now reads, in part, as follows:

> (a) Except as is expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state may not impose stricter standards on premises or businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.
>
> (b) It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code.
>
> (c) Neither this section nor Section 1.06 of this code affects the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions on the licensee or permittee or does not impose additional restrictions on the licensee or permittee. For purposes of this subsection, "zoning regulation" means any charter provision, rule, regulation, or other enactment governing the location and use of buildings, other structures, and land.[85]

The Texas Supreme Court considered the preemptive effect of Section 109.57(a)-(c) in *Dallas Merchant's and Concessionaire's Association v. City of Dallas*.[86] In that case, the Dallas Merchant's and Concessionaire's Association and other various

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[83] Tex. Alco. Bev. Code § 1.06.

[84] *See Young, Wilkinson & Roberts v. City of Abilene*, 704 S.W.2d 380, 383 (Tex.App.-Eastland 1985, writ ref'd n.r.e.); *Abilene Oil Distributors v. City of Abilene*, 712 S.W.2d 644 (Tex.App.-Eastland 1986, writ ref'd n.r.e.).

[85] Tex. Alco. Bev. Code § 109.57 (emphasis added).

[86] 852 S.W.2d 489 (Tex. 1993).

parties challenged an ordinance passed by the City of Dallas which prohibited the sale of alcoholic beverages within 300 feet of residential areas in certain parts of the City without a specific use permit. The City's ordinance was passed in an effort to curtail rising crime and other problems associated with the high concentration of alcohol-related businesses in the Fair Park area of Dallas. Following a bench trial, the trial court held that the City's ordinance was void to the extent it conflicted with the TABC. The Texas Court of Appeals reversed and rendered judgment in favor of the City.

On appeal, the Texas Supreme Court reversed the Court of Appeals and affirmed the judgment of the trial court. The Texas Supreme Court held that the City's ordinance was preempted by the TABC, stating that "the regulation of alcoholic beverages is exclusively governed by the provisions of the TABC unless otherwise provided. Section 109.57 clearly preempts an ordinance of a home-rule city that regulates where alcoholic beverages are sold under most circumstances."[87] The Court concluded that the City could have prohibited the sale of alcoholic beverages in residential areas, but not in the 300-foot zone surrounding residential areas. The Court also held that Section 109.33, which permits a city to prohibit the sale of alcoholic beverages within 300 feet of a church, school, or public hospital, did not apply to residential areas. Accordingly, a municipality's authority to enact new legislation regulating the sale of alcoholic beverages is unenforceable to the extent it is in conflict with the TABC.

Importantly, Sections 1.06 and 109.57 of the TABC do not affect the validity or invalidity of a zoning regulation that was formally enacted before June 11, 1987, and that is otherwise valid, or any amendment to such a regulation enacted after June 11, 1987, if the amendment lessens the restrictions or does not impose additional restrictions.[88]

The legal and practical effects of Section 109.57 are far-reaching:

- a city may not impose stricter standards on premises required to have a liquor license than are imposed on similar premises that are not required to have a liquor license;
- the TABC exclusively governs the regulation of alcoholic beverages and a city may not discriminate against a business holding a liquor license;
- a city may prohibit the sale of alcohol in residential zones, but not in non-residential zones; and

[87] *Id.* at 491-92.

[88] Tex. Alco. Bev. Code § 109.57(c).

- a city may not prohibit the sale of alcohol in one residential zone but allow it in another residential zone.

VI.

Municipal Regulation of Oil and Gas Operations

With the rapid increase during the last 20 years of natural gas drilling in Texas—from the Barnett Shale in the Dallas/Fort Worth area to the Eagle Ford Shale in South Texas to the Haynesville Shale in far East Texas—municipal regulation of natural gas drilling presented several inherently unique land use issues, both conceptually and practically. Many Texas cities struggled with the pervasive effects of gas drilling on their communities, and whether the regulation of oil and gas drilling was to be considered a traditional zoning issue (that is, either rezone property for such a use, or consider a specific/special/conditional use permit to allow such a use in certain—or all—zoning districts), or (ii) consider requests to drill as an administrative approval function, utilizing a board or commission, such as the Zoning Board of Adjustment, as an oil and gas board of appeals to consider variances to the terms of a natural gas drilling ordinance. Whichever model was selected, municipal drilling regulations were usually very detailed and addressed drilling surface site standards as well as setbacks from nearby surface land uses.[89]

On November 4, 2014, everything changed—the citizens of Denton overwhelmingly enacted Texas' first hydraulic fracturing ban, with 59% of residents voting in favor of the ban. The "fracking ban" was a municipal business regulation, not a zoning regulation, and it simply provided that "it shall be unlawful for any person to engage in hydraulic fracturing within the corporate limits of the City." The same week of the election saw lawsuits being filed by the oil and gas industry against the City of Denton, but more significantly, the next session of the Legislature in January 2015 took care of any future fracking bans or other municipal regulations the industry considered to be against its best interests. The Legislature adopted House Bill 40, now codified in Section 81.0523 of the Texas Natural Resources Code.

House Bill 40 mandated that an oil and gas operation[90] is subject to the exclusive jurisdiction of the state, and provided that a city "may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or

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[89] I will shamelessly plug a book for which I was a contributing author. *See Beyond the Fracking Wars*, E. Powers and B. Kinne, eds. (American Bar Association 2013). It addresses the plethora of issues confronted by local governments in regulating natural gas drilling operations.

[90] An "oil and gas operation" means "an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities." Tex. Nat. Res. Code § 81.0523(a)(2).

extraterritorial jurisdiction" of the city[91]; however, cities were authorized to "enact, amend, or enforce an ordinance or other measure that: (a) regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements; (b) is commercially reasonable[92]; (c) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and (d) is not otherwise preempted by state or federal law." While the legislation offers cities a "safe harbor" for regulations that have been in effect for at least five years,[93] it is highly unlikely that the "safe harbor" would provide much solace to a local government undergoing a court attack on its drilling regulations by a natural gas operator.

VII.

Pawn Shops

Most local governments I believe would tell you that pawn shops in a neighborhood may lead to an increase in crime, negatively impact nearby home values, and may be a disincentive to people desiring to move into the neighborhood. Coupled with the perception that pawn shops often trade in stolen properties and bring in unwelcome elements to the neighborhood, it is clear why local governments have attempted to severely restrict, or even "zone out," pawn shops from a municipality.

The pawn shop industry, however, fights back against those perceptions. The National Pawnbrokers Association, for example, on its website extols the virtues of such businesses:

> In today's society, many people depend on independent pawnbrokers to help them meet daily financial needs not offered by other financial institutions. . . . Pawn customers represent the working families of America who periodically experience an unexpected need for short-term funds. Pawn loans keep the electricity on, the rent paid, and cars running with full tanks of gas by providing a safety-net to over 30 million unbanked or underbanked Americans. Independent pawnbrokers also provide services to America's small businesses. Today's pawn stores are

[91] Tex. Nat. Res. Code § 81.0523(b).

[92] "Commercially reasonable" is defined as "a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator's capacity to act." *Id*., § 81.0523(a)(1).

[93] *Id*., § 81.0523(d).

> attractive, welcoming places to do business. They are often family-owned and operated and offer superb customer service. . . . Each day, pawnbrokers help families through challenging economic times by providing non-recourse, small dollar, short-term loans when they have nowhere else to turn.[94]

The National Pawnbrokers Association estimated that in 2012, there were more than 10,000 pawn shops in the United States.[95] Pawnbrokers clearly have had the ear of Texas legislators in the past. In 1991 the Legislature approved House Bill 1258, now codified in Section 211.0035 of the Texas Local Government Code, which addresses the authority of municipalities to zone pawnshops:

> (b) For the purposes of zoning regulation and determination of zoning district boundaries, the governing body of a municipality shall designate pawnshops that have been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code, as a permitted use in one or more zoning classifications.
>
> (c) The governing body of a municipality may not impose a specific use permit requirement or any requirement similar in effect to a specific use permit requirement on a pawnshop that has been licensed to transact business by the Consumer Credit Commissioner under Chapter 371, Finance Code.[96]

Consequently, Texas municipalities may not "zone out" pawnshops from the city, may not impose any type of specific use permit or similar permit requirement on pawnshops, and must allow pawnshops as a permitted use in at least one zoning district in the city.[97]

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[94] *See* https://nationalpawnbrokers.org/pawn-industry-faqs/.

[95] *Id*.

[96] Emphasis added.

[97] *See Hollingsworth v. City of Dallas*, 931 S.W.2d 699, 704 (Tex.App.-Dallas 1996, writ denied) (Court of Appeals compares municipal regulation of pawnshops to municipal regulation of alcoholic beverage sales, concluding that "the legislature nevertheless passed other legislation enabling home-rule cities to regulate the location of those businesses under limited circumstances").

VIII.

Sport Shooting Ranges

In 2011, the Texas Legislature adopted Senate Bill 766. In the Bill Analysis for SB 766, sport shooting ranges specifically were addressed:

> Over the past two decades, Texas has significantly liberalized its firearms laws to allow for citizens to better protect themselves by carrying concealed handguns. Over the same period of time, urban and suburban growth has encroached on many of the rural areas where shooting ranges are located. Often, the growing municipalities and their residents find these ranges undesirable and seek to regulate or litigate them out of existence. Some residents reportedly have gone so far as to fabricate evidence by scattering bullets over their yards in order to bring lawsuits against neighboring ranges. The legal pressure on ranges is creating a public safety issue, because it is causing ranges to shut down at the same time that more and more citizens are exercising their new right to carry a concealed handgun. Nobody can safely carry a concealed handgun without practice, so ranges need to be protected.[98]

As a consequence, Chapter 229 of the Texas Local Government Code limits municipal authority to regulate firearms. Specifically, a municipality may not adopt regulations relating to "the discharge of a firearm or air gun at a sport shooting range."[99] A "sport shooting range" is defined as

> a business establishment, private club, or association that operates an area for the discharge or other use of firearms for silhouette, skeet, trap, black powder, target, self-defense, or similar recreational shooting.[100]

Chapter 229, however, does not eliminate the authority of a city to regulate the use of property under a municipal zoning ordinance,[101] and consequently, a municipality may prohibit a "sport shooting range" as a permitted use in its corporate limits. Local government attorneys should be aware, however, that civil and criminal penalties, as well as nuisance actions, based upon noise complaints brought against sport shooting

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[98] *See* https://capitol.texas.gov/tlodocs/82R/analysis/pdf/SB00766F.pdf#navpanes=0 (emphasis added). The bill was approved in the Texas Senate by a vote of 31-0 and in the Texas House of Representatives by a vote of 145-1.

[99] Tex. Local Gov't Code § 229.001(a)(2).

[100] *Id*., § 250.001(a)(2).

[101] *Id*., § 229.001(b)(3).

ranges by local governments have been curtailed by the Legislature.[102] Further, if there is no applicable noise ordinance or regulation, then no governmental official may seek a civil or criminal penalty involving noise or complaints about the sports shooting range.[103]

IX.

Preemption of Local Regulation of Propane Gas Cylinder Exchange Racks?

Section 113.054 of the Texas Natural Resources Code provides, in part, that the rules and standards of the Texas Railroad Commission "preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry."[104] While many local governments do not attempt to regulate the liquefied petroleum gas (LPG) industry, it is not unusual to find zoning and fire code regulations about outside storage of propane tanks and similar safety regulations. These may now be in question.

In Attorney General Opinion KP-0086 (2016), Texas Attorney General Ken Paxton wrote that "Section 113.054 plainly states that the [Texas Railroad] Commission's rules and standards 'preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision . . . relating to *any* aspect or phase of the liquefied petroleum gas industry."[105] Thus, according to the Attorney General, "the existence of an unapproved local LPG provision would generally be in conflict with the statute's mandate that local-level regulation is preempted and superseded by the [Texas Railroad] Commission's regulation."[106]

According to Rule § 9.1(a)(2) of the Texas Administrative Code, Texas Railroad Commission regulations apply to propane gas cylinder exchange racks.[107] Does that provision unequivocally preempt all local regulation as a consequence?[108] In one of the

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[102] *See id*., § 250.001. *See also id*., § 236.002(a)(2) (a county may not adopt regulations relating to the discharge of firearms or air guns at a sport shooting range).

[103] *Id*., § 250.001(b).

[104] Tex. Nat. Res. Code § 113.054.

[105] Tex. Att'y Gen. Op. No. KP-0086 at 2 (2016) (emphasis in original).

[106] *Id*.

[107] 16 Tex. Admin. Code § 9.1(a)(2). *But see* 16 Tex. Admin. Code § 9.101(a) (states, in part, that LP-gas container facilities must also meet "any applicable requirements of the municipality or county where an installation is or will be located.").

[108] Preemption is the rule of law that if the federal government through Congress has enacted legislation on a subject matter it shall be controlling over state laws and/or

cities in North Texas that my firm represents, industry representatives claim that any municipal regulation about propane gas cylinder exchange racks at a convenience store (for example, limiting or prohibiting outside storage of such cylinder exchange racks at the local 7-Eleven) are specifically preempted by Section 113.054 of the Texas Natural Resources Code and the Texas Attorney General's analysis of the preemptive effect of that section. The preemptive effect of Section 113.054 may be addressed in pending litigation involving the City of Houston and the Texas Propane Gas Association.[109]

X.

Confederate Monuments

The issue of the removal of Confederate statues and monuments by local governments, along with the renaming of schools or streets that honor Confederate war heroes, usually has been addressed in one of three ways: (1) state preemption by prohibiting local governments from removing Confederate monuments without a vote of either the legislature or a state commission; (2) outright removal of the monuments; or (3) keeping the monuments in place and adding some sort of historical context to those monuments.

Generally, Texas local governments have opted for either outright removal (for example, the removal of the Robert E. Lee statue in Dallas) or adding historical context (for example, the "Confederate Soldier" statue on the grounds of the Courthouse-on-

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preclude the state from enacting laws on the same subject if Congress has specifically declared it has "occupied the field." Preemption can occur by Congress passing a law, preempting state or local law. If Congress has not clearly claimed preemption, a federal or state court may examine legislative history to determine the lawmakers' intent toward preemption. Similarly, state laws may preempt local regulation of a subject. Under federal law, there are three types of preemption: (1) express preemption, where Congress "clearly and explicitly" articulates its intent to preempt; (2) implied preemption, where Congress "occupies a field so pervasively as to" exclude state law; and (3) conflict preemption where state or local law is in conflict with federal law, making compliance with both impossible or impeding the achievement of Congress' purposes. There is no doctrine of implied preemption under Texas state law. *See City of Richardson v. Responsible Dog Owners,* 794 S.W.2d 17 (Tex. 1990). Under Texas law, "[i]f the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with unmistakable clarity." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

[109] *See* July 18, 2019, Memorandum Opinion in *City of Houston v. Texas Propane Gas Association*, No. 03-18-00596-CV, 2018 WL 6841202, in the Texas Court of Appeals, Austin. The Austin Court of Appeals held that the TPGA lacked standing to sue and remanded the case to the trial court in Travis County to give it a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to sue.

the-Square in Denton). In the last session of the Legislature, House Bill 583 (which died in committee), in part, would have amended the Texas Local Government Code to:

- prohibit a monument or memorial that is located on municipal or county property for at least 40 years from being removed, relocated or altered;

- authorize a monument or memorial that is located on municipal or county property for at least 20 years but less than 40 years to be removed, relocated or altered, including alteration to maintain historical accuracy, only by approval of a majority of the voters of the municipality or county, as applicable, voting at an election held for that purpose;

- authorize a monument or memorial that is located on municipal or county property for less than 20 years to be removed, relocated or altered, including alteration to maintain historical accuracy, only by the governing body of the municipality or the commissioners court of the county, as applicable;

- authorize an additional monument or memorial to be added to the surrounding municipal or county property on which a monument or memorial is located to complement or contrast with the monument or memorial; and

- provide for the applicable definition of "monument or memorial."

The proposed legislation also would have authorized a Texas resident to file a complaint with the attorney general if the resident asserted facts supporting an allegation that an applicable entity violated the bill's provisions regarding the removal, relocation or alteration of a monument or memorial. The bill required the resident to include a sworn statement with the complaint stating that to the best of the resident's knowledge all of the facts asserted in the complaint are true and correct. The bill also authorized the attorney general, if the attorney general determined that the complaint was valid, to file a petition for a writ of mandamus or apply for other appropriate equitable relief in an applicable district court to compel the entity to comply with the applicable bill provision.

HB 583 subjected an entity that is found by a court to have intentionally violated it to a civil penalty in an amount of not less than $1,000 and not more than $1,500 for the first violation; and not less than $25,000 and not more than $25,500 for each subsequent violation. Each day of a continuing violation constituted a separate violation for purposes of the civil penalty, requiring the court that heard the action brought against the entity to determine the amount of the civil penalty, and required the collected civil penalty to be deposited to the credit of the general revenue fund. HB 583 also provided for the waiver of sovereign and governmental immunity.

While HB 583 died in the last session of the Legislature, there is virtually no doubt that a similar bill will be considered in the next session of the Legislature.

XI.

Conclusion

As local government practitioners, we must be aware of those areas where local governmental regulatory authority is either completely or significantly circumscribed by state or federal statutory authority. The foregoing topics clearly reflect that local governments are not free to undertake regulation without possibly confronting violations of state or federal law. As time passes, it is reasonable to anticipate that the sphere of local government regulation will be further limited by the state or federal government.