



# Legislative UPDATE

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Number 3

## **IMPORTANT INFORMATION ABOUT THE TML LEGISLATIVE UPDATE**

In the near future, the Texas Municipal League will stop mailing printed copies of the *Legislative Update* except to cities that request them. The *Legislative Update* will continue to be sent by e-mail and will be available to view and download at its usual location on the TML Web site. **If you would like to continue receiving a printed copy in the mail, please fill out the enclosed postcard and return it to TML at the address provided. We thank you for your prompt response.**

## **CITY FRANCHISE FEES IN THE CROSSHAIRS**

On March 25, the Texas House Ways and Means Committee took testimony on what appeared, from a city prospective, to be a relatively harmless interim study charge: "Study the tax structure as applied to cable versus satellite service to determine if any unfair competition results from state tax policies." But the hearing quickly took a turn for the worse. Cable company lobbyists and some committee members began attacking city franchise (right-of-way) fees as an unfair "tax" on cable television.

Cable lobbyists began their attack by pointing out that federal law limits the authority of local governments to apply sales taxes to satellite providers. Thus, they argued, only cable providers pay franchise fees or sales taxes, and that the cable industry is unfairly "taxed" when compared to satellite. Rep. John Otto, a member of the committee, quickly and correctly pointed out that cities don't control the airwaves and thus don't have any basis to impose franchise fees on satellite. Cable representatives responded that cities could use their general taxing authority to tax satellite companies, and this, absent the federal regulations, would have levelled the playing field between cable and satellite. Despite the many questions surrounding this argument, cable lobbyists persisted in their testimony that franchise fees are nothing but a tax that unfairly burden them when compared to other industries. Eventually, **one committee member wondered aloud why the state doesn't simply do away with municipal authority to impose franchise fees altogether.**

The characterization of franchise fees as a tax is, of course, erroneous. Franchise fees represent the rental cost for city land when private companies run pipes, wires, or facilities across that land. Cities may not give away the use of city land to a private company, just as they may not give any other city resources to a private individual without charge. Satellite companies don't pay franchise fees because they don't use city rights-of-way. It's that simple.

It is likely that legislation filed during the 2011 session will once again attack cities' right to charge rent for the use of their land. TML will carefully monitor and oppose such bills.

The portion of the Ways and Means Committee testimony devoted to franchise fees lasted approximately one hour and can be viewed here: [CLICK HERE](#).

## **FCC APPOINTS TASK FORCE TO STUDY RIGHT-OF-WAY RENTAL FEES**

In the February 22 edition of the *TML Legislative Update*, we raised a concern about Federal Communications Commission (FCC) preemption of municipal right-of-way fees. A local controversy in New York State, coupled with the pending release of the FCC's "National Broadband Plan (NBP)," could have had serious financial implications for cities across the nation, including Texas cities.

Some telecommunications and cable companies have urged the FCC – as part of the NBP and the New York State proceeding – to adopt a unilaterally-imposed, federal standard for compensation for use of public rights-of-way that would limit municipal fees to the actual costs of regulation.

Since right-of-way rental fees constitute nearly ten percent of many Texas cities' general revenues, negative FCC action would be a financial disaster. Many Texas cities, along with the Texas Municipal League's national partners, including the National League of Cities, the International Municipal Lawyers Association, the U.S. Conference of Mayors, and the National Association of Telecommunications Officers and Advisors, worked hard to protect city authority in this area.

The FCC recently submitted the NBP to Congress. The plan makes recommendations on "improving the business case for deploying and upgrading broadband network infrastructure and facilitating competitive entry." Among many other specific recommendations for improving broadband infrastructure, the NBP calls on the FCC to "establish a joint task force with state...and local policymakers to craft guidelines for rates, terms and conditions for access to public rights-of-way." In other words, the FCC has recommended a task force in lieu of unilaterally imposing right-of-way fee standards. It also appears that the FCC will postpone any action on the New York State proceeding pending the input of the task force.

To view the NBP, [CLICK HERE](#).

The League will continue to monitor and support the national associations' efforts to oppose FCC preemption.

## **GRANT PROGRAM WOULD SAVE AND CREATE CITY JOBS**

The United States House of Representatives is considering legislation that would establish grants to help save municipal jobs and prevent layoffs. H.R. 4812, also known as the Local Jobs for America Act, has as its purpose: "To provide funds to States, units of general local government, and community based organizations to save and create local jobs through the retention, restoration, or expansion of services needed by local communities, and for other purposes."

If passed, this legislation would allocate \$75 billion to cities and counties nationwide to be directed specifically to fund full-time, full-year government or local community organization jobs. Of this amount, roughly \$52 billion would be dedicated to communities with more than 50,000 residents, and \$23 billion would be granted to states to be distributed among communities with fewer than 50,000 residents. In addition, the bill also is drafted to include \$1.18 billion to create an estimated 5,550 police officer jobs nationwide, and \$500 million to hire and retain firefighters.

For more information on the Local Jobs for America Act, please visit the National League of Cities' Web site at [www.nlc.org](http://www.nlc.org).

## **CITY FUNDING OF CONTINUATION OF HEALTH BENEFITS IS EXTENDED AGAIN**

Federal requirements that employers pay for a portion of COBRA health benefits have been extended through March 31, 2010. The act that extended the COBRA premium reduction eligibility period to March 31, 2010, also expanded eligibility to any employee whose reduction of hours causes a loss of health coverage and who is then terminated on or after March 2, 2010, through March 31, 2010. This expansion also allows individuals whose reduction in hours caused a loss of health coverage and were later terminated, to sign up for continuation of health coverage under COBRA and receive the subsidy from the city, if the individuals did not elect COBRA continuation coverage when it was first offered or elected but subsequently discontinued COBRA. In the past, a city was not responsible for paying for that continued health coverage under COBRA, but could do so if it chose to. However, a new law, passed as part of last year's federal stimulus package, requires cities to pay 65 percent of the cost of the continued health benefits if an employee is involuntarily terminated for a reason other than misconduct. The city is then reimbursed for the payment through its payroll taxes.

For more information, go to <http://www.dol.gov/ebsa/cobra.html>. This topic is also discussed in the Legal Q&A section of the February issue of *Texas Town & City* magazine.

Contact Laura Mueller at the TML Legal Department with questions at (512) 231-7400 or [laura@tml.org](mailto:laura@tml.org).

## **ATTORNEY GENERAL REJECTS REQUEST CHALLENGING STATE AGENCY AUTHORITY OVER CITIES**

For the past several years, the Texas Board of Professional Engineers (TBPE) has sought to enforce state engineering laws against cities and city officials. In the most recent episode, the City of Brownwood entered into an agreed order with the TBPE to avoid further entanglements.

According to the TBPE, City of Brownwood employees in the city's development services and public works departments and the office of the city manager were responsible for the acceptance of design plan sheets for a medical office building. The plans were signed and sealed by a design professional (an architect), and the city subsequently issued a building permit. Based on the size of the building, the plans should have been prepared by a Texas licensed professional engineer. However, the site grading plan did not bear a seal or signature of a Texas licensed professional engineer. The TBPE alleged that the acceptance of the plan by the city violated the state's Engineering Practices Act.

According to letters and other information obtained by TML, the TBPE threatened to impose an administrative penalty against the City of Brownwood in 2006, and that action was dealt with pursuant to an agreed order. Apparently, the building in the plans developed defects that were attributable to poor engineering. Subsequent to the appearance of the defects, the TBPE once again – in 2009 – informed the city that it violated the Engineering Practices Act by accepting the plans and issuing the permit. Again, to avoid further costs of contesting the enforcement, the city entered into a second agreed-upon order with the TBPE in 2009.

In response, State Representative Bill Keffer (R- Eastland) asked the attorney general whether the TBPE has the authority to take enforcement action against a city. TML, the Texas City Attorneys Association (TCAA), and the Building Officials Association of Texas (BOAT) filed comments on the request, taking the position that neither a city's building official nor any other city official is "responsible for enforcing laws that affect the practice of engineering." Rather, a building official is generally charged to ensure that buildings are constructed according to the city's building code.

The TBPE's action signals a disturbing trend of state agencies seeking enforcement against cities. These agencies are created to regulate professions, not political subdivisions. An opinion request that is remarkably similar to the present request is RQ-00775-GA. That request deals with the authority of the Department of State Health Services (DSHS) to enforce state asbestos regulations against cities. The TML position is that a city is not the responsible party when it comes to asbestos abatement, nor should it be the entity that regulates engineers.

On March 4, the attorney general declined to issue an opinion on Representative Keffer's request "because the opinion process cannot be used to appeal an agreed board order between a municipality and the [TBPE]..." The League's position remains that the TBPE was created to monitor and police engineers and should not "regulate" cities.

## **MUNICIPAL COST INFLATION STILL RISING**

The Municipal Cost Index (MCI), developed exclusively by *American City and County* magazine, shows the effect of inflation on the cost of providing municipal services. The MCI is used to study price trends, make informed government contract decisions, and facilitate sound budget planning.

According to *American City and County* magazine, the MCI for March was 210.0. That's 0.6 percent higher than last month's MCI and an increase of 3.1 percent over the previous twelve months. The March 2009 MCI was 203.6.

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