

TML LEGISLATIVE UPDATE



May 5, 2023
Number 18

Senate Committee Approves Preemption Bill, Heads to Senate Floor

[H.B. 2127](#) seeks to prevent cities and counties from adopting or enforcing local ordinances or orders related to any activity contained in several state codes unless expressly allowed by state law. The House approved H.B. 2127 on April 19. The text of the bill as passed in the House can be accessed [here](#). On Thursday, the Senate Committee on Business and Commerce approved and voted out H.B. 2127. The League anticipates the bill will be considered in the Senate next week. If the Senate approves the bill without any modifications, H.B. 2127 will be passed and sent to the Governor.

House Language

H.B. 2127, as it was approved by the House varies significantly from the as-filed version. The bill now contains the following provisions, among others:

- A prohibition on a city ordinance “regulating conduct in a field of regulation that is occupied by a provision” of certain state codes, unless expressly authorized by another statute. The following codes contain a field preemption clause: (1) Agriculture Code; (2)

Business and Commerce Code; (3) Finance Code; (4) Insurance Code; (5) Labor Code; (6) Natural Resources Code; (7) Occupations Code; and (8) Property Code.

- The Finance Code preemption language would seemingly preserve existing payday lending ordinances (pending existing litigation outcomes), but preempts cities from adopting new payday lending ordinances, or amending existing payday lending ordinances moving forward.
 - The Labor Code preemption language specifically provides that a field occupied by the Labor Code includes “employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than a municipality or county.”
 - The Occupations Code preemption language preserves city and county authority to regulate a massage establishment in accordance with Section 455.055 of the Occupations Code.
- Creation of a cause of action for a person or trade association to sue a city for an ordinance that violates a field preemption clause above. Further, the bill would waive governmental immunity to suit and entitle a claimant to recover both court costs and reasonable attorney’s fees. The bill would entitle a city to three months’ notice of a claim before a claimant may file suit.
 - Language adding Sec. 51.002 of the Local Government Code stating that a city council may “adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state”.
 - Specific preemption of a city ordinance that restricts or impedes a business “involving the breeding, care, treatment, or sale of animals or animal products, including a veterinary practice, or the business’s transactions if the person operating that business holds a license for the business that is issued the federal government or a state”.
 - Language prohibiting a city from regulating the retail sale of dogs or cats, with an exception permitting such an ordinance adopted before April 1, 2023, until the state legislature adopts a statewide regulation for the retail sale of dogs or cats.
 - Uncodified language in the bill stating that the bill does not prohibit: (1) a city or county from building or maintaining a road, imposing a tax, or carrying out any authority expressly authorized by statute; (2) a home-rule city from providing the same services and imposing the same regulations that a general-law city is authorized to provide or impose; (3) a city from adopting, enforcing, or maintaining an ordinance or rule that relates to the control, care, management, welfare, or health and safety of animals, except as otherwise provided by the bill; (4) a city or county from conducting a public awareness campaign; (5) a city or county from entering into or negotiating a collective bargaining agreement or adopt a policy related to its employees; and (6) a city or county from repealing or amending an

existing ordinance, order, or rule that violates the bill for the limited purpose of bringing the regulation into compliance with the bill.

Many Questions Remain

H.B. 2127's lack of specificity on exactly when a city is considered to be preempted has only created more questions about the impact of the bill. At best, the bill would abdicate the legislature's traditional role in setting specific limitations on city regulation to the courts. At worst, the bill attempts to dramatically scale back 110 years of Texas home rule city authority by running an end around of Article XI, Sec. 5 of the Texas Constitution. If the bill passes in something resembling its current form, city officials and residents will have to wait years for the courts to resolve countless lawsuits authorized by the bill to determine the scope of the proposed preemption.

For decades, Texas courts have explained that for the state legislature to preempt city authority, it must do so with unmistakable clarity. Courts have relied on this standard to evaluate specific state statutes' impact on city ordinances and invalidate conflicting city regulations, like local plastic bag bans. Instead of clearly and unambiguously spelling out exactly which city ordinances are preempted, H.B. 2127 cryptically states that city ordinances are preempted if they regulate conduct in a field of regulation occupied by one of the impacted state codes.

This begs the question – when does the state occupy a field of regulation? The bill doesn't answer that question, and instead punts it to the courts. Is a field occupied if a state code merely mentions a particular topic? What if state statute authorizes some governmental entities to act but not cities? Could a field be occupied if the legislature chooses not to regulate certain conduct? We simply don't know the answer to these questions right now.

H.B. 2127 provides that a city may continue to regulate if expressly authorized by statute. This language is helpful for cities in light of the rest of the bill, but still may not preserve home rule authority in certain areas. For instance, some state laws provide that a statute “shall not be construed” to limit a city's authority to act, or that state law does not affect a local ordinance. These provisions probably would not be construed as “expressly authorizing” city regulation. Under current law, a home rule city would clearly be authorized to regulate with that language in place due to home rule authority in the Texas Constitution. But the bill's preservation of only regulations “expressly authorized by statute” potentially preempts any city regulation that is expressly not prohibited by state statute.

As mentioned above, the House-approved version of H.B. 2127 adds Section 51.002 of the Local Government Code to only allow a city to adopt an ordinance that is consistent with the laws of the state. This raises even more questions about the scope of the bill. If state law is silent in a certain area, can a home rule city regulate in that area? One might argue yes, since the Texas Constitution gives home rule cities the full power of self-government. But the bill certainly calls home rule authority in question in several areas. There's a real possibility that a court would determine proposed Section 51.002 of the Local Government Code eliminates city regulatory authority in the absence of state regulation. Such an interpretation by the courts would effectively end home rule authority in Texas.

We urge city officials with concerns about the impact of H.B. 2127 to communicate their concerns to their senators immediately. If your senator's chief concern with city regulations is those of the employment benefits variety, point out to them that S.B. 130 by Senator Campbell does that with much more clarity and specificity. That bill has already passed the Senate and is waiting on action by the House. Because of the legal complexities involved in H.B. 2127, city officials may wish to consult with their city attorneys over the impact on their city and have the city attorney's opinion inform conversations with their elected officials in Austin.

Bills on the Move

Significant Floor Action

H.B. 5 (Hunter), creating a new economic development program for tax abatement agreements between the owner of a new investment project and a school district. Passed to third reading.

H.B. 410 (S. Thompson), prohibiting a peace officer to arrest, without a warrant, a person found only committing one or more misdemeanors related to certain traffic offenses that are punishable by fine only. Passed the House.

H.B. 504 (Wu), allowing only certain judges to issue a warrant for no-knock entries and limits the circumstances to which the warrants are issued. Passed the House.

H.B. 1819 (Cook), repealing city juvenile curfew ordinances except for purposes of emergency management. Passed the House.

H.B. 2239 (Troclair), providing a city may not prohibit the removal of Ashe Juniper trees located on residential property. Passed the House.

H.B. 2265 (Leach), prohibits or limits the award of compensatory damages for a delay in a construction contract caused solely by a governmental entity. Passed to third reading.

H.B. 2308 (Ashby/Perry), limiting city regulation of agricultural operations within city limits and ETJ. Passed the Senate.

H.B. 2350 (Cody Harris), prohibiting a city occupational license if the state issues an occupational license, with exceptions. Passed to third reading.

H.B. 2806 (Canales), allowing billboards to relocate in certain areas if the billboard use is discontinued due to a public construction project and requires a city to provide for the relocation by a special exception to any applicable zoning ordinance. Passed the House.

H.B. 3490 (Rogers), requiring a city to provide written notice containing certain information regarding any proposed zoning change that could result in the creation of a nonconforming use. If a nonconforming use is required by a city to cease operation, the owner or lessee of the property

is entitled to receive either payment for costs associated with closing the operation or additional time to engage in the nonconforming use. TML provided [written testimony](#). Passed the House.

[H.B. 3492 \(Stucky\)](#), prohibits cities from using the cost of constructing or improving public infrastructure as a factor in determining certain value-based fees related to engineering, inspection, and subdivision. Passed the House.

[H.B. 3659 \(Hefner\)](#), establishing a minimum value for property that could be seized by law enforcement under civil asset forfeiture provisions and requires reporting to the attorney general of seized property and its value. Passed the House.

[H.B. 4082 \(Goldman\)](#), allowing for use of certificates of obligation for “public works” but prohibits their usage for certain new stadiums, convention centers, civic centers, hotels, and arenas. Passed the House.

[H.B. 4175 \(Cody Harris\)](#), requiring a city to provide full municipal services to certain areas in the ETJ. Passed the House.

[S.B. 1017 \(Birdwell/Landgraf\)](#), prohibiting a city from adopting or enforcing an ordinance, order, or regulation that limits access to an energy source or an engine. Sent to governor.

[S.B. 1419 \(Birdwell\)](#), prohibiting cities from making a loan or grant of public money under a Chapter 380 economic development agreement from the proceeds of property taxes or other city obligations payable from property taxes and adding transparency measures. TML [testified](#) in committee. Passed the Senate.

[S.B. 2037 \(Bettencourt\)](#), prohibits cities from applying subdivision regulations and certain road and groundwater regulations in the ETJ. TML [testified](#) in committee. Passed the Senate.

[S.B. 2038 \(Bettencourt/C. Bell\)](#), requiring a city to release an area from the ETJ if the population of an area is less than 200 and upon petition from more than 50 percent of qualified voters. Requires release of an area with a population of 200 or more from the ETJ after a petition and election. TML [testified](#) in committee and provided [written testimony](#). Passed the House.

Significant Committee Action

[H.B. 586 \(E. Thompson\)](#), allowing a city to annex a road right-of-way to bring a voluntarily requested area into city limits. Voted from Senate Local Government.

[H.B. 622 \(Shaheen\)](#), allowing cities to satisfy any law that requires notice to be published in a newspaper by publishing notice in an alternate form of media, including social media, utility billings, and direct mailings. TML [testified](#) in committee. Committee substitute voted from House County Affairs.

[H.B. 1191 \(Cain\)](#), prohibiting a city from allowing six or fewer chickens in the boundaries of a city. Committee substitute voted from House Agriculture and Livestock.

H.B. 1526 (Cody Harris), limiting parkland dedication requirements and fees in lieu of dedication for cities over 800,000 in population. Left pending after hearing from Senate Natural Resources and Economic Development.

H.B. 1750 (Burns), limiting city regulation of agricultural operations within city limits and ETJ. Voted from Senate Water, Agriculture and Rural Affairs.

H.B. 1922 (Dutton), requiring a review of building permit fees every ten years. Voted from Senate Local Government.

H.B. 2127 (Burrows), preempts city regulation in a field occupied by the Agriculture, Business and Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property Code unless expressly authorized by statute. Voted from Senate Business and Commerce.

H.B. 3613 (Cain), requiring a city that is divided into districts, wards, or other areas to elect all councilmembers following each apportionment on the first uniform election date. Voted from House Urban Affairs.

S.B. 491 (Hughes), prohibiting a city over 725,000 in population from adopting or enforcing a zoning regulation that limits the height of a building based on the lot's proximity to another lot that is more than 50 feet away. Voted from House Land & Resource Management.

S.B. 1787 (Bettencourt), prohibiting a city from requiring a residential lot to be larger than 1,400 square feet, wider than 20 feet, or deeper than 60 feet, and from adopting certain other requirements on small lots. Applies to cities in counties with a population of 300,000 or more. Committee substitute voted from Senate Local Government.

Federal Infrastructure Bill Update

In November 2021, the federal Infrastructure Investment and Jobs Act (IIJA) was signed into law. The IIJA is altogether a \$1.2 trillion bill that will invest in the nation's core infrastructure priorities including roads, bridges, rail, transit, airports, ports, energy transmission, water systems, and broadband.

The League will monitor state and federal agencies and work with the National League of Cities (NLC) to access the latest information relating to the IIJA. We will provide periodic updates in the Legislative Update on resources for Texas cities on how to access IIJA funding for local infrastructure projects.

U.S. Department of Transportation (DOT)

Reminder: Applications for the DOT's Charging and Fueling Infrastructure (CFI) Discretionary Grant Program are due by **10:59:59 PM CST on May 30, 2023**. The CFI program will provide up to \$2.5 billion in grant funding for cities, counties, local governments, and Tribes to strategically

deploy EV charging and other alternative vehicle-fueling infrastructure projects in publicly accessible locations in urban and rural communities.

You can find more information about the CFI program [here](#).

City Officials Testify

When the legislature is in session, nothing compares to the effectiveness of city officials testifying at the Capitol. City officials who take the time to travel to Austin to speak out on important city issues should be applauded by us all. The League extends its thanks to all those who have vigilantly represented cities during this session. If we missed your testimony let us know by an email to alyssa@tml.org, and we'll recognize you in next week's edition.

- Sally Bakko, Intergovernmental Relations Director, City of Galveston
- Michael Evans, Mayor, City of Mansfield
- Jane Hughson, Mayor, City of San Marcos
- Troy Lestina, Deputy City Manager, City of Mansfield
- Casey Lewis, Councilmember, City of Mansfield

TML member cities may use the material herein for any purpose. No other person or entity may reproduce, duplicate, or distribute any part of this document without the written authorization of the Texas Municipal League.