



Legislative UPDATE

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Court Strikes Down Laredo's Plastic Bag Ban

Last Wednesday, the San Antonio Court of Appeals issued its opinion in [*Laredo Merchants Association v. City of Laredo*](#). The court struck down the City of Laredo's plastic bag ban ordinance, concluding that it is preempted by state law.

In 2015, a City of Laredo ordinance designed to "reduce litter from discarded plastic bags" became effective. The ordinance makes it unlawful for commercial establishments to provide plastic checkout bags to customers. It was adopted pursuant to a strategic plan aimed at creating a "trash-free city."

The Texas Health and Safety Code prohibits a city from adopting an ordinance, rule, or regulation to "prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law..." The court concluded that the city's ban is clearly and unmistakably preempted by the code because: (1) it was adopted for a "solid waste management purpose;" and (2) it prohibits or restricts the sale or use of "containers" or "packages" (i.e., a plastic bag).

The city argued that, by regulating plastic bags, the ordinance aims to *prevent litter* as opposed to *managing solid waste*. The court disagreed and stated that, by prohibiting the sale and use of bags to prevent them from becoming litter, the ordinance is regulating the generation of litter. Controlling the generation of solid waste is the "management" of solid waste as that term is defined by the code.

The city also argued that a "container or package" relates to prohibiting municipal regulation of wasteful product packaging, rather than plastic carryout bags. The court disagreed and

concluded that those terms included plastic checkout bags. One justice filed a [dissenting opinion](#), in which she argued that a plastic bag is not a “container” under the state law. Because the ordinance does not apply to solid waste containers, she argued, the state law and the ordinance could both be given effect.

The League will report on whether the city intends to appeal the opinion.

Senate Committee Re-Do: Renewed Big-Government Efforts to Centralize Power in Austin

If some state senators get their way, Texas cities will be homogenized, one-size-fits-all governments that are controlled from Austin. And this time it’s not even city officials they have a problem with; it’s city voters who use direct democracy through the home rule initiative and referendum process.

The Senate Committee on Intergovernmental Relations held its first interim hearing on December 2. At that meeting, it heard testimony on its charge to “*examine the processes used by home rule municipalities to adopt ordinances, rules, and regulations, including those initiated by petition and voter referendum.*”

Last Monday, it held a second hearing on the exact same charge. Apparently, certain witnesses didn’t get the chance to complain about cities at the first hearing, so they were given another chance. The second hearing focused on recent referenda in the City of Houston, but every city official (and city voter) should be mortified by many of the suggestions that were made.

Referendum is a process that is unique to home rule cities. It isn’t authorized anywhere in state law. Rather, it is a creature of the home rule amendment to the Texas Constitution. That amendment was adopted *by the voters* in 1912. Of the almost 400 home rule cities in Texas, *voters* in 93 percent have adopted referendum provisions. Those charter provisions were all adopted pursuant to a *local election*. The process typically provides for the submission of a petition signed by a certain percentage of registered voters in a city to enact or repeal a local ordinance. (The percentage is dictated by the charter, which *can be amended through an election*.) Once the signatures on a petition are verified as authentic, the council usually has the option of repealing the ordinance or *submitting it to an election* on the merits.

It appears from the statements of some legislators and witnesses that they believe the process should be “uniform” across the state. What that uniformity would look like is anyone’s guess. Would it mean a very high signature threshold? Or would they want to lower it, making it such that some tiny minority could muddle up every action a city council takes? Would it remove some ordinances from the process? (Some already are, based on whether there is a state law procedure for adoption.) Would it limit the authority of a city secretary to throw out invalid signatures?

What better way to answer those questions than to defer to the voters of each city, who can address all those questions right now? According to some, the better way is to have a state

legislator from Houston decide what's best for the citizens of Amarillo, or one from San Antonio decide what's best for the citizens of Plano.

Even more intriguing was a suggestion at the hearing that a city shouldn't be able to defend itself in court if there is a dispute about the process. Some committee members were appalled that a city council would defend itself from a lawsuit relating to the language that's placed on the ballot, whether signatures on the petition are valid, or whether the subject matter of a petition is appropriate for referendum. Presumably, those members believe that those suing a city are correct every time, all the time, and that they should just "get their way" because they filed a lawsuit. In fact, some testifying at the hearing said that a mayor or city councilmember should be subject to criminal penalties for voting to defend their city in a lawsuit!

Why is referendum under such scrutiny? The truth is that some legislators don't like the ordinances that some cities pass. Recently, some cities have taken on controversial issues, such as equal rights and transportation network companies. When those with deep pockets try to overturn the regulations by referendum and fail, they frequently move on to lawsuits. And when the lawsuits don't get the results they want over the wishes of city residents? They head on down to Austin.

Cities are always willing to discuss compromise legislation, but these ideas reek of big government in Austin taking away city voters' right to direct democracy. Direct democracy at the city level is a privilege, not a right. Negotiations about the difficulty or ease of its use should take place at the local level. If legislators want to centralize that power in Austin, perhaps local voters should just amend their charters to eliminate it altogether.

Senate Committee Once Again Discusses Local Debt, Mandatory Local Debt Reporting

The Senate Committee on Intergovernmental Relations held its first interim hearing on December 2. Last Monday, it held a second hearing on the exact same charges, including one to "*examine ways to improve government accountability in elections regarding the issuance of public debt.*"

The usual suspects gave the usual testimony. Some try to frighten by taking the total amount of local government debt and dividing it by the total number of people in the state. "That's \$12,500 for every man, woman, and child in Texas," they lament. But that number tells us nothing. Some live in areas with zero debt, while some live in areas with higher debt. It's all a function of where one chooses to live, ability to pay, and willingness to incur.

Some play the "we're passing this on to our children" card. That's a red herring as well. Local government debt is typically revolving all the time. It's not an ever increasing total that isn't being paid back.

League testimony highlighted recent legislation that requires cities and other local governments to put together an [annual report on debt information](#) and make the report available to the public, as well legislation requiring various types of debt information to be included in the election order that is then posted on the city's website and at every polling place used in a bond election. That type of transparency is helpful, and the League was supportive of that legislation.

However, the League will continue to oppose, as it did at this interim hearing, attempts to add limited and potentially misleading debt information to the ballot proposition itself, which has the effect of swaying voters towards rejecting debt issuances simply because they are not presented with a complete picture of a city's finances.

FCC Overturned on Municipal Broadband

Last week, the federal Court of Appeals for the Sixth Circuit issued its opinion in [State of Tennessee, et al. v. FCC, et al.](#) The opinion reverses a Federal Communications Commission (FCC) Order preempting state laws in Tennessee and North Carolina that prohibited cities from providing broadband service. (In other words, the FCC said that cities *can* provide Internet service, even though a state law prohibits it. The federal court opinion reversed the FCC and said that a state can prohibit cities from providing Internet service.)

The FCC concluded that the state prohibitions are barriers to broadband deployment, investment and competition, and conflict with the FCC's mandate to promote those goals. Thus, it voted to allow the City of Chattanooga, Tennessee's Utility and the City of Wilson, North Carolina to expand broadband service outside their current footprints in response to numerous requests from neighboring unserved and underserved communities. The FCC Order highlighted the value of municipal broadband in meeting these goals, particularly in areas where service was not provided by industry.

The Texas Municipal League didn't directly participate in that proceeding because, at the time, Texas law allowed cities to provide broadband service. A subsequent FCC order has challenged that authority, though. In addition, participation would have been a double-edged sword because the FCC attempts to preempt city authority more often than state authority. Arguing that the FCC should be able preempt states could have been interpreted as the self-defeating argument that it should be able to preempt cities as well.

The Sixth Circuit overturned the FCC Order, concluding that the federal Telecommunications Act does not provide a "clear statement" that the FCC has sufficient authority to preempt state laws. While the case was a loss for the cities in Tennessee and North Carolina, it may be beneficial when the FCC attempts to preempt cities in the future.

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