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MUNICIPAL ORDINANCE - TEXAS

City of Houston v. BCCA Appeal Group, Inc.

Court of Appeals of Texas, Houston (1st Dist.) - August 29, 2013 - Not Reported in S.W.3d - 2013 WL 4680224

This case concerned the constitutionality of a home-rule city's ordinance which purported to regulate air pollution within that city's borders. The BCCA Appeal Group, Inc. (the Group), a non-profit organization whose members own and operate industrial facilities in the Houston area, brought suit to enjoin enforcement of two air pollution control ordinances enacted by the City of Houston (the City)—City of Houston Ordinance Nos.2007–208 and 2008–414 (collectively, the Ordinance).

The Group asserted that the Ordinance was preempted because it claimed for the City several powers the Legislature granted exclusively to the Texas Commission on Environmental Quality (TCEQ) in the Texas Clean Air Act (TCAA) and the provisions of the Texas Water Code (TWC) that govern enforcement of the TCAA. According to the Group, the Ordinance conflicted with the TCAA, TWC, and Article XI, Section 5 of the Texas Constitution which bars home-rule cities from enacting any ordinance that is "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."

The Ordinance requires facilities to register with the City by filing an application and paying the applicable registration fee. It is unlawful to operate a facility within the City's boundaries that is not registered with the City. The Group argues that these sections are not only inconsistent with state law, but also make unlawful a condition or act approved or authorized under state law.

The Group argued that a facility's lawful operation pursuant to TCEQ's rules and orders would nonetheless be unlawful under the Ordinance, if that facility failed to register with the City or pay a registration fee. Thus, according to the Group, the entire registration program created by the ordinance is preempted. If the Group is correct, then any concurrent regulatory scheme or permitting process by a municipality would be preempted. This does not appear to be the prevailing law in Texas.

In this case, the City was not attempting to hold an affected industry to a higher, more onerous standard than the one set forth by the state. On the contrary, the Ordinance was the City's attempt to create a concurrent regulatory scheme or permitting process through which it will enforce the state's existing rules and regulations. In fact, the City acknowledged that its decision to regulate and enforce the TCAA and TCEQ rules and regulations on its own in this case—rather than in cooperation with TCEQ—is due to what it perceives to be TCEQ's lax enforcement efforts. According to the City, the Group is only challenging the constitutionality of the Ordinance because the industry "currently enjoys what it perceives to be a permissive regulatory approach from the TCEQ" and it fears regulation by "a vigilant watch dog" (i.e., the City).

The court concluded that the Group failed to show that the Legislature intended to preempt the Ordinance with "unmistakable clarity," and thus, failed to meet its extraordinary burden to establish that the ordinance is invalid.

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