

REGULATING “SIN” USING CODE ENFORCEMENT TOOLS

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TCAA Summer Conference

June 14, 2023

OUTLINE

Examples

Legal Considerations

Practical Considerations

EXAMPLES OF REGULATING “SIN”

'Footloose', Kevin Bacon jokes abound over Terre Haute dance ordinance



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Published 5:13 p.m. ET April 28, 2018 | Updated 5:55 p.m. ET April 28, 2018

'Footloose' Law Repealed by Arkansas Town

The residents of Forth Smith, Arkansas can finally cut loose after officials there repealed their [...]

By DANIEL S. LEVINE - July 16, 2018 03:47 pm EDT



The residents of Forth Smith, Arkansas can finally cut loose after officials there repealed their *Footloose* rule, a 1953 ordinance that banned public dances on Sunday this week.

REINING IN THE FOOTLOOSE AND FANCY FREE

FOOTLOOSE TOWN COUNCIL SCENE

DANCE HALLS

- City of Cleburne
- City of Corpus Christi

REGULATIONS THAT ARE AGE- SPECIFIC

- City of San Antonio
- City of Ft. Worth

POOL HALLS

- City of Dallas
- City of San Antonio

GAME ROOMS/EIGHT LINERS

- City of Victoria
- City of Austin

HOOKAH LOUNGES

- City of Waco
- City of Frisco
- City of Irving

BRING YOUR OWN BOTTLE (BYOB)

- City of Carrollton
- City of Irving

MASSAGE ESTABLISHMENTS

- City of San Antonio
- City of Pleasanton
- City of Houston

SEXUALLY- ORIENTED BUSINESSES

ADULT- ORIENTED BUSINESSES

- City of Amarillo
- City of Austin
- City of El Paso

SEXUALLY-ORIENTED PERFORMANCES

- **SB 12** – Sent to the Governor for signature
 - Prohibits sexual oriented performances on public property or in the presence of an individual younger than 18 years of age
 - Authorizes a city to regulate sexually oriented performances as necessary to promote the public health, safety or welfare
 - Sexual oriented performance means a visual performance that features: a performer who is nude; or any other performer who engages in sexual conduct; and appeals to the prurient interest in sex
 - Sexual conduct means:
 - Exhibition or representation, actual or simulated, of sexual acts, including vaginal sex, anal sex, and masturbation;
 - Exhibition or representation, actual or simulated, of male or female genitals in a lewd state, including a state of sexual stimulation or arousal
 - Exhibition of a device designed and marketed as useful primarily for sexual stimulation of male or female genitals;
 - Actual contact or simulated contact occurring between one person and the buttocks, breast, or any part of the genitals of another person; or
 - Exhibition of sexual gesticulations using accessories or prosthetics that exaggerate male or female sexual characteristics

Madonna truth or dare threat of arrest

LIFE IMITATING ART

LEGAL CONSIDERATIONS

IS THERE A NEED TO REGULATE?

- What's right for another city isn't always right for your city
- What is the nature of the right implicated?
- What is the government interest at stake requiring regulation?
- Data is paramount to justify regulations, e.g. police calls for service
- Legislative findings in ordinances should be used to bolster the city's position in the event of a challenge
- Ordinances should be crafted to address the specific issue/concern
 - Rational Basis Scrutiny – Regulation must bear a rational relationship to a legitimate government interest
 - Intermediate Scrutiny – Regulation must be substantially related to an important government interest
 - Strict Scrutiny – Regulation must be narrowly tailored to serve a compelling government interest
- Regulatory fees must be based on cost recovery

IS THE PROPOSED REGULATION PREEMPTED UNDER FEDERAL LAW?

- Congress' intent is paramount consideration.
- Types of federal preemption:
 - Express preemption
 - Implied preemption: *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).
 - Congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.
 - Federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law.
 - Impossible to comply with both federal and state regulations.
 - Obstacle to the purposes and objectives of federal law.

IS THE PROPOSED REGULATION PREEMPTED UNDER TEXAS LAW?

- Texas Constitution, Article XI, Section 5(a): City ordinances may not contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.
- *City of Laredo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018).
 - Home-rule municipalities look to state law for limitations, not permissions.
 - A limitation may be express or implied but the limitation “must appear with unmistakable clarity”.
 - The mere “entry of the state into a field of legislation does not automatically preempt that field from city regulation”.
 - “Local regulation that is ancillary to and in harmony with the general scope and purpose of the state enactment is acceptable.”
 - Absent an express limitation, if the regulations can coexist peacefully without stepping on each other’s toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency.”
 - Courts look at the statutory text and the ordinary meanings of its words.
- *BCCA Appeal Group v. City of Houston*, 496 S.W.3d 1 (Tex. 2016) – Preemption case involving a state regulatory scheme.

IS THE PROPOSED REGULATION PREEMPTED UNDER TEXAS LAW?

- **House Bill 2127** – Sent to the Governor for signature
 - Prohibits cities from enacting any ordinance where state has entered the field of regulation
 - Applies to conduct within the field of regulation occupied under these specific state statutes:
 - Agriculture Code; Business & Commerce Code; Finance Code; Insurance Code; Labor Code; Chapter 229 of the Local Government Code; Natural Resources Code; Occupations Code; Property Code
- Other Codes with specific pre-emption language:
 - Alcoholic Beverage Code 1.06 & 109.57

WILL THE PROPOSED REGULATION VIOLATE TEXAS' DUE COURSE OF LAW PROVISION?

- Texas Constitution, Article I, Section 19:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land.
- This means:
 - An economic regulation must be crafted to further a legitimate government interest.
 - The purpose or effect of the regulation is connected to or reasonably related to the government interest.
 - In other words, the requirement imposed by the law must support or work towards achieving the legitimate goal of the regulation.
- See *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015).

WILL THE REGULATION VIOLATE THE PROVISIONS IN ARTICLE I, SECTION 16 OF THE TEXAS CONSTITUTION?

- Article I, Section 16

No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

- Ex Post Facto: A law that punishes as crime an act previously committed, which was innocent when done; makes more burdensome punishment for crime, after its commission; alters legal rules of evidence and require less or different evidence than the law required at the time of the commission of the offense in order to convict an offender; or deprives one charged with crime of any defense available according to law at time when act was committed.
- Contracts:
 - In most circumstances, a newly adopted law may not modify or release substantive rights or obligations of the parties in existing contracts.
 - Power is not absolute, must be balanced against the government's interest in exercising its police powers.

WILL THE REGULATION QUALIFY AS A RETROACTIVE LAW THAT VIOLATES THE TEXAS CONSTITUTION?

- Retroactive law: A law that extends to matters that occurred in the past.
- Fundamental objectives: “[I]t protects the people's reasonable, settled expectations”—i.e., “the rules should not change after the game has been played”—and it “protects against abuses of legislative power.” *Zaatari v. City of Austin*, 615 S.W.3d 172, 188 (Tex. App. - Austin 2019).
- *City of Grapevine v. Muns*, 651 S.W.3d 317, 344 (Tex. App. – Fort Worth 2021): A court considers three factors in light of the prohibition's objectives:
 - “the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;”
 - “the nature of the prior right impaired by the statute;” and
 - “the extent of the impairment.”

PRACTICAL CONSIDERATIONS

IS AN INSPECTION NECESSARY TO IMPLEMENT, ADMINISTER, OR ENFORCE THE REGULATION?

- The Fourth Amendment protects individuals from unreasonable searches and seizures.
 - A search or seizure without a warrant is presumptively unreasonable.
 - Applies to municipal government (even outside of the police context).
 - Consent to search must be freely and voluntarily given and may be withdrawn at any time.
- Cases
 - *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967): The limitation and warrant requirement apply to code enforcement.
 - *Patel v. City of Los Angeles*, 135 S.Ct. 2443 (2015): The warrantless inspection requirement of a regulatory scheme must provide a constitutionally adequate substitute for a warrant.

IS AN INSPECTION NECESSARY TO IMPLEMENT, ADMINISTER, OR ENFORCE THE REGULATION?

- Is this an inspection that falls under Article 18.05 of the Texas Code of Criminal Procedure?
 - An administrative warrant may be obtained by a fire marshal, health officer, or code enforcement official.
 - The purpose of the administrative warrant is to determine the presence of a fire or health hazard or unsafe building condition or a violation of any fire, health, or building regulation, statute, or ordinance.
- How will the client handle situations when a person refuses an inspection?
 - Initial waiver of rights is not likely to protect the City or the employee.
 - In lieu of a city inspection, would a third-party inspection work?
- Existing City Code provisions that reference right of entry to inspect:
 - Apply those consistent with the Fourth Amendment – the person can withdraw consent.
 - Educate client department.

WHAT ARE THE ENFORCEMENT TOOLS AND LIMITATIONS?

- Business regulations vs. Land Use regulations:
 - Available remedies are different.
- Civil or criminal enforcement tools:
 - Financial penalty limitations.
 - Local Government Code Sections 54.001, 54.017, and 54.044.
 - Transportation Code Section 542.401
 - 8th Amendment: *Timbs v. Indiana*, 139 S.Ct. 682 (2019).
 - Two-year statute of limitations for criminal cases.
- Administrative actions:
 - What kind of notice and when will it be required?
 - What does due process look like?
 - What are the decision-making factors to guard against bias/favoritism?

WHAT DOES SUCCESS LOOK LIKE?

