

# Don't Mess with Houston, Texas: The Clean Air Act and State/Local Preemption\*

## I. Introduction

If a city determines that the state is not doing enough to regulate air pollution, what steps may the city take to ensure that its citizens breathe clean air? This is the central question in *BCCA Appeal Group v. City of Houston*,<sup>1</sup> a case currently pending in Harris County, Texas. The lawsuit arises out of the continuing battle to improve Houston's notoriously poor air quality. In 2007, Mayor Bill White of Houston, frustrated with the slow pace of progress under the inspection regime run by the Texas Commission for Environmental Quality (TCEQ),<sup>2</sup> enacted an ordinance that gave the City of Houston (the City) broad powers to register and inspect polluting facilities within the City and to fine them for violations of the Texas Clean Air Act (TCAA).<sup>3</sup> In February 2008, the BCCA Appeal Group (BCCAAG), an organization formed to represent the litigation interests of Houston-area refineries and petrochemical companies, brought suit against the City seeking a declaration that the ordinance was preempted by state law.<sup>4</sup> The City has responded that the ordinance is a valid exercise of its home-rule authority to protect the health and safety of the public.<sup>5</sup>

This Note argues that, in many situations, local government may be the level of government that can address air pollution problems most effectively. When a state agency fails to take sufficient action to protect local populations from air pollution, the local government may be the only entity that can take effective action. How far a city can go in regulating air pollution, however, remains an open question. This Note considers this question through the lens of *BCCA Appeal Group v. City of Houston*. Part II examines the background

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1. No. 2008-09399 (269th Dist. Ct., Harris County, Tex. Feb. 15, 2008); see also Plaintiff's First Amended Petition at 2, *BCCA Appeal Group*, No. 2008-09399 (June 9, 2008) (criticizing local environmental regulations that are inconsistent with state regulations). For an explanation of the origins of the BCCA Appeal Group, see *infra* notes 65-69 and accompanying text.

2. *Playing Favorites: Counsel's Support for Suit Against Houston Ordinance Puts Environmental Agency on the Side of Polluters*, HOUS. CHRON., May 9, 2008, at B10 (reporting the city's view that the ordinance is a necessity in light of the TCEQ's ineffective protections against air pollution).

3. Houston, Tex., Ordinance 2007-208 (Feb. 14, 2007).

4. Plaintiff's First Amended Petition, *supra* note 1, at 15.

5. Defendant City of Houston's Motion for Summary Judgment at 4, *BCCA Appeal Group*, No. 2008-09399 (June 16, 2008).

of the Houston ordinance, in particular the City's growing discontent with the TCEQ enforcement system. Part III presents the legal arguments on both sides and suggests that the court will likely find that the ordinance is not preempted by state law. Part IV considers the question of municipal regulation of air pollution more broadly and asks how similar state/local preemption disputes might play out in other states.

While there is a tremendous body of literature on the issues of federal/state preemption, comparatively little work has been done on the issues of state/local preemption.<sup>6</sup> This discrepancy may be due to the fact that state/local issues generally do not present the kinds of constitutional dilemmas that make their way into the U.S. Reports, rather than due to a lack of significance of state/local disputes. Indeed, most American citizens have the majority of their government contact with local government: local police departments, local school districts, and local property assessors are likely to have far more impact on the average citizen's daily life than the actions of far-away federal agencies.<sup>7</sup> In this vein, perhaps nothing a government can affect has as constant an impact on people's daily lives as the quality of the air they breathe.

## II. Houston's Air Pollution Problem

Houston, the nation's fourth most populous city<sup>8</sup> and the center of the nation's petrochemical industry,<sup>9</sup> has an air pollution problem. In 2003, the Fifth Circuit noted in a prior case involving BCCAAG—that time concerning the group's challenge to the Houston–Galveston ozone plan—that “Houston-

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6. On the issue of federal/state preemption, see, for example, THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 33–34 (2008), which argues that Congress and the courts should avoid federal preemption of state common law tort claims because, among other reasons, federal regulatory regimes generally lack the corrective-justice elements of the common law tort system. For other recent works on federal/state preemption, see Ernest A. Young, *Federal Preemption and State Autonomy*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 249, 250 (Richard A. Epstein & Michael S. Greve eds., 2007) (offering a vision of limited federal preemption that emphasizes states' autonomy as political communities); Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1092–94 (2007) (analyzing the proper roles of federal regulation and state tort laws in the promotion of product safety); and Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 452–53 (2008) (advancing a model that emphasizes federal agencies' role as aggregators of empirical data that aid judicial decision making).

7. See Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 143–44 (2008) (addressing the problem of public disengagement with government by advocating participation at the local level, as local governments provide goods and services that have the most impact on citizens' day-to-day lives).

8. See GREATER HOUSTON P'SHIP, *HOUSTON AREA PROFILE* (2009), <http://www.houston.org/pdf/research/02CW001.pdf> (“Houston had a population of 2.24 million in mid-2008 . . .”).

9. See GREATER HOUSTON P'SHIP, *CHEMICALS* (2008), <http://www.houston.org/pdf/research/16HW001.pdf> (“The Houston Metropolitan Statistical Area (MSA) has 40.8 percent of the nation's base petrochemical capacity . . .”).

Galveston has one of the most serious ozone problems in the country.”<sup>10</sup> In 2008, the American Lung Association ranked Houston as the nation’s fourth most ozone-polluted city.<sup>11</sup> Exposure to high ozone levels can cause coughing, asthma, impaired lung development, increased hospitalizations, and permanent lung scarring from repeated exposure.<sup>12</sup>

In addition to an ozone problem, Houston has a toxic-chemicals problem. In 2006, Mayor White commissioned a study by public-health experts to evaluate the risk posed by toxic emissions in Houston; the study identified twelve chemicals present in Houston air at levels high enough to pose health risks.<sup>13</sup> A similar study conducted that year by local universities and medical schools considered the health risks posed by four pollutants in Houston and concluded: “Mounting evidence demonstrates that the population of Southeast Texas is exposed to disproportionate levels of toxic air pollutants considered to be a health risk to this population.”<sup>14</sup> Houston’s air pollution has economic effects as well; business leaders have reported that the reputation of Houston’s air has put them at a disadvantage in recruiting employees.<sup>15</sup>

#### A. *Regulating Houston’s Air Pollution*

In Texas, air quality is regulated under the federal Clean Air Act (CAA)<sup>16</sup> and the TCAA.<sup>17</sup> The CAA authorizes the Environmental Protection Agency (EPA) to identify pollutants to regulate and to establish national ambient air quality standards (NAAQS). EPA sets NAAQS for “criteria” pollutants, including particulate matter, ozone, carbon monoxide, nitrogen dioxide, and lead, and designates regions as in “attainment” or

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10. BCCA Appeal Group v. U.S. EPA, 355 F.3d 817, 822 (5th Cir. 2003).

11. AM. LUNG ASS’N, STATE OF THE AIR (2008), [http://www.stateoftheair.org/2008/key-findings/SOTA08\\_Table2.pdf](http://www.stateoftheair.org/2008/key-findings/SOTA08_Table2.pdf).

12. EPA, Ground-Level Ozone: Health and Environment, <http://www.epa.gov/air/ozone/pollution/health.html> (last updated May 9, 2008). On January 19, 2010, the EPA proposed new, stricter standards for ground level ozone. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010). This new standard, if adopted, would place Houston in serious noncompliance. See Matthew Tresaugue, *EPA Versus Smog—Here We Go Again*, HOUS. CHRON., Jan. 8, 2010, available at <http://www.chron.com/disp/story.mpl/metropolitan/6803329.html> (“The federal government proposed a tougher limit on ozone pollution Thursday that will force Houston to make deeper emissions cuts just as the former smog capital met the previous standard for the first time.”).

13. HEIDI L. BETHEL ET AL., A CLOSER LOOK AT AIR POLLUTION IN HOUSTON: IDENTIFYING PRIORITY HEALTH RISKS 13 (2006), <http://www.epa.gov/ttn/chief/conference/ei16/session6/bethel.pdf>.

14. RICE UNIV. ET AL., THE CONTROL OF AIR TOXICS: TOXICOLOGY MOTIVATION AND HOUSTON IMPLICATIONS 181 (2006).

15. Monica Perin, *Poor Air Quality Hinderin*g Recruiting in Houston, *Experts Say*, HOUS. BUS. J., Feb. 29, 2008, available at <http://houston.bizjournals.com/houston/stories/2008/03/03/story7.html>.

16. 42 U.S.C. §§ 7401–7671q (2006).

17. TEX. HEALTH & SAFETY CODE ANN. §§ 382.001–.143 (Vernon 2001).

“nonattainment” of the standards.<sup>18</sup> In areas designated as in nonattainment for a pollutant, states submit for EPA approval state implementation plans (SIPs) to provide attainment and enforcement of NAAQS within the state.<sup>19</sup> Once the EPA approves a SIP it is enforceable by the EPA and the state.

Houston has been classified as in nonattainment of the NAAQS for ozone every year since 1975, the original deadline for compliance with the CAA’s ambient air standards.<sup>20</sup> Houston has received three extensions on the deadline, the most recent at the request of Governor Rick Perry, who asked that Houston be reclassified from “moderate” to “severe” nonattainment of the standard so that the deadline would be pushed back to 2019.<sup>21</sup> In September 2008 the EPA granted the Governor’s request.<sup>22</sup> While this reclassification helps keep federal highway money flowing, it does little to improve the air breathed by Houston’s 2.2 million inhabitants.

Until 2005, the responsibility for monitoring Houston’s air pollution was shared by the TCEQ and the City of Houston under a contract in which the City oversaw registration and investigations, and shared fees and penalties collected under the program with the TCEQ.<sup>23</sup> In September 2005 the City and the TCEQ agreed to terminate the contract, with the City retaining responsibility for regulation of most small businesses, while the TCEQ continued to have responsibility for regulation of most heavy industry.<sup>24</sup> John Steib, TCEQ Deputy Director of the Office of Compliance and Enforcement, said the contract was dropped when the two parties could not agree on a joint-enforcement strategy.<sup>25</sup> Observers of Houston’s city government, however, may have suspected that the split was largely the doing of Houston’s new mayor.

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18. 42 U.S.C. §§ 7407, 7409.

19. *Id.* §§ 7409, 7410(a).

20. Ella Tyler, *Pack the House for Clean Air*, CITIZENS’ ENVTL. COALITION, Aug. 31, 2007, <http://www.cechouston.org/index.php/?p=2983>; see also REG’L AIR QUALITY PLANNING COMM. OF THE HOUSTON–GALVESTON AREA COUNCIL, AIR QUALITY REFERENCE GUIDE FOR THE HOUSTON–GALVESTON AREA 18–26 (2002), <http://www.cleanairaction.org/pubs/pdfs/2002/2002aqrg.pdf> (presenting Houston’s history of NAAQS violations from 1987 to 2001).

21. Tyler, *supra* note 20.

22. TCEQ, Houston-Galveston-Brazoria Ozone Nonattainment Area, <http://www.tceq.state.tx.us/implementation/air/sip/hgb.html>.

23. Editorial, *Words into Action: New City Enforcement Powers Give Officials the Opportunity to Back Up Speeches with Civil Lawsuits Against Air Polluters*, HOUS. CHRON., Jan. 25, 2005, at B8; TCEQ, *Houston Air Program Undergoes a Remake*, NAT. OUTLOOK, Winter 2006, at 8, 9–10, available at [http://www.tceq.state.tx.us/assets/public/comm\\_exec/pubs/pd/020/06-01/Outlook-Winter06.pdf](http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/pd/020/06-01/Outlook-Winter06.pdf).

24. Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 26.

25. TCEQ, *supra* note 23.

### B. *Taking Air Pollution Seriously*

Bill White was elected Mayor of Houston in 2003 as a pro-business Democrat.<sup>26</sup> A former litigator, energy-industry executive, and U.S. Deputy Secretary of Energy in the Clinton administration,<sup>27</sup> White began calling for a more serious approach to air pollution while campaigning for office. Once elected, he altered and implemented city policies that could impact air quality or global warming, such as purchasing wind-powered electricity for the City, replacing cars in the city fleet with fuel-efficient hybrids, and installing low-energy diodes in traffic lights.<sup>28</sup> The City's electrical usage dropped almost six percent during White's term in office.<sup>29</sup>

During White's first term as mayor, he spoke about the need for Houston's industries to take larger strides in controlling emissions, but he left direct enforcement of environmental regulations to the cooperative relationship between TCEQ and the City's regulators.<sup>30</sup> In 2005, after White was reelected by a vote of ninety-one percent,<sup>31</sup> his approach became far more direct. In early 2005, White announced the City's first concrete initiative to clean up Houston's air—a pollution-monitoring network along the fences of the City's industrial sites to gain more accurate data on toxic emissions, particularly of benzene and 1,3-butadiene.<sup>32</sup> White explained that the plan was a response to the inadequacy of the current system of industry-reported emissions data: "I don't care who does it, but if somebody doesn't do it quick, we are going to do it."<sup>33</sup>

In January of 2005, the *Houston Chronicle* ran a special series, "In Harm's Way," reporting the results of the paper's own monitoring

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26. See Press Release, Bill White for Tex., State Representatives from Across Texas Endorse Mayor Bill White for U.S. Senate (Sept. 10, 2009), available at <http://www.billwhitefortexas.com/2009/09/state-representatives-from-across-texas-endorse-mayor-bill-white-for-us-senate.html> [hereinafter *State Representatives*] (describing White's previous business experience and his 2003 election).

27. Monica Perin, *Energy Player Joins Heated Mayor's Race*, HOUS. BUS. J., Jan. 31, 2003, available at <http://www.bizjournals.com/houston/stories/2003/02/03/story8.html>; Bill White for Texas, Biography, <http://www.billwhitefortexas.com/biography/>.

28. Carolyn Feibel & Matthew Tresague, *Toward a Greener Houston: Mayor Has Gotten High Marks from Environmentalists, but Some Critics Say He May Have Another Goal—Higher Office*, HOUS. CHRON., May 28, 2008, at A1.

29. *Id.*

30. See Dina Cappiello, *White Talks Tough on Pollution: Pushes Stricter Controls, Better Monitoring, More Information*, HOUS. CHRON., May 1, 2004, at A1 (recounting White's effort to persuade the TCEQ to be more aggressive in its enforcement measures); Rick Casey, "Tough on Crime," *Some of the Time*, HOUS. CHRON., Aug. 4, 2004, at B1 (describing White's efforts to convince a "toothless" TCEQ to identify and monitor Houston's biggest polluters).

31. *State Representatives*, *supra* note 26.

32. Dina Cappiello, *Mayor Unveils First Specific Actions on Air Toxics Issue: New Plan Would Monitor Plants Along Their Fences*, HOUS. CHRON., Jan. 25, 2005, at A1.

33. *Id.*

investigation of toxic emissions in east Houston.<sup>34</sup> The report criticized the TCEQ's air monitoring system as "spotty" and overly reliant on industry-reported data.<sup>35</sup> The *Chronicle* concluded:

It's as clear as the air quality readings measured by the Chronicle monitors that this state's system for protecting the environment has failed and must be overhauled.

While state investigators have the common sense not to breathe the air they monitor, their bosses continue to turn a blind eye to poor air quality that subjects entire neighborhoods to substandard quality of life.<sup>36</sup>

In a meeting with TCEQ representatives on March 1, 2005, the Houston City Council questioned whether the TCEQ was responding fast enough to reports of toxins in southeast Houston.<sup>37</sup> Councilwoman Carol Alvarado stated, "What we are hearing today . . . we've been talking about for 15 years. I don't see the seriousness of the issue from your agency. Frankly, I just don't know if you get it."<sup>38</sup>

In spring of 2005, frustrated with delays in enforcement actions by the TCEQ after City monitors reported air pollution violations, the City amended its contract with the TCEQ so that it could independently bring suit for such violations.<sup>39</sup> Elena Marks, Mayor White's health-policy advisor, described the City's frustration with the TCEQ: "We'd write something up and turn it over to them, and they would or wouldn't take action."<sup>40</sup> The *Houston Chronicle* applauded the City's decision: "[T]he change will allow local officials who represent constituents in the most polluted areas of the city to initiate court action on their behalf. That's a welcome addition of power to the governmental body most sensitive to the problem."<sup>41</sup>

By September of 2005, the City and the TCEQ agreed to part ways on their joint monitoring program.<sup>42</sup> The TCEQ maintained its office in the City to conduct registration and monitoring of "sources"—large industrial sites—while the City conducted its own program of registration and monitoring of

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34. Editorial, *Dereliction of Duty: Lax State Environmental Regulations and Barely Existent Enforcement Have Compromised the Air Quality of Eastside Neighborhoods*, HOUS. CHRON., Jan. 23, 2005, at E2.

35. *Id.*

36. *Id.*

37. Dina Cappiello, *Tough Talk on Toxics: Council Asks Agency to Act Sooner*, HOUS. CHRON., Feb. 8, 2005, at A1.

38. *Id.*

39. Editorial, *supra* note 23.

40. *Id.*

41. *Id.*

42. TCEQ, *supra* note 23.

“facilities”—smaller emitting sites such as dry cleaners and gas stations—under a city ordinance that had been on the books since 1992.<sup>43</sup>

In early 2007, as a result of two studies raising flags about the risks of toxic chemicals in Houston's air,<sup>44</sup> the City sought to ramp up its campaign against toxic emissions. A particular challenge was how to deal with emissions originating from outside the City; the air in Houston is affected by emissions from the vast stretch of petrochemical facilities from Beaumont in the east to Galveston in the south,<sup>45</sup> but the City has no regulatory authority over facilities outside the city limits. Mayor White's solution was to announce that the City would begin to use its nuisance ordinance to bring suit against polluting facilities in neighboring municipalities.<sup>46</sup> White explained that the City was resorting to nuisance laws because the TCEQ had failed to adopt strong enough standards on toxic emissions: “For years, we have urged Texas state regulators to set maximum levels for the concentration of carcinogens, such as benzene. They should adopt the city's detailed plan to reduce benzene or develop their own plan.”<sup>47</sup>

In March of 2007, Mike Jackson, the Republican state senator who represents Baytown and other industrial towns east of Houston, introduced a bill in the Texas Senate that sought to prohibit local governments from regulating pollution coming from outside of their boundaries.<sup>48</sup> In the Senate debate over the bill, Senator Rodney Ellis, a Democrat from Houston, asked, “Why would you take away the ability of the largest city in the state to clean up its air? The city of Houston has stepped forward to show leadership to do something about ambient air-quality standards because the state is not doing it.”<sup>49</sup> Ultimately, the antinuisance bill never passed in the House, leaving Houston free to pursue lawsuits against polluting facilities in neighboring municipalities.<sup>50</sup> The City put the nuisance plan on hold, however, and it has yet to bring a nuisance suit under the ordinance.<sup>51</sup> The *Houston Chronicle*, discussing the antinuisance fight, commented:

Houstonians are not willing to breathe bad air indefinitely. The latest legislative failure to deal with the issue should go a long way toward convincing business and civic leaders that a more

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43. See HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 2 (2007) (codifying ordinances dating back to 1992).

44. BETHEL ET AL., *supra* note 13, at 13; RICE UNIV. ET AL., *supra* note 14, at 181.

45. GREATER HOUSTON P'SHIP, *supra* note 9.

46. Kristen Mack, *White's Clean-Air Plan Suffers Setback: Senate OKs Bill to Keep One City from Trying to Limit Another's Pollution*, HOUS. CHRON., May 2, 2007, at B4.

47. *Id.*

48. Texas Legislature Online, 80(R) History for SB 1317, <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=80R&Bill=SB1317>.

49. Mack, *supra* note 46.

50. Editorial, *Helpless in Austin: Texas Legislature's Failure to Address Air Pollution Should Spur Local Enforcement Efforts*, HOUS. CHRON., June 10, 2007, at E2.

51. Editorial, *Foot-Dragers: Regulators Are Too Willing to Grant Polluters Leeway; Mayor White Is Right to Set a Deadline*, HOUS. CHRON., Nov. 14, 2007, at B8.

aggressive local stance is necessary. If the state continues to drag its feet, it will be up to county and municipal government to effectively champion the cause of clean air.<sup>52</sup>

### C. *The Ordinance*

The City's broadest salvo so far in its clean-air fight took place on February 14, 2007, when the City Council enacted Ordinance No. 2007-208, "Relating to Registration of Air Pollution Sources" (together with 2008 amendments, the Ordinance).<sup>53</sup> The Ordinance amended and broadened the provisions in the Houston Code of Ordinances under which the City had been registering and monitoring polluting facilities since 1992.<sup>54</sup> The Ordinance brought about three significant changes. First, it requires the registration of "facilities," but expands the definition of "facilities" to include "sources," as defined in the TCAA, that emit one ton per year or more of airborne contaminants.<sup>55</sup> This definition significantly broadened the scope of the Ordinance by including the heavy industrial operations that had previously been overseen by the TCEQ.<sup>56</sup>

Second, the Ordinance increases registration fees and noncompliance penalties from the previous system. The registration fees range in scale from \$100 per year for a small dry-cleaning plant to \$3,000 per year for a facility emitting ten tons or more of airborne contaminants.<sup>57</sup> The Ordinance states, "It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility."<sup>58</sup> Violations under the section can be punished with fines of between \$250 and \$2,000 per day of violation.<sup>59</sup> Registration enforcement is overseen by a health officer, who is also empowered to conduct a regulatory-compliance program, which "shall include, but need not be limited to, on site inspections, complaint investigations and reviews of applicable compliance documentation."<sup>60</sup>

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52. Editorial, *supra* note 50.

53. See Houston, Tex., Ordinance 2007-208 (Feb. 14, 2007) (amending the City's air pollution abatement and registration programs, codified in HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 1, § 21-146(a), div. 2, §§ 21-161 to -166 (2007)).

54. See Douglas Britt, *Proposal Targets Air-Code Violators: Amendment Undergoing Public Comment Period*, HOUS. CHRON., Mar. 8, 2007, § Z8, at 4 (discussing new means of air-quality monitoring and enforcement offered by the amendments).

55. CODE OF ORDINANCES ch. 21, art. VI, div. 2, § 21-161(a).

56. Significantly for the case at hand, this new definition includes facilities operated by three members of the BCCAAG within the city limits: Lyondell Chemical Company, Texas Petrochemicals L.P., and Valero Refining-Texas L.P. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 7.

57. CODE OF ORDINANCES § 21-166.

58. *Id.* § 21-162(a).

59. *Id.* § 21-162(c), (d).

60. *Id.* § 21-164(b).

Civil, administrative, and criminal sanctions imposed by law shall be pursued where violations are determined to exist.<sup>61</sup>

The last quoted clause takes on added significance when combined with the Ordinance's third major amendment, which incorporates by reference the pollution standards and practices required by the TCAA.<sup>62</sup> In other words, the City claimed the power to enforce the TCAA against industrial facilities that had previously been regulated exclusively by the TCEQ. The Ordinance also contains a severability provision, stating that if any part of the Ordinance is held unconstitutional or otherwise invalid, the validity of the remaining portions shall be unaffected.<sup>63</sup>

In explaining why the City chose to enact the Ordinance, Mayor White said he would "applaud state and federal regulation if it occurred. But without that, the city needs to take the actions that it can to protect its citizens."<sup>64</sup> The gauntlet was thrown down.

#### D. BCCAAG Files Suit

Not everyone was happy with the City's assertion of authority. Houston industries that had worked with the TCEQ and its predecessors for decades were not pleased with the prospect of a second regulatory system with all the powers of the TCEQ but a far more aggressive public stance. The most displeased found their voice in BCCAAG,<sup>65</sup> an organization founded in 2001 as the litigation arm of the "Business Coalition for Clean Air,"<sup>66</sup> a now-defunct organization that was a regulated-industry spinoff of the Greater Houston Partnership, a Houston-area business coalition.<sup>67</sup> The Partnership, which favors voluntary cooperation by industry and state action to strengthen air-toxics enforcement,<sup>68</sup> has disclaimed any relationship with BCCAAG.<sup>69</sup>

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61. *Id.*

62. *Id.* § 21-164(a).

63. Houston, Tex., Ordinance 2007-208 § 5 (Feb. 14, 2007).

64. Editorial, *Protecting Their Own: Industry Group's Lawsuit Is Latest Effort to Undercut Houston's Enforcement of Clean Air Regulations*, HOUS. CHRON., Mar. 23, 2008, at E2.

65. In 2008, the ten members of BCCAAG were the following: ExxonMobil Corporation, The Dow Chemical Company, ConocoPhillips Company, Lyondell Chemical Company, Celanese Chemicals, Ltd., Valero Refining-Texas L.P., Texas Petrochemicals L.P., Entergy Texas, Inc., Dynegy, Inc., and Air Products, L.P. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 7.

66. Perin, *supra* note 15.

67. Editorial, *supra* note 64. The *Houston Chronicle* has been highly critical of BCCAAG's motives:

In 2001, the BCCA launched a \$1.3 million advertising campaign featuring smiling schoolchildren shouting the punch line, "Clean air. It's everybody's business." Meanwhile, the BCCA Appeals Group was suing the state to water down elements of a smog reduction plan. As with a number of industry associations with disingenuous, green-friendly, double-speak titles, it's best to watch what they do, not what they say.

*Id.*

68. Editorial, *supra* note 50.

BCCAAG's incorporation papers declare that the group's purpose is "to advance the common business interests of its members with respect to their mutual goals of clean air and a strong business economy in Houston."<sup>70</sup> Since 2001 the group has been involved in a number of legal challenges to environmental regulations, most notably an unsuccessful challenge to the Houston-Galveston ozone plan.<sup>71</sup> The group has been criticized by local environmental organizations, with one attorney referring to the group as "the most litigious group in town."<sup>72</sup>

BCCAAG filed its original petition in *BCCA Appeal Group v. City of Houston* in Harris County District Court on February 15, 2008.<sup>73</sup> The group issued a written statement: "The city's regulatory ordinance creates a new layer of regulation that is in conflict with the programs implemented by TCEQ . . . . 'Such a patchwork style of environmental regulation is not the way to improve air quality in our community or protect our economy and job base.'"<sup>74</sup> In the lawsuit BCCAAG is represented by Baker Botts L.L.P., the prominent Houston-based law firm that has represented the group in its previous legal challenges.<sup>75</sup> To mount a defense, Mayor White recruited the pro bono services of the Houston litigation boutique Gibbs & Bruns, L.L.P.,<sup>76</sup> which in 2007 had successfully defended the City's smoking ban in federal court.<sup>77</sup> The battle was on.

The City soon threw a curveball, however. On May 7, 2008, about three months after BCCAAG filed its petition, the City enacted Ordinance No. 2008-414, which altered the Ordinance's enforcement provisions.<sup>78</sup> The amendment replaced the sentence, "Civil, administrative, and criminal sanctions imposed by law shall be pursued where violations are determined to exist," with the statement, "It shall be unlawful for any person to operate or cause to be operated any facility that does not comply with [state air pollution control laws]."<sup>79</sup> It also provides an affirmative defense to prosecution under the section for any condition or activity that has been "[a]pproved or authorized by the [TCAA], state rule or state order."<sup>80</sup> This

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69. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at Exhibit B.

70. Editorial, *supra* note 64.

71. *BCCA Appeal Group v. U.S. EPA*, 355 F.3d 817 (5th Cir. 2003).

72. Perin, *supra* note 15.

73. Original Petition, *BCCA Appeal Group v. City of Houston*, No. 2008-09399 (269th Dist. Ct., Harris County, Tex. Feb. 15, 2008).

74. Perin, *supra* note 15.

75. Baker Botts L.L.P., Industry Solutions, [http://www.bakerbotts.com/departments/practice\\_detail.aspx?id=9e98441e-0a53-4445-909e-902708d112f3](http://www.bakerbotts.com/departments/practice_detail.aspx?id=9e98441e-0a53-4445-909e-902708d112f3).

76. The author has accepted an offer of employment with Gibbs & Bruns, L.L.P.

77. Editorial, *Tapping the Bar: Sometimes It Pays to Have a Lawyer, Especially If You're the Mayor and Get One for Free*, HOUS. CHRON., Aug. 16, 2007, at B10.

78. Houston, Tex., Ordinance 2008-414 (May 7, 2008).

79. *Id.* § 4 (amending HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 2, § 21.164 (1985)).

80. *Id.* § 5 (amending CODE OF ORDINANCES § 21.164(d)).

amendment was likely a response to BCCAAG's claim that the Ordinance created criminal penalties for activities approved by the TCEQ, a centerpiece of their preemption argument.<sup>81</sup> Whether the City was successful in undercutting BCCAAG's argument is discussed below.

### III. *BCCA Appeal Group v. City of Houston*

BCCAAG seeks to invalidate the Ordinance on the grounds that it "contravenes the Constitution and statutes of the State of Texas and represents an impermissible intrusion on the exclusive powers granted by the Legislature to a state agency."<sup>82</sup> As the basis for its challenge, BCCAAG points to the provision in the Texas Constitution that states, "no . . . ordinance [of a home-rule city] shall contain any provision *inconsistent* with the Constitution of the State, or of the general laws enacted by the Legislature of this State."<sup>83</sup> BCCAAG argues that the Ordinance contains provisions inconsistent with the TCAA and the Texas Water Code.<sup>84</sup> Both sides agree that the key statutory language in this case comes from the provision of the TCAA dealing with Authority of Municipalities,<sup>85</sup> which provides:

- (a) . . . [A] municipality has the powers and rights as are otherwise vested by law in the municipality to:
- (1) abate a nuisance; and
  - (2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, *not inconsistent* with this chapter or the commission's rules or orders.
- (b) An ordinance enacted by a municipality *must be consistent* with this chapter and the commission's rules and orders and *may not make unlawful* a condition or act approved or authorized under this chapter or the commission's rules or orders.<sup>86</sup>

This provision echoes, twice, the constitutional requirement that a municipal ordinance may not be inconsistent with state law. Thus, the central question in this case, as with most disputes over state/local preemption, is what it means to be inconsistent with state law.

BCCAAG argues that:

- [t]he Ordinance impermissibly:  
 [(1)] [e]stablishes a duplicative City air quality regulatory program to that run by the TCEQ, but without the provisions the

81. See Plaintiff's First Amended Petition, *supra* note 1, at 1 ("The City of Houston's competing program attempts to make 'unlawful' facilities that are already permitted and regulated by the TCEQ.").

82. *Id.*

83. TEX. CONST. art. XI, § 5 (emphasis added).

84. Plaintiff's First Amended Petition, *supra* note 1, at 3.

85. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 15–16.

86. TEX. HEALTH & SAFETY CODE ANN. § 382.113 (Vernon 2001) (emphasis added).

Legislature built in for the exercise of TCEQ discretion in implementing and enforcing TCEQ rules;

[(2)] [a]ssesses redundant air pollution fees, in clear conflict with TCEQ statutory fee programs;

[(3)] [r]equires air pollutant emitting facilities to apply for permits to lawfully operate, in clear conflict with TCEQ permitting programs; and

[(4)] [e]mpowers the City to prosecute air-quality cases criminally, in municipal court, rather than by filing suit in civil district court with the TCEQ as a necessary party, as required by the Texas Water Code.<sup>87</sup>

BCCAAG's first two arguments involve implied preemption, while the second two claim express preemption. Express preemption exists where a "general assembly has specifically prohibited local action in an area."<sup>88</sup> Implied preemption occurs either where the ordinance does not directly violate any statutory language, but where the statute occupies the field to such an extent that there is no room for the ordinance to function, or where the statute and the ordinance are in such conflict that the ordinance stands as an obstacle to the functioning of the statute.<sup>89</sup> This Note addresses both arguments.

#### A. *Implied Preemption: When Is an Ordinance "Inconsistent" with State Law?*

BCCAAG's first two objections—to a duplicative regulatory program and redundant fees—argue that there is an implicit conflict in the City regulating facilities that are already regulated, on essentially the same terms, by the TCEQ. BCCAAG argues that through the TCAA the legislature created a comprehensive regulatory regime for air emissions to be administered by the TCEQ and that the limited authority granted to municipalities in the TCAA constrains the scope of authority that municipalities may exercise lawfully.<sup>90</sup> The TCAA specifically authorizes municipalities to perform certain functions, such as to enter and inspect property to determine compliance with the TCAA,<sup>91</sup> or to contract with the TCEQ to administer a local air-quality inspection program.<sup>92</sup> BCCAAG argues that the granting of these specific powers indicates the legislature's intent that municipalities should

87. Plaintiff BCCA Appeal Group's Motion for Summary Judgment at 1, BCCA Appeal Group v. City of Houston, No. 2008-09399 (269th Dist. Ct., Harris County, Tex. June 16, 2008).

88. *See, e.g.,* Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977) ("We believe the language of this provision plainly expresses a legislative intention to deny political subdivisions the power to enact any law, ordinance or regulation relating to the availability of obscene material.")

89. *See* Davis, *supra* note 6, at 1111–20 (discussing the development of implied preemption in the federal context).

90. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 2–4.

91. § 382.111(a).

92. § 382.0622(d).

not exercise powers beyond those granted in the TCAA.<sup>93</sup> Since the TCAA clearly authorizes the TCEQ to register emitting facilities and to collect emission fees from them,<sup>94</sup> BCCAAG argues that municipalities are prohibited from exercising the same authority if they are not working in conjunction with the TCEQ.<sup>95</sup>

The strength of BCCAAG's arguments depends in large part on the standard the court uses to determine whether an ordinance is "inconsistent" with state law. On this issue both sides cite Texas Supreme Court cases<sup>96</sup> stating that if the legislature is to limit home-rule cities' use of their police powers, it must do so with "unmistakable clarity."<sup>97</sup> Where the parties diverge is on how the "unmistakable clarity" standard applies in this case.

BCCAAG argues that the language of the TCAA and the Water Code makes unmistakably clear the legislature's intent that the TCEQ should exercise exclusive jurisdiction over air-emissions regulations.<sup>98</sup> The TCAA states, "The [TCEQ] shall seek to accomplish the purposes of [the TCAA] through the control of air contaminants by all practical and economically feasible methods."<sup>99</sup> The Water Code states, "The [TCEQ] is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment."<sup>100</sup>

To support its case, BCCAAG points to the 1980 case *City of West Lake Hills v. Westwood Legal Defense Fund*,<sup>101</sup> in which the Waco Court of Appeals held invalid a municipal ordinance that provided for local licensing of sewage facilities, on the grounds that the ordinance was inconsistent with the Water Code's specific grant of power to the TCEQ to license sewage facilities and assess fees.<sup>102</sup> The court reasoned that although the Water Code grants municipalities the general power to "control and abate water pollution," the fact that the Code specifically grants the authority to license private sewage facilities to the TCEQ precludes the exercise of such power by municipalities.<sup>103</sup> BCCAAG suggests that the parallel to the current dis-

93. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 2–4.

94. §§ 382.062–.0622.

95. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 2–4.

96. *Id.* at 7; Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 14–15.

97. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975) (citing *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964)).

98. *See* Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 8 ("The Legislature's empowerment of the TCEQ—rather than the City or other municipalities—to protect the state's environment and regulate the quality of its air is unmistakably clear.").

99. § 382.011(b).

100. TEX. WATER CODE ANN. § 5.012 (Vernon 2008).

101. 598 S.W.2d 681 (Tex. Civ. App.—Waco 1980, no writ).

102. *See id.* at 685–86 ("In the instant case the specific assignment of the power to license private sewage facilities . . . limits the more general grant of power to the cities.").

103. *Id.*

pute is clear: the TCAA grants general authority to municipalities to address air pollution but grants specific authority to register emitting facilities to the TCEQ; therefore, the specific grant of authority precludes any registration program by municipalities.<sup>104</sup>

*B. The City's Response: The Ordinance Falls Within Houston's Home-Rule Authority*

The City argues that the Ordinance is specifically authorized by both federal and state law.<sup>105</sup> The City points to the recognition of the role of municipalities in the CAA, which states, “[A]ir pollution control at its source is the primary responsibility of States and local governments.”<sup>106</sup> The CAA further provides that it does not “preclude or deny the right of any State or political subdivision thereof” to adopt emissions standards so long as they are not “less stringent” than the SIP approved by the EPA.<sup>107</sup> The City states, “Congress has expressly invited local governments, like Houston, to assist in the fight against pollution.”<sup>108</sup> While these indications of congressional intent do support the City’s position, they are only persuasive, since both sides acknowledge that Texas law governs the dispute.<sup>109</sup>

The City further argues that it is specifically empowered to enact the Ordinance by the TCAA, which provides: “[A] municipality has the powers and rights . . . to: (1) abate a nuisance; and (2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission’s rules or orders.”<sup>110</sup> Whereas BCCAAG argues that this provision limits the role of municipalities in regulating air pollution, the City sees it as a grant of power. Clearly, the provision does both—the central question is whether the Ordinance is inconsistent with state law.

On the question of inconsistency, the City points to a line of precedents that establish a heavy burden for parties wishing to invalidate an exercise of police power by a home-rule city.<sup>111</sup> BCCAAG does not dispute that Houston is a home-rule city.<sup>112</sup> BCCAAG’s reliance on *City of West Lake*

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104. Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *supra* note 87, at 9.

105. Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 3.

106. *Id.* (citing 42 U.S.C. § 7401(a) & (a)(3) (2006)) (emphasis added).

107. 42 U.S.C. § 7416 (2006) (emphasis added).

108. Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 3.

109. *See* Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *supra* note 87, at 2; Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 3 (both referring to Texas law as the governing authority).

110. Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 3–4 (citing TEX. HEALTH & SAFETY CODE ANN. § 382.113 (Vernon 2007)).

111. *Id.* at 12–15.

112. Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *supra* note 87, at 6; *see also* Brooks v. State, 226 S.W.3d 607, 609 n.5 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (noting that Houston is a home-rule city).

*Hills*, the City argues, is inapposite because West Lake Hills was not a home-rule city but a general-rule city,<sup>113</sup> and was thus entitled to far less independent authority than a home-rule city such as Houston.<sup>114</sup> The Texas Local Government Code states that a home-rule city “has full power of local self-government,”<sup>115</sup> and has power to “enforce ordinances necessary to protect health, life, and property . . . of the municipality and its inhabitants.”<sup>116</sup> The Appeals Court in Dallas has stated that the Texas Constitution vests home-rule cities with broad discretion to address “questions that deal with public safety, health, morals, general welfare, and questions properly within the scope of the city’s police power.”<sup>117</sup> The Appeals Court in Tyler stated that courts considering preemption challenges to local ordinances should determine only “whether the Legislature has limited the power of a home rule city, not whether it has made specific grants of authority.”<sup>118</sup> Regarding the specificity of such a limitation, the Texas Supreme Court stated in *In re Sanchez*, “[I]f the Legislature decides to preempt a subject matter normally within a home-rule city’s broad powers, it must do so with ‘unmistakable clarity.’”<sup>119</sup> The Court in *Sanchez* directed that a statute and a city ordinance should not be held repugnant to each other if a court can reach a reasonable construction leaving both in effect.<sup>120</sup>

Thus, if the court finds that in enacting the Ordinance the City is exercising its police power to protect the public health, the court may only find the Ordinance preempted if the legislature’s intent to preempt it is “unmistakably clear.” The City presents a compelling argument that it is operating under its police power. The preamble to the Ordinance states that its purpose is to “protect the health, safety, and welfare of the public.”<sup>121</sup> The City strengthens this argument by presenting substantial evidence that air pollution threatens public health.<sup>122</sup> The City points to cases in which courts have upheld city smoking ordinances, including a 2007 decision by a federal

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113. See *City of W. Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 682 (Tex. Civ. App.—Waco 1980, no writ) (“The Appellant, City of West Lake Hills, is a general law city having a population of less than 5000 people.”).

114. Defendant City of Houston’s Reply in Support of Its Motion for Summary Judgment at 9, *BCCA Appeal Group v. City of Houston*, No. 2008-09399 (269th Dist. Ct., Harris County, Tex. July 25, 2008).

115. TEX. LOC. GOV’T CODE ANN. § 51.072(a) (Vernon 2008).

116. *Id.* § 54.004.

117. *MJR’s Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied).

118. *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no writ).

119. 81 S.W.3d 794, 796 (Tex. 2002).

120. *Id.*; see also *Robinson*, 936 S.W.2d at 416 (“[T]he court must construe the city ordinance in a manner that renders it constitutional, if it is possible to do so, consistent with a reasonable interpretation of its language.”).

121. Houston, Tex., Ordinance 2007-208 pmb1. (Feb. 14, 2007).

122. See *supra* notes 13–14.

district court upholding Houston's antismoking ordinance,<sup>123</sup> to demonstrate that regulating air quality falls under municipal authority. The City also notes that several other Texas cities have enacted ordinances similar to the Houston Ordinance.<sup>124</sup> BCCAAG has not disputed that the Ordinance is an exercise of the City's police power.<sup>125</sup>

Given the broad discretion granted to home-rule cities, if the court finds that the Ordinance falls within the City's police power to protect the public health—and it probably will—then it will likely reject BCCAAG's implied-preemption arguments. Unlike federal preemption law, where “federal law or regulations may impliedly preempt state law or regulations if the statute's scope indicates that Congress intended federal law or regulations to occupy the field exclusively,”<sup>126</sup> under Texas law “the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.”<sup>127</sup> The Appeals Court in Houston has stated, “In the absence of express limitations, there is nothing that prevents a city from enacting an ordinance covering the same subject as state or federal regulations.”<sup>128</sup>

These precedents undercut BCCAAG's argument that the Ordinance is implicitly preempted by the TCAA. While BCCAAG can point to statutory language granting the TCEQ general authority over air pollution regulation, it cannot present any language that expressly forbids a city from imposing its own registration requirement or fee-collection program. Rather, the TCAA specifically authorizes a city to “enact and enforce an ordinance for the con-

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123. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 13–14 (citing *Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston*, 508 F. Supp. 2d 576, 587 (S.D. Tex. 2007) (upholding Houston, Tex., Ordinance 2006-1054 (Oct. 18, 2006))); *see also Ex parte Woodall*, 154 S.W.3d 698, 702 (Tex. App.—El Paso 2004, pet. denied) (holding that the regulation of smoking is within a home-rule city's police power).

124. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 4.

125. *See* Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 2 (conceding that while “[t]he City can participate in air quality regulation in several legitimate ways,” the Ordinance is not an example).

126. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

127. *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990); *see also City of Amarillo v. Griggs Sw. Mortuary*, 406 S.W.2d 230, 232 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.) (“The fact that the state requires a license does not mean that the legislature has pre-empted the field.”).

128. *City of Houston v. Harris County Outdoor Adver. Ass'n*, 732 S.W.2d 42, 48 (Tex. App.—Houston [14th Dist.] 1987, no writ). The City points to several cases in which Texas courts have found that action by a state agency in an area does not preempt local action in the same area. *See, e.g., City of Mont Belvieu v. Enter. Prods. Operating, L.P.*, 222 S.W.3d 515, 520 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that the legislative grant of authority to the Texas Railroad Commission over salt-dome facilities does not preempt local ordinances on the same subject matter); *Manchester Terminal Corp. v. Tex. TX TX Marine Transp. Inc.*, 781 S.W.2d 646, 649–50 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (finding that prior air quality legislation, which gave the Texas Air Control Board “principal authority” over regulation of the state's air resources, did not preempt private right of action to seek injunctive relief or damages for air pollution).

trol and abatement of air pollution.”<sup>129</sup> This same provision requires that such an ordinance cannot be inconsistent with the TCAA,<sup>130</sup> but the City argues, since the Ordinance incorporates the enforcement provisions of the TCAA,<sup>131</sup> the Ordinance could only be inconsistent with the TCAA if the TCAA were inconsistent with itself.<sup>132</sup> In other words, an act can only violate the Ordinance if it also violates the TCAA. BCCAAG argues that even if this is true, the Ordinance is still inconsistent with the TCAA because it does not incorporate the discretion built into the TCEQ concerning when to bring enforcement actions.<sup>133</sup> BCCAAG points to a number of provisions in the TCAA where the executive director of the TCEQ is granted discretion in whether or not to bring an action against an emitting facility or source.<sup>134</sup>

This question of discretion gets to the heart of the matter. If it is true that under the Ordinance the City enforces the exact same rules as the TCEQ, then what is the point in fighting over who oversees the enforcement? The comments of the City's representatives in the dispute leading up to the Ordinance make clear that the City was dissatisfied with the TCEQ's exercise of its discretion; it is reasonable to infer that the City believes its program will be more effective because it will enforce regulations more aggressively than the TCEQ did. This is probably the central reason why the City enacted the Ordinance, and why BCCAAG is fighting it.

The problem for BCCAAG is that it is challenging a hypothetical application of the Ordinance in the context of a facial challenge to the Ordinance itself. Speculation about what the City might do versus what the TCEQ might do does not rise to the standard of unmistakably clear legislative intent that is required to invalidate a home-rule city's ordinance. BCCAAG's argument proves too much. Any enforcement regime requires some degree of discretion in how potential violations are addressed; if the mere possibility of discretion were enough to make an ordinance inconsistent with the statute, then there would be no room for overlapping areas of city and state authority. And yet the TCAA clearly contemplates just such an area of overlap in its provision authorizing municipal ordinances for the abatement of air pollution.<sup>135</sup> The City argues, “[T]he fact that BCCAAG . . . currently enjoys what it perceives to be a permissive regulatory approach from the TCEQ [does not] change the fact that state law expressly *authorizes* Houston to regulate air pollution . . . *within* the parameters set out under state law.”<sup>136</sup> To prevail, BCCAAG must establish

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129. TEX. HEALTH & SAFETY CODE ANN. § 382.113 (Vernon 2001).

130. *Id.*

131. HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 2, § 21-164(a) (2007).

132. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 2.

133. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 11.

134. *Id.* at 11–12 (citing §§ 382.023–.025, .0215–.0216, .023(b)).

135. § 382.113.

136. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 2.

that the TCAA's grant of discretion to the TCEQ preempts with "unmistakable clarity" the exercise of similar discretion by the City. It does not appear to be able to meet that burden.

*C. Express Preemption: How Clear Is "Unmistakable Clarity"?*

BCCAAG can make a stronger case for express preemption. Because the Texas Supreme Court has stated that a home-rule city's ordinance involving its police powers is only preempted if the legislature has indicated its preemptive intent with "unmistakable clarity,"<sup>137</sup> a challenger to an ordinance may almost be required to identify specific statutory provisions directly in conflict with the ordinance in order to prevail in a preemption challenge. BCCAAG argues that it can point to such provisions in the TCAA and the Texas Water Code.

1. *Does the Ordinance Make Unlawful an Act Authorized by the TCAA?*—BCCAAG argues that the Ordinance is invalid because it violates the provision of the TCAA that states, "An ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders."<sup>138</sup> The relevant language of the Ordinance states, "It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility."<sup>139</sup> BCCAAG argued in its original petition that this provision would make unlawful the operation of a facility that is in compliance with TCEQ regulations but has failed to register with the City of Houston.<sup>140</sup> The May 7, 2008 amendments to the Ordinance, however, provide an affirmative defense to a facility for any condition or activity that has been "[a]pproved or authorized by the [TCAA], state rule or state order."<sup>141</sup> While the creation of this affirmative defense undercuts BCCAAG's argument, BCCAAG has responded that "[t]he creation of an affirmative defense is not, as a practical or legal matter, equivalent to exempting conduct that is approved or authorized by the state" because the City could still bring charges against a facility, and the burden would be on the facility to prove that its conduct was authorized by the TCAA or by a state rule or order.<sup>142</sup>

The City argues that the 2008 amendment alleviates the conflict with the TCAA.<sup>143</sup> While in practice the new language should mean that facilities

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137. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

138. § 382.113(b) (emphasis added); Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 10.

139. HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 2, § 21-162(a) (2007).

140. Original Petition, *supra* note 73, at 9.

141. CODE OF ORDINANCES § 21-164(d).

142. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 10.

143. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 26–27.

in compliance with TCEQ regulations can avoid penalties under the Ordinance, the amendment does not entirely address BCCAAG's concern that providing an affirmative defense is not the same thing as exempting conduct in the first place.<sup>144</sup> The City responds that BCCAAG's concern about enforcement in such a situation is, at this time, entirely hypothetical and consequently does not present a justiciable controversy under Texas law.<sup>145</sup> The City further argues that the Ordinance can be interpreted as consistent with state law and that under Texas law the court must interpret it in this way.<sup>146</sup> The Texas Supreme Court has instructed courts to construe possibly conflicting laws so as "to avoid constitutional problems if possible."<sup>147</sup> The Court of Appeals in Tyler stated, "[T]he court must construe the city ordinance in a manner that renders it constitutional, if it is possible to do so, consistent with a reasonable interpretation of its language."<sup>148</sup> The City suggests that, given the intent of the 2008 Ordinance to avoid prosecutions for activities authorized by the state and given the hypothetical nature of the concern at present, the court should read the 2008 Ordinance as eliminating any inconsistency with the TCAA.<sup>149</sup>

BCCAAG has presented a viable textual argument that the Ordinance is inconsistent with the TCAA. The City, however, has presented the court with ways to avoid finding preemption, either on the grounds that the identified inconsistency is purely hypothetical, and is therefore nonjusticiable, or, given the clear intent of the 2008 Ordinance and the precedents ordering the court to interpret the Ordinance as constitutionally valid if possible, on the grounds that the Ordinance is not inconsistent with state law. The court could go either way.

2. *Does the Ordinance Violate the Procedural Requirements of the Water Code?*—BCCAAG argues that there is an express conflict between the provisions of the Ordinance and of the Water Code.<sup>150</sup> The Water Code authorizes local governments to bring civil suits in district courts for violations of the Health and Safety Code (which incorporates the TCAA),<sup>151</sup> but states,

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144. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 10.

145. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 27 ("To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." (citing *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995))).

146. *Id.*

147. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004).

148. *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no writ).

149. Defendant City of Houston's Motion for Summary Judgment, *supra* note 5, at 27.

150. Plaintiff BCCA Appeal Group's Motion for Summary Judgment, *supra* note 87, at 6.

151. TEX. WATER CODE ANN. § 7.351 (Vernon 2008). For historical reasons, the Texas Water Code contains many of the enforcement provisions for other environmental statutes. See Texas Commission on Environmental Quality History, <http://www.tceq.state.tx.us/about/tceqhistory.html> (explaining that TCEQ's predecessor, TNRCC, was formed in 1991 by the consolidation of the Texas Water Commission and the Texas Air Control Board).

“In a suit brought by a local government under this subchapter, the commission [TCEQ] is a necessary and indispensable party.”<sup>152</sup> BCCAAG argues that since the Ordinance allows the City to bring suit in Houston municipal court without joining the TCEQ, the Ordinance is inconsistent with the Water Code.<sup>153</sup> The City responds that the Ordinance authorizes it to bring suit for violations of the Ordinance, not state law, so there is no violation of the Water Code.<sup>154</sup> BCCAAG points out that the Ordinance incorporates the enforcement provisions of the TCAA, so in effect the Ordinance allows the City to make an end run around the procedures mandated in the Water Code for TCAA enforcement actions.<sup>155</sup> The City responds, however, that the enforcement actions described in the Water Code do not preclude other actions;<sup>156</sup> the Water Code states that it “does not exempt a person from complying with or being subject to other law,”<sup>157</sup> and that “[t]he remedies under this chapter are cumulative of all other remedies.”<sup>158</sup>

BCCAAG has again presented a viable argument, but the City probably has the stronger case. While the City’s argument that the Ordinance authorizes suits under the Ordinance rather than the TCAA relies on a technicality, that is probably good enough under the permissive standard for home-rule ordinances. To invalidate an ordinance the challenger must show that the legislature intended to preempt it with “unmistakable clarity.”<sup>159</sup> The Water Code does not prohibit cities from bringing air pollution suits under their own ordinances, and in fact it states that it is cumulative of other remedies.<sup>160</sup> This does not appear to meet the standard of “unmistakable clarity.”

#### *D. The City Has the Stronger Case*

The City will likely prevail on summary judgment on most points. As discussed above, Texas law grants home-rule cities a great deal of discretion in managing their affairs, and their ordinances will only be deemed invalid where the legislature has limited their authority with unmistakable clarity.<sup>161</sup> The TCAA does not clearly limit a city’s authority to pass air pollution ordinances; rather it explicitly authorizes cities to pass ordinances that are not

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152. § 7.353.

153. Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *supra* note 87, at 6.

154. *See* Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 30 (“[E]ven if the City was attempting to enforce state law, rather than a local ordinance (which it is not) and even if the Legislature had made state law the exclusive avenue to regulate air quality (which it has not) the City *still* would be acting within its delegated home-rule authority.”).

155. Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *supra* note 87, at 6.

156. Defendant City of Houston’s Motion for Summary Judgment, *supra* note 5, at 28.

157. § 7.005.

158. *Id.* § 7.004.

159. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

160. § 7.004.

161. *See supra* notes 96–97 and accompanying text.

inconsistent with the TCAA.<sup>162</sup> Since the Ordinance incorporates the enforcement provisions of the TCAA, the Ordinance does not appear to be inconsistent with the TCAA, with the possible exception of the situation in which a facility is in compliance with the TCAA but has not registered with the City.<sup>163</sup> BCCAAG's argument concerning the Water Code likewise fails to establish that the legislature preempted the Ordinance's procedural mechanisms with unmistakable clarity.<sup>164</sup>

BCCAAG's strongest argument is that the Ordinance makes it unlawful for a facility that is otherwise in compliance with state law to operate without obtaining registration from the City, which may impermissibly "make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders."<sup>165</sup> As discussed above, the court has viable reasons to go either way. But whichever way the court chooses, the City will probably get what it wants.

If the court does find that this particular provision is inconsistent with the TCAA, the City has a few options. The Ordinance contains a severability provision stating that if any provision is found invalid then the remainder of the Ordinance should continue in full effect.<sup>166</sup> If the court finds the severability provision valid, then the court could strike down the specific provision making it unlawful to operate a facility without a registration from the City, and the remainder of the City's inspection regime could continue as before. The City could then amend the Ordinance to cure the defect. In other words, a win for BCCAAG on this particular issue is not likely to do away with the City's inspection program, which is presumably the goal of BCCAAG's lawsuit. In summary, although BCCAAG could win on one of its arguments, the most likely result is that the City's inspection program will continue as the City intends.

The summary judgment hearing took place on April 23, 2009, in Harris County's 269th District Court; the judge has not yet ruled. Since the case involves questions of law only, the case can be resolved on summary judgment.<sup>167</sup> Whatever the outcome of the case, given the parties involved it seems likely that the decision will be appealed.

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162. See *supra* notes 128–30 and accompanying text.

163. See HOUSTON, TEX., CODE OF ORDINANCES ch. 21, art. VI, div. 2, § 21-162(a) (2007) (requiring registration); *id.* § 21-164 (incorporating the TCAA separately).

164. See *supra* notes 150–58 and accompanying text.

165. TEX. HEALTH & SAFETY CODE ANN. § 382.113 (Vernon 2001).

166. Houston, Tex., Ordinance 2007-208 § 5 (Feb. 14, 2007).

167. See ALEX WILSON ALBRIGHT, TEXAS COURTS: A SURVEY 71 (3d ed. 2009) (categorizing cases in which the only dispute is over the applicable law—with no dispute over the facts—as “no evidence” cases that can be resolved by summary judgment).

#### IV. Municipal Regulation of Air Pollution and State/Local Preemption

##### A. *Why Local Regulation May Be More Effective at Protecting Health*

This Note proposes that in certain situations, local governments, if empowered to do so, may be able to protect the public more effectively from the health risks of air pollution than can the state. There are a number of reasons why this may be so. First, local governments are likely to have a stronger incentive than the state to protect local health. Second, local governments, because of their proximity to and knowledge of the regulated parties, may be able to regulate local pollution sources more efficiently than can a distant state agency. And third, some health threats, such as “toxic hot spots,” are inherently local in nature, and it may be that statewide regulations as currently enforced are not well suited to address these local problems.

1. *Local Incentives Are Aligned.*—It is likely that local governments have a greater incentive to protect local health from air pollution than state governments do. On the most basic level, local officials breathe where they regulate, so they have a personal incentive to regulate effectively. On a political level, local governments are likely to be more attuned than the state government to the concerns of their local constituents, who make up much larger percentages of the local government’s electorate than of the state government’s electorate. This distance from the constituents becomes more pronounced where, as in Texas, environmental regulation is overseen almost exclusively by unelected administrators. This distance between the local population and the regulating agency also tends to favor the interests of the regulated parties, who generally have relatively greater resources and legal sophistication than the average citizen, and who consequently tend to exert disproportionately greater influence on the statewide regulatory process than do the citizens affected by their actions.<sup>168</sup> A further consideration is the trend in contemporary American politics that urban areas tend toward the Democratic Party,<sup>169</sup> which is associated with more aggressive environmental regulation.<sup>170</sup> The significance of this trend is that states with powerful rural

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168. See, e.g., Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1441 (2005) (“[I]t has long been recognized that agency decision making has the capacity to be grossly distorted by the power imbalance between regulated industry and regulatory beneficiaries. The prevailing view is that ‘agencies unduly favor . . . the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor.’” (quoting Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1684–85 (1975))).

169. See Samuel Issacharoff, *Judging Politics, the Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1683 (1993) (discussing voting rights and noting that cities tend more towards the Democratic Party).

170. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 69 (5th ed. 2007) (noting that the Democratic Party is generally perceived to be more in favor of environmental regulations than is the Republican Party).

constituencies, such as Texas, may adopt less strict environmental regulations than would the leadership of their large cities.<sup>171</sup>

2. *Local Governments May Regulate Local Pollution More Effectively.*—It is possible that local governments may be able to regulate local air pollution more effectively than state agencies due to their greater familiarity with local conditions and local regulated parties. In the context of the CAA, the Ninth Circuit has stated that “local control fosters both administrative efficiency and democratic governance.”<sup>172</sup> Congress may have had this idea in mind when it stated in the CAA that “air pollution control at its source is the primary responsibility of States and local governments.”<sup>173</sup> In a very early case involving the CAA, Justice Douglas, after noting the primary role given to state and local governments by the CAA, stated one of the rationales for emphasizing local control:

[G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution. . . . Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.

As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations.<sup>174</sup>

Justice Douglas recognized that a familiarity with “localized situations” will likely result in more efficient and effective regulation of air pollution. As the CAA has been implemented nationwide, however, regulation of air pollution has been taken over almost exclusively by the states.<sup>175</sup> There are some exceptions where states have delegated primary regulatory authority to local agencies: California has thirty-five local air pollution control districts responsible for promulgating rules and regulations for stationary sources

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171. See Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 458–59 (2008) (“States with Republican majorities that are powerful in rural areas, may reflexively reject additional environmental regulations from large cities, which tend to be more Democratic.”).

172. *Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1179 (9th Cir. 1992).

173. 42 U.S.C. § 7401(a)(3) (2006) (emphasis added).

174. *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 115–16 (1972).

175. See Flatt, *supra* note 171, at 456 (“[T]he environmental arena since 1970 has been dominated by federal legislation that makes the states significant partners in the administration of the law, but generally sidelines local government.”); see also Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 809–10 (2006) (suggesting that, typically, discussion of local control means control at the state level).

within their districts,<sup>176</sup> and Washington has seven Local Clean Air Agencies.<sup>177</sup> Other states, such as Texas, have encouraged cooperative relationships between state agencies and municipal governments such as the joint-monitoring relationship that prevailed between the TCEQ and the City of Houston prior to 2005.<sup>178</sup>

The point here is that the more specific a problem a governmental unit is tasked with addressing, the more likely that it will address it effectively. A state is the proper governmental unit to address state-wide air pollution, but a local government may be more effective at addressing local problems.

*3. Some Air Pollution Problems Are Inherently Local: Toxic Hot Spots.*—Air pollution is primarily regulated at the national and state levels, yet the effects of air pollution are often felt most acutely at the local level. Ozone and smog are primarily the problems of cities, where sufficient concentrations of vehicles and industry can emit enough oxides of nitrogen (NOX) and volatile organic compounds (VOCs) to create hazardous conditions.<sup>179</sup> Likewise, toxic emissions are primarily an urban problem where industrial operations and residential populations exist in close proximity.<sup>180</sup> Health experts are devoting increasing attention to the issue of toxic hot spots—highly localized areas of acute or prolonged toxic exposure.<sup>181</sup> The TCEQ has identified three air toxic hot spots in Harris County.<sup>182</sup> A January 2007 study by the University of Texas Health Science Center found a 56% elevated risk of acute lymphocytic leukemia among children living within two miles of the Houston Ship Channel.<sup>183</sup>

As discussed above, a number of environmental groups and Houston politicians have criticized the TCEQ's efforts to regulate toxic emissions as inadequate.<sup>184</sup> The Galveston–Houston Association for Smog Prevention

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176. Cal. Air Res. Bd., Local Air District Stationary Source Rules and Regulations, <http://www.arb.ca.gov/html/lawsregs.htm>.

177. Dep't of Ecology, State of Wash., Local Clean Air Agencies, <http://www.ecy.wa.gov/programs/air/local.html>.

178. See *supra* notes 23–24 and accompanying text.

179. EPA, Ground-Level Ozone, <http://www.epa.gov/air/ozonepollution/> (last updated Jan. 7, 2010).

180. See GALVESTON–HOUSTON ASS'N FOR SMOG PREVENTION ET AL., HOUSTON, WE HAVE A PROBLEM: A ROADMAP FOR REDUCING PETROCHEMICAL INDUSTRY TOXIC EMISSIONS IN THE LONE STAR STATE 6 (2008), <http://www.environmentalintegrity.org/pubs/Houston%20We%20Have%20A%20Problem.pdf> (identifying reasons why the dangers posed by refineries to nearby communities are even more severe than the EPA has found).

181. See *id.* at 2–5 (highlighting the failure of federal regulators to adequately monitor, analyze, and address toxic hot spots).

182. TCEQ, Air Pollutant Watch List, <http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL.html>.

183. KRISTINA M. WALKER ET AL., AN INVESTIGATION OF THE ASSOCIATION BETWEEN HAZARDOUS AIR POLLUTANTS AND LYMPHOHEMATOPOIETIC CANCER RISK AMONG RESIDENTS OF HARRIS COUNTY, TEXAS 11 tbl.1 (2007).

184. See *supra* notes 32–52 and accompanying text.

(GHASP), an antismog organization, has suggested that the TCEQ routinely issues permits for sources whose emissions exceed the Effects Screening Levels.<sup>185</sup> In 2008, the City of Houston, dissatisfied with the TCEQ's toxics monitoring system along the Ship Channel, obtained a \$650,000 federal grant to conduct its own emissions testing.<sup>186</sup> The City requested the grant in response to studies suggesting that the actual emissions of volatile organic compounds from some refineries and chemical plants were 10 to 100 times higher than the industries had reported to the TCEQ using EPA-approved formulas.<sup>187</sup> In July 2008, White sent a twenty-six-page letter to the EPA requesting that it discard its self-reporting system, which relies on inputting estimated data and "emission factors" into formulas to estimate emissions, and replace it with a more reliable monitoring program.<sup>188</sup> While applauding White's request, the *Houston Chronicle* commented, "Why wait for EPA to tweak the formula and give us a new number to multiply by another? . . . Maybe the answer is on the local level. If we want to know the truth, we should seek it ourselves."<sup>189</sup>

This Note argues that in some situations, local regulation of air pollution will be more effective at protecting public health than will regulation by the state. Assuming that this is true, and further assuming that the benefits of local regulation outweigh its costs, this Note concludes with the following question: Can other municipalities follow Houston's example and assume more direct control over regulating local air pollution?

*B. State/Local Preemption: Can Other Cities Follow Houston's Example?*

Whether a city can follow Houston's example will depend in large part on state/local preemption jurisprudence in the relevant jurisdiction. While the delineation of authority between state and local governments differs widely from state to state, some principles of state/local preemption are common across most jurisdictions. Municipal ordinances are generally inferior in status and subordinate to state law.<sup>190</sup> The relationships between ordinances and statutes are defined in different states by varying permutations of state constitutions, statutory provisions, and city charters. But as a general rule, ordinances regulating subjects on which there is a general state

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185. GALVESTON-HOUSTON ASS'N FOR SMOG PREVENTION ET AL., *supra* note 180, at 11. Effects Screening Levels are health-based ambient toxics levels set by the TCEQ. *Id.*

186. Lisa Falkenberg, *Fog Clearing on Houston's Emissions: To Clean Up Houston's Air, Mayor Bill White Has Proposed a Number of Innovative Options*, HOUS. CHRON., July 22, 2008, at B1.

187. *Id.* For evidence of the substantial underreporting by industry, see TEXAQS II RAPID SCI. SYNTHESIS TEAM, FINAL RAPID SCIENCE SYNTHESIS REPORT: FINDINGS FROM SECOND TEXAS AIR QUALITY STUDY (TEXAQS II) 7 (2007), <http://www.esrl.noaa.gov/csd/2006/rss/rsstfinalreport083107.pdf>.

188. Falkenberg, *supra* note 186.

189. *Id.*

190. 5 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 15:18 (3d ed. 1911).

law must be consistent with that state law, and in any conflict between an ordinance and a statute the latter must prevail,<sup>191</sup> unless state law plainly and specifically gives predominance to local government on that subject.<sup>192</sup> In cases where the state gives local government limited authority to regulate an area that is already governed by a statute, the local government can only enact ordinances that are consistent with the statute.<sup>193</sup> Thus, as with Texas law generally, and the TCAA specifically, the central question in state/local preemption cases is whether the ordinance is inconsistent with state law.<sup>194</sup>

Considering the viability of local air pollution ordinances, the level of authority allowed to local governments will depend in each case upon the specific language in each state's constitution, environmental regulations, local-government code, and the case law interpreting these sources of authority. While each case will be fact specific, there are a few principles we can draw. First, where a statute expressly forbids all local regulation of air pollution, any local ordinance will be preempted.<sup>195</sup> Likewise, where an air pollution ordinance is not generally prohibited, but the particular ordinance violates an express provision of state law, as BCCAAG has argued concerning the Houston Ordinance, the ordinance will be wholly or partly invalid.<sup>196</sup>

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191. *Id.*; see also, e.g., *Societa Per Azioni De Navigazione Italia v. City of Los Angeles*, 645 P.2d 102, 112 (Cal. 1982) (holding invalid a city ordinance relieving the city of liability for municipal pilots, to the extent it conflicted with state laws either directly or by entering a field that the state laws were intended to occupy exclusively); *Peoples Gas Co. of Ky. v. City of Corbin*, 625 S.W.2d 848, 849 (Ky. 1981) (holding invalid a city ordinance prohibiting placement of gas meters within twenty-five feet of a public thoroughfare because the ordinance conflicted with a state regulation requiring that gas meters be located as close to the utility's main as practicable).

192. See, e.g., *IT Corp. v. Solano County Bd. of Supervisors*, 820 P.2d 1023, 1031 (Cal. 1991) (finding that an expressed intent in a hazardous waste disposal statute to allow local regulation is convincing evidence that the state legislative scheme was not intended to occupy the field); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78, 80 (N.Y. 1980) (holding a local landfill ordinance not preempted by state environmental law since the latter statute expressly disclaimed any purpose to supersede or preclude local ordinances).

193. See, e.g., *N. States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 544-45 (Minn. Ct. App. 1990) (noting that in general, conflicts only render an ordinance invalid when the statute contains either express or implied terms which are irreconcilable, not when the ordinance is additional or complementary to the statute); *County of Milwaukee v. Williams*, 732 N.W.2d 770, 777 (Wis. 2007) ("While [the statute] allows counties to regulate commercial ground transportation at airports, a county may not promulgate regulations that are inconsistent with state legislation.").

194. See 5 MCQUILLIN, *supra* note 190, § 15:18 ("[T]he central question in a preemption case is not whether the legislature intended to grant authority to municipalities to act concerning a particular matter, but rather whether the legislature intended to deny municipalities the right to legislate on the subject.").

195. See, e.g., *Montgomery County v. Atlanta Guns, Inc.*, 489 A.2d 1114, 1115 (Md. 1985) (holding an ordinance restricting local sale of ammunition to be expressly preempted where a Maryland gun statute stated "[t]hat all restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters").

196. See, e.g., *Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 680 (Iowa 2006) ("The Act does not give local authorities the power to establish a transfer fee. Instead the general assembly has, under its exclusive right to 'establish licenses and [alcoholic beverage]

The issues become murkier where a statute establishes a comprehensive regulatory regime but does not expressly forbid local regulation. In such situations, particularly where the statute expresses an interest in uniformity, courts will often find that the state legislature has chosen to occupy the field, thus preempting all local regulation.<sup>197</sup> Alternately, the statute may establish a comprehensive regulatory regime but authorize or recognize the possibility of local regulation (e.g., the TCAA). Many statutes permit local regulation as long as the local ordinance is not more,<sup>198</sup> or less,<sup>199</sup> stringent than the applicable state law. The federal CAA allows states to enact air pollution statutes that are not “less stringent” than federal standards;<sup>200</sup> if states have incorporated similar language into their own statutes, municipalities in such states may have more discretion in crafting their own antipollution ordinances.

Courts are generally reluctant to infer a legislative intent to preempt concerning subject matters involving significant local interests that may differ from municipality to municipality.<sup>201</sup> Likewise, where ordinances regulate areas over which local governments have traditionally exercised control, such as the location of particular land uses, courts will generally presume that state law does not preempt the ordinance absent express preemptive language in the statute.<sup>202</sup> Courts are also likely to give more leeway to local governments in jurisdictions, such as Texas, where municipalities are given “home-rule” status.<sup>203</sup> In some states, ordinances enacted by home-rule municipalities in exercise of their traditional police power will

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permits,’ assigned the power to establish transfer fees to the administrator. The City usurps this power by establishing its own transfer fees.”).

197. *See, e.g.,* Municipality of Monroeville v. Chambers Dev. Corp., 491 A.2d 307, 309 (Pa. Commw. Ct. 1985) (arguing that where the general tenor of a statute indicates a legislative intent that it should not be supplemented by municipalities, that intent controls).

198. *See, e.g.,* E. Perry Iron & Metal Co. v. City of Portland, 941 A.2d 457, 461 (Me. 2008) (holding a local waste-disposal ordinance not preempted where state law provided that “municipalities . . . may enact ordinances with respect to solid waste facilities that contain standards the municipality finds reasonable . . . provided that the standards are not more strict than those contained in this chapter”).

199. *See, e.g.,* Middlesex County Health Dep’t v. Middlesex County Utils. Auth., 617 A.2d 300, 302 (N.J. Super. Ct. App. Div. 1992) (upholding a local air pollution ordinance that was more stringent than state law, where the state statute provided that “[n]o ordinances of any governing body of a municipality . . . more stringent than this act . . . shall be superseded by this act”).

200. 42 U.S.C. § 7416 (2006).

201. *See, e.g.,* DiFrancesco v. County of Rockland, 839 N.Y.S.2d 105, 105 (N.Y. App. Div. 2007), *appeal dismissed*, 9 N.Y.3d 953 (N.Y. 2007) (holding that the New York state real-property code does not preempt a local ordinance regulating private water systems).

202. *See, e.g.,* Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 827 (Cal. 2006) (upholding a local ordinance restricting timber operations).

203. *See, e.g.,* City of Fargo v. Malme, 737 N.W.2d 390, 393 (N.D. 2007) (stating that home-rule cities may enact ordinances contrary to the laws of the state where statutes authorize them to do so).

only be constrained by a specific act of the legislature expressly limiting the power of the municipality.<sup>204</sup>

Any city wishing to regulate air pollution should assert that it is doing so on the basis of its police power to protect the public health. Prior to the era of federal environmental regulations, cities were the first line of defense against environmental harms.<sup>205</sup> Cities have traditionally addressed local problems such as overflowing sewage and noxious smoke through zoning laws and public-nuisance ordinances.<sup>206</sup> In 1960 the U.S. Supreme Court noted that “[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”<sup>207</sup> While the focus of environmental enforcement has increasingly turned to the states and the federal government in recent decades,<sup>208</sup> there is no reason why local governments cannot still invoke their police power to protect the public health.<sup>209</sup>

While there are few published cases on the question of state preemption of air pollution ordinances specifically, there are a few examples that cities can look to for guidance. In a 1992 case, the New Jersey Superior Court upheld a local air pollution ordinance that was more stringent than state law where the state’s clean air act provided, “No ordinances of any governing body of a municipality . . . more stringent than this act . . . shall be superseded by this act.”<sup>210</sup> Plaintiffs have sought to invalidate local air pollution ordinances on the grounds that they were preempted by federal law; in a recent California case, a federal district court held that local air-emissions rules promulgated by the pollution-control district for the San Joaquin Valley were not preempted by the CAA.<sup>211</sup> In *Engine Manufacturer’s Ass’n v. South Coast Air Quality Management District*,<sup>212</sup> the Ninth Circuit held that a local air-control district’s rule governing fleet-vehicle purchases by local governments was not preempted by the CAA’s prohibition on inconsistent vehicle

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204. See, e.g., *City of Champaign v. Sides*, 810 N.E.2d 287, 294 (Ill. App. Ct. 2004) (“The power of a home rule unit can only be restrained by a specific act of the legislature.”).

205. CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 3 (2d ed. 2007).

206. *Id.*

207. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

208. JOHNSTON ET AL., *supra* note 205, at 5–10.

209. See Paulette Wolfson & Ceil Price, *Watch Out for the City: Local Governments Can Enforce*, 36 ST. B. TEX. ENVTL. L.J. 65, 65 (2006) (noting that local governments have a role to play in enforcing environmental laws and can seek appropriate remedies including monetary penalties and injunctive relief).

210. *Middlesex County Health Dep’t v. Middlesex County Utils. Auth.*, 617 A.2d 300, 302 (N.J. Super. Ct. App. Div. 1992).

211. *Nat’l Ass’n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, No. CV F 07-0820 LJO DLB, 2008 WL 4330449, at \*13 (E.D. Cal. Sept. 19, 2008) (holding that an air-emissions rule of a local air-control district is not preempted by the CAA because the rule is not a “standard” for purposes of the CAA).

212. 498 F.3d 1031 (9th Cir. 2007).

fuel-efficiency standards because the rule governed activities in which the local governments acted as market participants.<sup>213</sup> The market-participant doctrine provides that actions taken by a state or its subdivision as a market participant are generally protected from federal preemption.<sup>214</sup> While this principle has apparently so far been applied only to federal preemption cases, a local government might be able to invoke it successfully by analogy in a state/local preemption challenge.

Cities may also be able to bolster their legal authority to regulate air quality by pointing to cases on an analogous issue—indoor smoking ordinances. The majority of courts that have considered conflicts between local smoking ordinances and state smoking regulations have found, in the absence of express statutory preemption language, that local smoking ordinances are a valid operation of municipal police powers to protect the public health.<sup>215</sup>

## V. Conclusion

The City of Houston perceived that air pollution was posing a continuing threat to the public health, and the City further perceived that the state's efforts to regulate air pollution in Houston were inadequate. Consequently, the City chose to exercise its police powers as a home-rule city to regulate air pollution in ways that it hopes will be more effective. Whether the City has the legal authority to take the steps that it did remains to be proven in court, but the City has presented a compelling legal argument that it has such authority.

Houston's initiative provides a blueprint for how a city may address a challenge to its legal authority to regulate air pollution independently. By establishing that an ordinance is grounded in a legitimate basis of municipal authority, and by demonstrating that an ordinance is not inconsistent with state law, a city may establish its authority to regulate air pollution. Houston's approach may ultimately fail to accomplish its goals; Houston's air pollution problems have persisted for decades, and changing the identity of the primary regulator may or may not bring about meaningful improvements. But the City has attempted to take what steps it can to perform the most basic function of any government—to protect the health

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213. *See id.* at 1050 (“[U]nder the market participant doctrine, the Clean Air Act does not preempt those provisions of the Fleet Rules directing state and local governmental entities’ purchasing, procuring, leasing, and contracting decisions.”).

214. *Id.* at 1040.

215. *See, e.g.,* *City of Tucson v. Grezaffi*, 23 P.3d 675, 680 (Ariz. Ct. App. 2001) (holding that state smoking-restriction statutes did not reflect express or implied legislative intent to so occupy the field that no room was left for local regulation); *Tri-Nel Mgmt. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 44 (Mass. 2001) (holding that statutes prohibiting smoking in various locations and restricting smoking in restaurants did not preempt municipal regulation prohibiting smoking in all restaurants and bars because the local ban “furthers, rather than frustrates, [state legislative] intent”).

and safety of its people. Other cities and states should take note.

—*Ryan Hackney*