



Overview of Local Authority & Preemption for Advocates in Texas

This document provides a summary of local authority and preemption in Texas that can inform advocates' efforts to adopt new policies at the city or county level. State preemption laws limit or prohibit local policymaking in different areas. In addition to an overview of how local authority operates in Texas, this document provides examples of important policies that are preempted (i.e., prohibited), emergency powers that may be available to local officials, examples of key COVID-19 policies that local governments in Texas appear to have the power to implement, and ways in which advocates may expand their local authority through repeal of existing preemption and/or voter-initiated ballot measures.¹

I. Summary of Home Rule in Texas

- Charter cities with populations of more than 5,000 residents have broad authority to pass local legislation in all areas not preempted by the State Legislature or the Constitution.
- While there are no limitations on the Texas Legislature's authority to preempt local law, courts should generously interpret conflicts between state and local law in favor of municipalities when there is no clear legislative intent to preempt local governments.
- If conflicts exist between state and local legislation, courts will attempt to reconcile the difference "if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect."² For a state law to preempt a home rule city's law, the legislature must reveal its intention with "unmistakable clarity."³
- Texas counties are considered subdivisions of the state and do not have home rule authority to enact substantive legislation.⁴

¹ The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.

² *Cooke v. City of Alice*, 333 S.W.3d 318, 323 (Tex. App.--San Antonio 2010) (citations omitted).

³ *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) ("While a home rule city thus has all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter, TEX. CONST. art. XI, § 5, these broad powers may be limited by statute when the Legislature's intention to do so appears 'with unmistakable clarity.'") (citation omitted); see also *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007) ("[Home rule] cities derive their powers from the Texas Constitution, not the Legislature. They have 'all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter.' . . . The question thus is not whether any statute grants home-rule cities immunity from suit, but whether any statute limits their immunity from suit. Such limits exist only when a statute speaks with 'unmistakable clarity.'") (citations omitted) (emphasis in original).

⁴ See Tex. Const. art. XI, § 1.

II. What Policies Are Preempted in Texas?

The following are examples of subject areas where the state has expressly preempted local action:

- Minimum wage⁵ (this provision has been interpreted by an appellate court in Texas to also preempt local authority over paid sick leave)
- Project labor agreements⁶
- Taking “adverse action” against individuals or entities based on their religious affiliation⁷
- Mandatory inclusionary housing policies⁸
- Rent control is only permitted to address a housing emergency caused by a disaster if the governor approves the ordinance⁹
- Source of income discrimination¹⁰
- Property tax increases¹¹
- Sanctuary cities policies (also imposing penalties on city officials that enact sanctuary policies)¹²
- Regulating transportation network companies (TNCs)¹³
- Raising the minimum age to buy tobacco products or regulating e-cigarettes¹⁴
- Creation of municipal broadband service, unless approved by the Public Utility Commission¹⁵
- Regulation of firearms (also imposing penalties on cities that enact gun regulations)¹⁶
- Regulation of plastic containers and packages¹⁷

⁵ Tex. Lab. Code Ann. § 62.0515.

⁶ Tex. Gov’t Code Ann. § 2269.0541.

⁷ Tex. Gov’t Code Ann. § 2400.002.

⁸ Tex. Loc. Gov’t Code Ann. § 214.905.

⁹ Tex. Loc. Gov’t Code Ann. § 214.902(a).

¹⁰ Tex. Loc. Gov’t Code Ann. § 250.007.

¹¹ Tex. Const. art. VIII, § 9(c).

¹² Tex. Gov’t Code Ann. § 752.053.

¹³ Tex. Ins. Code Ann. § 1954.102.

¹⁴ Tex. Health & Safety Code Ann. § 161.089.

¹⁵ Tex. Util. Code Ann. § 54.052.

¹⁶ Tex. Loc. Gov’t Code Ann. § 229.001.

¹⁷ Tex Health & Safety Code Ann. § 361.0961.

- Local broadband¹⁸

In addition, the Texas Constitution limits any “county, city or town” from levying “a tax rate in excess of Eighty Cents (80¢) on the One Hundred Dollars (\$100) valuation in any one (1) year for general fund, permanent improvement fund, road and bridge fund and jury fund purposes.” The legislature is allowed to authorize an additional “Fifteen Cents (15¢) on the One Hundred Dollars (\$100) valuation” property tax with voter approval “for the further maintenance of the public roads.”¹⁹

III. Emergency Powers in Texas

- The Texas Disaster Act of 1975, Tex. Gov’t Code Ann. § 418.001 *et seq.*, provides for a broad range of powers and duties involving the governor, state agencies, local government, and others in order to respond to emergencies affecting the state.
- The governor, for example, is empowered to “issue executive orders, proclamations, and regulations” with the “force and effect of law.”²⁰ The governor can also “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster.” The state’s Attorney General has advised that statutes concerning deadlines and timing for special elections fall under that category,²¹ but case law and regulations do not appear to further clarify this language.
- Local governments have various emergency powers under state law regarding particular issues, including, for example:
 - Municipalities may establish a rent control ordinance if their governing body finds that “a housing emergency exists due to a disaster as defined by Section 418.004,” and the governor approves the ordinance.²²
 - The presiding officer or governing body of a municipality may declare a local state of disaster, after which a county judge or mayor “may control the ingress to and egress from a disaster area . . . and control the movement of persons and the occupancy of premises in that area.”²³

¹⁸ According to a memo on state restrictions on local broadband services, Texas “prohibits municipalities and municipal electric utilities from offering specified categories of telecommunications services to the public either directly or indirectly through a private telecommunications provider. (*Texas Utilities Code*, § 54.201 *et seq.*)” Baller Stokes & Lide, *State Restrictions on Community Broadband Services or Other Public Communications Initiatives* (July 1, 2020), <https://www.baller.com/wp-content/uploads/BallerStokesLideStateBarriers7-1-20.pdf>

¹⁹ Tex. Const. art. VIII, § 9(c).

²⁰ Tex. Gov’t Code Ann. § 418.012.

²¹ Tex. Att’y Gen. Op. KP-0191 (2018).

²² Tex. Loc. Gov’t Code Ann. § 214.902(a).

²³ Tex. Gov’t Code Ann. § 418.108.

- Municipalities may adopt fair housing ordinances that are “substantially equivalent to those granted under federal law,” and the enforcement mechanisms for those ordinances may differ from state or federal law.²⁴
- Separate from the statutory grants of emergency powers described above, it is possible that a court may view an exercise of emergency powers (and preemption of a policy enacted through emergency powers) differently from an exercise of powers during non-emergency circumstances, especially if the emergency policy is clearly temporary.

IV. Examples of Key COVID-19 Policies That Cities and Counties May Have Authority to Adopt

- Local notice requirement (e.g., 60-90 days) before a landlord can initiate eviction proceedings (Austin²⁵ and San Marcos²⁶ offer examples of this local policy)
- County judges may decide to suspend eviction proceedings²⁷
- Eviction moratorium (based on power granted to local governments to “control the ingress and egress from a disaster area . . . and control the movement of persons and the occupancy of premises in that area”)²⁸
- Rent control (if a housing emergency exists and the governor approves the ordinance)²⁹
- Cap on fees for late rent payments
- Worker health and safety ordinance to protect workers from contracting COVID-19
- Fair scheduling
- Living wage and paid sick leave (or other employment benefits) requirements for businesses contracting with localities

²⁴ Tex. Loc. Gov’t Code Ann. § 214.903.

²⁵ Christopher Neely, *Austin Tenants Who Miss Rent Will Be Safe From Eviction Through July 25; City Council Extends 60-day Grace Period Rent Payments Through Aug. 24*, Community Impact Newspaper, May 7, 2020, <https://communityimpact.com/austin/central-austin/coronavirus/2020/05/07/austin-tenants-who-miss-rent-will-be-safe-from-eviction-through-july-25-city-council-extends-60-day-grace-period-rent-payments-through-aug-24/>.

²⁶ San Marcos, Community Resources for COVID-19, *Ordinance Requiring a Landlord to Provide a “Notice of Proposed Eviction”*, <http://sanmarcostx.gov/2954/Documents-and-Resources> (last viewed June 23, 2020).

²⁷ See, e.g., Audrey McGlinchy, *Texas Supreme Court Says Evictions Can Go Ahead. But These Protections Are Still in Place*, KUT 90.5, May 18, 2020, <https://www.kut.org/post/texas-supreme-court-says-evictions-can-go-ahead-these-protections-are-still-place> (Travis County judges suspend eviction proceedings).

²⁸ Tex. Gov’t Code Ann. § 418.108.

²⁹ Tex. Loc. Gov’t Code Ann. § 214.902(a).

V. Repealing Preemption in Texas – Drafting Considerations

- During a time of crisis—and beyond—there may be opportunities to repeal state preemption of local authority. For example, in 2019 a bill was introduced in the Texas Legislature to repeal the state’s preemption of local minimum wage increases.³⁰
- Some procedural considerations for repeal include:
 - **Single Subject/Clear Title Rule:** Any effort to repeal existing preemption in Texas should take into account the state’s “single subject rule.” The Texas Constitution requires all bills (excluding general appropriations bills) to contain only one subject and clearly express that subject in the title of the bill.³¹ Ultimately, the subjects encompassed in a statute must “relate directly or indirectly to the same general subject.”³² It is possible that a preemption repeal bill may address preemption of a variety of subject areas as long as all subjects are tied to the expansion or clarification of local authority, but advocates should consult with an attorney who can provide advice on the best approach in order to comply with the single subject rule.
 - **Repealing & Granting Affirmative Authority:** Nothing in state law precludes a bill that repealed existing preemption legislation and also granted affirmative authority,³³ but advocates should consult with an attorney or legislative sponsor who can consult with legislative staff on bill drafting practices in Texas.
- For more information on efforts to repeal preemption and lessons learned from successful campaigns in other states, including sample model language, see [this report](#)³⁴ from the Local Solutions Support Center and the National Employment Law Project.

VI. Is There A Ballot Measure Process in Texas?

- Texas residents *cannot* adopt new statewide statutes or constitutional amendments through citizen-initiated ballot measures. They can reject or ratify constitutional

³⁰ Tex. H.B. 328, 86th Reg. Leg. Sess. (2019).

³¹ Tex. Const. art. III, § 35.

³² *LeCroy v. Hanlon*, 713 S.W.2d 335, 337 (Tex. 1984).

³³ State statutes do not appear to prohibit the introduction of a bill that repeals legislation and also authorizes new local powers or includes new statutory language. Recent bills provide examples of legislation that includes repeal of statutes along with new language and other amendments. *See, e.g.*, H.B. 2847, 86th Reg. Leg. Sess. (2019).

³⁴ Laura Huizar, Local Solutions Support Center and National Employment Law Project, *Repealing Preemption: Defending Local Democracy Now Includes A Growing Focus on Recovering Lost Local Authority* (Dec. 2019), <https://www.abetterbalance.org/wp-content/uploads/2020/01/White-Paper-Repealing-Preemption-FINAL.pdf>.

amendments placed on the ballot by the Texas Legislature.³⁵

- Local charters in Texas may give residents the authority to adopt or amend ordinances through a local ballot initiative process, with the limitation that charters cannot be amended more often than every two years.³⁶ While a charter can limit the authority of residents to legislate by initiative, it must do so in a clear and compelling manner.³⁷

VII. What Organizations Are Fighting Preemption and Supporting Local Democracy?

Advocates interested in working with other organizations in Texas focused on protecting local democracy and strengthening local authority can email LSSC@supportdemocracy.org.

For additional support, please contact The Local Solutions Support Center at LSSC@supportdemocracy.org.

³⁵ Tex. Const. art. XVII, § 1.

³⁶ Tex. Const. art. XI, § 5.

³⁷ *Quick v. City of Austin*, 7 S.W.3d 109, 124 (Tex. 1998).