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Texas Supreme Court Rules in *Southern Crushed Concrete* that Texas Clean Air Act Preempts City of Houston Land Use Ordinance

By Michael L. Knapek, Steven Dimitt, Peter Wahl and Jacob Arechiga

On February 15, 2013, the Texas Supreme Court reversed the rulings of both a trial court and lower appellate court and found in favor of Southern Crushed Concrete in holding that a City of Houston ordinance placing location restrictions on new concrete-crushing operations was preempted by the Texas Clean Air Act (TCAA).¹ Specifically, the Texas Supreme Court held that "[b]ecause the Ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the [Texas Commission on Environmental Quality's] orders by virtue of the permit, we hold that the Ordinance is preempted."

FACTUAL AND PROCEDURAL BACKGROUND

In October 2003, Southern Crushed Concrete applied to the Texas Commission on Environmental Quality (TCEQ) for an air quality permit to move an already-permitted concrete-crushing facility to a new location in Houston closer to a significant project – the former Astro Arena. At that time the TCAA and TCEQ rules required 1,320 feet of separation between concrete-crushing facility and a school, measured from the nearest buildings. However, before the TCEQ ruled on Southern Crushed Concrete's permit application, a school was built near the property where Southern Crushed Concrete proposed to move its facility and the City of Houston enacted an ordinance prohibiting a concrete-crushing facility to be located within 1,500 feet of a school, measured from property line to property line. The TCEQ granted Southern Crushed Concrete's request for an air quality permit because the school was built after Southern Crushed Concrete applied for its permit. But the City of Houston denied Southern Crushed Concrete's application for a municipal permit because the facility would be located within 1,500 feet of a school in violation of the City's ordinance that contained more restrictive location requirements.

Southern Crushed Concrete sued the City of Houston, seeking (a) a declaration that the ordinance was preempted by the TCAA and its enforcement would violate the Texas Constitution, and (b) injunctive relief prohibiting the City of Houston from enforcing the ordinance and directing it to issue Southern Crushed Concrete a permit to operate its facility at the proposed location. Both parties filed cross-motions for summary judgment. The trial court granted the City of Houston's motion, denied Southern Crushed Concrete's motion, and dismissed Southern Crushed Concrete's claims with prejudice.

Southern Crushed Concrete appealed the trial court's ruling to the Fourteenth Court of Appeals. On appeal, Southern Crushed

Concrete argued that although a home rule municipality such as the City of Houston is generally granted considerable authority over land use regulation, Section 382.113(b) of the TCAA bars a local ordinance that is "inconsistent" with the TCAA or TCEQ rules or which "make[s] unlawful a condition or act approved or authorized under [the TCAA] or the [TCEQ's] rules or orders." The appellate court disagreed with Southern Crushed Concrete's contention and affirmed the trial court's ruling. The Fourteenth Court of Appeals appeared to have strongly disfavored striking down the City ordinance in quoting a 1927 Texas Supreme Court case which held that "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction." This court reasoned that there was not "inconsistency" between the TCAA and the City ordinance because they served different purposes – air pollution and land use, respectively. With regard to whether the City ordinance "makes unlawful" something approved by the TCAA, the Fourteenth Court of Appeals largely side-stepped the issue in holding that "[t]he permit is not an exemption from the requirements of a local ordinance designed to prevent such operations from adversely affecting other land uses and residential property values."

THE TEXAS SUPREME COURT'S DECISION

Southern Crushed Concrete continued its appeal to the Texas Supreme Court, this time with a different result. As in the lower courts, the City of Houston argued that the TCEQ's permit "merely removed one government-imposed barrier to operations but did not affirmatively authorize anything." The Supreme Court rejected this argument finding that a permit – by definition – is "an authorization," and therefore, the ordinance would make the TCEQ's permit authorization unlawful. The Supreme Court also disregarded the City of Houston's argument that a distinction between land use and air quality regulation exists in the TCAA, and even if the distinction was valid, a city would "almost always" be able to circumvent section 382.113(b) by passing an ordinance that purported to regulate something other than air quality.

In reaching its unanimous decision in favor of Southern Crushed Concrete, the Supreme Court found that the plain language of TCAA section 382.113(b) "unmistakably forbids" a city from nullifying an act that is authorized by the TCAA or the Commission's rules or orders. The Supreme Court held that "[b]ecause the Ordinance makes it unlawful to build a concrete-crushing facility at a location that was specifically authorized under the [TCEQ's] orders by virtue of the permit, we hold that the Ordinance is preempted."

GOING FORWARD

The Texas Supreme Court found that the City's ordinance was preempted by the TCAA, but limited its decision by explicitly stating that it did not "decide whether a city may more restrictively regulate an activity that the State also regulates," as that issue was not before them in this case. Even with this limitation, this decision could still have a broad effect on a city's ability to pass ordinances which conflict with state statutes specifically limiting a city's ordinance authority. Further, solely in the Texas Clean Air Act context, the decision serves as a significant and clear limitation on cities attempting to regulate air quality through ordinances. This is particularly relevant to industries, such as the oil and gas industry, which operate within city limits and have been the subject of numerous recent city ordinances.

The impact of the Court's decision in the Southern Crushed Concrete case is already having impacts on similar litigation pending in Texas. For example, a currently pending case involves another City of Houston ordinance that requires industrial facilities to register with the City, pay annual registration fees, and be subjected to a "compliance program" by City representatives to evaluate compliance with air emission requirements, with municipal legal proceedings for findings of noncompliance. When argued before the First Court of Appeals in September 2012, this court specifically asked how a Texas Supreme Court decision in the Southern Crushed

Concrete case would impact this case. Not surprisingly, the party seeking to have the City of Houston air emission registration ordinance invalidated, BCCA Appeal Group, has already filed a "Notice of Recent Authority" explaining that "Southern Crushed Concrete has now been decided and it provides considerable additional support for BCCA Appeal Group's position."

Jackson Walker L.L.P. represented the Texas Aggregates and Concrete Association (TACA) in filing an amicus curiae brief with the Texas Supreme Court supporting Southern Crushed Concrete.

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¹ The city of Houston has filed for a motion rehearing from the unanimous decision.

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