



Legislative UPDATE

July 17, 2015
Number 28

Oil and Gas Regulation Clearinghouse

The House version of the oil and gas drilling bill, [H.B. 40](#) by Rep. Drew Darby, became law on May 18, 2015, when it was signed by Governor Abbott. The final version of the bill represents a compromise between the Texas Municipal League and the Texas Oil and Gas Association.

The final version of the bill improves on the original bill in four significant ways. Specifically, it:

1. enshrines in statute a non-inclusive list of items cities can regulate, including fire and emergency response, traffic, lights, noise, notice, and reasonable setbacks. (The inclusion of setbacks is a key component because the original version of the bill likely prevented them.)
2. permits cities to regulate aboveground activity that is “related” to oil and gas operations, as opposed to activities that are “incident” to operations, as in the original version of the bill. The “incident to” language was prohibitively restrictive.
3. includes a much better definition of “commercially reasonable,” one of the tests an ordinance must meet to be valid under the bill. The final version provides that commercially reasonable is based on an objective standard instead of the subjective assessment of a particular oil and gas operator.
4. creates a “prima facie” presumption of commercial reasonableness for certain ordinances that have allowed activity for at least five years. This “safe harbor” is a rolling five-year time period that permits recent or future ordinances to qualify so long as they haven’t prevented operations for a five-year period.

Make no mistake: The bill isn’t perfect. Some areas of regulation, especially those related to subsurface activity, may be preempted. So would outright city-wide bans on oil and drilling or

fracking. But here's the essential point: *better than 80% of what most cities regulate under current ordinances is protected.*

City officials should be aware that adoption or amendment of any ordinance regulating oil and gas operations should be in conformity with H.B. 40. Likewise, the League will closely monitor the industry to ensure that the various safe harbor provisions permitted by the bill are respected by operators and their representatives. To assist cities, the League has created an "Oil and Gas Regulation" webpage at www.tml.org (Go to the Legal tab and click on the Topics drop down menu).

The page will include the pleadings in each lawsuit that has been filed, as well as additional information. The page will not include "sample" or "model" ordinances. That's because each city's needs and wants are unique, and also because the commercial reasonableness of various ordinance provisions will vary by geography and the level of drilling activity.

Thankfully, all appears quiet on the litigation front thus far. The only lawsuit pleadings on the page right now relates to the essentially moot challenge against the City of Denton's now-defunct hydraulic fracturing ban. Each city should consult with local legal counsel prior to adopting or amending any ordinance. That is particularly true in this instance.

Update: E-Cigarettes

As is often the case with novel issues impacting the public health and safety, cities preceded both the state and federal government in enacting regulations regarding electronic cigarettes (e-cigarettes). City e-cigarette ordinances generally impose: (1) zoning regulations; and/or (2) health and safety regulations (e.g., they often prohibit the sale and distribution to minors). In light of impending regulations at the state and federal level, your city may soon need to revisit its existing e-cigarette regulations.

What has state government done? Senate Bill 97, passed during the recent legislative session, is by far the most significant step the State of Texas has taken on this matter. That bill includes e-cigarettes in the existing state regulations that govern the sale, distribution, possession, use, and advertising of cigarettes and other tobacco products. Though the bill is not effective until October 1, 2015, the state comptroller must make related signage available to the public by September 15, 2015. Of particular interest to cities is the bill's state law ban on the sale of e-cigarettes to minors.

The bill did not add e-cigarettes to [Section 161.089](#) of the Texas Health and Safety, a current-law provision that deals with the preemption of local laws. That section allows cities to enact regulations relating to the sale, distribution, or use of cigarettes or tobacco products if the regulation is compatible with and equal to or more stringent than a requirement prescribed by state law. Because city e-cigarette regulations are neither permitted nor prohibited by the new or existing legislation, whether a city can regulate them is unclear. Thus, each city needs to consult its local legal counsel to determine whether Senate Bill 97 preempts any of its local regulations.

Perhaps in anticipation of Senate Bill 97 becoming effective, state agencies have begun to address e-cigarettes. For instance, the Texas Department of Criminal Justice (TDCJ) recently proposed rules that add the use of vapor products to the TDCJ Tobacco Policy.

What has the federal government done? In 2014, the Federal Drug Administration (FDA) proposed a rule that will allow the FDA to regulate products such as e-cigarettes, nicotine gels, and other products under the Federal Tobacco Control Act. You can follow the status of that rulemaking and find additional information about the FDA's regulation of e-cigarettes here: <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm172906.htm>.

For the time being at least, the action remains at the state and local level. The League will continue to monitor this issue and report any important federal regulatory developments.

Lt. Governor Appoints Select Transportation Committee

Lt. Governor Patrick announced the appointment of the Senate Select Committee on Transportation Planning. The committee created by [H.B. 20](#) will study issues related to transportation planning, financing and performance, and the Texas Department of Transportation's (TxDOT) collaboration with stakeholders such as elected officials, local governments, and metropolitan planning organizations. The committee is as follows:

Sen. Robert Nichols (R – Jacksonville), Chair
Sen. Bob Hall (R – Mesquite)
Sen. Juan “Chuy” Hinojosa (D – McAllen)
Sen. Joan Huffman (R – Houston)
Sen. Charles Perry (R – Lubbock)

The League will continue to monitor the committee hearings and provide necessary information to cities.

Reed v. Town of Gilbert: **Does Your Sign Ordinance Need Updating?**

Reed v. Town of Gilbert is the recent U.S. Supreme Court opinion that calls into question certain content-related sign ordinance provisions. A previous *Legislative Update* [article](#) explained the holding in more detail. A number of national organizations will be conducting webinars for city officials about the case in the coming days:

- **July 20:** International Municipal Lawyers Association [webinar](#)
- **July 21:** Planning & Law Division of the American Planning Association [webinar](#)
- **August 19:** State and Local Legal Center [webinar](#)

Resolutions for the 2015 TML Annual Conference

The legislative efforts of TML are guided by its members. That guidance comes in the form of resolutions that are submitted by member cities, TML regions, TML affiliates, and TML committees. If your city has a legislative issue that it would like TML to consider, please submit it in accordance with the following instructions.

The TML Constitution states that resolutions for consideration at the Annual Conference must be submitted to the TML headquarters 45 calendar days prior to the first day of the Annual Conference. For 2015, this provision means that resolutions from any member city, TML region, or TML affiliate must arrive at the TML headquarters no later than 5:00 p.m. on **August 10, 2015**.

The TML Board of Directors has adopted several procedures governing the resolutions process. Please review the following items carefully and thoroughly.

1. No resolution may be considered by the TML Resolutions Committee unless it has prior approval of: (a) the governing body of a TML member city; (b) the governing body or membership of a TML affiliate, or (c) the membership of a TML region at a regional meeting.
2. TML member cities, regions, and affiliates that wish to submit a resolution **must** complete a resolution cover sheet. The cover sheet is available [here](#). Please feel free to make as many copies of this cover sheet as you desire. The cover sheet must be attached to the resolution throughout each step of the resolutions process.
3. It is recommended that any resolution state one of four categories to better direct League staff. Those categories are:
 - **Seek Introduction and Passage** means that the League will attempt to find a sponsor, will provide testimony, and will otherwise actively pursue passage. Bills in this category are known as “TML bills.”
 - **Support** means the League will attempt to obtain passage of the initiative if it is introduced by a city or some other entity.
 - **Oppose**.
 - **Take No Position**.

Please see the [2015-2016 TML Legislative Policy Development Process](#) for more information.

4. Resolutions submitted will be thoroughly discussed at the TML Annual Conference. The Resolutions Committee is appointed by the TML President and is made up of city officials from TML member cities across the state.

5. The city, region, or affiliate that submits a resolution is encouraged to send a representative to the Resolutions Committee meeting to explain the resolution. The Resolutions Committee will meet at **2:00 p.m.** on **Tuesday, September 22, 2015**, at the **Henry B. Gonzalez Center in San Antonio**.

If the procedures described above are not followed for any given resolution, that resolution is likely to be referred to some other TML committee for further study. In that case, the resolution would not be adopted during the 2015 conference.

Under the TML Constitution, resolutions received after the deadline of August 10, 2015, must not only have the attached cover sheet, but also must “state the reason precluding timely submission.” These late resolutions may be considered by the TML Resolutions Committee at the Annual Conference only if two-thirds of the Committee members present and voting agree to suspend the submission rule and consider the resolution.

Resolutions may be submitted by mail, fax, or email to Scott Houston, Deputy Executive Director and General Counsel, at:

1821 Rutherford Lane, Suite 400
Austin, Texas 78754
Fax: 512-231-7490
Email: shouston@tml.org

If you have any questions or would like any assistance, please call 512-231-7400 at any time.

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