



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 21, 2020

The Honorable Lyle Larson  
Chair, Committee on Natural Resources  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

**Opinion No. KP-0309**

Re: Whether state or federal law preempts application of municipal development ordinances to a water control and improvement district's construction and maintenance of dams (RQ-0316-KP)

Dear Representative Larson:

You ask about the City of Austin's "authority to enforce its development ordinances on the dam building activities of the Upper Brushy Creek Water Control and Improvement District [the "District"] where these activities occur within [the City's] extraterritorial jurisdiction or within its city limits," and whether such activities are "specifically and preemptively regulated by state and federal authorities."<sup>1</sup> As background, you tell us the District is responsible for the operation and maintenance of 23 flood control structures within its jurisdiction, which were "[b]uilt originally as low-hazard dams in rural areas at the time of construction" but which "are now in rapidly-developing areas and have a high-hazard risk classification." Request Brief at 1. With respect to those structures, you describe a dam safety program the District developed in 2000 in response to certain changes in federal and state law that imposed more stringent design standards on dams to protect public safety and property. *Id.* at 1–2. As part of the program, the District established a plan "to modernize all of the District's dams," including the dam at issue, Dam #8. *Id.* at 3. You tell us "the District submitted a Site Development Plan Application to the City of Austin [the

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<sup>1</sup>See Letter & attached Brief from Honorable Lyle Larson, Chair, House Comm. on Natural Res., to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Dec. 4, 2019), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2019/pdf/RQ0316KP.pdf> ("Request Letter" & "Request Brief," respectively).

“City”] regarding the update of Dam #8” in 2018 at the City’s urging, which was intended to “give clarity to the City’s staff and to answer” their questions regarding the project.<sup>2</sup> *Id.* at 4.

However, the District believes that its dam building activities do “not fall under the regulatory control or permitting process of the City” and that the District is not required “to actually obtain a Site Development Plan or Permit from the City” for Dam #8.<sup>3</sup> *Id.*; *see also* District Brief at 4. Instead, the District posits that such activities are “specifically regulated by the Texas Commission on Environmental Quality [the “Commission”] pursuant to Title 30, Part 1, Chapter 299 of the Texas Administrative Code.” District Brief at 1. In briefing submitted to this office, the City states it “understands that the District is bound by state law and regulations specifying certain design and construction requirements for dams.” City Brief at 1. But, citing water quality issues such as sediment and stormwater discharge as well as drainage regulations impacting federal disaster funding in the event of a flood, the City maintains it “can require that the District comply with City development regulations to the extent that the City regulations do not unreasonably interfere with the dam modernization project.” City Brief at 1, 3–4. On behalf of the District, you ask whether its dam building activities, specifically “designing, constructing, reconstructing, modifying, enlarging, rehabilitating, altering, or repairing of a dam” are “preemptively controlled by [s]tate and [f]ederal authorities” or whether the District must also comply with the City’s development regulations. Request Brief at 4.

A municipal ordinance may not conflict with state law. *See* TEX. CONST. art. XI, § 5(a) (“[N]o . . . ordinance passed under [a city] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”). The City is a home-rule municipality that acquires its powers from the Texas Constitution and possesses the “full power of local self-government,” looking to state law “not for grants of power, but only for limitations on” its power. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016) (quotation marks omitted). While a home-rule city thus has all power “not denied by the Constitution or state law,” the Legislature may nonetheless “limit or withdraw that power by general law.” *City of Laredo v. Laredo Merchs. Ass’n*, 550 S.W.3d 586, 592 (Tex. 2018). As explained by the Texas Supreme Court,

[a] statutory limitation of local laws may be express or implied, but the Legislature’s intent to impose the limitation must appear with unmistakable clarity. The mere entry of the state into a field of legislation . . . does not automatically preempt that field from city regulation. Rather, local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable. Absent an express limitation, if the general law and

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<sup>2</sup>The City of Austin informs us that the “Dam #8 modernization project [is] located within the City’s extra territorial jurisdiction.” Brief from Ms. Anne L. Morgan, City Att’y, City of Austin at 1 (Jan. 3, 2020) (on file with the Op. Comm.) (“City Brief”).

<sup>3</sup>Brief from Mr. Dan M. Gattis, Gattis Law Firm, PC, on behalf of the District at 4 (Jan. 6, 2020) (on file with the Op. Comm.) (“District Brief”).

local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency.

*Id.* at 593 (footnotes and quotation marks omitted). Thus, a court would begin its preemption analysis of the City's development regulations and state law on dams by determining whether the state law limits the City's authority "with unmistakable clarity."<sup>4</sup> *Id.* If it does, a court would then determine whether the City ordinance at issue falls within the scope of the state law regulatory framework on dams. *Id.* at 593–94; *see also State v. DeLoach*, 458 S.W.3d 696, 698 (Tex. App.—San Antonio 2015, pet. ref'd) ("We must . . . determine whether the ordinance and the [state law] are attempting to regulate the same activity."). The City's ordinance would be preempted if it fell within the ambit of the Commission's regulatory framework. If, however, a court finds no clear and unmistakable legislative intent for state law on dams to preempt local law, then the court's analysis would focus on the extent to which the state and local provisions can coexist.

A court's objective in construing a statute is to "determine and give effect to legislative intent as expressed by the statute's plain language." *In re B.C.*, 592 S.W.3d 133, 136 (Tex. 2019). When construing a statute to determine legislative intent, courts start with the plain language of the text, construing it "in light of the statute as a whole." *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). The Legislature gave the Commission "general jurisdiction over . . . the adoption and enforcement of rules and performance of other acts relating to the safe construction, maintenance, and removal of dams." TEX. WATER CODE § 5.013(a)(5). As part of that authority, the Legislature directed the Commission to "make and enforce rules and orders" and "perform all other acts necessary to provide for the safe construction, operation, maintenance, repair, removal, and emergency management of dams located in this state." *Id.* § 12.052(a). Accordingly, the Commission promulgated rules in chapter 299 of the Texas Administrative Code applicable "to design, review, and approval of construction plans and specifications; and construction, operation and maintenance, inspection, repair, removal, emergency management, site security, and enforcement of dams" meeting certain criteria, including those with a "high- or significant-hazard dam" classification. 30 TEX. ADMIN. CODE § 299.1(a)(3) (2020) (Tex. Comm'n on Env'tl. Quality, Applicability). The rules require owners of certain<sup>5</sup> existing dams slated for reconstruction, modification, enlargement, rehabilitation, alteration, or repair to "submit final construction plans and specifications, which are sealed, signed, and dated by a professional engineer, to the executive director [of the Commission] for review and approval before commencing" with the project. *Id.* § 299.22(a)(1) (Review and Approval of Construction Plans and Specifications); *see also id.*

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<sup>4</sup>While you ask also about potential preemption by federal law, the National Inventory of Dams, a national database of dams authorized by Congress and maintained by the U.S. Army Corps of Engineers, lists Upper Brushy Creek Dam #8 as a state-regulated, not federally-regulated, dam. *See* <https://nid.sec.usace.army.mil/ords/f?p=105:22:1778403048377::NO::> (select "General Public" and Search Type "Name of Dam" search "Upper Brushy Creek WS SCS Site 8 Dam, Williamson, TX").

<sup>5</sup>*See* 30 TEX. ADMIN. CODE § 299.21 (Tex. Comm'n on Env'tl. Quality, Applicability) (describing applicability of construction requirements to dams based on various criteria).

§ 299.22(b)(2) (addressing required content of such plans and specifications).<sup>6</sup> “The executive director shall review the final construction plans, specifications, and engineering reports and plans according to the most current version, at the time of the design, of the agency’s Design and Construction Guidelines for Dams in Texas.” *Id.* § 299.22(e)(1) (Review and Approval of Construction Plans and Specifications). Once the Commission’s executive director issues approval to a dam owner, the project must commence within four years or it will be subject to reapproval. *Id.* § 299.22(f)(1).

However, the statutory provisions in chapters 5 and 12 of the Water Code authorizing this regulatory framework of dam projects contain no express limitations on the local regulation of dams. *See* TEX. WATER CODE §§ 5.013(a)(5), 12.052(a). In contrast, the Legislature in other contexts has made unmistakably clear its intent to preempt local ordinances. *See, e.g., Laredo Merchs. Ass’n*, 550 S.W.3d at 593 (Texas Solid Waste Disposal Act stating that “[a] local government or other political subdivision may not adopt” certain ordinances evidenced a “clear” intent to preempt local law); *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 13 (Tex. 2016) (section 382.113 of the Texas Clean Air Act “unmistakably expresses the Legislature’s desire to preempt any ordinance ‘inconsistent’ with the Act or with a [Commission] rule or order”); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000) (relying on principle of statutory construction that the Legislature knows how to enact laws effectuating its intent). Without evidence in the statutes of the Legislature’s clear and unmistakable intent to preempt all local ordinances affecting dams, a court would likely conclude that the local regulation will be invalid only to the extent inconsistent with a state regulation.

You do not identify a specific local provision against which to compare the Commission’s dam regulatory framework but instead refer broadly to the City’s “rules, regulations, ordinances, and/or codes regarding ‘development.’” Request Brief at 4. Moreover, whether any particular City development regulation is inconsistent with the Commission’s regulatory framework may require the consideration of specific facts, which this office cannot determine through the opinion process. *Tex. Att’y Gen. Op. No. KP-0239* (2019) at 2. As a fact-finding body, a court is best suited to consider whether the state and local provisions at issue could both be given effect.

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<sup>6</sup>Among other items, the plans and specifications must “include language, or design criteria, that requires the proposed contractor to develop a Storm Water Pollution Prevention Plan and submit a Notice of Intent (NOI) for coverage under the State of Texas Construction General Permit (TXR150000), if applicable.” *Id.* § 299.22(a)(3).

**S U M M A R Y**

The Legislature made the Texas Commission on Environmental Quality responsible for dam safety through subsections 5.013(a)(5) and 12.052(a) of the Water Code. However, without evidence in the statutes of the Legislature's clear and unmistakable intent to preempt all local ordinances affecting dams, a court would likely conclude that a local regulation will be invalid only to the extent inconsistent with a state regulation.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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