



Workers Defense Project

Proyecto Defensa Laboral

MEMORANDUM

TO: Austin City Council
FROM: Stephanie Gharakhanian, Esq., Workers Defense Project
SUBJECT: City Council's Authority to Establish a Living Wage for Public Work Construction Workers
DATE: June 6, 2015

The City of Austin is not precluded from guaranteeing construction workers employed on City projects its living wage if that wage is higher than the corresponding prevailing rate. As a home-rule city, Austin has the authority to enact ordinances that are not preempted by state law. The Texas Prevailing Wage Statute, Texas Government Code §2258, does not preempt a city living wage rate that is higher than the prevailing wage rate for public work construction workers. In fact, Chapter 2258 expressly authorizes that construction workers on public work projects may receive a wage that exceeds the prevailing rate.

1. As a home-rule city, Austin has authority to enforce its living wage for construction workers on public works as long as the living wage is equal to or higher than the prevailing wage rate.

Because neither the Texas Constitution nor Texas statute prohibit a higher wage, the City of Austin, a home-rule city, has the authority to guarantee public works construction workers a higher wage than the prevailing wage established in Chapter 2258. As a home-rule city, Austin has the powers to create its own charter and possesses the “full power of self government.” *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W. 2d 489, 490 (Tex. 1993). The scope of the City's legislative powers therefore is not defined by state law, but only

limited by it. *Id.* at 490-91. The City may establish a higher wage for public works construction workers even if such authority is not expressly granted by the state legislature, as long as state law does not preempt. State law preempts a city ordinance only if the legislature distinctly designates that a state statute should do so. *Id.* at 491. “The mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted.” *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990) As the Texas Supreme Court stated in *Dallas Merchant’s*, if the legislature intends a state statute to preclude a municipality’s home-rule authority, it must do so with “unmistakable clarity.” 852 S.W. 2d at 491.

Chapter 2258 lacks the “unmistakeable clarity” required to preempt Austin’s Living Wage Ordinance because the statute and City ordinance do not inherently conflict. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (explaining “courts will not hold a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect”). In *Sanchez*, the court found that the the Texas Election Code did not preempt the voter registration deadline established by city ordinance because the Texas Election Code includes a provision granting municipalities the ability to set their own voter registration deadlines within their home-rule charter. *Id.* at 797. Because of this provision in the state statute, the court determined that there was no inherent conflict between the state voter registration law and the city voter registration ordinance and held that the legislature therefore had not clearly intended for the state statute to preempt. *Id.* at 798.

Similar to the voter registration ordinance and Texas Election Code provisions discussed in *Sanchez*, there is no inherent conflict between Austin’s Living Wage Ordinance and Chapter

2258, the Texas Prevailing Wage Statute. Chapter 2258 contains a provision that expressly permits workers employed on a public work to earn a wage that exceeds the prevailing wage rate. Section 2258.025 reads “this chapter does not prohibit the payment to a worker employed on a public work an amount greater than the general prevailing rate of per diem wages.” Tex. Gov’t Code Ann. §2258.025. Moreover, Section 2258.021(1) states that a construction worker on a public work must be paid a wage “not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed”. Tex. Gov’t Code Ann. §2258.021(1). As long as Austin’s living wage is greater than the general prevailing rate, there is no conflict between Chapter 2258 and the City’s Living Wage Ordinance. Because the Austin Living Wage Ordinance and Chapter 2258 do not inherently conflict with each other, according to the precedent established in *Dallas Merchant’s* and *Sanchez*, a court would therefore not likely find that Chapter 2258 preempts a city living wage for public work construction workers that is higher than the corresponding prevailing wage rate.

2. The 1999 AG Opinion, JC-0011, does not interpret Chapter 2258 as prohibiting home-rule cities from supplementing prevailing wage rates with a higher living wage rate.¹

In a 1999 opinion interpreting Chapter 2285, the Attorney General notes that the powers of home-rule cities are distinct from other political subdivisions like school districts. He

¹ On December 1, 2014, Attorney General Greg Abbott released Opinion No. GA-1090, regarding the ability of Dallas County to guarantee living wages for county contract employees under the Labor Code, section 62.0515, and the County Purchasing Act. Because its analysis rests on the governing authority of Dallas County, which is not a home-rule city, GA-1090 does not apply to the matter at hand here: whether the City of Austin, as a home-rule city, has the authority to guarantee a minimum living wage for public work construction workers. For this reason, GA-1090 is not discussed in this memorandum.

writes, “School districts, like other political subdivisions of the state, *other than home-rule cities*, have only those powers expressly conferred on them by the constitution or by statute.” AG Opinion JC-0011 (1999), 3 (emphasis added). The Attorney General continues to confirm that there is no constitutional or statutory bar that prohibit public work construction workers from earning a living wage that is higher than the prevailing wage established by Chapter 2258. According to the Attorney General, “[C]hapter 2258 sets a floor for wages, not a ceiling” and there is “no constitutional impediment” to mandating a higher level wage or living wage that is higher than the required prevailing wage. *Id.*

While he does posit that “in enacting the minimum wage requirements of [C]hapter 2258, the legislature intended to preclude a public body from requiring its contractors to adhere to any other minimum wage requirement,” the Attorney General does not offer any caselaw to substantiate this claim, nor does he specifically attribute this claim of preemption to home-rule cities like Austin. Indeed, assuming that the legislature’s enactment of Chapter 2258 preempts home-rule cities from establishing higher living wage rates for public work construction workers contradicts the progeny of caselaw on home-rule authority articulated in cases like *In re Sanchez* and *Dallas Merchant’s*. As provided in that well-established precedent, Chapter 2258 would only preempt the City’s Living Wage Ordinance if the statute expressed such intent with “unmistakable clarity”. The fact that Chapter 2258, as affirmed by the Attorney General, “sets a floor for wages, not a ceiling”, Chapter 2258 does not preempt Austin’s Living Wage as long as that living wage remains greater than the prevailing wage rate established by statute.

CONCLUSION

Chapter 2258 does not preempt the City of Austin from guaranteeing public work construction workers a living wage that is higher than the prevailing wage rate. Chapter 2258 expressly provides that public work construction workers may receive a wage rate that is higher than the prevailing wage rate. Furthermore, home-rule cities have the authority to create laws not prohibited by state law. Chapter 2258 does not clearly nor implicitly preclude cities from guaranteeing public work construction workers a wage that is higher than the prevailing wage rate. To the contrary, Chapter 2258 guarantees public work construction workers a wage that is “not less than” the prevailing rate and expressly states that workers employed on public works are not prohibited under the Chapter from receiving “an amount greater than the general prevailing rate.” Tex. Gov’t Code Ann. §2258.025; Tex. Gov’t Code Ann. §2258.021(1).

As long as the Austin Living Wage is greater than the prevailing wage rate required by Chapter 2258, there is therefore no inherent conflict between city ordinance and state law. Without such conflict, a court would not likely construe Chapter 2258 as preempting the City of Austin Living Wage Ordinance. Assuming the City’s living wage exceeds the prevailing wage rate required by Chapter 2258, the City, pursuant to its home-rule authority, is entitled to ensure public work construction workers living wages established by City Ordinance.