Cause No. C-1-CR-17-100025

IN THE COUNTY COURT AT LAW NUMBER TWO

TRAVIS COUNTY, TEXAS

THE STATE OF TEXAS,

Appellant,

v.

ACSO of Texas, LP,

Appellee.

On Appeal from the Municipal Court of Austin, Texas
No. 8530627, Hon. Mitchell Solomon, Presiding

AMICUS CURIAE BRIEF OF TEXAS APPLESEED IN SUPPORT OF THE CITY OF AUSTIN

Amy Leila Saberian
Texas Bar No. 24041842
asaberian@enochkever.com
ENOCH KEVER PLLC
5918 W. Courtyard, Suite 500
Austin, Texas 78730
512.615.1200 / 512.615.1198 facsimile
ATTORNEY FOR TEXAS APPLESEED FOUNDATION

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DISCLOSURE OF INTEREST

Texas Appleseed[1] is a nonprofit public interest law center working to change unjust laws and policies that prevent Texans from realizing their full potential. Texas Appleseed works to stem abuses in the Texas payday and auto title lending market and support policy and market standards to improve or end harmful lending practices.

Texas Appleseed is a leading advocate for fairness in the financial services industry and the reform of predatory lending products with the goal of products that promote both borrower and lender success. Texas Appleseed has an interest in issues with the potential to significantly impact payday and auto title lending and the citizens of Texas that use these products. Texas Appleseed has worked at the local, state and federal levels to ensure effective payday and auto title lending industry regulation and oversight, including encouraging cities to pass fair ordinances, which add basic, common-sense standards to control predatory practices in the payday and auto title lending marketplace in Texas, particularly the on-going cycle of unaffordable debt too often caused by these uncapped loans.

Texas Appleseed's Board of Directors is comprised of distinguished legal practitioners from various sectors of the Texas Bar who are committed to

[1] Texas Appleseed's mission is to promote social and economic justice for all Texans by leveraging the skills and resources of volunteer lawyers and other professionals to identify practical solutions to difficult systemic problems. Texas Appleseed conducts data-driven research to uncover inequity in laws and policies and identify solutions for lasting, concrete change.

promoting social and economic justice for all Texans. Texas Appleseed is receiving the services associated with preparation of this amicus letter pro bono.

Texas Appleseed files this amicus letter in support of the City of Austin's appeal of the municipal court's dismissal of its action against ACSO, LP (ACSO). The municipal court erred in its dismissal of the appeal based upon the argument that the City's ordinance, Section 4-12-22(D) of the Austin City Code (Austin Ordinance), is preempted by state law. *See* Appendix A (Austin Municipal Court Order).

BACKGROUND

Payday and auto title lending in Texas is an almost $5.2 billion industry built on high fees and refinances. The industry relies on high-cost loans, with charges that can exceed 400 percent APR.[2] For many years, these loans have been the subject of much policy debate and controversy in Texas.

I. Payday and Auto Title Loan Industry in Texas

Payday and auto title loans, which are currently sold in Texas by credit services organizations (CSOs) and credit access businesses (CABs) operating under Ch. 393 of the Texas Finance Code, carry uncapped fees. These very high-cost loans are sold as short-term loans, but often deliver long-term debt. A study of 2015 Texas payday and auto title loan data found that between 18% and 64% of all

[2] Texas Office of Consumer Credit Commissioner, *2016 Report on Availability, Quality, and Pricing of Certain Financial Services and Consumer Loan Products* (Dec. 1, 2016) at 11.

loans, depending on the loan product,[3] were generated by borrowers who refinanced five or more times.[4]

National data, drawn from a sample of over 15 million loans, including loans from Texas, found that 75% of payday loan proceeds were generated by borrowers who took out 11 loans or more in a one-year period.[5] This cycle of debt has negative financial impacts on individuals, churches, nonprofits, and the local economy. Based on the average cost of a payday loan in Texas, borrowers often pay $1,300 or more to repay a typical $500 loan; one in seven auto title borrowers lose their car.[6] Studies have found that having a payday loan increases borrowers' risk of involuntary bank account closure and nearly doubles chances of filing for

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[3] The range is related to the various types of payday and auto title loans offered in Texas. The Texas Office of Consumer Credit Commissioner collects data on four different loan types offered by credit access businesses: single payment payday loans and auto title loans, where full payment, including principal, interest and fees is due in one payment, usually two-week to one-month after the loan is taken out; and installment payday loans and auto title loans, which include multiple contracted payments for a term not to exceed 180-days.

[4] Ann Baddour, et. al., *Payday and Auto Title Lending in Texas: Market Overview and Trends 2012-2015*, Texas Appleseed (2016) at 8-12. Available at: https://www.texasappleseed.org/sites/default/files/Payday-Auto-Title-Lending-Tx_MktOv-Trends2012-2015Rev.pdf.

[5] Consumer Financial Protection Bureau, Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings (April 2013) at 22 (available at: http://files.consumerfinance.gov/f/201304_cfpb_payday-dap- whitepaper.pdf).

[6] Texas Appleseed analysis of the Texas Office of Consumer Credit Commissioner Credit Access Business Annual Data Report, CY 2016 (March 13, 2017).

bankruptcy.[7] A 2012 survey of Texas nonprofits found that nearly 32% of charitable cash assistance goes to people in trouble with payday or title loans.[8] According to a study from the Texas League of Women Voters Education Fund, payday and auto title loan businesses caused an estimated loss of $351 million in economic value and a loss of 7,375 jobs in Texas in 2014.[9] A study also found that a high concentration of payday loan stores leads to more property and violent crime, even when controlling for other factors that are known to impact crime rates.[10] Local ordinances have been adopted across Texas to address these many detrimental impacts of payday and auto title lending on families and communities.

II. Nature and Statutory Framework of Texas Finance Code Ch. 393

To understand the preemption issue at hand, it is important to understand the nature and the statutory framework of payday and auto title loan businesses in Texas. In 1987, the Texas Legislature passed the Texas Credit Services

[7] *See:* Dennis Campbell, Asis Martinez Jerez, & Peter Tufano, *Bouncing out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*, Harvard Business School (2008) at 27 (available at http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf) and Paige Marta Skiba and Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, Vanderbilt University and the University of Pennsylvania (2011) at 12 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215).

[8] Texas Catholic Conference 2012 Survey of Texas Nonprofits (Jan. 2013) (available at https://txcatholic.org/pay-day-lending/research/).

[9] League of Women Voters of Texas Education Fund, *Facts and Issues: Payday & Auto Title Loans in Texas: A Study by League of Women Voters of Texas Education Fund* (Aug. 2015) at 4 (available at http://www.lwvtexas.org/files/StudyPayDayLoansFactsIssues.pdf).

[10] Charis E. Kubrin, Gregory D. Squires, Steven M. Graves and Graham C. Ousey, *Does Fringe Lending Exacerbate Neighborhood Crime Rates: Investigating the Social Ecology of Payday Lending, Criminology & Public Policy*, Vol. 10, Issue 2 (2011) at 465 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028137).

Organizations Act (CSOA), an act intended to protect consumers from abuse by credit repair clinics that had arisen since the passage of the Federal Fair Credit Reporting Act. *See* TEX. FIN. CODE §§ 393.001–393.505; Bill Analysis, House Bill 742, 70th R.S. (1987) The CSOA is under Title 5 of the Texas Finance Code, Protection of Consumers of Financial Services.

The CSOA contains a provision that describes "obtaining an extension of consumer credit for a consumer" as a credit services organization activity. *Id.* § 393.001(3) (b). Despite being outside the original purpose of the CSOA, a handful of businesses registered as credit services organizations (CSOs) and seized on the language of this provision to structure their businesses in a way to engage in high-cost payday and auto title lending in Texas and avoid Texas usury laws. These businesses charge fees to arrange, collect and guarantee a loan with a third-party lender for the consumer. While the lender can only loan the money to the consumer at a rate that complies with Texas usury laws, the CSOA does not include a limit on the dollar amount of fees that a CSO may charge.[11]

This use of a statute originally designed to protect consumers was challenged in court. The U.S. Fifth Circuit Court of Appeals held in *Lovick v. Ritemoney Ltd.*, 378 F.3d 433 (5th Cir. 2004) that the fees charged by these CSOs to obtain consumer credit for customers are not considered part of the interest

[11] The duration of charges, however, cannot exceed 180 days. TEX. FIN. CODE § 393.201 (b)(2).

when determining compliance with usury laws. After this 2004 decision, payday and auto title loan businesses moved en masse from operating as licensed consumer lenders under Ch. 342 of the Texas Finance Code to operating under the CSOA. In 2004, there were 250 registered CSOs; by 2006, there were over 2,000 registered CSOs, and by 2011, over 3,400, with the vast majority arranging uncapped payday and auto title loans.[12]

In 2011, there was a groundswell of popular and bipartisan support to reform payday and auto title lending in Texas spurred on by the many lending abuses documented by nonprofit and faith-based organizations. The Legislature enacted Subchapter G of the CSOA (Chapter 393 of the Texas Finance Code) and created a special designation for payday and auto title loan businesses operating as CSOs: "credit access businesses" (CABs). *See* Acts 2011, 82nd Leg., ch. 1302 (H.B. 2594), § 2, eff. Jan. 1, 2012. Subchapter G of Chapter 393 licensed these operations for the first time. TEX. FIN. CODE §§ 393.601-.628. Payday and auto title loan businesses now operate in Texas as CABs, under Chapter 393 of the Texas Finance Code. *See* Acts 2011, 82nd Leg., ch. 1302 (H.B. 2594), § 2, eff. Jan. 1, 2012.

[12] Ann Baddour, *Why Texas' Small-Dollar Lending Market Matters, e-Perspectives*, Federal Reserve Bank of Dallas, Vol. 12, Issue 2 (2012) (available at http://www.legis.state.tx.us/tlodocs/83R/handouts/C2702013041512301/fb4dbdfc-de6b-4e40-98a1-16b4bde84cad.PDF).

Additionally, the law instituted data collection of industry information, required consumer disclosures, required quarterly reports from CABs to the consumer credit commissioner with information about the loans provided, and initiated an endowment to improve the financial education of Texans.

CABs serve as loan brokers, arranging short-term loans with third-party lenders. The third-party lender charges an interest rate near 10%, the state constitutional usury cap, and then the CAB charges consumers fees to arrange, service, and provide a letter of credit or guarantee to the third-party lender who supplies the capital for the loans. Their services do not end with the closing of the loan. The consumer does not interact directly with the third-party lender. All payments and communication are managed by the CAB and the CAB, under the terms of the guarantee, makes the third-party lender whole and takes ownership of the loan if the borrower defaults. Generally, the fee and loan payments are linked by contract, with provisions in both the CAB and lender contracts stating that a default on payment of the fees to the credit access business can be considered a default on the extension of consumer credit. Based on data collected by the Texas Office of Consumer Credit Commissioner, CABs offer four basic loan products:

- Single payment payday loans are due in full at the borrower's next payday— usually two weeks—and secured by a post-dated check or electronic access to a deposit account;

- Installment payday loans are secured by a check or electronic account access and include more than one scheduled payment;

- Single payment auto title loans are due in full in one month and secured by a vehicle with a clear title; and

- Installment auto title loans are secured by a clear vehicle title and include more than one scheduled payment.

Subchapter G of Chapter 393 licensed these operations, which prior to 2011 had been unlicensed.

III. City of Austin Credit Access Business (CAB) Ordinance

While state law made some progress to address concerns by licensing CABs and collecting data about the industry, it did not include any provisions addressing the well-documented problem of CSO/CAB loans ensnaring Texas citizens in a cycle of debt. Thus, some cities adopted ordinances aimed at ending the cycle of debt and helping borrowers successfully repay their loans.[13] Cities recognized the economic drain from these loans; in the Austin Metropolitan Statistical Area (MSA) (Austin-Round Rock-San Marcos) in 2015 (the year the current installment language was passed), the area experienced a drain of around 68.7 million dollars in fees alone to high-cost payday and auto title loans. Refinances of payday loans accounted for a large amount of payday and auto title loan transactions,

[13] The Texas Municipal League has information on these ordinances and which cities have passed them, to date around 40. Texas Municipal League Website, *City Regulation of Payday and Auto Title Lenders,* available at https://www.tml.org/payday-updates (accessed Jul. 12, 2017). These local ordinances are making a positive difference, reducing fees and vehicle repossessions. Texas Appleseed, *Payday and Auto Title Lending in Texas: Market Overview and Trends 2012-2015* (2016), available at https://www.texasappleseed.org/sites/default/files/Payday-Auto-Title-Lending-Tx_MktOv-Trends2012-2015Rev.pdf.

representing around 87 million dollars.14 Since that time, based on the most recent 2016 state regulator data from the Texas Office of Consumer Credit Commissioner, the volume of refinances for the Austin MSA decreased by nearly 19%. Auto repossessions from auto title loans decreased from 1,587 in 2015 to 1,101 in 2016.

At present, over forty cities in Texas have passed ordinances regulating the practices of credit access businesses. Such ordinances include the following provisions:

- A credit access business must apply for and receive a certificate of registration from the city.

- A credit access business must maintain complete records of all loans made by the business for at least three years and make the records available to the city for inspection upon request.

- The amount of a payday loan may not exceed 20 percent of the consumer's gross monthly income.

- The amount of an auto title loan may not exceed the lesser of three percent of the consumer's gross annual income or 70 percent of the retail value of the motor vehicle.

- Any loan from a credit access business that provides for repayment in installments may not be payable in more than four installments, and the proceeds from each installment must be used to repay at least 25 percent of the principal amount of the loan. No renewals or refinancing of installment-payment loans are permitted.

- Any loan from a credit access business that provides for a single lump sum repayment may not be refinanced or renewed more than three times, and the proceeds from each refinancing or renewal must be used to repay at least 25 percent of the principal amount of the

loan.

• Any loan made to a consumer within seven days of a previous loan has been paid by the consumer constitutes a refinancing or renewal.

The Austin Ordinance contains the above provisions and is very similar to other ordinances all over the state. Notably, the Dallas Ordinance, which is very similar to the Austin Ordinance, has previously been challenged as preempted by state law. *See* Appendix B (Dallas Order on Defendant's Motion to Quash Complaints).

ACSO has now brought a challenge based on state preemption against the Austin Ordinance. While ACSO's challenge concerns a different provision of the Austin Ordinance than the one at issue in the Dallas Ordinance, there similarly is no basis for state preemption here. The Austin Ordinance contains a provision that disallows an extension of consumer credit that provides for repayment in no more than four installments. As discussed further below, Subchapter G of Chapter 393 of the Texas Finance Code contains no regulation of the number of installments. And, under a reasonable construction of both, state law and the Austin Ordinance can be read in harmony and does not require that the relevant provision of the Austin Ordinance is void.

ARGUMENT

I. The municipal erred in granting ACSO's motion to dismiss because the Austin Ordinance is not preempted by state law.

At issue here, ACSO has been charged with violating the restrictions on extensions of consumer credit in the ordinance, specifically § 4-12-22 D. Section 4-12-22D states:

> An extension of consumer credit that a credit access business obtains for a consumer or that the credit access business assists a consumer in obtaining and that provides for repayment in installments may not be payable in more than four installments. Proceeds from each installment must be used to repay at least 25% of the total amount of the transaction, including the principal, fees, interest, and any other charges or costs that the consumer owes the credit access business. An extension of consumer credit that provides for repayment in installments of the principal, fees, interest, and any other charges or costs that the consumer owes the credit access business may not be refinanced or renewed.

ACSO's agreement with a consumer in this case exceeded four installments, and the City of Austin pursued a prosecution of a violation of the Austin Ordinance against ACSO. ACSO moved to dismiss the charge based on state preemption, and the municipal court granted its motion.

In its March 1, 2017 Order, without any explanation, the municipal court rescinded the court's prior order denying ACSO's motion to quash. *See* Appendix A. The municipal court then granted the motion to quash, providing little reasoning in its order, stating that "the Texas Financial Code including, specifically Section

393.602(b), covers the area in regard to Credit Access Businesses" and "[t]herefore, the Austin City Code Section 4-12-22(D) conflicts with State Law and is preempted." *See* Appendix A. But this reasoning is incongruous with Texas law concerning state preemption.

Importantly, the municipal court failed to properly analyze whether there was state preemption under current case law. As a home rule city, Austin possesses the power of self-government. Home rule cities look to the Legislature not for grants of authority—but only for limitations on their authority. TEX. LOC. GOV'T CODE § 51.072(a); *BCCA Appeal Grp., Inc. v. City of Hous.*, 496 S.W.3d 1 (Tex. 2016); *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 490–91 (Tex. 1993). Under the Texas Constitution, no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a). Thus, a home rule city's ordinance is unenforceable only to the extent that it is inconsistent with the state statute preempting that particular subject matter. *BCCA Appeal Group, Inc.*, 496 S.W.3d at 6; *Dall. Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491. In analyzing whether an ordinance is inconsistent with state law, importantly, both will be enforced if that is possible under any reasonable construction. *Id.* (citing *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (Tex. Com. App. 1927) ("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")).

Mere "entry of the state into a field of legislation does not automatically preempt that field from city regulation." *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). Rather, preemption analysis looks to whether the Legislature's intent to provide a limitation appears with "unmistakable clarity." *BCCA Appeal Group, Inc.*, 496 S.W.3d at 7. An ordinance is not preempted if it is "ancillary to and in harmony with the general scope and purpose" of the state law at issue. *See id.*

Subchapter G of Chapter 393 of the Texas Finance Code governs the licensing and regulation of CABs, yet nothing in this Subchapter states at all, much less with "unmistakable clarity," that the Legislature intended to preempt the entire field of licensing and regulation of CABs.

Subchapter G does contain specific statements about the fees that a CAB may charge, including:

> • A credit access business may assess fees for its services as agreed to between the parties. A credit access business fee may be calculated daily, biweekly, monthly, or on another periodic basis. A credit access business is permitted to charge amounts allowed by other laws, as applicable. A fee may not be charged unless it is disclosed. TEX. FIN. CODE § 393.602(b)
>
> • Nothing in Section 393.201(c) or Sections 393.601-.628 grants authority to the finance commission or the Office of Consumer Credit Commissioner to establish a limit on the fees charged by a credit

access business. TEX. FIN. CODE § 393.622(c)

But nothing in the Austin Ordinance regulates ***the amount of the fees or the periodic basis for calculating the fees***. The ordinance provision at issue here simply regulates the ***number of installments that payment*** of those fees and other amounts collected by the credit access business may be made. The number of installments does not regulate the amount of fees, or their period of calculation. It also does not regulate the period in which installments must be paid. A reasonable construction of the terms "fees" and "installments" makes clear that the state law and the Austin Ordinance are not regulating the same subject matter:

• **fee**: "A charge for labor or services, esp. professional services." *Fee*, Black's Law Dictionary (10th ed. 2014)

• **installment**: "A periodic payment of a debt." *Installment*, Black's Law Dictionary (10th ed. 2014)

An "installment" is not the actual charge or the amount of the debt itself, but is rather one of the divided parts into which a debt or charge is payable. Similarly, the Austin Ordinance does not regulate fees, but simply has a provision limiting the maximum number of parts that CABs may seek to have the total charges paid. Based on a reasonable construction of the state law and the city ordinance at issue here, the two are not repugnant to each other and both can be left in effect.

II. The Austin Ordinance can readily be read in harmony with Chapter 393 of the Texas Finance Code and is not repugnant to Chapter 393's provisions.

Moreover, the Austin Ordinance is indeed ancillary to and in harmony with Chapter 393. *BCCA Appeal Group, Inc.*, 496 S.W.3d at 12 (*citing City of Brookside Vill.,* 633 S.W.2d at 796) (explaining that the referenced state and federal legislation preempted specific areas of regulation of mobile homes–construction, safety, and installation–but that local regulation "ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable," and therefore the ordinance regulating the location of mobile homes was not preempted); *see also City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18, 19–20 (1957) (explaining that "[t]he statute itself demonstrates the intention on the part of the Legislature to provide for and establish grades of milk and specifications therefore as well as the labeling of the same to the end that uniformity shall prevail throughout the State").

A statute and an ordinance will not be held repugnant to each other if any reasonable construction upholding both can be reached. *Gordon v. State*, 757 S.W.2d 496, 502 (Tex. App. —Houston [1 Dist.] 1988) *citing City of Beaumont v. Jones*, 560 S.W.2d 710, 711 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). The ordinance provision that limits extensions of consumer credit arranged by a credit access business to four payments and requires principal reduction with each

payment is aligned with the consumer protection focus of Title 5 of the Texas Finance Code, which governs credit access businesses and with the intent of the statute to ensure that credit access businesses complete all their services in a short period of time, "not to exceed 180 days."[14] It is also consistent with notice requirements for credit access businesses. Each credit access business location, website and social media site must include conspicuous posting of the following language, "An advance of money obtained through a payday loan or auto title loan is not intended to meet long- term financial needs. A payday loan or auto title loan should only be used to meet immediate short-term cash needs."[15] Based on the structure of these loans, additional scheduled payments simply extend borrower indebtedness without making the loans more affordable.

The ordinance's four payment limits and 25% principal reduction work together in concert to ensure that any extension of credit is successfully repaid and providing for relatively equal periodic payments assists the borrower in understanding not just the fee required to avoid default, but the full amount that must be budgeted per payment to successfully repay the transaction. As documented above in this brief, there is significant consumer harm caused when borrowers struggle to repay payday and auto title loans, often creating deeper financial hardship.

[14] TEX. FIN. CODE § 393.201(2).

[15] TEX. FIN. CODE § 393.222(a)(3).

III. ACSO's arguments fail to overcome the presumption that the Austin Ordinance is valid.

In its brief, ACSO applies overly broad definitions of "assess" and "calculation" to assert that state law preempts the Austin Ordinance. But its arguments ignore the clear meaning of these terms as used in the state statute. Section 393.602(b) of the Texas Finance Code is focused on allowing CABs to determine the amount of fees ("assess" and "calculate") that they want. CABs can choose the amount for the fee, and they and they can choose if it is a fee charged per day, per month, etc. Importantly, however, that amount must be agreed upon and disclosed.

Chapter 393 says nothing about how or in what manner the consumer should pay that fee amount determined by the CABs. The City ordinance simply regulates how charges are paid when the CAB seeks to collect the total charges on the extension of consumer credit in installments. The amount that the CAB charges, and whether that charge is assessed as a per day charge, etc. or not, is unaffected by the Austin Ordinance. ACSO's arguments fail to overcome the presumption that the Austin Ordinance is valid. *Utter v. State*, 571 S.W.2d 934, 937 (Tex. Crim. App. 1978). Thus, this Court should find the Austin Ordinance is not preempted by Chapter 393, but rather is ancillary to, and in harmony with, that Chapter.

CONCLUSION

The Austin Ordinance is not preempted by state law, and thus the municipal court erred in dismissing the City of Austin's case against ACSO. This Court should reverse the municipal court's decision and remand for further proceedings.

Respectfully submitted,

By: /s/ *Amy Saberian*

Amy Leila Saberian
Texas Bar No. 24041842
asaberian@enochkever.com
ENOCH KEVER PLLC
5918 W. Courtyard, Suite 500
Austin, Texas 78730
512.615.1200 / 512.615.1198 (fax)

ATTORNEY FOR TEXAS APPLESEED FOUNDATION

CERTIFICATE OF COMPLIANCE

I certify that this Amicus Curiae Brief (when excluding the caption, table of contents, index of authorities, signature, certificate of compliance, certificate of service, and appendix) contains 4,295 words.

/s/ Amy L. Saberian
Amy L. Saberian

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2017, the above and forgoing brief was served via electronic service on the following counsel of record.

Lino Mendiola, III
Lino.mendiola@sutherland.com
Martha M. Hopkins
MartyHopkins@eversheds-sutherland.com
One American Center
600 Congress Ave., Suite 2000
Austin, Texas 78701
ATTORNEYS FOR APPELLEE ACSO OF TEXAS, LP

Tracy Shahan Snelson
tracy.Shahan@austintexas.gov
Chase Gomillion
chase.Gomillion@austintexas.gov
Criminal Prosecution Division
700 E. 7th St.
Austin, Texas 78701
ATTORNEYS FOR APPELLANT THE STATE OF TEXAS

/s/ *Amy Saberian*
Amy L. Saberian

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ACSO of Texas, LP,

Appellee.

On Appeal from the Municipal Court of Austin, Texas
No. 8530627, Hon. Mitchell Solomon, Presiding

APPENDIX

A. Order of the Court, Cause No. 8530627 in the Municipal Court, City of Austin, Travis County, Texas

B. Order on Defendant's Motion to Quash Complaints, in Cause Nos. Z13-000856-859 in the Municipal Court Number Eight of the City of Dallas, Texas

APPENDIX A

CAUSE NO. 8530627

THE STATE OF TEXAS	§	IN THE MUNICIPAL COURT
VS.	§	CITY OF AUSTIN
ACSO OF TEXAS, LP	§	TRAVIS COUNTY, TEXAS

ORDER OF THE COURT

The previous order in this case dated February 1, 2017 denying the Motion to Quash is rescinded. The Court has reconsidered the Motion and finds that the Texas Financial Code including, specifically Section 393.602(b), covers the area in regard to Credit Access Businesses. Therefore, the Austin City Code Section 4-12-22(D) conflicts with State Law and is preempted. The Motion to Quash is GRANTED.

Ferdinand D. Clervi
Judge Presiding
Austin Municipal Court

March 1, 2017

APPENDIX B

CAUSE NO. Z13-000856
CAUSE NO. Z13-000857
CAUSE NO. Z13-000858
CAUSE NO. Z13-000859

STATE OF TEXAS	§	IN THE MUNICIPAL COURT
	§	
VS.	§	NUMBER EIGHT OF
	§	
CBA LEASING LTD.	§	
DBA POWER FINANCE	§	CITY OF DALLAS, TEXAS

ORDER ON DEFENDANT'S MOTION TO QUASH COMPLAINTS

Before the Court is the Motion to Quash Complaints filed by Defendant CBA Leasing Ltd. dba Power Finance. The Defendant has provided the Court with Defendant's Brief in Support of Motion to Quash, along with an Appendix of Authorities. The State of Texas has filed its Response to Defendant's Motion to Quash, along with two volumes of supporting documents; and in response thereto, the Defendant has filed its Reply to State's Response to Defendant's Motion to Quash, along with a Supplemental Appendix of Authorities. The Court stands indebted to counsel for each party for their clear, concise and quite extensive presentation of their respective contentions.

Background

The Defendant stands charged by way of four complaints filed with this Court by the State of Texas, in pertinent part as follows:

> In Cause No. Z13-000859, it is alleged that the Defendant on or about October 18, 2013, in the City of Dallas, Texas, did act, operate, or conduct business as a credit access business at 8500 North Stemmons Freeway, Suite 4040, without a valid certificate of registration.[1]

[1] Dallas City Code § 50-148 provides as follows: "A person commits an offense if the person acts, operates, or conducts business as a credit access business without a valid certificate of registration. A certificate of registration is required for each physically separate credit access business. (Ord. 18287, eff. 1-1-12)." A violation of this ordinance is a criminal offense and is punishable by a fine of up to $500. Dallas City Code § 50-146(b).

> In Cause No. Z13-000856, it is alleged that the Defendant on or about October 18, 2013, in the City of Dallas, Texas, did knowingly own or operate an alternative financial establishment at 8500 North Stemmons Freeway, Suite 4040, without a specific use permit and such location is a nonresidential district that was not zoned NO(A), NS(A), MU-1, MU-1(SAH), UC-1, or P(A) district.[2]
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> In Cause No. Z13-000857, it is alleged that the Defendant on or about October 18, 2013, in the City of Dallas, Texas, did knowingly own or operate an alternative financial establishment at 8500 North Stemmons Freeway, Suite 4040, said use not occurring in a freestanding building or in a structure with no other use.[3]
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> In Cause No. Z13-000858, it is alleged that the Defendant on or about October 18, 2013, in the City of Dallas, Texas, did knowingly own or operate an alternative financial establishment at 8500 North Stemmons Freeway, Suite 4040, said location being within 500 feet of an expressway or new expressway as defined in Section 51A-7.102, measured from the property line of the alternative financial establishment to the nearest expressway or new expressway travel lane.[4]

The essence of Defendant's Motion to Quash involves a contention that the respective ordinances under which the complaints have been filed by the State are unconstitutional because

[2] Dallas City Code § 51A-4.207(1)(A)(i) provides that the term "Alternative Financial Establishment" means a car title business, check cashing business, or money transfer business." Dallas City Code § 51A-4.207(1)(A)(iii) provides that "Check Cashing Business means a business that provides check cashing, payday cash advance, payroll advance, short-term cash loan, short-term cash advance, instant payday cash advance, short-term money loan services, or similar services to individuals for a specified fee." Dallas City Code § 51A-4.207(1)(B) provides as follows: "Districts permitted: By SUP only in all nonresidential districts except the NO(A), NS(A), MU-1, MU-1(SAH), UC-1, and P(A) districts." A violation of this ordinance is a criminal offense and is punishable by a fine of not less than $200 nor more than $2000. Dallas City Code § 51A-1.103(a)(1).

[3] Dallas City Code § 51A-4.207(1)(E)(iv) provides that "An alternative financial establishment may only operate within a freestanding building and may not operate in the same structure as any other use." A violation of this ordinance is a criminal offense and is punishable by a fine of not less than $200 nor more than $2000. Dallas City Code § 51A-1.103(a)(1).

[4] Dallas City Code § 51A-4.207(1)(E)(iii) provides that "No alternative financial establishment may be located within 500 feet of an expressway or new expressway as defined in Section 51A-7-102, measured from the property line of the alternative financial establishment to the nearest expressway or new expressway travel lane." A violation of this ordinance is a criminal offense and is punishable by a fine of not less than $200 nor more than $2000. Dallas City Code § 51A-1.103(a)(1).

the ordinances are preempted[5] by State law, are in conflict with State law, and constitute an illegal taking without due process.[6]

Discussion

Relevant statutory law and ordinances.

Chapter 393 of the Texas Finance Code regulates credit services organizations ("CSOs").[7] *See* Tex. Fin. Code §§ 393.001-.628. (the "Act"). During the 2011 Legislative Session, the Texas Legislature amended the Act (effective on January 1, 2012), to provide for the licensing and regulation of credit access businesses ("CABs"). A CAB is a type of CSO.[8] Defendant is a State licensed CAB.

On May 25, 2011, the Dallas City Council adopted Ordinance No. 28214, creating zoning regulations for "alternative financial establishments." That Ordinance (effective immediately

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[5] A claim that a state statute preempts a municipal ordinance is a challenge to the municipal court's subject matter jurisdiction. *Gordon v. State*, 757 S.W. 2d, 496, 501 (Tex.App.—Houston [1st Dist.] 1988, writ ref'd).

[6] The Court treats the Motion to Quash as a *facial* challenge to the constitutionality of the subject ordinances. Thus, this Court shall consider the challenged ordinances only as they are written, rather than how they operate in practice. *See State ex. rel. Lykos v. Fine*, 330 S.W.3d 904, 908-09 (Tex.Crim.App. 2011). *See also State v. Rousseau*, 398 S.W.3d 769, 779 (Tex.App.—San Antonio 2011), *aff'd*, 396 S.W.3d 550 (TexCrim.App. 2013), (holding "It follows that a pretrial motion to quash an indictment may be used only for a facial challenge to the constitutionality of a statute.") "[W]hat is the difference between a facial challenge and an 'as applied' challenge to the constitutionality of a penal statute? Evidence. A facial challenge is based solely upon the face of the penal statute and the charging instrument, while an applied challenge depends upon the evidence adduced at a trial or hearing. A facial challenge to the constitutional validity of a statute considers only the text of the measure itself, and not its application to the particular circumstances of an individual. A party asserting a facial challenge to a statute seeks to vindicate not only his own rights, but also those of others who may also be adversely impacted by the statute in question." *Karenev v. State*, 281 S.W.3d 428, 435 (Tex.Crim.App. 2009) (Cochran, J., concurring). A facial attack upon a penal statute is solely a question of law. *Id*.

[7] A CSO is "[A] person who provides, or represents that the person can or will provide, for the payment of valuable consideration any of the following services with respect to the extension of consumer credit by others: (A) improving a consumer's credit history or rating; (B) obtaining an extension of consumer credit for a consumer; or (C) providing advice or assistance to a consumer with regard to Paragraph (A) or (B)." Tex. Fin. Code § 393.001(3).

[8] A CAB is a CSO that "obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan." Tex. Fin. Code § 393.601(2).

after publication), was codified, as relevant here, in Dallas City Code §§ 51A-4.207(1)(B);[9] 51A-4.207(1)(E)(iii);[10] and 51A-4.207(1)(E)(iv).[11] On June 22, 2011, the Dallas City Council adopted Ordinance No. 28287, regulating CABs located in the City of Dallas, Texas. That Ordinance (effective January 1, 2012) was codified in Dallas City Code §§ 50-144 - 50.151.[12]

Comparison of relevant sections of Ordinance No. 28287 and the Texas Finance Code.

The Court begins its analysis by comparing the Act to the pertinent sections of Ordinance No. 28287 to determine Defendant's preemption contentions regarding the issue of licensing/registration.

Dallas City Code § 50-148, entitled "Registration Required," provides as follows: "A person commits an offense if the person acts, operates, or conducts business as a credit access business[13] without a valid certificate of registration. A certificate of registration is required for each physically separate credit access business."

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[9] *See* Footnote 2.

[10] *See* Footnote 4.

[11] *See* Footnote 3.

[12] *See* Footnote 1. Defendant is charged with a violation of Dallas City Code § 50-148 in Cause No. Z13-000859. Defendant asks that the Court take into consideration other sections of Ordinance No. 28287 (e.g., § 50-151.3) in determining the merits of the motion before the Court. The Court is not inclined to do so because of the concern of justiciability. Justiciability doctrines such as ripeness reflect the separation of powers doctrine and the prohibition against court-issued advisory opinions. *See Patterson v. Planned Parenthood of Houston & Southeast Texas, Inc.*, 971 S.W.2d 439, 442-43 (Tex. 1998) (citing Tex. Const. art. II, §1; art. IV, §§1, 22; and art. V, § 8). Thus, this Court when analyzing Defendants contentions of preemption and due process violations will look at the specific sections (and directly related sections) of the respective ordinances under which Defendant has been charged and will not comment upon the constitutionality of those sections of the respective ordinances under which Defendant has not been charged.

[13] "Credit Access Business" is defined in Dallas City Code § 50-145, as follows: "Credit Access Business has the meaning given that term in Section 393.601 of the Texas Finance Code, as amended." Thus, a Credit Access Business is a business that "obtains for a consumer or assists a consumer in obtaining an extension of consumer credit in the form of a deferred presentment transaction or a motor vehicle title loan." Tex. Fin. Code § 393.601(2). "Deferred presentment transaction" means: "a transaction in which: (A) a cash advance in whole or in part is made in exchange for a personal check or authorization to debit a deposit account; (B) the amount of the check or authorized debit equals the amount of the advance plus a fee; and (C) the person making the advance agrees that the

Dallas City Code § 50-149, entitled "Registration Application," provides as follows:

(a) "To obtain a certificate of registration for a credit access business, a person must submit an application on a form provided for that purpose to the director. The application must contain the following:
   (1) The name, street address, mailing address, facsimile number, and telephone number of the applicant.
   (2) The business or trade name, street address, mailing address, facsimile number, and telephone number of the credit access business.
   (3) The names, street addresses, mailing addresses, and telephone numbers of all owners of the credit access business and other persons with a financial interest in the credit access business, and the nature and extent of each person's interest in the credit access business.
   (4) A copy of a current, valid state license held by the credit access business.
   (5) A copy of a current, valid certificate of occupancy showing the credit access business is in compliance with the Dallas Development Code.
   (6) A non-refundable application fee of $50.

(b) An applicant or registrant shall notify the director within 45 days after any material change in the information contained in the application for a certificate of registration, including, but not limited to, any change of address and any change in the status of the state license held by the applicant or registrant."

The Texas Finance Code, Subchapter G, is entitled "Licensing and Regulation of Certain Credit Services Organizations."[14] This subchapter deals with licensing and regulation of credit access businesses ("CABs"), a type of credit service organization ("CSO").[15] The pertinent sections of this subchapter are set out in length to aid in discussion.

Tex. Fin. Code § 393.603 provides "A credit services organization must obtain a license under this subchapter for each location at which the organization operates as a credit access business in performing services described by Section 393.602(a)."

Tex. Fin. Code § 393.604 provides:

(a) "An application for a license under this subchapter must:

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check will not be cashed or deposited or the authorized debit will not be made until a designated future date." Tex. Fin. Code §§ 341.001(6); *See* Tex. Fin. Code §§ 393.601(3).

[14] Tex. Fin. Code §§ 393.601 - 628.

[15] *See* Tex. Fin. Code §§ 393.601(2); 393.602(a).

(1) be under oath;
(2) give the approximate location from which the business is to be conducted;
(3) identify the business's principal parties in interest;
(4) contain the name, physical address, and telephone number of all third-party lender organizations with which the business contracts to provide services described by Section 393.602(a) or from which the business arranges extensions of consumer credit described by Section 393.602(a); and
(5) contain other relevant information that the commissioner[16] requires for the findings required under Section 393.607.

(b) On the filing of one or more license applications, the applicant shall pay to the commissioner an investigation fee of $ 200. Except for good cause as determined by the finance commission, a separate investigation fee is not required for multiple license applications.

(c) On the filing of each license application, the applicant shall pay to the commissioner for the license's year of issuance a license fee in an amount determined as provided by Section 14.107."

Tex. Fin. Code § 393.605 provides:

(a) "If the commissioner requires, an applicant for a license under this subchapter shall file with the application a bond that is:
(1) in an amount satisfactory to the commissioner that does not exceed the lesser of (A) $ 10,000 for the first license and $ 10,000 for each additional license; or (B) $ 2,500,000; and
(2) issued by a surety company qualified to do business as a surety in this state.

(b) The bond must be in favor of this state for the use of this state and the use of a person who has a cause of action under this subchapter against the license holder.

(c) The bond must be conditioned on:
(1) the license holder's faithful performance under this subchapter and rules adopted under this subchapter; and
(2) the payment of all amounts that become due to this state or another person under this subchapter during the calendar year for which the bond is given.

(d) The aggregate liability of a surety to all persons damaged by the license holder's violation of this subchapter may not exceed the amount of the bond.

(e) A credit access business that files a bond under this section is not required to file a bond under Subchapter E.

(f) A credit access business, instead of obtaining a surety bond, may satisfy the requirements of this section by depositing an amount described by Subsection (a)(1) in a surety account held in trust at a federally insured bank or savings association located in

[16] The Office of Consumer Credit Commissioner is authorized to administer this subchapter. *See* Tex. Fin. Code §§ 393.621; 393.601(6). The Texas Finance Commission is authorized to "adopt rules necessary to enforce and administer this subchapter." Tex. Fin. Code § 393.622(a)(1). Those "rules" are contained in 7 Tex. Admin. Code, Part 5, Chapter 83. 7 Tex. Admin. Code § 83.3002 provides: "An application for issuance of a new credit access business license must be submitted in a format prescribed by the commissioner at the date of filing and in accordance with the commissioner's instructions. The commissioner may accept the use of prescribed alternative formats to facilitate multistate uniformity of applications or in order to accept approved electronic submissions."

this state. The name of the depository, trustee, and account number of the surety account must be filed with the office."

Tex. Fin. Code § 393.606 provides: "On the filing of an application and a bond, if required under Section 393.605, and on payment of the required fees, the commissioner shall conduct an investigation to determine whether to issue the license."

Tex. Fin. Code § 393.607 provides:

(a) "The commissioner shall approve the application and issue to the applicant a license to operate as a credit access business for purposes of engaging in the activity to which this subchapter applies if the commissioner finds that:
(1) the financial responsibility, experience, character, and general fitness of the applicant are sufficient to: (A) command the confidence of the public; and (B) warrant the belief that the business will be operated lawfully and fairly, within the purposes of this subchapter;[17] and
(2) the applicant has net assets of at least $ 25,000 available for the operation of the business as determined in accordance with Section 393.611."

Tex. Fin. Code § 393.609 provides:

(a) A license issued under this subchapter must state: (1) the name of the license holder; and (2) the address of the office from which the business is to be conducted, except as provided by Subsection (c).[18]
(b) A license holder may not conduct business under this subchapter under a name other than the name stated on the license.
(c) A license holder may not conduct business at a location other than the address stated on the license, except that a license holder: (1) is not required to have an office in this state; and (2) may operate using e-commerce methods, including the internet.

Tex. Fin. Code § 393.614 provides:

(a) After notice and a hearing the commissioner may suspend or revoke a license if the commissioner finds that:

[17] It is quite apparent to the Court that the actual State application process is very detailed. Each "principal party" of the CAB and each person "responsible for day-to-day operations" of the business must submit an affidavit and personal questionnaire. Such persons must provide an employment history, and principal parties have to submit fingerprints. *See* 7 Tex. Admin. Code §§ 83.3002(C); 83.3002(E)(2)(A). Those fingerprints are to be forwarded to the Texas Department of Public Safety and to the FBI in order to obtain criminal history record information. *See* 7 Tex. Admin. Code § 83.4003(a).

[18] In the application, with regard to location of CAB, "a physical street address must be listed for the applicant's proposed address, or if the applicant will have no such location, a statement to that effect must be provided." 7 Tex. Admin. Code § 83.3002(1)(A)(i).

(1) the license holder failed to pay the annual license fee, an examination fee, an investigation fee, or another charge imposed by the commissioner under this subchapter;
(2) the license holder knowingly or without the exercise of due care, violated this chapter or a rule adopted or order issued under this chapter; or
(3) a fact or condition exists that, if it had existed or had been known to exist at the time of the original application for the license, clearly would have justified the commissioner's denial of the application.

(b) If in a three-year period the commissioner suspends or revokes under this section the licenses of five or more credit access businesses owned or controlled by the same person, including a corporation that owns multiple businesses, the commissioner may suspend or revoke the licenses of all credit access businesses owned or controlled by that person.

Texas constitutional law/case law regarding home rule cities.

In 1912, Texas adopted a constitutional amendment providing for home rule in cities with population over 5,000.[19] "This amendment, known as the 'Home Rule Amendment,' essentially fashioned such cities into mini-legislatures, giving them full authority to do anything the legislature could theretofore have authorized them to do."[20] "Home rule cities therefore derive their powers not from the Legislature, but from the Texas Constitution. TEX. CONST., art. XI, § 5."[21] The City of Dallas is such a home-rule city,[22] deriving it power from article XI, section 5 of the Texas Constitution.[23] TEX. CONST., art. XI, § 5 provides:

> "Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters…. The adoption or amendment of charters is subject to such *limitations* as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision *inconsistent* with the Constitution of the State, or of the general laws enacted by the Legislature of this State (emphasis added)."

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[19] *State v. Chacon*, 273 S.W.3d 375, 378 (Tex.App.—San Antonio 2008, no pet.).

[20] *Id*. at 378 (citing *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948).)

[21] *Chacon*, 273 S.W.3d at 378.

[22] *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex.App.—Dallas 1990, writ denied).

[23] *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

This constitutional provision provides two important concepts for purposes of preemption analysis – (1) that home-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for *limitations* on their powers;[24] and (2) that "home rule cities have all the powers of the State *not inconsistent* with the Constitution, the general laws, or the city's charter (emphasis added)."[25] With respect to the first concept of "*limitations*," "these 'broad powers' of municipalities may be limited by the Legislature only when the Legislature's intent to do so 'appears with unmistakable clarity."[26] With regard to the second concept of "*inconsistency*," "the fact that there is state legislation on a particular subject does not automatically preempt that subject from city regulation."[27] An ordinance that is in fact irreconcilably inconsistent with state legislation is impermissible;[28] however, "the state law and city ordinance will not be held 'repugnant to each other' if the court can reach a reasonable construction that leaves both in effect."[29] "Local regulation, ancillary to and in harmony with the state legislation, is acceptable."[30] "And, if there is no conflict, the ordinance is not void."[31] "Home rule city ordinances are presumed valid."[32] In fact, there is a presumption that all city

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[24] *Id*. at 678.

[25] *Chacon*, 273 S.W.3d at 378 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).)

[26] *Id*., (citing *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998).)

[27] *Gordon v. State*, 757 S.W.2d 496, 502 (Tex.App.—Houston [1st Dist.] 1988, writ ref'd).

[28] *See Chacon*, 273 S.W.3d at 378 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).)

[29] *Id*. *See also City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17, 19 (Tex. 1990) (holding that in attempting to determine whether a local ordinance is preempted by a state law, a court must make an effort to construe the two in such a way that both the statute and the ordinance will remain in effect.)

[30] *Gordon*, 757 S.W.2d at 502 (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570 (1982).)

[31] *Chacon*, 273 S.W.3d at 378 (citing *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17, 19 (Tex. 1990).)

[32] *Chacon*, 273 S.W.3d at 378 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).)

ordinances are valid, and the party attacking the ordinance has the burden of showing invalidity.[33]

Analyzing legislative intent regarding contended preemption of Ordinance No. 28287.

Did our Legislature intend to limit the power of the City of Dallas from enacting the pertinent sections of Ordinance No. 28287? If so, that intent, according to the State's contention, should be provided by the Legislature "with unmistakable clarity." The State bases its contention on *Dallas Merchants and Concessionaire's Association v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993), which holds "if the legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity." The Defendant argues the "unmistakable clarity" rule is not the proper standard of review in the case before this Court for the reason that historically, regulation of the financial/lending industry has not been within a city's typical police power. In fact, Defendant argues, "the Legislature has the exclusive authority to regulate corporations engaging in the business of lending money."[34] In support thereof, Defendant respectfully points this Court to *Berry v. City of Fort Worth*, 124 S.W.2d 842 (Tex. 1939). This Court does not read *Berry* so broadly. *Berry* stands for the premise that an ordinance will not pass constitutional scrutiny if it is wholly inconsistent with State law.[35] Berry deals with an ordinance governing the lending of money without security. The Court found fatal inconsistencies between the ordinance and State law with regard to issues

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[33] *Utter v. State*, 571 S.W.2d 934, 937 (Tex.Crim.App. 1978).

[34] Defendant's Reply to State's Response to Defendant's Motion to Quash, Page 2.

[35] "By express provisions of our constitutional and statutory laws, no ordinance of a city operating under a home rule charter can contain any provision *inconsistent* with our Constitution, or the general laws of this State. Berry et al, contend that this ordinance violates the above constitutional and statutory provisions in many particulars. We think there is no escape from the conclusion that such is the case. (emphasis added)" *Berry v. City of Fort Worth*, 124 S.W.2d 842, 845-46 (Tex. 1939).

of service of process and penalties/remedies for usurious contracts. Even if the Court accepts Defendant's contention that historically, regulation of the financial/lending industry has not been within a city's typical police power, it is the Defendant's burden to point to legislative intent for *limitations* on the home rule powers of the City of Dallas to enact Ordinance 28287 and in particular, Dallas City Code §§ 50-148 and 50-149.[36]

At least one other Texas Court has interpreted the "unmistakable clarity" rule of *Dallas Merchants* more broadly than does Defendant. In *State v. Chacon*, 273 S.W.3d 375, 379 (Tex.App.—San Antonio 2008, no pet.), the Court held: "The courts should restrict San Antonio's autonomy only if the Legislature *clearly and unmistakably intended to withdraw a particular subject* from the City's domain (emphasis added)." Some nine years before *Dallas Merchants*, the Texas Supreme Court rendered a decision in *City of College Station v. Turtle Rock Corporation*, 680 S.W.2d 802, 807 (Tex. 1984), in which it held with regard to the relevant judicial standard of review: "Home rule cities have full power of self-government and look to the acts of the legislature not for grants of power . . . but only for limitations on their powers. The intention of the legislature to impose such limitations must appear with unmistakable clarity, and *if the limitations arise by implication, the provisions of the law must be 'clear and compelling' to that end* (emphasis added)." Thus, "a limitation on the powers of home rule cities by general law or by charter may be either an express limitation or one arising by implication. Such a limitation will not be implied, however, unless the provisions of the general law or of the charter are clear and compelling to that end."[37]

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[36] *See Southern Crushed Concrete, LLC*, 398 S.W.3d at 678. *See Chacon*, 273 S.W.3d at 378 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).) *See also Utter v. State*, 571 S.W.2d at 934, 937.

[37] *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975).

The Court has conducted a highly thorough review of the relevant law herein and can fairly and impartially state that neither state law nor the Texas Constitution contain language *expressly* limiting the City of Dallas, or granting the Texas Finance Commission or the Office of Consumer Credit Commissioner exclusive authority, to enact the type of regulation at issue.[38] The Defendant points to a Resolution of the Texas Finance Commission regarding CABs to evidence legislative intent for exclusive authority of the state to regulate CABs.[39] That Resolution, entitled "Resolution Supporting Uniformity of Laws Governing Credit Access Businesses" (dated April 20, 2012), concludes as follows: "Now, therefore, be it resolved, that the Texas Finance Commission does hereby request that the Texas Legislature consider amending the Texas Finance Code *to more clearly articulate its intent* for uniform laws and rules to govern credit access businesses in Texas (emphasis added)." If state law does in fact *clearly* and *expressly* limit the City of Dallas from legislating in the subject area of CABs, then the Court questions why the Texas Finance Commission chose to use the words "to more clearly articulate its intent." The intent is either clear and express, or it's not, and this Court believes it is not.[40]

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[38] Had the Legislature intended to be the exclusive regulator of CABs within the State of Texas, it certainly could have done so, and indeed, has done so with respect to other areas of regulation. See, e.g., TEX. ALCO. BEV. CODE ANN. § 1.06 ("Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by this code"); TEX. NAT. RES. CODE ANN. § 133.085(c) ("The provisions [of the Quarry Safety Act] supercede any other municipal ordinance or county regulation that seeks to accomplish the same ends as set out herein.")

[39] "Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute." *Tarrant Appraisal District v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993).

[40] The Court also gives due weight to a Memorandum (dated December 11, 2012) issued by the Office of Consumer Credit Commissioner ("OCCC") in which the OCCC relates to CABs the following: "The Office of Consumer Credit Commissioner (OCCC) is concerned about a business model used by some credit access businesses (CABs) in the cities of Dallas, Austin and San Antonio. These three cities have enacted ordinances restricting certain renewal activities by CABs and limiting the number of installments a transaction may have. *The practice discussed in this bulletin appears to be intended to avoid compliance with the city ordinances* (emphasis added)." Pursuant to the *Tarrant Appraisal District* holding *supra,* this Court believes the OCCC, at a minimum, gives some degree of respect to the ordinances of the named cities.

The lack of an express preemption, however, does not end the Court's analysis. The Court must determine whether the subject ordinance is preempted by implication. As stated above, limits on the authority of a home-rule city may arise by implication, but only if the provisions of State law are "clear and compelling" in implying limits.[41] Defendant argues that the Legislature in Chapter 393 of the Texas Finance Code has expressed its intention to preempt local regulation of CABs by implementing a highly comprehensive[42] regulatory regime governing CABs to a minute detail.[43] There is no doubt in this Court's mind the Legislature intended to provide a rather broad framework for regulation of CABs. However, "even when the Legislature gives an administrative agency *extensive authority* to regulate a given subject-matter, a municipal ordinance that establishes a parallel registration, licensing, and/or permitting program is not necessarily preempted (emphasis added)."[44] Once again, after thoroughly considering state law, I cannot say that there is there is "clear and convincing" indication that the Legislature intended to preempt the field of CAB regulation. Neither State law nor the Texas Constitution contain language *implicitly* limiting the City of Dallas, or granting the Texas Finance Commission or the Office of Consumer Credit Commissioner exclusive authority, to

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[41] *City of College Station*, 680 S.W.2d at 807 (citing *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975).)

[42] The Court takes note of H.B. 452, 60th Legislature, creating the Office of Consumer Credit Commissioner. With regard to legislative intent, the Legislature found "many citizens of our State are being victimized and abused in various types of credit and cash transactions. These practices impose a great hardship upon the people of our State." The Legislature also found "These facts conclusively indicate a need for a *comprehensive* code of legislation to clearly define usury and interest, to classify and regulate loans and lenders . . . (emphasis added)." Acts 1967, 60th Leg., p. 608, ch. 274, § 1, eff. Oct. 1, 1967. However, "while a statement by the Legislature of the purpose of an act is helpful in construing it, nevertheless the provisions designed to accomplish that purpose must fairly and reasonably do so." *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964).

[43] The courts have referred to such as "field preemption." *See City of Houston v. BCCA Appeal Group, Inc.*, No. 01-11-00332-CV, 21 (Tex.App.—Houston [1st Dist.] 2013, pet. filed).

[44] *City of Houston v. BCCA Appeal Group, Inc.*, No. 01-11-00332-CV, 18 (Tex.App.—Houston [1st Dist.] 2013, pet. filed) (citing *Unger v. State*, 629 S.W. 2d 811, 812-13 (Tex.App.—Fort Worth 1982, writ ref'd).)

enact the type of regulation at issue. The case at hand is very close to the scenario in *Unger v. State*, 629 S.W.2d 811 (Tex.App.—Fort Worth 1982, writ ref'd). In *Unger*, the Fort Worth Court of Appeals upheld the authority of Burkburnett, Texas, a home-rule city, to both regulate and prohibit the drilling of oil wells within the city limits, despite the fact that the Legislature had given the Texas Railroad Commission ("RRC") highly extensive jurisdiction over all oil and gas wells in Texas and authorized the RRC to issue drilling permits for such wells.[45] The subject ordinance in *Unger* made it unlawful to drill an oil or gas well within the city limits without a city-issued drilling permit.[46] The Court held that the Legislature's delegation of authority to the RRC to regulate the oil and gas business in Texas – which includes the issuance of drilling permits – was not inconsistent with a city's authority to also regulate in that area for its own legitimate purpose.[47] The oil and gas industry in Texas is heavily regulated, and if the Legislature did not preempt the field with respect to the location of oil and gas wells within the state's borders, as it did not based upon *Unger*, then it certainly did not do so here by "clear and convincing" demonstration.

Analyzing contention of inconsistency between Ordinance No. 28287 and Texas Finance Code.

The Court next turns its attention to analyzing the subject ordinance and relevant statutory law to determine if there is fatal inconsistency.[48] As set out above, Tex. Const. art. 11, sec. 5 provides that municipal ordinances may not contain provisions *inconsistent* with the Texas

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[45] *See BCCA Appeal Group, Inc.*, No. 01-11-00332-CV at 20. (citing TEX. NAT. RES.CODE ANN. § 81.051(a)(2) (granting RRC jurisdiction over all oil and gas wells in Texas); 16 TEX. ADMIN.CODE § 3.5 (requiring RRC-issued drilling permits).)

[46] *Unger*, 629 S.W.2d at 812.

[47] *See id*. at 812-13.

[48] Determining whether a municipal ordinance conflicts with a state statute is solely a question of law. *Austin Police Association v. City of Austin*, 71 S.W.3d 885, 888 (Tex.App.—Austin 2002, no pet.).

constitution or with the general laws enacted by the Legislature. The fact that there is state law on a particular subject, though, does not automatically preempt that subject from city regulation.[49] "Local regulation, ancillary to and in harmony with the state legislation, is acceptable."[50] "A statute and an ordinance will not be held repugnant to each other if any reasonable construction upholding both can be reached."[51]

Let us compare the relevant sections of Ordinance No. 28287 to the pertinent sections of the Texas Finance Code to see if fatal inconsistency exists. First, the term "Credit Access Business" is defined in Dallas City Code § 50-145 identically to that contained in Tex. Fin. Code § 393.601. In order to operate as a CAB in the City of Dallas, the CAB must obtain a certificate of registration, pursuant to Dallas City Code § 50-149.[52] In order to operate as a CAB anywhere in the State of Texas, the CAB must obtain a license, pursuant to Tex. Fin. Code § 393.604. The Court has compared what specifically a CAB applicant is mandated to submit in order to obtain both a certificate of registration from the City of Dallas and a license from the State of Texas. The Court finds the sole significant difference rests in the Ordinance's mandate that the applicant provide the City of Dallas with "a copy of a current, valid certificate of occupancy[53] showing the credit access business is in compliance with the Dallas Development Code."[54]

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[49] *Gordon*, 757 S.W.2d at 502 (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570 (1982).)

[50] *Id.*

[51] *Id.* (citing *City of Beaumont v. Jones*, 560 S.W.2d 710, 711 (Tex.Civ.App.—Beaumont 1977, writ ref'd n.r.e.).)

[52] It should be noted that an applicant in order to obtain a certificate of registration from the City of Dallas for a CAB must among other things submit a copy of a current, valid state license held by the CAB. Dallas City Code § 50-149(a)(4).

[53] Dallas City Code § 51A-1.104 provides: "Except as provided in Section 306.1 . . . of Chapter 52, 'Administrative Procedures for the Construction Codes,' a person shall not use or occupy or change the use or occupancy of a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official in compliance with Section 306, 'Certificate of Occupancy,' of Chapter 52, 'Administrative Procedures for the Construction of Codes,' of the Dallas City Code." Dallas City Code § 52.306(1) provides "no

The Court understands Defendant to assert that it was duly licensed, including being licensed at the specific location in question, as a CAB under Tex. Fin. Code § 393.604, and once so licensed by the State of Texas, a municipality cannot then constitutionally enact an ordinance essentially establishing a *dual* CAB licensing program containing additional requirements in order to secure a certificate of registration.[55] In *Gordon v. State*, 757 S.W.2d, 496 (Tex.App.—Houston [1st Dist.] 1988, writ ref'd), a similar argument was made.[56] Gordon was licensed under a state law to operate pleasure coin-operated machines in his business.[57] The Houston ordinance made it unlawful for a person to operate, without a city issued license, a business permitting customers to use an "arcade device," which was defined as "any coin-or slug-operated . . . device that dispenses or effectuates the dispensing of entertainment . . . ."[58] The Houston

certificate of occupancy is required for single family uses, handicapped group dwelling unit uses, duplex uses, U occupancies accessory to single-family or duplex uses, and tenant changes to individual dwelling units in Group R, Division 2 apartment houses." Generally speaking, "a certificate of occupancy is necessary for a business to operate." *Azad v. Aaron Rents*, No. 14-07-01087-CV (Tex.App.—Beaumont 2009, no pet.). And a business' right of occupancy of a building is subject to regulation by a municipality. *See Simms v. Sherman*, 181 S.W.2d 100, 103 (Tex.Civ.App.—Dallas 1944, aff'd. 183 S.W.2d 415 (Tex. 1944) (holding "This is not to say, however, that appellant's occupancy may be without regulation. In Sec. 13 of the ordinance in question are valid municipal requirements, irrespective of zoning: no premises shall be used or occupied nor changed in use or occupancy until a certificate of occupancy and compliance shall have been issued by the building inspector, stating that such use or change in use complies with all the building, fire, sanitary and health laws. In above application for permit . . ., defendants are committed to an observance of all regulatory measures of the city . . . . Such regulations, so far as reasonable and applicable to the structure and use involved, may be enforced; and to that extent, appellants' rights are subject to issuance of the named certificate of occupancy.")

[54] Dallas City Code § 50-149(a)(5).

[55] Defendant submits on Page 2 of Defendant's Brief in Support of Motion to Quash that "after Defendant was properly licensed and was operated as a CAB at the location of the alleged 'criminal' conduct for many years and against the background of the state license and evaluation procedures, the City now attempts to tell the State of Texas that it is wrong and to 'go after' legitimate lawful businesses who have a license and are highly regulated and scrutinized by the State. To do that the City has enacted an Ordinance that purports to criminalize conduct that has been declared perfectly lawful by the Texas Legislature."

[56] "Appellant argues that once the State has granted a permit under article 8814 to engage in the coin-operated machine business, the city is without power to enforce an ordinance requiring compliance with conditions not found in the state statute." *Gordon*, 757 S.W. 2d at 502.

[57] *Id*. at 501.

[58] *Id*. at 498.

ordinance also mandated "each adult arcade shall be equipped with overhead lighting fixture of sufficient intensity to illuminate every place to which patrons are permitted . . . ."[59] The Court analyzed three cases in which ordinances were in fact declared void due to conflicts with state law: "*Royer v. Ritter*, 531 S.W.2d 448 (Tex.Civ.App.—Beaumont 1975, writ ref'd n.r.e.) (ordinance required liquor stores to close at 8:00 o'clock p.m., and on certain holidays, whereas State law required stores to close at 9:00 p.m. and did not require closing for the same holidays); *Jere Dairy, Inc. v. City of Mount Pleasant*, 417 S.W.2d 872 (Tex.Civ.App.—Texarkana 1967, writ ref'd n.r.e.) (ordinance required delivery of fresher milk than that allowed by state law to be sold in city); *City of Fort Worth v. McDonald*, 293 S.W.2d 256 (Tex.Civ.App.—Fort Worth 1956, writ ref'd n.r.e.) (complete prohibition on coin operated machines void where same machines were allowed by state license)."[60] The Court held "We find no *direct* conflict between the ordinance and article 8817 that is of the magnitude that caused ordinances to be struck down in *Royer*, *McDonald* and *Jere Dairy*. We therefore conclude that the ordinance is not preempted by article 8817 (emphasis added)."[61] *Gordon* stands for the proposition that if a reviewing court finds no direct conflict exists between state law and a challenged municipal ordinance and further finds that the ordinance is "ancillary to and in harmony" with the State law, the local regulation is lawful and not preempted. In *Gordon*, state law mandated a license be issued in order to run a coin-operated machine business, and municipal law added a condition as to *how* such a business can be *safely* operated. And with regard to the case before this court, is that not

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[59] *Id*. at 500.

[60] *Id*. at 502.

[61] *Id*. at 503.

the purpose of a certificate of occupancy and compliance with development code regulations?[62] Is it not for a legitimate interest in the safety of its citizens when a city considers such matters as the number of fire exits in a structure; the safety of electrical wiring; and evidence that a building complies substantially with the plans and specifications that were submitted to and approved by the City – matters typically addressed in the issuance of a certificate of occupancy? I believe it is, and I further believe that Dallas City Code §§ 50-148 and 50-149 are so closely analogous to the ordinance in *Gordon* that the Court's holding there is applicable here also.

While it is correct that a State CAB license is given for a particular location, pursuant to Tex. Fin. Code § 393.609(a)(2), the Court is unwilling to accept argument that such specificity somehow creates preemptive sacrosanctity. In fact, pursuant to Tex Fin. Code §393.609(c), a license holder is not even required to maintain an office in Texas and is allowed to conduct business by e-commerce. The case at hand needs to be distinguished from the facts in *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013). The Texas Commission on Environmental Quality ("TCEC") in 2008 issued Southern Crushed Concrete ("SCC") a permit, pursuant to the Texas Clean Air Act ("TCAA"), to build a concrete-crushing facility at location in Houston authorized by the TCEC. The permit was issued for a *specific* location on State Highway 288. The state law, as of 2003, prohibited the operation of a concrete-crushing facility within 1320 feet of a school and other specified land uses, as measured from the nearest point of the buildings in question. In 2007, the City of Houston enacted an ordinance prohibiting concrete-crushing operations at a location on which the property line is within 1500

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[62] Dallas City Code § 51A-1.102(b) provides the "purpose" of Chapter 51A, Part II, Dallas Development Code. As stated above, Dallas City Code § 51A-1.104 provides the requirement for a certificate of occupancy. The purpose of the Chapter is set out, in relevant part, as follows: "The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city in order to (B) secure safety from fire, flooding, and other dangers; (C) provide adequate light and air; (F) facilitate the adequate provision of . . . public requirements; (G) promote the character of areas of the city; (I) conserve the value of buildings."

feet of a school and other specified land uses, as measured from property line to property line. SCC applied to the City of Houston for a permit, but was denied, since its concrete-crushing business was located within 1500 feet of a school. SCC's facility was more than 1320 feet from a school, which satisfied State law. SCC sued the City of Houston, arguing the Houston ordinance was "preempted under the Texas Constitution" because it was "impermissibly inconsistent with the TCAA."[63] The Texas Supreme Court agreed with SCC. There are two major differences though between *Southern Crushed Concrete* and the case at hand. First, in *Southern Crushed Concrete*, the Legislature's designation of the 1320 feet separation requirement emanated from due regard to environmental effects on schools and other land uses in the neighborhood.[64] Secondly, the subject statute in *Southern Crushed Concrete* specifically provided "that a city ordinance may not make unlawful a condition or act approved or authorized under the TCAA or the Commissioner's rules or orders."[65] I find nowhere in the Texas Finance Code or in the Rules for CABs in the Texas Administrative Code, with regard to issuance of a CAB license, where it is taken into consideration the neighborhood land use effects that a CAB might have. And as set out above, I find no express preemption in the case at hand, as did exist in *Southern Crushed Concrete*.[66]

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[63] *Southern Crushed Concrete*, 398 S.W.3d at 677.

[64] *Id* at 678. ("The TCAA's policy and purpose is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. Accordingly, any person who plans to construct a facility that may emit air contaminants, such as a concrete-crushing facility, must obtain a permit from the Commission. The TCAA lists general considerations the Commission may take into account in determining whether to grant a permit. In issuing the permit, the Commission determines that the permit application satisfies the TCAA and applicable rules.")

[65] *Id*. at 677.

[66] "The plain language of section 382.113(b) unmistakably forbids a city from nullifying an act that is authorized by either the TCAA or, as in this case, the Commission's rules or orders." *Id* at 679.

And finally with regard to determining if fatal inconsistency exists in the case at hand, this Court considers *Temple Independent School District v. Proctor,* 97 S.W.2d 1047 (Tex.Civ.App.—Austin, 1936, error ref'd), a case involving a scenario where dual regulatory control over an entity existed by virtue of a state law and a city charter. In *Proctor*, the City of Temple's Charter provided that the governing body of the City had a right to appoint the school board and also the right to rescind any vote of the school board regarding any monetary obligation the school board might contractually incur. State law allowed for a city's governing body to appoint the school board, but once appointed, the board of trustees "had exclusive power to manage and govern said schools."[67] Mr. Proctor was hired as superintendent by the school board, but the City's governing body voted to have his contract rescinded. With regard to the statutory language that "Schools thus organized [Independent School Districts] and provided for by incorporated cities and towns shall be subject to the general laws," the Court held that such language "manifests a clear legislative intent that, where a board of trustees has control of such schools, their control is to be exclusive."[68] The Court concluded its opinion by stating in regard to the subject city charter provision, as it "undertook to give the city commissioners veto power of the acts of the board of trustees in their government and exclusive control of the public schools of the district, it contravenes the provisions of the Constitution, because it is contrary to the general law of the state in force at the time, and is therefore void."[69] The statutory language in *Proctor clearly* indicated to the Court[70] that state law preempted the municipal ordinance

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[67] *Proctor,* 97 S.W.2d 1047 at 1054-55.

[68] *Id*. at 1054.

[69] Id. *a*t 1055.

[70] It is interesting to note that with regard to the relevant municipal charter provision, the Court opined in language quite similar to that found in Defendant's argument herein: "It is manifest we think that if this provision is valid it results in a dual control of the school system of Temple. Anything from the hiring of a janitor to the erection of a

governing the same subject matter, and thus a fatal inconsistency emerged – one that could not be harmoniously resolved.

Based upon the foregoing line of cases, there is no fatal constitutional inconsistency between the pertinent sections of Ordinance No. 28287 under which Defendant has been charged and the relevant sections of the Texas Finance Code. As shown above, the relevant sections of each are not repugnant to one another and can be reasonably harmonized.

Preemption analysis regarding Ordinance No. 28214.

The Court continues its analysis by comparing the Act to the pertinent sections of Ordinance No. 28214[71] to determine Defendant's preemption contentions regarding the issue of zoning regulation affecting an alternative financial establishment.

Dallas City Code Sec.51A-4.207(1)(B), provides, with regard to an alternative financial establishment: "Districts permitted: By SUP[72] only in all nonresidential districts except the NO(A), NS(A), MU-1, MU-1(SAH), UC-1, and P(A) districts."

Dallas City Code Sec. 51A-4.207(1)(E)(iv) provides that "An alternative financial establishment may only operate within a freestanding building and may not operate in the same structure as any other use."

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school building would, to that extent, incur a pecuniary liability, which under such charter provision would be subject to veto by the governing board of the city, and, as this case demonstrates, might readily lead to *confusion* inimical to a proper management and operation of the public schools . . . . (emphasis added)." *Proctor,* 97 S.W.2d 1047 at 1053. The avoidance of such "confusion" though, in my mind, was intended from the "clear" statutory language found to have existed in *Proctor*.

[71] It should be noted that the Preamble to Ordinance 28214 provides: "WHEREAS, a clustering of alternative financial establishments can have a detrimental effect on neighborhoods and create the appearance of decline; and WHEREAS, a proliferation of alternative financial establishments at particular locations can overwhelm a neighborhood and can be a disincentive for other business to locate in these neighborhoods; and WHEREAS, the city plan commission and the city council . . . have given the required notices and have held the required public hearings regarding this amendment to the Dallas City Code . . . ."

[72] "SUP" means a "specific use permit." Dallas City Code § 51A-2.102(136). "The SUP provides a means for developing certain uses in a manner in which the specific use will be compatible with adjacent property and consistent with the character of the neighborhood." Dallas City Code § 51A-4.219(a)(1).

Dallas City Code Sec. 51A-4.207(1)(E)(iii) provides that "No alternative financial establishment may be located within 500 feet of an expressway or new expressway as defined in Section 51A-7-102, measured from the property line of the alternative financial establishment to the nearest expressway or new expressway travel lane."

"A city ordinance is presumed to be valid, and this presumption applies to amendatory zoning ordinances as well as original comprehensive zoning ordinances.[73] In either case the courts have no authority to interfere unless the ordinance is unreasonable and arbitrary – a clear abuse of municipal discretion.[74] If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare,[75] no clear abuse of discretion is shown and the ordinance must stand as a valid exercise

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[73] The U.S. Supreme Court first sanctioned the use of a comprehensive zoning ordinance in 1926 when it endorsed a city's right to zone in *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926). The Court upheld the constitutionality of zoning as a valid exercise of the police power to the extent that the restriction on land use is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id*. at 395. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id*. at 388.

[74] "When the constitution addresses questions that deal with public safety, health, morals, general welfare, and questions properly within the scope of the city's police power, it vests home-rule cities with broad discretion. *MJR's Fare of Dallas, Inc. v. The City of Dallas*, 792 S.W.2d 569 (Tex.App.—Dallas 1990, writ denied) (citing *John v. State*, 577 S.W.2d 483, 484-85, Tex.Crim.App.1979).

[75] The purpose of the Dallas Development Code, Dallas City Code § 51A-1.101 et. seq., is as follows: "The regulations in this chapter have been established in accordance with a comprehensive plan for the purpose of promoting the health, safety, morals, and general welfare of the city in order to (A) lessen the congestion in the streets; (B) secure safety from fire, flooding, and other dangers; (C) provide adequate light and air; (D) prevent the overcrowding of land; (E) avoid undue concentration of population; (F) facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements; (G) promote the character of areas of the city; (H) limit the uses in areas of the city that are peculiarly suitable for particular uses; (I) conserve the value of buildings; and (J) encourage the most appropriate use of land throughout the city." Dallas City Code § 51A-1.102(b)(1). "A home-rule municipality may enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants." Local Govt. Code § 54.004.

of the city's police power."[76] And Texas law presumes that zoning ordinances are valid exercises of a city's police power.[77]

In *MJR's Fare of Dallas, Inc. v. The City of Dallas*, 792 S.W.2d 569 (Tex.App.—Dallas 1990, writ denied), MJR operated a topless dancers gentleman's club and was licensed by the Texas Alcoholic Beverage Commission. The City of Dallas added an ordinance to its comprehensive zoning ordinance creating a new classification of "Sexually Oriented Businesses." The ordinance provided for the licensing and distance restrictions applicable to existing businesses like MJR. MJR argued the Texas Alcohol Beverage Code ("TABC") preempted the City of Dallas from regulating topless bars serving alcohol. MJR contended the *breadth* of the TABC "includes control over the conduct of the permittee in the entertainment it provides; therefore the Texas Constitution precludes additional regulation by Dallas of the same area."[78] The Court denied MJR's constitutional preemption challenge, holding "MJR misinterprets the Code's preemption provision, which speaks only to the governance of the manufacture, sale, distribution, transportation, and possession of alcoholic beverages. By enactment of the Ordinance, Dallas added the classification, 'Sexually Oriented Businesses,' to its comprehensive zoning ordinance which provides for licensing and distance restrictions. While the Alcoholic Beverage Code *precludes some types of local regulation*, it places no limitation on Dallas' zoning powers . . . (emphasis added)."[79] Given the Texas Finance Code contains no such express language as that found in the TABC which "precludes some types of local regulation" over an alternative financial establishment such as Defendant, *a fortiori*, the

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[76] *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971).

[77] *City of Pharr v. Tippitt*, 618 S.W.2d 173, 175-76 (Tex. 1981).

[78] *MJR's Fare of Dallas, Inc.,* 792 S.W.2d at 576.

[79] *Id*.

Texas Finance Code does not preempt the City of Dallas' zoning power to regulate an alternative financial establishment such as Defendant.

As to a constitutional challenge to the above three zoning ordinances as a result of the ordinances being "inconsistent" with the relevant sections of the Texas Finance Code, the proponent of such challenge may satisfy its burden by showing a given zoning ordinance is inconsistent with the statute's imposition of powers, duties and responsibilities. This was shown in *Gulf v. White*, 281 S.W.2d 441 (Tex.Civ.App.—Dallas 1955, error ref'd n.r.e.). There, a Dallas ordinance restricted the use of a right of way that a railroad company had sought. The right of way was zoned for single family use. The railroad had applied for a permit to use the right of way, even though the railroad already had authority granted by the Texas Constitution of eminent domain to condemn the property for railroad use. The Court did find constitutional inconsistency, due to the fact that the zoning ordinance was trumped by way of a power *specifically* granted by state law to the railroad. I see no such *specifically* granted power in the Texas Finance Code which would trump any of the three zoning regulations in question.

And with regard to Defendant's contention that the CAB license is issued for a specific location, I also see no provision in the Texas Finance Code to the effect that the Office of Consumer Credit Commissioner takes into consideration the land use ramifications of the CAB, e.g., whether "a clustering" of CABs "can have a detrimental effect on neighborhoods and create the appearance of an area in decline;" or whether "a proliferation" of CABs "can overwhelm a neighborhood and can be a disincentive for other business to locate in these neighborhoods," in determining whether to issue a CAB license.[80]

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[80] What if an individual desired to start a bail bond business in Texas? That person, too, would have to secure a license. After investigation, the person finally secures a license. Would the City of Houston then be preempted from zoning out such a business that wanted to operate on a residential street in the middle of the River Oaks neighborhood? *See* Occupations Code, Title 10, Subchapter D.

Thus, as to Dallas City Code § 51A-4.207(1)(B), Dallas City Code § 51A-4.207(1)(E)(iv), and Dallas City Code § 51A-4.207(1)(E)(iii), I find these ordinances are not impermissibly inconsistent with the relevant sections of the Texas Finance Code, and I further find the Legislature has not preempted the City of Dallas from enacting same.

Due process analysis.

Next, the Court addresses the Defendant's substantive due process challenge. Defendant contends that Ordinance No. 28287 and Ordinance No. 28214 "seek to invalidate" Defendant's CAB license; that the ordinances "take away what Defendant has already been licensed by the State to do; that the ordinances serve no legitimate purpose;" and that the ordinances "harass a business model that has been sanctioned by the Legislature."

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law." Article 1, section 19 of the Texas Constitution provides "no citizen of this state shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised, except by due course of the law of the land."[81]

"A person's property interests include actual ownership of real estate, chattels, and money. The term 'property right' refers to any type of right to specific property, including

[81] The Court assumes Defendant's due process challenge is under the Fourteenth Amendment. For purposes of this Court's analysis, it makes no difference though. The Supreme Court of Texas has stated that the language of the United States Constitution's due process clause and the Texas due course clause is "nearly identical" and that there is no meaningful distinction between "due course" and "due process." *See University of Texas Medical School v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). *See also State v. Rudd*, 871 S.W. 2d 530, 533 (Tex.App.—Dallas 1994, no pet.) (holding article 1, section 19 provides the same protection as the Fourteenth Amendment of the United States Constitution on such an important issue as the State's failure to preserve potentially useful evidence.")

tangible, personal property. Property owners do not have a constitutionally protected vested right to *use* property in any certain way (emphasis added)."[82]

In *City of LaMarque v. Braskey*, 216 S.W.3d 861 (Tex.App.—Houston [1st Dist.] 2007, pet. denied), Braskey operated a cat shelter, licensed under state law. A city penal ordinance prohibited such a kennel within 500 feet of a residence, and since Braskey's shelter was within 100 feet of three houses, the City filed a complaint against her in municipal court. Braskey filed suit in district court requesting an injunction against prosecution. In order to secure the injunction, she had to show a vested property right was threatened with irreparable harm. The Court held as follows:

> "Property owners do not have a constitutionally protected vested right to use real property in any certain way, *without restriction*. Braskey's use of her property as a facility for cats is not a constitutionally protected vested right because it concerns only *the way that her property is used*, which not an absolute right. Braskey's asserted harms – the closing of her facility, the death of cats housed at the facility, possible fines levied against her for operating the facility, and her expenditure of attorney's fees to pursue continued operation of the facility – all concern the *use* of her property as a facility for cats, which is not a constitutionally protected vested right (emphasis added)."[83]

In *Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211 (Tex.App.—Tyler 2012, no pet.), Wild Rose, a nonprofit organization in the business of rescuing and adopting out animals, had operated in Whitehouse, Texas since 2004. In 2011, the City passed a penal ordinance to protect the health, safety and welfare if its citizens. The ordinance prohibited one from keeping more than four dogs and other types of animals. Wild Rose filed suit for declaratory and injunctive relief, arguing the ordinance was unconstitutional. Again, the issue

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[82] *Consumer Service Alliance of Texas, Inc. v. City of Dallas*, 433 S.W.3d 796, 805 (Tex.App.—Dallas 2014, no pet.).

[83] *Braskey*, 216 S.W.3d at 863-64.

involved whether or not enforcement of the ordinance would cause irreparable injury to a vested property right. The Court held as follows:

> ”The ordinance in question here is best characterized as a land use regulation. The issue before us is not whether Wild Rose has vested property rights in the animals kept at the animal shelter, but whether Wild Rose is prohibited by the ordinance from continuing to use its property as an animal shelter. Property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Therefore, even though Wild Rose has used the property as an animal rescue shelter since 2004, it does not have a constitutionally protected vested right in its property use. Moreover, a city may lawfully exercise its police power to control an owner’s use of its property to protect the health, safety and welfare of citizens within its jurisdiction.”[84]

In *Helton v. City of Burkburnett*, 619 S.W.2d 23 (Tex.Civ.App.—Fort Worth 1981, writ ref’d n.r.e.), Helton wanted to drill an oil well in the City of Burkburnett, but was faced with a city ordinance prohibiting such drilling within 50 feet of a residence. Helton argued the ordinance violated his Fourteenth Amendment due process rights, contending the ordinance purported to provide the power to totally prohibit drilling and thus exceeded the legitimate use of the city’s police power. The Court held as follows:

> “Comprehensive zoning has long been established as a legitimate exercise of a city’s police power. In determining the constitutionality of an ordinance passed pursuant to the police power of the city it must be borne in mind that the presumptions favor the ordinance. For a challenge to be successful the ordinance must clearly appear to be unreasonable and arbitrary. In making this determination this court is not entitled to substitute its judgment for that of the city and its officers. Nor do we conclude that Ordinance No. 375 works a deprivation of vested property rights. It neither prohibits the drilling of oil and gas wells nor their maintenance and operation. The Ordinance merely provides rules facilitating the orderly and harmonious development of both oil exploration and city growth.”[85]

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[84] *Wild Rose Rescue Ranch*, 373 S.W.3d at 216.

[85] *Helton*, 619 S.W.2d at 24.

Further, Texas law provides that "zoning regulations which restrict the use of property and cause a reduction in value do not constitute a taking under article 1, section 19 of the Texas Constitution."[86]

Based upon the aforementioned line of cases involving the issue of due process, I find (1) that the Defendant possesses no constitutionally protected vested due process right to use its real property located in the City of Dallas in any certain way, without restriction; and (2) the restrictions imposed by the ordinances facially represent a rational attempt by the city to preserve its neighborhoods.

As to Defendant's contention that the ordinances "take away what Defendant has already been licensed by the State to do," Texas law provides that yes, a person or business entity does have a vested property right in making a living, but such right is "subject . . . to valid and subsisting regulatory statutes." *Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958). "Smith stands for the proposition that a statute harms vested property rights if it *completely* shuts down an otherwise lawful business. Post-*Smith* cases . . . demonstrate that a law that does not forbid a lawful business from operating will not be regarded as harming vested property rights (emphasis added)."[87] The Ordinances in question do not *forbid* Defendant from operating – the Ordinances on their face regulate the *use* of the building from which the Defendant operates its business in the City of Dallas.[88] Thus, such contention of Defendant is also overruled.

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[86] *MJR's Fare of Dallas, Inc.,* 792 S.W.2d at 573 (holding "Since Dallas possesses the powers of a home-rule city and the statute provides no prohibition against regulations which address the dispersion of sexually oriented businesses, Dallas may rightfully enact an ordinance which regulates the location and use of buildings and land within a zoning district").

[87] *Consumer Service Alliance of Texas, Inc.,* 433 S.W.3d at 806.

[88] "The Zoning Enabling Acts grant a municipality the power to divide a city into zoning districts and to regulate the use of buildings within those districts. See TEX. LOCAL GOV'T CODE ANN. §§ 211.001-211.013 (Vernon 1988)." *MJR's Fare of Dallas, Inc.,* 792 S.W.2d at 573.

Conclusion

Based upon the above considerations, Defendant's Motion to Quash is respectfully denied.

SIGNED this 20th day of October, 2014.

/s/*Jay Robinson*______
JUDGE PRESIDING