CAUSE NO. C-1-CR-17-100025

THE STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
V.	§	AT LAW NUMBER TWO
	§	
THE MONEY STORE, LP	§	TRAVIS COUNTY, TEXAS

OPINION AND JUDGMENT

The State appeals an Austin Municipal Court order quashing a criminal complaint. At issue is whether state law preempts the ordinance under which Appellee, The Money Store, LP, was charged. As explained below, this Court reverses the Municipal Court order and remands the case for further proceedings.

I. Background

Appellee, The Money Store, LP (hereinafter "The Money Store"), is classified as a Credit Access Business ("CAB") under the Texas Finance Code. *See* Tex. Fin. Code Ann. § 393.001(3), 393.601(2) (West 2016). By ordinance, the City of Austin requires any extension of credit that a CAB obtains or assists a consumer in obtaining to be payable in no more than four installments, with each installment repaying "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 to the CAB. *See* Austin City Code § 4-12-22(D).

In June 2016, a customer reported The Money Store to the Regulatory Monitor of the City of Austin, which reviewed their transaction and found probable cause to believe it violated the City Code. The following month, The Money Store was charged by complaint in the Austin Municipal Court with violating City Code § 4-12-22(D). In January 2017, The Money Store moved to quash the complaint on the grounds that City

Code § 4-12-22(D) was preempted by Chapter 393 of the Texas Finance Code. After a hearing, the municipal judge issued an order quashing the complaint due to preemption.

This appeal followed, and briefs were filed not only by the State and The Money Store but also by various *amici curiae* wishing to endorse the State's position and place Austin's ordinance in the context of payday lending practices and regulations statewide.

II. Standard of Review

When reviewing a trial court order granting a motion to quash that does not concern the credibility or demeanor of a witness, appellate courts apply a *de novo* standard, giving no deference to the ruling below. *State v. Empey*, 502 S.W.3d 186, 189 (Tex. App.—Fort Worth 2016, no pet.). In this case, the parties agree that *de novo* review is appropriate because the motion to quash was decided purely on legal argument.

When the validity of a city ordinance is challenged, reviewing courts presume the ordinance is valid. *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982). Home-rule cities look to the legislature not for grants of power, but for limitations on their power. *City of Carrollton v. Texas Com'n on Envtl. Quality*, 170 S.W.3d 204, 208 (Tex. App.—Austin 2005, no pet.) (citing *Wilson v. Andrews*, 10 S.W.3d 663, 666 (Tex. 1999)). Accordingly, the burden of showing a city ordinance is invalid rests on the party attacking it. *RCI Entm't (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 595 (Tex. App.—San Antonio 2012, no pet.). When the legislature decides to limit municipal power through preemption, it must do so with unmistakable clarity. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002); *Dallas Merch's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

III. Discussion

Home-rule cities have broad discretionary powers, provided that no 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. When municipalities pass ordinances in areas where the State has also legislated, "local regulation, ancillary to and in harmony with the general scope of the purpose of the State enactment, is acceptable." *City of Brookside Vill.*, 633 S.W.2d at 796. Thus, "a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction." *City of Beaumont v. Jones*, 560 S.W.2d 710, 711 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) (quoting *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Comm'n App. 1927)). Ordinances that supplement a state statute are not inconsistent with the statute unless the state has explicitly provided that localities cannot further regulate a given area. *RCI Entm't (San Antonio), Inc.*, 373 S.W.3d at 597.

On appeal to this Court, the State claims that the Austin Municipal Court erred in granting The Money Store's motion to quash because Austin City Code § 4-12-22(D) does not conflict with the Texas Finance Code. The Money Store counters that the ordinance and statute cannot be reconciled and therefore preemption renders the ordinance invalid. The text of City Code § 4-12-22(D) provides:

> 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.

Austin City Code § 4-12-22(D). Meanwhile, the Finance Code provides in relevant part:

> 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 Ann. § 393.602(b) (West 2016). There are also provisions setting various licensing and disclosure requirements for CABs, *see, e.g., id.* §§ 393.222, 393.603, and creating and limiting the rulemaking authority of the finance commission and Office of the Consumer Credit Commissioner under the statute, *see id.* § 393.622.

The State contends that the ordinance and statute can and should be harmonized by recognizing that "assessing" or "calculating" fees is a different activity than "collecting" fees. To comply with both laws, the State suggests, "a CAB could assess a fee of $30.00 per day for the entirety of a two year loan as long as those payments were only *due* once every six months." Noting that a guest paying one bill at the end of a hotel stay does not change the fact that a nightly rate was charged, the State deems it "beyond a reasonable interpretation" that the two laws "address separate ends of a transaction."

The Money Store rejects this reasoning as "hyper-technical" and "nonsensical." First, turning to dictionary definitions for the plain meanings of "assess" and "payable," The Money Store denies that these terms are distinct in the way the State proposes. Second, the Money Store argues that City Code § 4-12-22(D) could affect CABs' process of setting fees to a degree that itself causes preemption. Finally, The Money Store asserts that the ordinance is "not in harmony" with statute because the Legislature intended for CAB fees to be regulated solely through state licensing and disclosure requirements.

a. Plain Meaning of Terms

The Money Store disputes the distinction of "assessing" or "calculating" versus "collecting" or "making payable" used by the State to harmonize the ordinance and statute. According to The Money Store, such a distinction does not comport with the plain meaning of these terms.

For support, The Money Store turns to Black's Law Dictionary, noting that it defines "assess" as:

> To ascertain; fix the value of. To fix the amount of damages or the value of the thing to be ascertained. To impose a pecuniary payment upon persons or property. To ascertain, adjust, and settle the respective shares to be contributed by several persons toward an object beneficial to them all, in proportion to the benefit received. To tax.

BLACK'S LAW DICTIONARY 116 (6th ed. 1990). Meanwhile, The Money Store claims, "'Payable' means 'capable of being paid' or 'suitable to be paid'"—something true of its fees from the moment they are charged to a customer. Because "there is no meaningful difference between 'imposing a pecuniary payment' upon a customer and rendering her payment 'capable of being paid' or 'suitable to be paid,'" The Money Store reasons, the Finance Code and the Austin City Code govern the same activity and therefore conflict.

This reasoning represents a valiant effort by The Money Store to use semantics to its advantage, but is ultimately unpersuasive. For one thing, The Money Store discusses two Black's Law Dictionary definitions inconsistently. It charges the State with "contend[ing] that 'assess' should be interpreted in its very narrowest sense to mean 'fix the value of,' as in 'to assess taxes,'" and portrays the "impose a pecuniary payment" language in the definition as a glaring omission by the State. However, The Money Store tenders only a partial definition of "payable," repeatedly mentioning "capable of being paid" and "suitable to be paid" when the complete definition reads:

> Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once, as opposed to "owing."

Id. at 1128. That "payable may… signify an obligation to pay at a future time" is detrimental to the argument that "assess" and "make payable" are indistinguishable. Also, The Money Store's approach to this definition undermines its criticism of "the State's overly narrow interpretation of 'assess.'" The Money Store seems to suggest that only its opponent is obliged to interpret statutory language in such a way that every part of a dictionary definition pertains to every usage of a word.

Moreover, dictionary definitions are not the last word on the plain meaning of statutory terms. *See, e.g.*, *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 354 (Tex. 2017); *Texas State Bd. of Examiners of Marriage & Family Therapists v. Texas Med. Ass'n*, 511 S.W.3d 28, 34 (Tex. 2017); *Christian Jew Found. v. State*, 653 S.W.2d 607, 615 (Tex. App.—Austin 1983, no writ). Here, the distinction urged by the State is consistent with common sense. The difference, often temporal, between charging a sum of money and collecting it from a customer is a bedrock principle underlying our entire financial system. The time value of money would not exist without it. That this difference would be reflected in the Texas Legislature's choice of words, and subsequently the City of Austin's, is no stretch of the imagination.

Finally, The Money Store is contending with a presumption that an ordinance is valid and a burden of proving otherwise. *See Wilson*, 10 S.W.3d at 666; *City of Brookside Vill.*, 633 S.W.2d at 792. At best, The Money Store has demonstrated that the statute is ambiguous, which necessarily falls short of the unmistakable clarity required to preempt.

See In re Sanchez, 81 S.W.3d at 796. All things considered, this Court simply is not persuaded that the activities discussed in City Code § 4-12-22(D) and Finance Code Chapter 393 are coequal. Thus, The Money Store fails to meet its burden on this point.

b. Effects of Ordinance

Next, The Money Store argues that preemption arises from the effects of City Code § 4-12-22(D) on CABs' process of setting fees. The Money Store notes that a CAB fee "represents a specific calibration of the risk of nonpayment by the customer" and "not only compensates a CAB for its services and its continuing guarantee of the loan," but also "serves as an augur of the customer's continuing good-faith intention to repay the loan." According to The Money Store, limiting the number of installments will cause CABs to receive fees less frequently, prompting adjustments to those fees. The ordinance would therefore have the effect of interfering in the "assessment" activity governed by the Finance Code. And this effect reveals the State's proposed harmonization of ordinance and statute to be unreasonable, The Money Store claims, by running contrary to the consumer-protection aims of both laws.

However well-reasoned, this argument remains essentially speculative. The Money Store does not explain why fewer installments must necessarily be spaced further apart. Presumably, the fee amount is not the only aspect of an extension of consumer credit that can be adjusted; a shorter overall repayment term, for instance, could allow the CAB to collect fees with the same frequency as ever. This alternative might even benefit consumer protection by ensuring that borrowers discharge debt sooner, serving the purposes of both statute and ordinance. By treating less frequent installments as an inevitability, The Money Store generates more questions than answers.

Further, in support of its assertion that the ordinance's effects should be considered at all, The Money Store cites case law that is readily distinguishable. The unreported opinion in *Laredo Merchants Association v. City of Laredo*, No. 04-15-00610-CV, 2016 WL 4376627 (Tex. App.—San Antonio Aug. 17, 2016, pet. granted), compared a statutory ban on ordinances that "prohibit or restrict, for solid waste management purposes, the sale or use of a container or package," with an ordinance pursuing "prevention of litter" by declaring it unlawful to provide checkout bags to consumers.

In evaluating whether litter prevention purposes equate to waste management purposes, the San Antonio Court of Appeals wrote that "Texas courts must consider not only the purpose of an ordinance as defined by that ordinance, but also the actual effect of that ordinance." *Laredo Merchants Ass'n*, 2016 WL 4376627, at *7. The Court cited *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678–79 (Tex. 2013), which involved the Texas Clean Air Act and warned of cities attempting to circumvent preemption by passing ordinances that merely purport to regulate different subject matter than state law.

As discussed above, this Court has not been dissuaded that the difference in activities governed by the Finance Code versus City Code Code § 4-12-22(D) is real. As discussed below, the Texas Clean Air Act forbids ordinances that "make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders." Tex. Health & Safety Code § 382.113(b) (West 2016). Consequently, with the case at hand involving no statutory mention of ordinances whatsoever, it is far from clear that the same reasoning in *Laredo Merchants Association* should apply.

Finally, it seems likely that any ordinance ancillary to a state statute, *see City of Brookside Vill.*, 633 S.W.2d at 796, or permissibly supplementing it, *see RCI Entm't (San*

Antonio), Inc., 373 S.W.3d at 597, could have the kind of effects alleged here by The Money Store. For example, when an ordinance banning the lowest grade of milk established by statute was upheld in *City of Weslaco v. Melton*, 308 S.W.2d 18 (Tex. 1957), dairies surely changed their business models in ways affecting their engagement with other statutory grading and labeling requirements. Likewise, by regulating sand pits in areas outside those covered by statute, the ordinance upheld in *City of Santa Fe v. Young*, 949 S.W.2d 559 (Tex. App.—Houston [14th Dist.] 1997, no writ), must have changed businesses' assessment of where to locate sand pits so that different ones were subjected to statutory safety rules than might otherwise have been.

These effects would give rise to preemption by The Money Store's logic, yet the ordinances in question were deemed valid. For this reason among others, The Money Store falls short of meeting its burden to prove Austin City Code § 4-12-22(D) invalid on the basis of its effects for CABs' fee assessments.

c. Exclusivity of State Control

Lastly, The Money Store alleges that the ordinance is "not in harmony" with statute because the Legislature intended for CAB fees to be regulated exclusively through state licensing and disclosure requirements.

This issue turns on the significance of Finance Code § 393.602(b), which states in part, "A credit access business is permitted to charge amounts allowed by other laws, as applicable," and § 393.622(c), which states, "Nothing in Section 383.201(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 credit access businesses." The State views these provisions as proof that the Legislature contemplated municipal

CAB regulation, or at least knew how to place explicit limits on a government entity's power yet declined to do so with respect to municipalities.

The Money Store counters that preemptive intent is evident from the Texas Legislature having "chosen to regulate CABs through stringent licensing and disclosure requirements" and "pointedly allowed CABs to charge fees agreed to by the customer." The provision forbidding a limit on fees, The Money Store claims, serves only to clarify that the earlier "amounts as allowed by other laws" language did not grant that particular power to the finance commission or Office of Consumer Credit Commissioner. This reading may be a viable alternative to the State's, but The Money Store does not clarify why it should be considered superior. *See generally City of Beaumont*, 291 S.W. at 206.

In fact, the Texas Supreme Court has interpreted similar "other laws" language in a manner more akin to the State. Of the Texas Water Code provision, "This chapter does not exempt a person from complying with or being subject to other law," the Court wrote, "Even conduct complying with the Act may still constitute a nuisance or violate some other law, such as a municipal ordinance, and the violator would not be exempt from a lawsuit based on another cause of action simply because he was complying with the Act." *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 16 (Tex. 2016).

In addition, at least two Texas statutes explicitly forbid municipal ordinances supplementing state regulation of an activity. *See* Tex. Alco. Bev. Code Ann. § 109.57(b) (West 2016) ("It is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state"); Tex. Health & Safety Code § 382.113(b) (West 2016) ("An ordinance enacted by a municipality... may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders."). Both statutes are comprehensive and provide for rulemaking and enforcement

mechanisms by state agencies. If that alone demonstrated legislative intent to exclude municipalities from regulating an activity, as The Money Store contends, then these statutory provisions would be pointless and redundant.

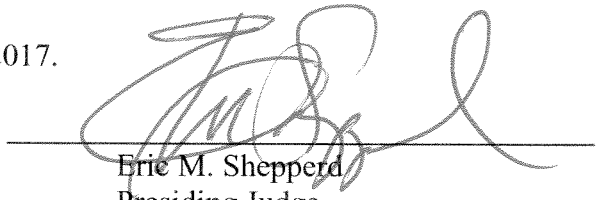
The Money Store advances one plausible construction of the ordinance and statute at issue, but an ordinance must be upheld if *any* reasonable construction leaving both statute and ordinance in effect can be reached. *City of Beaumont*, 291 S.W. at 206. Deficiencies in The Money Store's argument prevent this Court from rejecting the State's interpretation of Finance Code Chapter 393 and Austin City Code § 4-12-22(D) and declaring the ordinance preempted.

IV. Conclusion

In passing this ordinance, the City of Austin has undoubtedly regulated in close proximity to the same territory already occupied by Texas statute. However, "ordinances that supplement… a state statute are not inconsistent with the statute." *RCI Entm't (San Antonio), Inc.*, 373 S.W.3d at 597. The State has offered a reasonable construction by which Austin City Code § 4-12-22(D) is valid, and The Money Store has not met its burden to prove otherwise. *See Wilson*, 10 S.W.3d at 666; *City of Brookside Vill.*, 633 S.W.2d at 792.

It is therefore ORDERED, ADJUDGED, AND DECREED that the judgment of the Austin Municipal Court is REVERSED and this cause is REMANDED for further proceedings consistent with this Opinion.

Signed this 21st day of September, 2017.



Eric M. Shepperd
Presiding Judge