Developing New Regulatory Schemes: What You Need to Know

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Outline

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- Next Steps
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  - Legal Research
  - Consider Alternatives
  - Drafting
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- Final Steps

Initial Steps

- Identify the problem your client wants to solve.
- Identify the city departments/agencies that may be involved.
- Identify the industry or activity that could be regulated.

Next Steps: General Research

- Learn about how the industry/activity functions.
- Existing regulations applicable to the industry/activity.
- Examples of regulations from other jurisdictions/agencies.
- Ask the client department/agency if they have contacts with other jurisdictions/agencies who may be able to share lessons learned.

Next Steps: Legal Research

- Federal and State Preemption issues.
- U.S. and State Constitutional issues.
- Enforcement tools and limitations.

Legal Research: Preemption

- Federal preemption doctrines: Congress' intent is paramount consideration
  - Express preemption
  - Implied preemption: *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).
    - Congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.
    - Federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility
  - *Austin Apartment Ass'n v. City of Austin*, 89 F.Supp.3d 886 (W.D. Tex. 2015).

- State preemption doctrines

Legal Research: U.S. Constitution – Equal Protection

- A direction to the government that all persons similarly situated should be treated alike.
- Classifications are allowed but they must relate to the government's interest in adopting the classification/regulation.
- Economic Regulations:
  - *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).
  - *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).
- Avoid suspect and quasi-suspect classes: *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Legal Research: U.S. Constitution – Due Process

- Procedural
  - *Matthews v. Eldridge*, 424 U.S. 319 (1976).
  - *City of Los Angeles v. David*, 538 U.S. 715 (2003).

- Substantive
  - *Washington v. Glucksberg*, 521 U.S. 702 (1997).
  - *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845 (6th Cir. 2012)
  - *Metropolitan Washington Chapter, Associated Builders and Contractors, Inc. v. District of Columbia*, 578 F.Supp.3d 7 (D.D.C 2021).

Legal Research: U.S. Constitution – 4th Amendment(Inspections)

- Protects individuals from unreasonable searches and seizures.
- A search or seizure without a warrant is presumptively unreasonable.
- Cases
  - *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967): The limitation and warrant requirement apply to code enforcement.
  - *Patel v. City of Los Angeles*, 135 S.Ct. 2443 (2015): The warrantless inspection requirement of a regulatory scheme must provide a constitutionally adequate substitute for a warrant
- Considerations:
  - Is an inspection necessary?
  - How will you satisfy the warrant substitute requirement?

Legal Research: U.S. Constitution – Takings

- Requires the government to compensate persons when it takes private property for public use.

- Cases:
  - *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).
  - *Yee v. City of Escondido*, 503 U.S. 519 (1992).
  - *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).
  - *Ballinger v. City of Oakland*, 24 F.4th 1287 (9th Cir. 2022).

- Considerations:
  - Mere application of the regulation
  - Enforcement of the regulation: Denials, Suspensions, Revocations. *Persaud Properties FL Invs., LLC v. Town of Fort Myers Beach, Fla.*, No. 2:21-CV-384-JLB-NPM, 2022 WL 888919, (M.D. Fla. Mar. 25, 2022).

Legal Research: Contract Clause

- No State shall pass any Law impairing the Obligation of Contracts. Const. Art. I § 10, cl. 1.

- Not an absolute prohibition. *Nekrilov v. City of Jersey City*, 45 F.4th 662 (3d Cir. 2022)
  - To determine whether a regulation has substantially impaired an existing contract, we "consider[ ] the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."
  - If so, the court then "turns to the means and ends of the legislation" and evaluates whether the legislation (1) has "a significant and legitimate public purpose," and (2) "is drawn in an appropriate and reasonable way to advance" that public purpose.
  - A legitimate public purpose is one that is "aimed at remedying a broad and general social or economic problem."
  - Whether the ordinance is "both necessary and reasonable to meet the purpose advanced by the [City] in justification."

Legal Research: Anti-Trust Law

- Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government."

- Protects a city when state law authorizes the city to adopt the regulation and anticompetitive conduct in connection with the regulation.

- Cases (zoning regulations are an example):
  - *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370, 111 S. Ct. 1344, 1349, 113 L. Ed. 2d 382 (1991).
  - *Stone River Lodge, LLC v. Village of North Utica*, 2020 WL 6717729 (N.D. Ill 2020).

Legal Research: Commerce Clause

- "The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.
  - Grant of authority to Congress.
  - **Prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. (Dormant Commerce Clause)**
    - A law can violate this clause on its face, by its purpose, or by its effect.
    - A law that violates this clause must be narrowly tailored to advance a legitimate local purpose.
- Cases
  - *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136 (9th Cir. 2015).
  - *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019).
  - *Hignell v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022).

Legal Research: Commerce Clause

- Interplay with the Privileges and Immunity Clause.
  - P & I Clauses
    - Applies to an interest sufficiently "fundamental" to the promotion of interstate harmony.
    - Does not preclude discrimination against non-residents where there is a "substantial reason" for the difference in treatment. (Does the degree of discrimination bear a close relation to the reasons for the difference in treatment?)
  - When acting as a market participant, the Commerce Clause is not likely to be triggered.
  - P & I can be triggered regardless of whether the city is acting as a market participant or as a regulator.

- Considerations:
  - Client as market participant vs. regulator – *United Bldg. and Const. Trades of Camden County and Vicinty v. City of Camden Mayor and Council members*, 465 U.S. 208 (1984).

Legal Research: Enforcement Tools and Limitations

- Civil or criminal enforcement tools:
  - Financial penalty limitations.
    - State law
    - 8th Amendment: *Timbs v. Indiana*, 139 S.Ct. 682 (2019)
  - Jailable offense.

- Administrative actions: *Dirt, Inc. v. Mobile County Commission*, 739 F.2d 1562 (11th Cir.1984).
  - Notice
  - Bias

Next Steps: Consider Alternatives

- Can your client help another jurisdiction/agency with enforcement of their regulations?
- Is there an incentive program that would accomplish your client's goals?

Next Step: Drafting

- Outline the ordinance.

- Consider the types of legal challenges.
  - Who has standing?
  - When would a claim be ripe?
  - What would their relief look like?
    - 42 U.S.C. §1983: Cause of action for violating a constitutional or statutory right.
    - Federal or state declaratory judgment actions.
    - State law causes of action

Next Step: Drafting

- Draft definitions, requirements, exceptions, and enforcement provisions.

- Review regulations –
  - Ask colleagues who will participate in enforcement to review.
  - Is the ordinance:
    - Vague?
    - Overly broad?
  - Do you use plain language?

Next Step: Stakeholder Feedback

- Confirm client is on the same page and is contemplating how it will enforce.

- Recommend releasing concepts and general aspects of the ordinance.
  - May want to share examples from other jurisdictions/agencies.
  - If/when appropriate, share the rationale behind the proposal.

- Be open to feedback but recognize you may need to provide additional legal advice.
  - Understand how the feedback would change the provisions and, if applicable, your client's approach to enforcement.
  - Provide legal advice if the feedback is inconsistent with the law.

Last Step: Governing Body Consideration

- Finalize your draft.
- Ask for a second or third set of eyes to review.
- Prepare with your client department/agency.
  - Manage expectations.
  - Practical questions about application, implementation, enforcement.
  - Legal issues that will require legal advice.

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