

CREATIVE USE OF OTHER LOCAL AUTHORITY ADVANCE PROGRESSIVE POLICY: CONTRACTING, PROCUREMENT, COMMUNITY BENEFITS AGREEMENTS, AND OTHER STRATEGIES

LOCAL GOVERNMENT CONTRACTING/PROCUREMENT POWER

There is some support in caselaw and statutes for the idea that actions that local governments take pursuant to their contract or spending power (as distinct from their regulatory or “police” power) should be immune from state preemption. Such actions might include, for example, requiring that minimum wages and benefits be provided by companies contracting with the local government or requiring that developers leasing land from the local government include affordable housing units in their projects.

One clear example of this comes from Ohio, where the constitutional home rule regime provides immunity from preemption to exercises of “local self-government.” In a recent decision enjoining enforcement of a state law designed to preempt Cleveland’s local hiring requirements for city-funded projects, an Ohio court found that creating contract requirements for city-funded projects was a protected exercise of local self-government.

In states that give local governments immunity from preemption with respect to “local affairs,” including Arizona, California, Colorado, and Connecticut, among others, local governments generally have the power to negotiate conditions into agreements with contractors. In California, charter cities’ exercise of their contract power has generally been regarded as a protected matter of municipal concern, even with respect to property outside city limits. The California Supreme Court has held that even state-set prevailing wages do not override a charter city’s power to hire contractors who pay lower than the state-mandated prevailing wage. In Arizona, under this “local affairs” immunity doctrine, local governments appear to have immunity with respect to their own “industrial pursuits” and the sale or disposition of their property.

Even state legislatures acting to preempt local laws through statute have in some instances carved out city contracts from the scope of preemption. For example, the wage and benefits preemption laws in Alabama and Florida exempt local requirements placed on the government’s independent contractors. Colorado’s wage preemption law prohibits “jurisdiction-wide laws with respect to minimum wages,” but says nothing about contract terms. However, other states, e.g. Georgia and Arizona, prohibit local labor standards for anyone other than direct government employees. It is worth noting that some of the most recent state preemption legislation in a few states would eliminate or has eliminated such exceptions, so we don’t know how viable this principle will continue to be in the political realm.

FEDERAL LIMITATIONS ON LOCAL STANDARDS AFFECTING FEDERALLY-FUNDED PROCUREMENT

The federal government provides hundreds of billions of dollars in grants and loans supporting the purchase of goods and services, such as roads and bridges or buses and railcars, by local governments. By virtue of this federal involvement, these purchases are subject to a rules applicable across every federal agency that are designed to ensure competitive bidding.

Through a series of interpretations originating with the Reagan administration, these rules have been interpreted to prohibit any standard that diminishes the number of bidders who participate in the process or raises the eventual cost of the winning bid. The rule has been used by federal agencies to bar the use of federal funds for a great number of jurisdictions that have adopted progressive policies governing procurement, including policies limiting the use of bidders with connections to slavery or the apartheid regime in South Africa, requiring local and targeted hiring, requiring provision of equal benefits for domestic partners, and limiting contracts for those who have made political contributions.

Several organizations (most notably Jobs to Move America and the Partnership for Working Families) have in recent years moved the U.S. Department of Transportation to permit, through a pilot program, local hiring and related domestic jobs measures on DOT-funded projects, but it is unclear whether the new administration will sustain this pilot. Jobs to Move America is driving an effort to reform these federal limits on competition in a way that permits progressive local innovation while protecting the integrity of the procurement process.

COMMUNITY BENEFITS AGREEMENTS

Community Benefits Agreements (CBAs) offer another strategy that may be employed to help local advocates avoid preemption. CBAs are legally binding agreements negotiated by community coalitions and addressing community needs related to a development project or set of development projects. Most commonly, these agreements are entered into only by the coalition and the developer and thereby offer an effective vehicle for progressive policy that does not involve local government action and should thus be immune from preemption.

Local officials can support the negotiation of CBAs by (1) providing transparent and inclusive approval processes for development projects and the award of subsidy to such projects and (2) conveying to developers that they will weigh heavily the community's views when evaluating project approvals but not coercing the developer to enter into a Community Benefits Agreement.

AFFIRMATIVE LITIGATION

One more, but certainly not final, example of the creative use of local authority outside of traditional regulatory realms to advance progressive policy can be found in the use of affirmative litigation by cities and other local governments. Some city attorneys, such as San Francisco, have used their litigation authority to pursue claims based on a wide variety of statutory and even common-law bases.¹ Other examples of litigation by cities to advance the welfare of their residents include suits against gun manufacturers,² recent litigation against banks arising from the housing crisis,³ and cases involving climate change,⁴ among others.

¹ See Lee Romney, *Activism Defines S.F. City Attorney's Office: Drive to legalize gay marriage is the latest in a list of causes that includes a \$12-billion victory over tobacco industry*, L.A. Times, Mar. 23, 2004.

² See Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 12-20 (2010)

³ See Adam Liptak, *Can Cities Sue Banks Over Predatory Loans? Supreme Court Will Decide*, N.Y. TIMES, Nov. 8, 2016.

⁴ See Brescia, *supra* note 2, at 32-26.

The use of litigation as a policy tool raises complex, but by no means insurmountable, questions of authority, causation, and standing, among other potential barriers,⁵ and the results substantively have been mixed. But in evaluating a range of options for progressive local governments, including litigation is a strategy is worth considering.

⁵ See Brescia, *supra* note 2; see generally Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59 (2014).