

March 26, 2014

Office of the Attorney General of Texas
Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

Re: Section 361.0961 of the Texas Health and Safety Code and “Bag Bans”

Dear Opinion Committee:

This letter brief is submitted to you on behalf of the signatories below who come from a variety of background local government officials, former state elected officials, businesspeople and environmental and conservation organization. On March 4, 2014, your office received a request from the Honorable Dan Flynn, Chair, Select Committee on Transparency in State Agency Operations, relative to the legality of municipal ordinances banning single-use checkout bags, and associated fees, in light of Section 361.0961 of the Texas Health and Safety Code. That request was assigned as RQ-1189-GA. For the reasons set forth below, municipal “bag bans” are not in violation of Section 361.0961 of the Texas Health and Safety Code and in fact, Section 361.0961 by its express terms is significantly limited in its application.

There is a serious question whether Section 361.0961 applies at all to municipal ordinances that address single-use checkout bags. Chapter 361 of the Texas Health and Safety Code (the Solid Waste Disposal Act) addresses the permitting of solid waste facilities and hazardous waste facilities. By focusing on Section 361.091 in a vacuum, Representative Flynn must overlook other relevant provisions of the Solid Waste Disposal Act, including declarations of public policy such as Section 361.022, which sets forth Texas’ “Public Policy Concerning Municipal Solid Waste and Sludge”:

(a) To protect the public health and environment, it is the state's goal, through source reduction, to eliminate the generation of municipal solid waste . . . to the maximum extent that is technologically and economically feasible. Therefore, it is the state’s public policy that, in generating, treating, storing, and disposing of municipal solid waste . . ., the methods listed under Subsections (b) and (c) are preferred to the extent economically and technologically feasible. . . .

(b) For municipal solid waste, . . . the following methods are preferred, in the order listed:

(1) *source reduction and waste minimization*;

Tex. Health & Safety Code § 361.022 (emphasis added). The municipal single-use checkout bag ordinances in question do not attempt to restrict or prohibit the type of container used for solid waste purposes. The municipal ordinances in question are obviously aimed at source reduction

and waste minimization. *See also* Texas Health & Safety Code § 361.119 (the Texas Commission on Environmental Quality shall adopt rules, including “limitations on the storage of recyclable material, to ensure that: (1) recyclable material is reused and not abandoned or disposed of; and (2) recyclable material does not . . . threaten or impair the environment or public health and safety.”). Therefore, the more appropriate reading of Section 361.0961 is in conjunction with Section 361.022 and when harmonized, a strong argument may be made that the “container or package” provisions of Section 361.0961 do not apply to single-use checkout bags at all; instead, it refers to “containers or packages” related to solid waste disposal. Further, Section 361.022(b)(1) declares it to be the policy of the State to encourage source reduction and waste minimization. The municipal ordinances in question are fully compliant with the public purposes articulated in Section 361.022 of the Texas Health and Safety Code.

**Statutory Construction Principles Related to
the Interpretation of Section 361.0961**

Section 361.0961(a) of the Texas Health and Safety Code provides, in pertinent part, as follows:

(a) A local government or other political subdivision may not adopt an ordinance, rule, or regulation to:

(1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law; [or]

* * *

(3) assess a fee or deposit on the sale or use of a container or package.

This statute was adopted by the Legislature in 1993 (introduced as Senate Bill No. 963) and was effective September 1, 1993. There is no analysis of Senate Bill No. 963 relative to Section 361.0961 specifically and therefore, assuming only for the sake of argument that this section of the Texas Health and Safety Code in fact does apply to single-use checkout bags, in an attempt to interpret its meaning, one must resort to accepted principles of statutory construction.

The Texas Code Construction Act is found in Chapter 311 of the Texas Government Code and its companion provision, Chapter 312, provides the rules of construction for civil statutes. In general, the first rule of statutory construction is that courts interpret statutes in accordance with the plain meaning of their language unless the statutory language is ambiguous or the plain meaning leads to absurd results.

When we interpret statutes . . . we seek to effectuate the “collective” intent or purpose of the legislators who enacted the legislation. . . . We do so because our state constitution assigns the law *making* function to the Legislature while assigning the law *interpreting* function to the Judiciary.

When attempting to discern this collective legislative intent or purpose, we necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. We do this because the text of the statute *is the law* in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for her signature. We focus on the literal text also because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law. There really is no other certain method for determining the collective legislative intent or purpose at some point in the past, even assuming a single intent or purpose was dominant at the time of enactment. Yet a third reason for focusing on the literal text is that the Legislature is *constitutionally entitled* to expect that the Judiciary will faithfully follow the specific text that was adopted. . . .

There is, of course, a legitimate exception to this plain meaning rule: where application of a statute's plain language would lead to absurd consequences that the Legislature could not *possibly* have intended, we should not apply the language literally. . . . If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extratextual* factors as executive or administrative interpretations of the statute or legislative history.

Boykin v. State, 818 S.W.2d 782, 785-86 (Tex.Crim.App. 1991)(citations omitted)(emphasis in original). Therefore, resort to statutory construction principles is necessary only if a statute is either ambiguous or its language would lead to absurd results.

It is clear that Section 361.0961(a) is *not* ambiguous.* The statute specifically provides that a municipality, among other political subdivisions, “may not adopt an ordinance, rule, or regulation to . . . prohibit or restrict, *for solid waste management purposes*, the sale or use of a container or package in a manner not authorized by state law. . . .” Therefore, if a Texas municipality adopts a “bag ban” or similar prohibition or restriction on single-use checkout bags for any reason other than “for solid waste management purposes,” then that ordinance would *not* be in violation of Section 361.0961(a) of the Texas Health and Safety Code.

Permissible Purposes for Prohibition or Restrictions on Single-Use Checkout Bags

While a prohibition or restriction on single-use checkout bags may not be premised upon a solid waste management purpose by the express terms of Section 361.0961(a) of the Texas Health and Safety Code, municipal prohibitions or restrictions indeed may be premised upon other valid public health, safety and welfare concerns: litter abatement and costs incurred by

* The “absurd results” principle is not relevant to this discussion.

local governments associated with such litter abatement,[†] tourism and economic development, cattle and wildlife protection,[‡] and aesthetic reasons, among others. Litter abatement in particular is a permissible purpose for a municipal regulation prohibiting or restricting single-use checkout bags, and Texas law contains provisions authorizing litter abatement restrictions (both civil and criminal) and litter abatement programs. *See, e.g.*, Texas Health and Safety Code Chapter 365 (Texas Litter Abatement Act, and specifically § 365.012, which provides for criminal penalties for littering); Texas Local Government Code § 54.012(7) (municipalities may bring civil actions “relating to conditions caused by accumulations of refuse. . . .”). *See generally* Texas Local Government Code §§ 51.001 (governing body of any municipality may adopt ordinances that are “for the good government, peace, or order of the municipality”); 51.012 (Type A general law municipalities may adopt ordinances “for the government, interest, welfare, or good order of the municipality”); 51.032 (Type B general law municipalities may adopt ordinances “that the governing body considers proper for the government of the municipal corporation”); 51.071 (home-rule municipalities have “full power of local self-government”). Perhaps no state in the nation has a more effective anti-litter campaign than the “Don’t Mess With Texas” program administered by the Texas Department of Transportation. The bottom line is straightforward: Other than for solid waste management purposes, local governments are empowered by state law to adopt ordinances and restrictions that enhance, or attempt to enhance, the cleanliness, orderliness and aesthetic beauty of communities, and Section 361.0961 does nothing to limit that authority except as to “solid waste management purposes” and nothing else. Therefore, municipal regulations prohibiting or restricting single-use checkout bags are legally authorized if the purpose of the prohibition or restriction is not for the sole impermissible purpose of solid waste management.

Public Policy Purposes Support Municipal Regulation

Notwithstanding the clear legislative intent to allow municipalities to prohibit or otherwise regulate single-use checkout bags except for solid waste management purposes, public policy also supports such municipal ordinances. While various reasons for such ordinances are

[†] For example, data provided by the City of Austin to the Mayor and City Council estimated that the annual cost to the community at large to manage plastic bag waste was \$331,000 to \$804,000 based on impacts to wildlife, wildlife habitat, water quality, storm water systems, among others.

Further, in Austin alone, 14 organizations expressed various concerns regarding the continued dependence on single-use plastic bags.

[‡] *See, e.g.*, http://www.itla.net/Longhorn_Information/index.cfm?con=plastic. The International Texas Longhorn Association describes plastic ingestion as “one real killer of cattle today with almost no known cure. . . . It is just a quiet and painful way for cattle to die with several difficult symptoms to confuse the issue. . . . Today . . . most people live within a mile of an open construction dumpster, trash pickup container or uncovered disposal site of plastic and litter. Add to that condition a strong wind and various plastics will float into your cattle grazing or growing areas. From bread wrappers hanging on a fence to grocery bags, hay bale wraps, weather balloons, party balloons, to pallet wrappings; some people even toss plastic bale strings on the ground. It is all lethal once inside a critter. . . . When a critter eats a large piece of plastic the end is often imminent and generally no one ever knows why.”

listed above, the principle of local control should be respected by the Legislature, the courts and the Attorney General's Office. For example, while Fort Stockton may be particularly concerned about single-use checkout bags and livestock health, South Padre Island about beach litter and Austin about environmental concerns, it should be the role of the State to permit local governments to legislate about those local concerns without State oversight. That indeed has been the State's response to local anti-litter and litter abatement ordinances—most cities in Texas in fact have adopted and currently enforce municipal ordinances regulating litter in some manner.[§] Consequently, as now is the case, Texas municipalities should be permitted to regulate single-use checkout bags as an exercise of local authority. While this local authority is not unbridled,** it should remain the prerogative of local governments to fashion regulations that address local concerns, without oversight from the Legislature.

For the foregoing reasons, we believe it is clear that Section 361.0961 of the Texas Health and Safety Code does not proscribe municipalities from adopting and enforcing prohibitions and restrictions on single-use checkout bags as long as those regulations are not for the purpose of solid waste management.

Sincerely,

Hill Abel*
CEO, Bicycle Sports Shop

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District Attorney for the 156th Judicial District, Bee, Live Oak, and McMullen Counties.
Former State Representative, District 35

Rose Cardona
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Mike Garver
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Jeff George
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[§] See, e.g., Dallas Code of Ordinances, ch. 7A, "Anti-Litter Regulations"; Houston Code of Ordinances, ch. 39, art. 5, "Litter Control"; Austin Code of Ordinances, ch. 10-5, art. 3, "Prohibition on Litter"; San Antonio Code of Ordinances, § 29-3, "Depositing Litter, Trash and Waste Material"; Fort Worth Code of Ordinances, § 11A-27, "Littering Prohibited"; El Paso Code of Ordinances, § 9.04.670, "Litter and Illegal Dumping Prohibited."

** For example, any municipal ordinance restricting or prohibiting single-use checkout bags must pass state and federal constitutional muster.

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Mayor Pro Tem, Fort Stockton

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President Lyne Energy Partners
Former State Representative, District 69
Former Mayor Wichita Falls

Evelyn Remmert
Landfill neighbor & rancher, Manor TX

Raul Rodriguez
City Manager, Fort Stockton

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*Still working out how to identify the signer.