



TEXAS MUNICIPAL LEAGUE

President **Jungus Jordan**, Councilmember, Fort Worth  
Executive Director **Bennett Sandlin**

March 24, 2014

Virginia K. Hoelscher  
Chair, Opinion Committee  
Office of the Attorney General of Texas  
P.O. Box 12548  
Austin, TX 78711-2948  
*Via E-Mail: [opinion.committee@texasattorneygeneral.gov](mailto:opinion.committee@texasattorneygeneral.gov)*

Re: Whether section 361.0961 of the Texas Health and Safety Code prohibits cities from adopting ordinances that ban plastic bags (RQ-1189-GA)

Dear Ms. Hoelscher:

The Texas Municipal League (TML) is a non-profit association of over 1,100 incorporated cities. TML provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties.

TML and TCAA advocate for the interests common to all Texas cities. TML and TCAA have a vested interest in preserving a city's ability to exercise local control over local issues.

With regard to plastic bag ordinances, Senator Kel Seliger may have expressed it best when he made the following statement about legislative attempts to preempt cities:

There are I think three communities in the State of Texas that have in one form or another banned plastic bags, and it seems to me that if the city determines that either the lack of a recycling program and then a waste is a problem for that city, and for the state to determine what a city's problems are or solutions that it may have, or may not have, is a little bit of an overextension of the legislature. . . .

Hearing on S.B. 908 before the Sen. Natural Resources Comm., 82nd Leg., R.S. (March 29, 2011, Part II) (statement of Sen. Keliger at approximately 28:15). With this in mind, TML and TCAA offer the following comments for your consideration.

**The issue presented by RQ-1189-GA is inappropriate for the attorney general opinion process.**

Section 361.0961, Health and Safety Code, provides 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;

(2) prohibit or restrict the processing of solid waste by a solid waste facility, except for a solid waste facility owned by the local government, permitted by the commission for that purpose 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.

(b) This section does not prevent a local government or other political subdivision from complying with federal or state law or regulation. A local government or other political subdivision may take any action otherwise prohibited by this section in order to comply with federal requirements or to avoid federal or state penalties or fines.

(c) This section does not limit the authority of a local government to enact zoning ordinances.

TEX. HEALTH & SAFETY CODE § 361.0961. RQ-1189-GA asks your office to opine “on the legality” of nine separate city ordinances “in light of the prohibition in Section 361.0961 of the Health and Safety Code.” Letter from Honorable Dan Flynn, Chair, House Select Committee on Transparency in State Agency Operations, to Honorable Greg Abbott, Tex. Att’y Gen. (Feb. 27, 2014).

Your office has established a policy of not opining on the legality of an ordinance where that requires interpreting an ordinance and resolving fact questions. *See, e.g.*, Tex. Att’y Gen. Op. Nos. GA-0648 (2008) at 6-7 (explaining that this office generally does not construe city ordinances and cannot answer questions that require the resolution of fact questions), GA-0449 (2006) at 1 (“In deference to municipal officials’ authority to interpret their charters and ordinances, this office does not ordinarily construe city charters or ordinances.”). In order to opine on the legality of the ordinances at issue here, your office would have to resolve fact questions. For instance, section 361.0961(a)(1) prohibits ordinances that are adopted for solid waste management purposes. You would have to determine that the ordinances were adopted for this purpose. Such a finding would be inappropriate for the opinion process. Many, if not all, of the ordinances at issue appear to have been adopted for much broader health, safety, and aesthetic purposes.

Furthermore, we note that “the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.” *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990). When

construing a statute in relation to city ordinances, a court will not hold a general law and a municipal ordinance “repugnant to each other if any other reasonable construction leaving both in effect can be reached.” *Dallas Merch’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993). In order to opine on the legality of these nine ordinances, your office would have to analyze each one to determine whether it can be harmonized with section 361.0961. Such analysis involves mixed questions of law and fact and is inappropriate for the opinion process.

Because your office cannot investigate and resolve disputed questions of fact or mixed questions of law and fact in an attorney general opinion, you should not opine on the legality of the specific ordinances mentioned in the request or plastic bag ordinances in general.

**It would be inappropriate to opine on the scope and meaning of section 361.0961, Health and Safety Code, in light of the request.**

It would be inappropriate for your office to opine on the scope and meaning of section 361.0961 as it is your policy to limit opinions to the scope of the requestor’s question. *See, e.g.*, Tex. Att’y Gen. Op. No. GA-0419 at n.2. The requestor asks only about the legality of certain ordinances. For the reasons stated above, that question is inappropriate for the opinion process. *See* Letter from Honorable Dan Flynn, Chair, House Select Committee on Transparency in State Agency Operations, to Honorable Greg Abbott, Tex. Att’y Gen. (Feb. 27, 2014).

Should your office—despite the request—decide to opine on the scope and meaning of section 361.0961, TML and TCAA offer the comments below.

**A plastic bag is not a “container” or “package” as those terms are used in section 361.0961, Texas Health and Safety Code.**

The terms “container” and “package” as used in section 361.0961 are not defined. However, the legislative history is instructive in understanding the meaning of the terms. TEX. GOV’T CODE § 311.023 (providing that, regardless of whether a statute is considered ambiguous on its face, the Code Construction Act allows a consideration of legislative history). The bill analysis explains that section 361.0961 “prohibit[s] a city from banning wasteful packaging or Styrofoam cups or imposing a bottle return fee.” House Research Organization, Bill Analysis, Tex. S.B. 963, 73d Leg., R.S. (1993) (discussing opponents comments). Thus, the terms “container” and “package” were meant to refer to the physical thing or wrapping in which a consumer commodity is immediately enclosed for use in delivering and displaying the commodity to retail purchasers. *Cf.* TEX. HEALTH & SAFETY CODE § 431.002(27) (defining the term “package” for purposes of the Food, Drug and Cosmetic Act). Moreover, the legislature clearly knows how to include a bag in the term “container” or “package” but has not done so here. *Cf.* TEX. TAX CODE §§ 151.302(d), 151.3021.

A plastic bag is not a container or package, but merely the means by which a container or package is transported. To broadly interpret the terms to include something like a plastic bag (i.e., the means of transporting containers or packages) would have significant and detrimental consequences for cities. Under that definition, cities would arguably be unable to require citizens to use or pay for particular receptacles (e.g., dumpsters and roll-away bins) to hold their solid waste or recyclable material. *Cf.* TEX. HEALTH & SAFETY CODE § 343.002(8) (defining “receptacle” as a type of container).

**Legislators do not read section 361.0961, Texas Health and Safety Code, as a ban on plastic bag ordinances.**

In the last several legislative sessions, legislators have proposed bills relating to plastic bags, some of which aimed to ban or preempt local ordinances. *See, e.g.*, Tex. H.B. 2416, 83rd Leg., R.S. (2013); Tex. S.B. 908, 82nd Leg., R.S. (2011). If legislators thought that section 361.0961, Texas Health and Safety Code, worked to ban such ordinances, there would have been no need to file and hold extended public hearings on these bills.

**Cities may regulate plastic bags for purposes other than solid waste management.**

The prohibition in section 361.0961(a)(1) is expressly limited to ordinances adopted for solid waste management purposes. TEX. HEALTH & SAFETY CODE § 361.0961(a)(1). Section 361.096, Health and Safety Code, provides that “[e]xcept as specifically provided . . . this subchapter does not limit the powers and duties of a local government or other political subdivision of the state as conferred by this or other law.” *Id.* § 361.096. There are many purposes—other than solid waste management—for which a city might regulate plastic bags. Depending on the local circumstances, the legal authority to undertake such regulation may include:

- Health & Safety Code § 121.003 (“The governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health.”);
- Health & Safety Code § 121.006 (providing “[t]he governing body of a municipality, . . . may adopt ordinances or rules to charge fees for public health services” and defining “public health services” to include “environmental and consumer health programs”);
- Health & Safety Code §§ 341.011, 341.012 (defining “public health nuisance” and authorizing cities to abate the same);
- Health & Safety Code § 342.003 (“The governing body of a municipality may regulate the cleaning of a building, establishment, or ground from filth, carrion, or other impure or unwholesome matter.”);
- Health & Safety Code § 365.031 (“The governing body of Port Arthur by ordinance may prohibit the depositing or placing of litter, garbage, refuse, or rubbish into or on the waters of Lake Sabine within the municipal limits.”);

- Local Gov't Code § 51.001 (providing that a city may adopt an ordinance “for the good government, peace, or order of the municipality or for the trade and commerce of the municipality”);
- Local Gov't Code § 51.012 (providing that a Type A general law city may adopt an ordinance “that is necessary for the government, interest, welfare, or good order of the municipality as a body politic”);
- Local Gov't Code § 51.032 (providing that a Type B general law city may adopt an ordinance “that the governing body considers proper for the government of the municipal corporation”);
- Local Gov't Code §§ 217.002, 217.022 (providing that general law cities have nuisance abatement authority);
- Local Gov't Code § 217.042 (providing that a home-rule city “may define and prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits.”);
- Local Gov't Code § 551.002 (“A home-rule municipality may prohibit the pollution or degradation of and may police a stream, drain, recharge feature, recharge area, or tributary that may constitute or recharge the source of water supply of any municipality.”); and
- Local Gov't Code § 552.001 (providing that a city may regulate its utility system in a manner that protects the interests of the city).

**Section 361.0961(a)(1) only forbids the adoption of ordinances in a manner not authorized by state law.**

Section 361.0961(a)(1) provides that “[a] local government or other political subdivision *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*.” (emphasis added). The phrase “in a manner not authorized by state law” modifies “adopt an ordinance, rule, or regulation.” Put another way, section 361.0961 requires that a solid waste management ordinance regulating the sale or use of a container or package be adopted in the manner required by state law. Because there appear to be no special requirements related to the adoption of such ordinances, cities must follow the general requirements for the adoption of city ordinances. *See* TEX. LOC. GOV'T CODE §§ 52.001-52.013.

TML and TCAA respectfully request that your office consider these comments when issuing your opinion.

Please contact me if I may be of assistance.

Sincerely,



Scott Houston  
Deputy Executive Director & General Counsel