CAUSE NO. 22-0482-C395

TEXAS DISPOSAL SYSTEMS, INC., *Plaintiff*	§	**IN THE DISTRICT COURT**
v.	§	**WILLIAMSON COUNTY, TEXAS**
CITY OF ROUND ROCK, TEXAS, and **LAURIE HADLEY, IN HER OFFICIAL CAPACITY OF CITY MANAGER OF ROUND ROCK, TEXAS,** *Defendants.*	§	**395TH JUDICIAL DISTRICT**

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER

TO THE HONORABLE JUDGE LARSON:

Defendants oppose Plaintiff's Application for a Temporary Restraining Order to restrain the "enforcement of the City's purported sole-source exclusive franchise for the collection of commercial waste and processing of recyclable materials through Balcones Recycling, and to restrain the City Manager and her designees from enforcing the revocation of the non-exclusive franchises held by Texas Disposal and the other non-preferred waster and recycling providers" (Orig. Pet. at 11) for the reasons set forth herein.

FACTS

On April 22, 2021, Plaintiff executed a Franchise Agreement for Non-Residential Refuse Collection with the City of Round Rock, Texas. *See* Ord. No. O-2021-110. Attached hereto as Exhibit "A." Previously executed Franchise Agreements between Plaintiff and Defendants were consistently for five (5) year terms. The Franchise Agreement executed April 22, 2021, by Plaintiff specifically stated in Section 5. "Term," that the Franchise Agreement would be effective through September 2022**, however, "the City may, at its sole discretion, terminate**

the Franchise Agreement at any time beginning December 1, 2021, upon thirty (30) days' written notice to the Grantee" (emphasis added). *Id.*

On July 22, 2021, Defendants held a Semi-Annual Retreat to discuss strategic planning goals for the City. All City Council Members and the Mayor were present at the Retreat and notice was posted in compliance with the Texas Open Meetings Act. One of the Agenda items stated, "Consider discussion and possible action regarding the collection and disposal of commercial refuse." After discussion on this item, a motion was made, seconded, and unanimously approved authorizing the City Manager to **negotiate** a sole source contract with Central Texas Refuse. Any negotiated contract would be subject to City Council approval.

On November 4, 2021, at a regular City Council Meeting, the City Council approved the execution of an Amended and Restated Refuse Contract with Central Texas Refuse, LLC, adding commercial services to the existing Contract for residential, municipal, and downtown commercial district services. *See* Res. No. R-2021-302. This item was unanimously approved by the City Council.

At the same Meeting, the City Council further authorized: 1) the City Manager to terminate the existing Franchise Agreements for Non-Residential Refuse with four (4) waste hauling entities, including Plaintiff, pursuant to Section 5.02 of the Franchise Agreements; and 2) an amendment to Chapter 32, Article II, Section 32-23 and Section 32-33 of the City of Round Rock Code of Ordinances (2018 Edition) pertaining to rates for non-residential refuse collection and disposal services to become effective May 1, 2022. *See* Res. No. 2021-301; Ord. No. O-2021-303. Both of these items were unanimously approved by the City Council.

On March 23, 2022, a Notification of Termination of Existing Franchise Agreement and Proposed Franchise Agreement for Temporary Services was sent to Plaintiff providing both

notice of termination of the existing Franchise Agreement effective April 30, 2022, and proposing a new Franchise Agreement with Petitioner for the collection and disposal of solid waste for Temporary Services. Temporary Services were defined in the proposed Agreement as solid waste collection and disposal services from a construction site, a remodeling or repair project, or to facilitate removal of junk, surplus goods and equipment, or debris through a roll-off container or other commercial container used to transport such solid waste. The letter stated that the City Council would take action on the new Franchise Agreement for Temporary Services on at the April 28, 2022 City Council Meeting. To date, Petitioner has not executed the proposed Franchise Agreement for Temporary Services.

ARGUMENT

I. Defendants has not violated any provision of its Home Rule Charter

Plaintiff alleges in its Petition that Defendants have adopted an ordinance contradicting its home-rule charter. Article 11 of the City's Home Rule Charter titled "Franchise of Public Utilities," states in Section 11-02 that "[n]o exclusive franchise shall ever be granted." Article 11 does not apply to the regulation of garbage and recycling services within the City. The inclusion of Section 11-02 in the City's Charter was to prevent the exclusive franchise of a business organization that supplies residents with commodities, such as gas, electricity, cable television or community antenna television services. Unlike the "public utilities" subject to Article 11, a City derives its power to regulate the collection and disposal solid waste from the granting of police power and the Texas Health and Safety Code.

A. Granting of Police Power for the Collection and Disposal of Solid Waste

The "legislature and courts have long recognized the importance of garbage disposal to the enhancement of health and safety." *Grothues v. City of Helotes*, 928 S.W.2d 725, 728 (Tex.

App.—San Antonio 1996, no writ) (op. on reh'g). Attached hereto as Exhibit "B." The Court in *City of Breckenridge v. McMullen* held, "[t]he removal of garbage comes under the powers of a municipality, and it is within the police power of a city to pass ordinances and make regulations governing the same." *City of Breckenridge v. McMullen*, 258 S.W. 1099, 1101 (Tex. Civ. App.--Fort Worth, 1923, no writ). Attached hereto as Exhibit "C." Moreover, courts have recognized that "[p]olice power is not static or unchanging. As the affairs of the people and government change and progress, so the police power changes and progresses to meet the needs." *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 165 (Tex. App.--Eastland 1972, writ ref'd n.r.e.). Attached as Exhibit "D."

Courts have long distinguished between "public utilities" and services incident to the police powers. See *Ayala v. Corpus Christi*, 507 S.W.2d 324 (Tex. App. Lexis 2086 1974). Attached as Exhibit "E." In *Ayala,* Petitioner sought to enjoin the City of Corpus Christi from purchasing and operating an ambulance system. *Id.* Petitioner argued that the City had violated Article IX, Sec. 15 of its Charter, which required a majority vote of the taxpayers in a special election to approve the purchase, construction or operation of "…a system or systems of water works, gas or electric lighting plants, telephones, streetcars and sewers **or any other public utility service or enterprise**" (emphasis added). *Id.*

In *Ayala*, the Court held that the institution of an ambulance services was incident to the police power of the state and "…does not require a capital investment such as would a water works system, electric or gas utility. *Ayala* at 327. The Court further held that the "…purchase and operation of the operation of the ambulance service was made in furtherance of the public health, safety, and welfare of the citizens of Corpus Christi" and the ambulance service

purchased and operated by the City Corpus Christi was not a "public utility" within the meaning of Article IX, Sec. 15 of the Charter, therefore the provision of the Charter was inapplicable. *Id.*

B. Authorization Granted to Regulate Solid Waste Collection and Disposal Pursuant to Chapters 363 and 364 of the Texas Health and Safety Code

Municipalities have been given specific and full authority under Chapters 363 and 364 of the Texas Health and Safety Code to make decisions and to enter into contracts for the regulation, prohibition and provision of services regarding solid waste collection and disposal. A municipality is authorized to under Chapter 363 to: 1) adopt rules for regulating solid waste collection, handling, transportation, storage, processing and disposal (*Id.* at Sec. 363.111(a)); 2) prohibit the processing or disposal of city or industrial solid waste in certain areas (*Id.* at Sec 363.112); 3) ensure that solid waste management services are provided to all persons in its jurisdiction by a public agency or private person (*Id.* at Sec. 363.113); 4) offer recycling services to persons in its jurisdictional boundaries and may charge fees for that service (*Id.* at Sec. 363.114); 5) **enter into contracts to enable it to furnish or receive solid waste management services on the terms considered appropriate by the city council** (emphasis added) (*Id.* at Secs. 363.116(a) and 363.117); and 6) fund solid waste management services by various means (*Id.* at Sec. 363.119).

Chapter 364 further authorizes municipalities to: 1) **contract with certain other public entities or a private contractor to furnish solid waste collection, transportation, handling, storage or disposal services** (emphasis added) (*Id.* at Sec. 364.033); 2) offer solid waste disposal service to persons in its territory, require the use of the service by those persons, charge fees for the service, and establish the service as a separate utility (*Id.* at Sec. 364.034); and 3)

enter into an agreement for the collection of unpaid solid waste disposal services fees (*Id.* at Sec. 364.037).

The plaintiffs in *City of Wichita Falls v. Kemp Hotel* argued that Wichita Falls violated its Charter when entering into a sole source contract with Green for the removal and disposition of solid waste within Wichita Falls. *City of Wichita Falls v. Kemp Hotel*, 162 S.W.2d 150 (Tex. Civ. App. 1942). Attached as Exhibit "F". Specifically, plaintiffs alleged that the City disregarded Section 121 of Wichita Falls' Home-Rule Charter:

> "All public utility franchises and all renewals, extensions and amendments thereof shall be granted or made only by ordinance. No such proposed ordinance shall be adopted by the Board of Aldermen until it has been printed in full and until a public written report containing recommendations thereon shall be made to the Board by the City Manager, or by the Mayor if there be no City Manager, until adequate public hearing have thereafter been held on such ordinance and until at least two weeks after its publication in final form. No public utility franchise shall be transferable except with the approval of the Board of Aldermen expressed by ordinance and copies of all transfer and mortgage and documents affecting the title or use of public utilities shall be filed with the City Clerk within ten days after the execution thereof." *Id.* at 152.

The Court did not find it relevant as to whether the gathering and disposition of garbage constituted a "public utility" or a "franchise," but rather viewed the ordinance passed and subsequent sole-source contract with Green "…**was a means chosen by the governing body of the municipality to keep the city clear of deleterious substance for the promotion of health and to prevent the spread of disease**" (emphasis added). *Id.* At 153. The Court further held,

"In the absence of fraudulent design or purpose, the judgment of the City's governing body in making the choice as it did will not be reviewed by the courts." *Id.* Moreover, "[t]he City, acting through its Board of Aldermen, had the right – indeed it was an imperative duty – to provide some means of accomplishing the end sought. *Id.* at 154.

II. Defendants Met the Requirements of the Texas Open Meetings Act

Plaintiff's argument that the City violated the Texas Open Meetings Act is completely without merit.

A. Semi-Annual Retreat

Defendants held a Semi-Annual Retreat on July 22, 2021, to discuss and prioritize action items for the City, including commercial garbage collection and disposal services. The Retreat notice was posted in accordance with Texas Government Code, Section 551.043, on July 16, 2021. The posted Agenda for the Retreat included three (3) "Resolution/Action Items," including an item that stated, "Consider discussion and possible action regarding the collection and disposal of commercial refuse." After discussion on the direction the City desired to proceed regarding the collection and disposal of commercial refuse within the City, a motion was made and approved authorizing the City Manager to **negotiate** a sole source contract with Central Texas Refuse.

B. Packet Briefing and City Council Meeting

On November 2, 2021 a Packet Briefing Meeting with the City Council was held to discuss items on the November 4, 2021 City Council Meeting Agenda, and on November 4, 2021, a regular City Council Meeting was held. Agendas for both meetings were posted in compliance with Texas Government Code, Section 551.043. The items on the Agenda included: 1) "Consider a resolution authorizing the Mayor to execute an Amended and Restated

Agreement with Central Texas Refuse, LLC"; 2) Consider a resolution authorizing the City Manager to provide written notice to Waste Connections Lone Star, Inc., Waste Management of Texas, Inc., Central Waste and Recycling, and Texas Disposal Systems, Inc., that there existing Franchise Agreements for Nonresidential Refuse Collection with the City will terminate on April 30, 2022; and 3) Consider an ordinance Amending Chapter 32, Article II, Section 32-23 and Section 32-33, Code of Ordinances (2018 Edition), adopting nonresidential refuse collection rates." Plaintiff attended and spoke to the City Council regarding the three (3) referenced items during "Citizen Communication" at both meetings.

III. A Municipality Has a Legal Authority to Enter into a Sole-Source Contract for Solid Waste Collection and Disposal Services

Texas courts have consistently held that a municipality has the right to enter into a contract with a sole provider for the collection and disposal of residential and/or non-residential waste. In *Browning-Ferris, Inc. v. Leon Valley*, the Court held that the City of Leon Valley lawfully acted when: 1) granting an exclusive franchise and contract to a private corporation for the collection, hauling and disposal of all commercial waste within the city; and 2) awarding a contract for the collection, hauling and disposal of solid waste material on behalf of the city to a private corporation without competitive bids. *Browning-Ferris, Inc. v. Leon Valley*, 590 S.W.2d 729 (Tex. App. 1979). Attached as Exhibit "G."

In *Gardner v. The City of Dallas*, it was held that "…the disposal of garbage is regarded as a corporate function, exclusive contracts for the disposal thereof over a fixed period of years, as well as ordinances having the same purpose, are sustained by the overwhelming weight of authority as a lawful exercise, not abdication, of the police power. *Gardner v. City of Dallas*, 81 F.2d 425 (1936). Attached as Exhibit "H."

Republic Waste Services of Texas, Ltd. v. Texas Disposal Systems, Inc. dealt with the question of whether Section 364.034 of the Texas Health and Safety Code restricted in any way a home-rule city's ability to enter into an exclusive contract for solid waste disposal services. *Republic Waste Servs. of Tex., Ltd. v. Tex. Disposal Sys., Inc.*, 848 F.3d 342 at 343 (5th Cir. 2016). Attached as Exhibit "I." The Court concluded that the statute did not restrict a city's home-rule authority to enter into an exclusive contract for solid waste disposal services. *Id.* at 347.

IV. Plaintiffs Have Failed to Establish Any of the Elements Required for Issuance of a Temporary Restraining Order.

An applicant must plead and prove three (3) elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable harm in the interim. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). A temporary injunction is "…an extraordinary remedy and does not issue as a matter of right." *Id.* at 57.

For all the reasons set forth herein, Petitioner fails to plead a cause of action against Defendants and the probable right to the relief sought. Defendants clearly have the legal right to regulate the collection and disposal of solid waste within its City pursuant to the City's Charter, the granting of police powers, and sections 363 and 364 of the Texas Health and Safety Code. Courts have determined that the right to regulation includes the authority to enter into a sole source contract for residential and/or commercial services if the City's governing body determines that is in the best interest of the City. Petitioner fails to plead a "cause of action" against Defendants and fails to show there is any probably right to the relief sought.

In addition, Plaintiff fails to show that status quo must be preserved due to a "probable imminent, and irreparable harm in the interim." *Walling* at 57. The City Council unanimously approved the Amended and Restated Agreement with Central Texas Refuse, Inc. at a regularly scheduled Council Meeting on **November 4, 2021**. Plaintiff is seeking "…to restrain the enforcement of the City's purported sole-source exclusive franchise for the collection of commercial waste and processing of recyclable materials through Balcones Recycling." Orig. Pet. at. 11. Petitioner waited until April 18, 2022 to filed an Application for a Temporary Restraining Order action regarding a contract approved over five (5) months ago.

In addition, Petitioner is seeking to "restrain the City Manager and her designees from enforcing the revocation of the non-exclusive franchises held by Texas Mutual [sic] and other non-preferred waste and recycling collection providers." Orig. Pet. at 11. Petitioner entered into a Franchise Agreement for the Non-Residential Waste Collection on April 22, 2021. The Term language specifically stated that the Agreement was effective only until September 30, 2022 and could be terminated by thirty (30) days' notice anytime after December 1, 2021. Petitioner willing executed the Agreement with no argument regarding the Term language. Petitioner further was made aware on November 4, 2021 that the City Council approved the issuance of termination letters for its existing Non-Residential Waste Collection Franchise Agreements. The Petitioner did not choose to file for injunctive relief at that time. Since the issuance of termination letters, the "other non-preferred waste and recycling collection providers" have willingly executed proposed Franchise Agreements for Temporary Services.

The Petitioner's lack of filing for Injunctive Relief in a timely manner does not create "imminent irreparable harm" required by the courts to grant temporary injunctive relief. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 570, 577-578 (Tex. App. Austin 2008, no pet.).

CONCLUSION

For the foregoing reasons, Plaintiff's Application for Temporary Restraining Order and Temporary Injunction should be denied.

Respectfully Submitted,

By: /s/STEPHAN L. SHEETS
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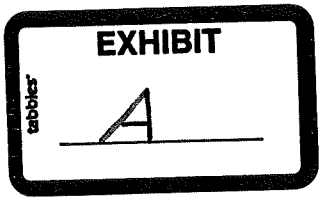
CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2022, a true and correct copy of the above and foregoing was served via e-file on Jim Hemphill, Attorney representing the Petitioner at JHemphill@gdhm.com.

/s/STEPHAN L. SHEETS
STEPHAN L. SHEETS



ORDINANCE NO. O-2021-110

AN ORDINANCE GRANTING A FRANCHISE TO TEXAS DISPOSAL SYSTEMS, INC. TO ENGAGE IN THE COLLECTION OF SPECIFIED WASTE MATERIALS FROM NON-RESIDENTIAL ESTABLISHMENTS WITHIN THE CITY OF ROUND ROCK, TEXAS; ESTABLISHING FRANCHISE FEES; PROVIDING FOR SEVERABILITY; PROVIDING A SAVINGS CLAUSE; AND REPEALING CONFLICTING ORDINANCES OR RESOLUTIONS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ROUND ROCK, TEXAS:

I.

FRANCHISE AGREEMENT FOR NON-RESIDENTIAL REFUSE COLLECTION BETWEEN THE CITY OF ROUND ROCK, TEXAS AND TEXAS DISPOSAL SYSTEMS, INC.

This "Franchise Agreement for Non-Residential Refuse Collection between the City of Round Rock, Texas and Texas Disposal Systems, Inc." ("Franchise Agreement") is made by and between the CITY OF ROUND ROCK, TEXAS (the "City") and TEXAS DISPOSAL SYSTEMS, INC. (the "Grantee") for the collection of garbage, rubbish, yard waste and solid (non-hazardous) waste from commercial and industrial businesses, institutional and governmental entities, and multi-unit residential complexes located within the City of Round Rock, Texas.

RECITALS

WHEREAS, the public welfare of the residents of the service area requires that adequate provisions be made for the regulated collection, removal and disposal of commercial refuse; and

WHEREAS, pursuant to, Chapter 32, Section 32-19 et seq., Code of Ordinances (2018 Edition) of the City of Round Rock, Texas, the City is authorized to enter into nonexclusive franchise agreements for the right to collect and remove all garbage and rubbish; and

WHEREAS, the City and Grantee previously executed a "Franchise Agreement for Non-Residential Refuse Collection between the City of Round Rock, Texas and Texas Disposal Systems, Inc." on March 27, 2014, as authorized by Ordinance No. O-2014-1268; and

WHEREAS, the term of the Franchise Agreement was for five (5) consecutive years, terminating December 31, 2018; and

WHEREAS, the City and Grantee desire to enter into a Franchise Agreement commencing upon execution of the Agreement; and

WHEREAS, the term of the Franchisee Agreement shall expire September 30, 2022, unless terminated sooner as provided in Section 5.02 herein,

NOW, THEREFORE, for and in consideration of the mutual covenants and provisions hereof, it is agreed as follows:

SECTION 1.
DEFINITIONS

1.01 For the purposes of this Franchise Agreement, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words used in the plural number include the singular number, and words used in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the sense requires. The words "shall" and "will" are mandatory, and the word "may" is permissive. Words not defined shall be given their common and ordinary meaning.

(A) **Apartment Complex** means a multi-unit residential dwelling of five (5) units or more.

(B) **Ash** means the material remaining after the incineration of garbage and rubbish, including bottom ash, fly ash and water.

(C) **City** means the City of Round Rock, Texas, a home-rule municipality.

(D) **City Council** means the governing body of the City of Round Rock, Texas.

(E) **Garbage** means animal and vegetable matter, such as waste material and refuse from kitchens, residences, grocery stores, butcher shops, cafes, restaurants, drug stores, hotels, rooming, boarding, and apartment houses, and other deleterious substances, not to include dirt, concrete, tile, plaster, rocks and other substances.

(F) **Gross Receipts/Gross Revenues** means all receipts and revenues received or derived directly or indirectly by the Grantee, its affiliates, subsidiaries, parent company, and any other person or entity in which the Grantee has a financial interest, from or in connection with the collection and removal of garbage, yard waste, and solid (non-hazardous) waste from commercial and industrial businesses, institutional and governmental entities, construction sites and multi-unit residential complexes located within the service area; and/or the operation of a waste hauling service for commercial and industrial businesses, institutional and governmental entities, and multi-unit residential complexes located within the service area, all pursuant to this Franchise Agreement. Gross receipts/revenues include franchise fees passed through to the Grantee's customers. Gross receipts/revenues do not include any surcharges imposed directly upon any customer by the state, city or other governmental unit and collected by the Grantee on behalf of such governmental unit.

(G) **Hazardous Waste** means any of the following:

(1) All waste defined or characterized as hazardous waste by the federal Solid Waste Disposal Act, as amended, including the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901, et seq.) and all future amendments thereto, or regulations promulgated thereunder;

(2) All waste defined or characterized as hazardous waste by the principal agencies of the State of Texas having jurisdiction over hazardous waste generated by facilities within such state, and pursuant to any applicable state or local law or ordinance, and all future amendments thereto, or regulations promulgated thereunder;

(3) Radioactive wastes;

(4) Those substances or items which require special or extraordinary handling or disposal due to their hazardous, harmful, toxic or dangerous character or quality; and

(5) Those substances and items which are not normally expected to be disposed of by generally accepted sanitary landfill disposal methods.

"Hazardous Waste" shall be construed to have the broader, more encompassing definition where a conflict exists in the definitions used by two or more governmental agencies having concurrent or overlapping jurisdiction over Hazardous Waste. If any governmental agency or unit having appropriate jurisdiction determines that substances which are, as of the date hereof, considered harmful, toxic, dangerous or hazardous, are not harmful, toxic, dangerous or hazardous, then those substances are not Hazardous Waste for purposes of this Franchise Agreement as of the effective date of such determination. If any governmental agency or unit having appropriate jurisdiction determines that substances which are not, as of the date hereof, considered harmful, toxic, dangerous or hazardous, are harmful, toxic, dangerous or hazardous, then such substances are Hazardous Waste for purposes of this Franchise Agreement as of the effective date of such determination.

(H) **Medical Waste** means waste, including bio hazardous waste and sharps waste, as defined by Texas statute. Medical waste may originate from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities. Medical waste does not include any such waste which is determined by evidence reasonably satisfactory to the Grantee to have been rendered non-bio hazardous. In any dispute regarding whether a specific type of waste is to be considered medical waste, the decision of the Sanitation Supervisor is final.

(I) **Recyclable Materials** or **Recyclables** means materials that have been designated by the City to be recovered or diverted from the nonhazardous solid waste stream for the purposes of reuse, recycling or reclamation. Chapter 32, Section 32-34(c), Code of Ordinances (2018 Edition) of the City of Round Rock, Texas, limits Recyclable Materials to the following designated materials: office paper, newsprint, magazines and catalogs, aluminum, steel and tin containers, glass bottles and containers, HDPE and PET plastic bottles #1, #2, #3, #4, #5, #6, #7, and household paper products, including junk mail, envelopes, cereal boxes, boxboard and telephone books.

(J) **Refuse** means all solid wastes, including garbage and trash.

(K) **Rubbish** means non-putrescible waste including but not restricted to paper, cardboard, crockery, rubber tires and other inert materials generated by all commercial, industrial, institutional, agricultural and other activities within the City. Rubbish contaminated by garbage is considered garbage. Rubbish does not include hazardous waste, medical waste, ash, or source-separated recyclable materials.

(L) **Sanitation Supervisor** means the person designated from time to time by the Director of Utilities.

(M) **Service Rates** means the rates charged to the Service Recipient.

(N) **Service Recipient** means any business located in the City which subscribes for collection services from the Grantee pursuant to the Grant of Franchise under this Franchise Agreement.

(O) **Sidewalk** means that portion of a street which is not improved and maintained for vehicular travel.

(P) **Solid (Non-Hazardous) Waste** means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded materials, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage. Examples of such waste may include but are not limited to domestic trash and garbage, such as milk cartons and coffee grounds; other refuse such as metal scrap, wallboard, recyclable materials such as cardboard, plastic, paper and glass; and empty containers; and other discarded materials from industrial operations, such as boiler slag and fly ash.

(Q) **Street** means a publicly dedicated or maintained right-of-way, a portion of which is open to use by the public for vehicular travel. The term "street" shall also include alleyways.

(R) **Trash** means rubbish such as feathers, coffee grounds, ashes, tin cans, paper bags, boxes, glass, newspapers, magazines, and other such paper products, grass, shrubs, flowers, yard

cleanings, grass clippings, leaves, and tree trimmings; not to include dirt, concrete, tile, plaster, rocks, and other such substances, including handbills except when such handbills are distributed in a manner prescribed by the City Council and with written permission from the City Manager certifying conformity with the outline requirements of the Council.

(S) **Yard Waste** means all plant debris including grass clippings, leaves, prunings, brush, branches and tree trunks not exceeding six inches (6") in diameter and not exceeding twenty-four inches (24") in length; clean, unpainted and untreated wood no longer than twenty-four inches (24") in length; and other forms of organic waste generated from landscapes and gardens in a quantity typical for a single-family dwelling, allowing for seasonal variations.

SECTION 2.
FRANCHISE REQUIRED; PENALTIES ESTABLISHED

2.01 No person or company providing the services herein described shall be allowed to occupy or use the streets of the City or be allowed to operate within the City without a franchise.

2.02 In accordance with Chapter 32, Section 32-25(a), Code of Ordinances (2018 Edition) of the City of Round Rock, Texas: "It shall be unlawful for any person to engage in the business of collecting refuse from commercial establishments within the city unless he shall have been issued a franchise therefor which is in force and effect. The franchise fee shall be ten percent of gross revenues and payable quarterly."

2.03 In addition to any other penalties herein provided, any person or company operating unauthorized without a franchise agreement, or who shall in anywise violate the provisions of this ordinance, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined as provided for in Chapter 1, Section 1-9, Code of Ordinances (2018 Edition) of the City of Round Rock, Texas, that being a fine not exceeding Two Thousand and No/100 Dollars ($2,000.00), and each day any violation of this ordinance or the referenced Code provisions is allowed to continue shall constitute a separate offense.

SECTION 3.
GRANT OF FRANCHISE RENEWAL

3.01 The Grantee, and its successors and assigns, shall continue to have a non-exclusive franchise to collect and remove garbage, rubbish, yard waste, and solid (non-hazardous) waste, including recyclables, from commercial and industrial businesses, institutional and governmental entities, and multi-unit residential complexes located within the City of Round Rock, Texas.

3.02 The Grantee, and its successors and assigns, shall continue to have the right, privilege, and franchise to have, use and operate in the entire area of the City its waste hauling service; and to have, use and operate its vehicles and equipment in, over, under, along, and across the present and future streets and alleyways of the City to the extent necessary to perform the Grantee's obligations specified herein.

3.03 This Grant of Franchise is non-exclusive and does not establish priority for use over other franchise holders, permit holders, and/or the City's or the public's use of public property. The Grantee's use of the City's streets and alleyways shall be subject to and in accordance with the City's policies and procedures governing same, as they currently exist or as they may be hereafter amended.

SECTION 4.
ACCEPTANCE OF FRANCHISE

4.01 Within thirty (30) days following adoption of the ordinance renewing the Franchise Agreement, and simultaneous with proper execution by the Grantee of this Franchise Agreement, the Grantee agrees to unconditionally accept and continue to be bound by all of the terms and conditions contained herein, thereby promising to comply with and abide by all of the provisions, terms, and conditions contained in this Franchise Agreement.

4.02 In accepting this Franchise Agreement, the Grantee acknowledges that its rights hereunder are subject to the police power of the City to adopt, enact and enforce Charter provisions, ordinances and resolutions necessary for the health, safety and welfare of the public.

SECTION 5.
TERM

5.01 This Franchise Agreement shall be effective upon execution and shall continue in effect through September 30, 2022.

5.02 Regardless of anything contained herein to the contrary, the City may, at its sole discretion, terminate this Franchise Agreement at any time beginning December 1, 2021, upon thirty (30) days' written notice to the Grantee.

5.03 This Franchise Agreement supersedes and replaces any previous franchise agreements and any express or implied renewal or extension of any previous franchise agreements between the City and the Grantee.

SECTION 6.
RENEWALS

6.01 This Franchise Agreement may be renewed at the City's sole discretion upon application of the Grantee pursuant to procedures established in this Section 6, and in accordance with then applicable laws:

(A) At least twelve (12) months prior to the expiration of the term of this Franchise Agreement, the Grantee shall inform the City in writing of its intent to seek a renewal of the franchise.

(B) After giving appropriate public notice, the City Council shall proceed to determine whether the Grantee has satisfactorily performed its obligations under this Franchise Agreement.

(C) If the City Council finds that a renewal of the franchise with the Grantee is in the public interest, and finds that the Grantee has satisfactorily performed its obligations under this Franchise Agreement, then the City may at its sole option enter into a renewal of the Franchise Agreement with the Grantee under appropriate terms and conditions, and such renewal may be for any period from one (1) to five (5) years.

(D) Additional renewals may be applied for by the Grantee under the provisions of this Section 6.

(E) The Grantee shall never have any express or implied right of renewal of this franchise. Any such renewal determination shall rest solely with the City Council, and its decision thereon shall be final.

SECTION 7.
FRANCHISE FEES

7.01 The parties acknowledge that the streets and public easements to be used by the Grantee in the operation of its services hereunder are valuable public properties acquired and maintained by the City at substantial expense to its taxpayers, and further acknowledge that the Grant of Franchise to the Grantee for the use of said streets and alleyways is a valuable right without which the Grantee would be required to invest substantial capital in costs and acquisitions, and further acknowledge that the City will incur costs in regulating and administering this Franchise Agreement.

7.02 Therefore, the Grantee shall pay quarterly to the City a franchise fee calculated as a percentage of the Gross Receipts derived during the preceding quarter by the Grantee from or in connection with the operation of its services within the City of Round Rock, Texas. As of the commencement date of this Franchise Agreement, the franchise fee established by the City is ten percent (10%) of Gross Receipts so derived.

7.03 The City reserves the right to review and modify the franchise fee percentage on an annual basis. The Grantee shall be given thirty (30) days' written notice prior to any increase in the franchise fee. Any change in the franchise fee must be established by resolution or ordinance of the City Council of the City of Round Rock, Texas, and by amendment to this Franchise Agreement.

7.04 The franchise fee and any other costs or penalties assessed shall be paid quarterly to the City on or before the last day of the month following the end of the quarterly period for which said payment is due. The franchise fee payment shall be delivered to the City's Director of Finance, along with a City-approved form entitled "Commercial Garbage Collection Franchise Fee Quarterly Statement" showing the calculations of the amount of such quarterly payment, and such form shall be certified by an officer of the Grantee.

7.05 Franchise fee payments not received on a timely basis, that being within thirty (30) days of the due date, are subject to a ten percent (10%) late penalty. Commencing thirty (30) days from the original due date, an additional one percent (1%) penalty will be added for every month or portion thereof that said payment is late.

7.06 Annually, not later than four (4) months after the end of the Grantee's fiscal year (September 30), the Grantee shall file with the City's Director of Finance either an audited statement or a sworn statement signed by an officer of the Grantee, and such audited or sworn statement shall show the revenues attributable to the operations of its services within the City pursuant to this Franchise Agreement. Such statement shall present, in a form approved by the City's Finance Director, a detailed breakdown of Gross Receipts/Gross Revenues as herein defined. If the Grantee elects to provide an audited statement, such statement shall have been audited by an independent Certified Public Accountant whose report shall accompany the statement.

7.07 The City shall have the right at any time to review or audit the Grantee's franchise fee statements and statements of revenues and other books and records directly relating to such matters, and to recompute any amounts determined to be payable under this Franchise Agreement, and the Grantee shall be under the continuing obligation to make all such records available to the City; provided, however, that any such review or audit shall take place within thirty-six (36) months following the close of the fiscal year covered by such statements. Any additional amount due to the City as a result of the City's review or audit shall be paid within thirty (30) days following written notice to the Grantee by the City. In addition to the right to review such records, the City shall have the right at any time to select an independent accounting firm to audit such books and records of the Grantee to determine compliance with this Franchise Agreement and any related ordinances. If such audit is requested by the City, then the costs of the audit shall be paid by the City unless the audit reveals an error in the Grantee's reporting of Gross Receipts/Gross Revenues by a margin of greater than three percent (3%), in which case the cost of the audit shall be paid by the Grantee.

SECTION 8.
REQUIREMENTS OF GRANTEE

The Grantee shall comply with each of the following requirements:

8.01 Performance. The collection and removal of garbage, rubbish, yard waste, and solid (non-hazardous) waste by the Grantee will at all times during the term of this Franchise Agreement be performed to the reasonable satisfaction of the Sanitation Supervisor. The collection and removal of materials hereunder will be done in a prompt, thorough, lawful and workmanlike manner.

8.02 Authority of Sanitation Supervisor. The Grantee will at all times during the term of this Franchise Agreement operate under the acknowledgment that the Sanitation Supervisor has the right to issue orders, directions and instructions to the Grantee with respect to the collection and removal of materials hereunder, the performance of Grantee's services hereunder, and Grantee's compliance with the provisions of City ordinances and resolutions as they now exist or may from time to time be amended. The Grantee agrees to comply therewith; provided, however, that the orders, directions and instructions of the Sanitation Supervisor shall be reasonably related to carrying out the purposes and intent of this Franchise Agreement.

8.03 Illegal Dumping. The Grantee will require its drivers to write down locations where seemingly illegal dumping has occurred. Information on such locations shall be conveyed to the Sanitation Supervisor within forty-eight (48) hours of observation.

8.04 Collection Equipment. The Grantee shall at its sole expense purchase, operate and maintain collection equipment. Dumpsters and any of the Grantee's other collection equipment shall be clearly labeled with the name of the Grantee. The Grantee at its sole expense shall replace or repair any collection equipment that fails to operate properly or is damaged beyond normal wear and tear.

8.05 Litter Control. The Grantee will not litter any premises or public property in making collections pursuant to this Franchise Agreement, nor will any materials be allowed to leak, blow or fall from collection vehicles. Any materials dropped or spilled in collection, transfer or transportation will be immediately cleaned up by the Grantee.

8.06 Vehicle Inventory. The Grantee will furnish the Sanitation Supervisor with an inventory of collection vehicles used by the Grantee under this Franchise Agreement and shall keep such inventory current. The inventory shall indicate the type, make, capacity, vehicle identification number and license number of each vehicle.

SECTION 9.
REPORTS

9.01 Operations Reports. The Grantee must maintain at its place of business current, accurate and complete tonnage records relating to services provided under this Franchise Agreement. Such reports shall contain information summarized by month, and shall contain data on the tonnage of garbage, rubbish, yard waste, and solid (non-hazardous) waste collected. Upon written notice to the Grantee by the City, and not more frequently than once per quarter, the City has the right to inspect all such operations reports. The City may at any time review any other records of the Grantee reasonably and directly necessary for the City's review, approval or enforcement of this Franchise Agreement.

9.02 Operations reports required by the City will be made available for inspection by the Grantee at no expense to the City and will be prepared in the manner and form reasonably prescribed by the City.

SECTION 10.
ACCOUNTING PROVISIONS

10.01 The Grantee must maintain current, accurate and complete financial and accounting records relating to services provided under this Franchise Agreement. All records will be maintained in accordance with generally accepted accounting principles. The City's Director of Finance or his/her designee has the right to audit and inspect all financial records pertaining to the City's Agreement-related account and may at any time review any other records of the Grantee reasonably and directly necessary for the City's review, approval or enforcement of this Franchise Agreement.

10.02 Financial reports and operating data required by the City for the purpose of any service rate review will be furnished by the Grantee at no expense to the City and will be prepared in the manner and the form reasonably prescribed by the City.

SECTION 11.
INDEMNITY AND INSURANCE REQUIREMENTS

11.01 Indemnity. The Grantee shall indemnify, defend, and hold harmless the City, its officers, agents and employees from any claim, liability, loss, injury or damage arising out of, or in connection with, performance of this Franchise Agreement by the Grantee and/or its agents, employees or subcontractors to the extent caused by the negligent acts or omissions of the Grantee. It is the intent of the parties to this Franchise Agreement to provide the broadest possible coverage for the City. The Grantee shall reimburse the City for all costs, attorneys' fees, expenses and liabilities incurred with respect to any litigation in which the Grantee is obligated to indemnify, defend and hold harmless the City under this Franchise Agreement.

11.02 Insurance. Without limiting the Grantee's indemnification of the City, the Grantee shall provide and maintain at its own expense during the term of this Franchise Agreement, or as may be further required herein, the following insurance coverage and provisions:

(A) Extended coverage and general liability insurance with an insurance company licensed to do business in the state of Texas, acceptable to the City, and such insurance shall insure against claims for liability and damages. Extended coverage insurance under this Section 11 shall be for a minimum of One Million and No/100 Dollars for the protection of the public in connection with:

(1) Liability to persons or damages to property, in any way arising out of or through the acts or omissions of the Grantee, its servants, agents, or employees or to which the Grantee's negligence shall in any way contribute; and

(2) Arising out of the Grantee's operations and relationships with any independent contractor or subcontractor.

(B) The insurance policy obtained by the Grantee in compliance with this Section 11 shall be approved by the City Attorney, and such insurance policy, along with written evidence of payment of required premiums, shall be filed and maintained with the City during the entire term of this Franchise Agreement and any renewal periods, and shall be changed from time to time to reflect changing liability limits as reasonably required by the City. The Grantee shall immediately advise the City Attorney of any significant litigation, actual or potential, that may develop which would affect this insurance.

(C) All insurance policies maintained pursuant to this Franchise Agreement shall contain the following conditions by endorsement:

(1) The City of Round Rock shall be named as an additional insured and the term "Owner" or "City" shall include all authorities, boards, bureaus, commissions,

division, departments, and offices of the City and the individual members, employees, and agents thereof in their official capacities and/or while acting on behalf of the City.

(2) Each policy shall require that written notice shall be given to the City by certified mail at least thirty (30) days prior to the cancellation of or the making of any material change in the policies.

(3) Insurers shall have no right of recovery against the City; it being the intention that the insurance policies shall protect the Grantee and the City and shall be primary coverage for all losses covered by the policies.

(4) The policy clause "Other Insurance" shall not apply to the City of Round Rock where the City is an additional insured on the policy.

(5) Companies issuing the insurance policies shall not have recourse against the City for payment of any premiums or assessments, which all are set at the sole risk of the Grantee.

(D) A Certificate of Insurance on the City's form shall be filed with the City as acceptable evidence of insurance coverage.

SECTION 12.
COMPLIANCE WITH LAWS

12.01 The Grantee shall comply with all laws and regulations of applicable federal, state and local governments. The Grantee and the City agree to be bound by all ordinance provisions or any amendments thereto, or other legal requirements that might affect the collection or disposal of the materials delineated hereunder. It is understood and agreed by and between the parties that ordinances are intended to be minimum standards and that higher standards and regulations may be required under this Franchise Agreement.

SECTION 13.
ASSIGNMENT

13.01 For purposes hereof, the term "assignment" includes but is not limited to:

(A) A sale, exchange or other transfer to a third party of substantially all of the Grantee's assets dedicated to service under this Franchise Agreement; and/or

(B) The issuance of new stock to or the sale, exchange, or other transfer of thirty percent (30%) or more of the then outstanding common stock of the Grantee to a person other than the shareholders owning said stock at the date of this Agreement.

13.02 The Grantee shall not assign this Agreement, or any interest, privilege or right granted herein, without the express written consent of the City, and then only to a person or persons approved by the City on such terms and conditions as the City may require. Consent to one assignment shall not be deemed to be consent to any subsequent assignment. Any assignment without such consent is null and void and shall terminate this Franchise Agreement.

SECTION 14.
SUBCONTRACTING

14.01 The Grantee shall not subcontract all or any portion of the work or business of this Franchise Agreement without the express written consent of the City.

SECTION 15.
INDEPENDENT CONTRACTOR

15.01 The Grantee shall perform all work and services described hereunder as an independent contractor and not as an officer, agent, servant, or employee of the City. The Grantee is solely responsible for acts and omissions of its officers, agents, employees, contractors, and subcontractors, if any. Nothing herein shall be considered as creating a partnership or joint venture between the City and the Grantee. No person performing any of the work or services described hereunder shall be considered an officer, agent, servant, or employee of the City, nor will any such person be entitled to any benefits available or granted to employees of the City.

SECTION 16.
TERMINATION

16.01 The City may terminate this Franchise Agreement for substantive default by the Grantee in its performance under this Agreement.

16.02 Prior to terminating this Franchise Agreement, the City shall give the Grantee thirty (30) days' written notice with the opportunity to correct the default to the satisfaction of the City within the said thirty (30) days. In the event the Grantee fails to correct the default to the satisfaction of the City within the thirty (30) day period, then the City may terminate this Franchise Agreement without further notice.

16.03 It is not the intention of the parties hereto to authorize repeated violations of this Franchise Agreement. Continued violations in the areas specifically described in the notice shall be grounds for termination without opportunity to correct default.

SECTION 17.
CANCELLATION FOR RECEIVERSHIP OR BANKRUPTCY

17.01 The City shall have the right to cancel this Franchise Agreement immediately should the Grantee come under the appointment of a receiver, liquidate, become insolvent, bankrupt, make a transfer for the benefit of creditors, reorganize and enter into an arrangement for the benefit of creditors, or file a

voluntary petition under any section or chapter of the National Bankruptcy Act, as amended, or under any similar law or statute of the United States; or should an involuntary petition in bankruptcy be filed against the Grantee and not be dismissed within one hundred twenty (120) days after the date of first filing.

SECTION 18.
NOTICE

18.01 Any notices required hereunder must be in writing and must be given personally or by certified mail, return receipt requested, addressed to the respective parties as follows:

GRANTEE: Texas Disposal Systems, Inc.
Post Office Box 17126
Austin, TX 78760-7126

CITY: City Manager
221 East Main Street
Round Rock, TX 78664

and to: City Attorney
309 East Main Street
Round Rock, TX 78664

or to such other addresses as either party may from time to time designate in writing.

SECTION 19.
AMENDMENT

19.01 Amendment to or modification of the terms and conditions of this Franchise Agreement shall be effective only upon the mutual agreement in writing of both parties hereto.

SECTION 20.
CONTROLLING LAW

20.01 This Franchise Agreement is governed and construed in accordance with the laws of the State of Texas, and venue for any legal action shall lie exclusively in Williamson County, Texas.

SECTION 21.
ENTIRE AGREEMENT

21.01 This document embodies the entire and integrated agreement between the parties with respect to the subject matter hereof. All prior negotiations, written agreements, and oral agreements between the parties with respect to the subject matter of this Agreement are merged into this document.

SECTION 22.
SEVERABILITY

22.01 Should any portion or part of this Franchise Agreement be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability will not affect the validity of the remainder of this Agreement which shall continue in full force and effect; provided that the remainder

of this Agreement can, absent the excised portion, be reasonably interpreted to give effect to the intentions of the parties.

SECTION 23.
FRANCHISE AGREEMENT DULY EXECUTED

23.01 The person signing this Franchise Agreement on behalf of the Grantee has been authorized by the Grantee to do so, and this Agreement has been duly executed and delivered by the Grantee in accordance with the authorization of its governing body, and constitutes a legal, valid and binding obligation of the Grantee, enforceable against the Grantee in accordance with its terms.

II.

A. All ordinances, parts of ordinances, or resolutions in conflict herewith are expressly repealed.

B. The invalidity of any section or provision of this ordinance shall not invalidate other sections or provisions thereof.

C. The City Council hereby finds and declares that written notice of the date, hour, place and subject of the meeting at which this Ordinance was adopted was posted and that such meeting was open to the public as required by law at all times during which this Ordinance and the subject matter hereof were discussed, considered and formally acted upon, all as required by the Open Meetings Act, Chapter 551, Texas Government Code, as amended.

READ and APPROVED on first reading this the ____ of _____, 2021.

READ, APPROVED and ADOPTED on second reading this the ___ day of _____, 2021.

_____
Craig Morgan, Mayor
City of Round Rock

ATTEST:

_____
SARA L. WHITE, City Clerk

ACCEPTANCE BY GRANTEE

The Grantee accepts and hereby agrees to be bound by all of the terms and conditions of this Franchise Agreement and Ordinance.

GRANTEE:

By: _____

ACKNOWLEDGMENT

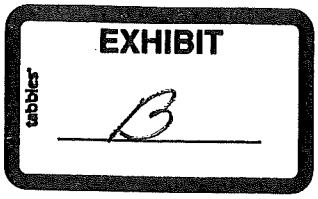
THE STATE OF TEXAS §
§
COUNTY OF Travis §

BEFORE ME, the undersigned authority, on this day personally appeared Jay Haward (name), _____ (title) of Texas Disposal Systems, Inc., known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said entity.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this the 6 day of the month of May, 2021.

LISA MARIE ONEY
Notary Public, State of Texas
Comm. Expires 11-13-2021
Notary ID 129301502

_____
Notary Public in and for the State of Texas



Grothues v. City of Helotes

Court of Appeals of Texas, Fourth District, San Antonio

August 14, 1996, Delivered ; August 14, 1996, Filed

Appeal No. 04-93-00151-CV

Reporter
928 S.W.2d 725 *; 1996 Tex. App. LEXIS 3584 **

Larry GROTHUES, Alan GROTHUES, Thomas GROTHUES, and Maurice GROTHUES, Appellants, v. CITY OF HELOTES, TEXAS AND INDUSTRIAL DISPOSAL SERVICE COMPANY, INC. d/b/a GARBAGE GOBBLER, and THE STATE OF TEXAS, Appellees.

Prior History: **[**1]** Appeal from the 285th District Court of Bexar County. Trial Court No. 92-CI-11565. Honorable Andy Mireles, Judge Presiding.

Disposition: AFFIRMED

Judges: Opinion by: Alfonso Chapa, Chief Justice. Dissenting opinion to follow by: Ted. M. Akin, Justice [1]

Opinion by: ALFONSO CHAPA

Opinion

[*726] Pursuant to our order dated October 9, 1995, granting appellees' motion for en banc rehearing of the motion for rehearing, our opinion issued on January 25, 1995, is withdrawn and this opinion is substituted in its place.

The questions presented by this appeal are whether a general-law municipality, as distinguished **[*727]** from a home-rule municipality, has authority to grant an exclusive garbage-collection contract to a private corporation, and, if so, whether that municipality can enforce payments to the garbage-collection franchise by fining its citizens who refuse to pay. We affirm the trial court's summary judgment in favor of the City of Helotes.

[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1988).

Factual Background

In February of 1992, the City of Helotes, a general-law **[**2]** municipality, enacted Ordinance No. 78 which awarded an exclusive franchise contract with Garbage Gobbler to collect and dispose of solid waste within the City. At the same time, the City enacted Ordinance No. 81 which required residents to use Garbage Gobbler exclusively, to pay its charges, and which authorized criminal sanctions for failure to do so. The Grothues, who are residents and landowners within the City, desired to dispose of their solid waste by transferring it to their business location in the City of San Antonio where it is removed by another garbage disposal company. When the City threatened to fine the Grothues for failing to pay Garbage Gobbler, the Grothues sued the City, Garbage Gobbler, and the State of Texas for a judgment declaring that the ordinances are unconstitutional and thus void, and for an injunction prohibiting enforcement of the ordinances and for attorney's fees. The City answered and counterclaimed for a judgment declaring the ordinances both valid and constitutional, and thus enforceable, and for attorney's fees. The State declined to participate in the litigation because the suit concerned neither the constitutionality nor validity of a statute. **[**3]** Both the Grothues and the City filed motions for summary judgment, each seeking the relief requested in their respective pleadings. After a hearing, the trial judge granted the City's motion for summary judgment and denied the Grothues' motion on November 9, 1992. Consequently, the Grothues brought this appeal.

Subsequent Legislative Action

Appellants first contend that the City lacked authority to enter into the contract with Garbage Gobbler to exclusively collect and dispose of solid waste within the city limits of Helotes because the franchise exceeds the City's statutory authority as a general-law municipality. Likewise, the appellants argue that the City does not have the authority to require them to subscribe to Garbage Gobbler's services or to fine them for their

failure to pay Garbage Gobbler for their solid waste removal. In this respect, appellants assert that since a municipality is a creature of the law created by the legislature, it possesses no power that is not conferred by its charter or by the general laws under which it was formed. *See* TEX. CONST. art. III, § 1 (Vernon 1984).

Our original opinion, issued January 25, 1995, agreed and found the City's **[**4]** ordinances void. While the matter was pending before us on rehearing, however, the legislature amended the County Solid Waste Control Act to provide a general-law municipality with the authority to contract with a private contractor for the collection and disposal of garbage and other solid waste. *See* Act of June 14, 1989, 71st Leg., ch. 678, 1989 Tex. Gen. Laws 2230, *amended by* Act of June 12, 1995, 74th Leg., ch. 486, 1995 Tex. Gen. Laws 3212 (codified at TEX. HEALTH & SAFETY CODE ANN. § 364.031 (Vernon Supp. 1996)). The amendment also validates existing contracts between a municipality and a private contractor. *Id.* [2] Appellants agree that this legislation renders moot their first point of error pertaining to a lack of authority to require appellants to use and pay for specified garbage collection services.

[5] A Municipality's Enforcement Authority**

Appellants continue to maintain that the City of Helotes had no authority to impose criminal sanctions in the form of fines for violations of Ordinance No. 81. [3] They **[*728]** assert that the sole weapon in a city's arsenal for garbage collection enforcement is the County Solid Waste Control Act, specifically TEX. HEALTH & SAFETY CODE ANN. § 364.034(b), which states:

[6]**

> To aid enforcement of fee collection for the solid waste disposal service, a public agency or county may suspend service to a person who is delinquent in payment of solid waste disposal service fees until the delinquent claim is fully paid.

TEX. HEALTH & SAFETY CODE ANN. § 364.034(b) (Vernon 1992). Since this is the only penalty provided by the Act for the conduct with which appellants expect to be prosecuted, appellants argue that the City has no statutory authority to impose a fine upon appellants to enforce payment for solid waste collection by appellants to Garbage Gobbler. [4]

[7]**

When construing a statute or ordinance, we consider such matters as the object sought to be attained by the statute, the circumstances involved, the legislative history, the common law, former provisions, and laws on the same or similar subjects. TEX. GOV'T CODE ANN. § 311.023 (Vernon 1988). We also may consider the consequences of a particular construction, an administrative agency's construction, and the title, preamble, or any emergency provisions of the statute. *Id.*

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[2] The legislature also amended the penal code to clarify that the meaning of an offense of omission includes those proscribed by municipal ordinance. *See* Act of February 25, 1993, 73rd Leg., ch. 3, 1993 Tex. Gen. Laws 10 (codified at TEX. PENAL CODE ANN. § 6.01 (Vernon 1994)).

[3] Ordinance No. 81 states in pertinent part:

> 1. The necessity for the establishment of a garbage and refuse collection system in the City for sanitary and public health purposes is hereby declared....
>
> 4. It shall be unlawful for residents of the City or persons dwelling therein, or proprietors or managers of commercial establishments, to refuse to avail themselves of the garbage and refuse collection provided by the City itself or through its contractor and to refuse to pay the charges for said service established by the City Council....
>
> 13. Each violation of any of the provisions of this ordinance shall constitute a penal offense and shall be punished by the penalty of a fine of not less than twenty-five dollars ($ 25) nor more than one thousand dollars ($ 1,000) and each day that such offense continues shall be a separate offense.

[4] Appellees dispute, in the alternative, appellants' standing to challenge the validity of a penal ordinance in the absence of any criminal proceeding against them. This court has previously acknowledged that "a court of equity may not enjoin the enforcement of a penal ordinance unless: (1) the ordinance is unconstitutional, or otherwise void, and (2) the enforcement of the ordinance causes irreparable injury to vested property rights." *Smith v. Copeland*, 787 S.W.2d 420, 421 (Tex. App.--San Antonio 1990, no writ) (quoting *City of Richardson v. Kaplan*, 438 S.W.2d 366 (Tex. 1969). The issue of constitutionality was clearly raised in appellants' original petition. Whether appellants have a vested property interest in the garbage they accumulate and haul into San Antonio for disposal is not clear. Appellees cite opinions dating back 50 years that establish that garbage has no value sufficient to make it a vested property interest. In light of the recycling industry which flourishes in many communities, we would ponder whether such opinions are ready for the compost heap. That is unnecessary today, however, because we find the ordinance challenged here constitutional.

The purpose of the County Solid Waste Control Act is "to authorize a cooperative effort by counties, public agencies, and other persons for the safe and economical collection, transportation, and disposal of solid waste to control pollution in this state." TEX. HEALTH & SAFETY CODE ANN. § 364.002 (Vernon 1992). Appellants would have us follow the maxim expressio unius est exclusio alterius and hold that suspension of garbage collection services is the only manner in which a general-law municipality may pressure its residents to pay the monthly garbage disposal service fee. Appellants' proposed construction [5] does not promote a rational, practical mechanism to encourage a resident to pay its monthly collection **[**8]** fees when it does not wish to have its garbage collected by the city's contractor. Rather, it is exactly what the delinquent resident who wishes to make other arrangements for garbage disposal would seek in this case. The legislature employed the phrase "to aid enforcement **[*729]** of fee collection" and chose the permissive "may" to authorize the suspension of garbage disposal services where a person is delinquent in paying monthly fees for this service. *Id.* at § 364.034 (b). We think context and the permissive language utilized in § 364.034 (b) clarifies that the public agency or county has no obligation to continue to provide garbage service to the resident whose service account is in arrears. Suspension of service is available as an encouragement to pay the delinquent bill so that delivery of the service may be restored.

[9]** We do not believe the legislature intended this "aid to enforcement" to be the only means to accomplish this goal. To reach such a conclusion, we would have to ignore other grants of authority the legislature has provided to general-law municipalities to safeguard the health and safety of its citizens. *See* TEXAS HEALTH & SAFETY CODE ANN. § 122.005 (Vernon 1992) [6] **[**11]**; *Texas Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 517 (Tex. 1968) (city's police powers extend to reasonable protection of public health and safety). The legislature and the courts have long recognized the importance of garbage disposal to the enhancement of health and safety. The enforcement of a comprehensive garbage collection plan such as the City has adopted is clearly within the police power granted to all municipalities. [7] TEX. LOCAL GOV'T CODE ANN. § 54.001 (Vernon 1994); *cf. City of Breckenridge v. McMullen*, 258 S.W. 1099, 1101 (Tex. Civ. App.--Fort Worth 1923, no writ) (a home-rule city)

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[5] A leading commentator on statutory construction emphasizes that "the expression of one implies the exclusion of all others" is not a rule of law but merely an aid to determine legislative intent. A court should apply the rule with care when "factually there [is] some evidence the legislature intended its (expressio unius) application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment." The maxim should be disregarded when to do so will serve the purpose for which the statute was enacted, will accomplish beneficial results, or is a necessary incidental to a power or right. *See* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.25 (5th ed. 1992).

[6] Specifically, the City points to the statutory language "take any action necessary or expedient to promote health or suppress disease" as authorization to arrange for garbage pickup and disposal. § 122.005 (a). Furthermore, the City argues that uncollected garbage or a chaotic system whereby garbage is disposed of on an irregular basis without enforcement of reasonable rules would constitute both a health hazard and a nuisance. In this respect, it notes that subsection (c) of the Health and Safety Code specifically gives a general-law municipality like Helotes the power to fine a person who refuses or fails to adhere to the rules of the health authority.

Although appellants argue that there is no proof that Ordinance No. 81 is a rule of the City's health authority, appellants have failed to establish this as fact as part of their burden in challenging the ordinance.

[7] The police power is a grant of authority from the people to their government agents for the protection of the health, safety, comfort, and welfare of the public. 52 TEX. JUR. III, Municipalities § 313 (1987). It is vested in the state and flows to a general law municipality through a legislative grant. *Id.* A general grant of such power is found at section 54.001 of the Local Government Code, which states:

> (a) The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may punish a violation of a rule, ordinance, or police regulation.
>
> (b) A fine or penalty for the violation of a rule, ordinance, or police regulation may not exceed $ 500. However, a fine or penalty for the violation of a rule, ordinance, or police regulation that governs fire safety, zoning, or public health and sanitation, including dumping of refuse, may not exceed $ 2,000.
>
> (c) This section applies to a municipality regardless of any contrary provision in a municipal charter.

The term "municipality" as used in § 54.001 encompasses general-law municipalities, home-rule municipalities, and special-law municipalities. *See* TEX. LOCAL GOV'T CODE ANN. § 1.005 (3) (Vernon 1988).

(upholding ordinance which assessed $ 100 per day penalty against one who hauled garbage within the city without a license). Moreover, we recognize that "police power is not static or unchanging. As **[**10]** the affairs of the people and government change and progress, so the police power changes and progresses to meet the needs." *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 165 (Tex. App.--Eastland 1972, writ ref'd n.r.e.).

[12]** We find that appellants' reliance on *Hope v. Village of Laguna Vista*, 721 S.W.2d 463 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) is misplaced. The Village of Laguna Vista sued a resident after assessing him for maintenance dredging of a boat channel located outside the village limits. The appellate court found that the village had no authority to make such an assessment. The general-law municipality had relied on a statute which authorized cities located on or connected with the Gulf of Mexico to build canals or channels and to fund such building with negotiable revenue bonds, loans or grants. The statute was silent on assessing residents for the cost of building or maintaining the structures. More importantly, however, the statute specifically limited any such **[*730]** expenditures to the corporate limits of the village. *Id.* at 464.

This is markedly different statutory intent than the permissive "aid to enforcement" language we are asked to construe today.

Omission or Commission?

Appellants characterize their unwillingness to utilize the city-franchised garbage collector, Garbage Gobbler, and their refusal to pay monthly fees for this service as **[**13]** an act of omission which was not subject to criminal sanctions at the time these ordinances were passed and this cause of action arose. They cite to § 6.01 (c) of the penal code which at the time Ordinance No. 81 was enacted read:

> A person who omits to perform an act does not commit an offense unless a *statute* provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

TEX. PENAL CODE ANN. § 6.01(c) (Vernon 1975). [8]

Two opinions cited by appellants have construed the use of the word "statute" in § 1.03 (b) as applied to § 6.01 to refer only to state and federal legislative enactments, not to municipal ordinances. *See Honeycutt v. State*, 627 S.W.2d 417, 422 (Tex. Crim. App. 1981); *Bidelspach v. State*, 840 S.W.2d 516 (Tex. App.--Dallas 1992), *writ dism'd, improvidently granted*, 850 S.W.2d 183 (Tex. Crim. App. 1993). Both parties acknowledge that the effect of these cases has been abrogated by the passage of Senate Bill 146 by the 74th Legislature.

[14]** Both *Honeycutt* and *Bidelspach* concerned municipal ordinances which the appellate courts found fundamentally defective because they purported to criminalize simple negligent conduct. *See Honeycutt*, 627 S.W.2d at 422 (complaint pursuant to negligent collision ordinance failed to allege culpable mental state); *Bidelspach*, 840 S.W.2d at 518 (indictment for failure to complete required documentation ordered dismissed). [9] The circumstances which engendered the analysis in these two cases are entirely different from our case. Appellants are not threatened with criminal sanctions for any acts or omissions due to negligence. They intend non-compliance of two city ordinances by using another means of garbage disposal not sanctioned by the City. To characterize appellants' conduct as an omission that cannot be criminalized under the penal code as it existed in 1992 is a considerable strain. Appellants admit that they intend to transport their garbage into the City of San Antonio for disposal with another collection service. That conduct is more than an omission, it is an affirmative act prohibited by the ordinance.

[15]** Appellants argue, however, that S.B. 146 cannot

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[8] In 1993, the legislature passed Senate Bill 146 which deleted the term "statute" and substituted "law as defined by Section 1.07 of this code." Act of February 25, 1993, 73rd Leg., ch. 3, 1993 Tex. Gen. Laws 10 (codified at TEX. PENAL CODE ANN. § 6.01 (c) (Vernon 1994). Thus, the statute currently limits culpability where one "who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act." TEX. PENAL CODE ANN. § 6.01 (c) (Vernon 1994).

[9] The *Bidelspach* opinion, moreover, is of limited authority because the court of criminal appeals issued an opinion when dismissing the State's petition for discretionary review that "the dismissal does not constitute endorsement or adoption of the reasoning employed by the Court of Appeals." *Bidelspach v. State*, 850 S.W.2d 183, 183 (Tex. Crim. App. 1993). In addition, the case illustrates a constitutional challenge to article XI, § 5 of the Texas Constitution which only applies to home rule municipalities.

and does not validate what is otherwise an unconstitutional ordinance. We presume that a duly-enacted ordinance is constitutional. *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex.), *cert. denied,* 459 U.S. 1087, 74 L. Ed. 2d 932, 103 S. Ct. 570 (1982); *John v. State*, 577 S.W.2d 483, 485 (Tex. Crim. App. [Panel Op.] 1979). It is our duty to give the ordinance a construction or interpretation that will render it valid, if it is reasonably possible to do so. *Swearingen v. City of Texarkana*, 596 S.W.2d 157, 161 (Tex. App.--Texarkana 1979, writ ref'd n.r.e.). To set aside a statute, it must clearly appear that its validity cannot be supported by any reasonable intendment or allowable presumption. *Wilson v. State*, 825 S.W.2d 155 (Tex. App.--Dallas 1992, pet. ref'd). We do not find the ordinance otherwise unconstitutional. Rather we find the ordinance to be authorized by section 54.001 of the Texas Local Gov't Code. *See Tweedy v.* **[*731]** *State*, 722 S.W.2d 30, 31-32 (Tex. App.--Dallas 1986, pet. ref'd) (ordinance or resolution valid under general grant of police power).

The Supreme Court **[**16]** has long recognized that "there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed at problems made manifest by experience, and that its discriminations are based upon adequate grounds." *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). Where public interest is involved, individuals' rights often yield to overriding public interests and are often regulated under the police power of the state. *See, e.g., Linick v. Employers Mut. Cas. Co.,* 822 S.W.2d 297, 300 (Tex. App.--San Antonio 1991, no writ) (contractual relationship between insurer and insurance agency highly regulated under state's police powers); *Palmer v. Unauthorized Practice Comm. of the State Bar of Texas*, 438 S.W.2d 374, 376-77 (Tex. App.--Houston [14th Dist.] 1969, no writ) (non-lawyer's sale of will "forms" held to violate state's interest in regulating the practice of law for the benefit of the public welfare). Thus, a government entity often regulates the contractual relations between parties and restricts the right to contract where it is reasonably necessary to protect the general public. *Linick*, 822 S.W.2d at **[**17]** 300. The enforcement of such restrictions is a necessary function of municipal governments to promote the common welfare of the greater metropolitan area. Ordinance No. 81 clearly places a duty on appellants to "act," that is, to utilize the city-sanctioned garbage collection services and pay the corresponding monthly fee. The fines imposed for failure to do so fall within the inherent police powers of the city.

Appellants' first point of error is overruled as moot and the second is also overruled. The judgment of the trial court is affirmed.

ALFONSO CHAPA

CHIEF JUSTICE

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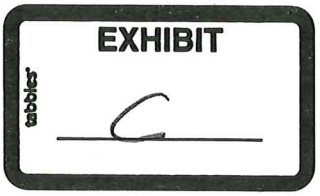

Breckenridge v. McMullen

Court of Appeals of Texas

Nov. 24, 1923, Decided

No. 10804

Reporter
258 S.W. 1099 *; 1923 Tex. App. LEXIS 1133 **

CITY OF BRECKENRIDGE v. McMULLEN.

Counsel: **[**1]** T. Edgar Johnson, of Breckenridge, for appellant.

Benson & Dean and A.O. Arnold, all of Breckenridge, for appellee.

Judges: BUCK, J.

Opinion

[*1099] D. W. McMullen brought suit in the district court of Stephens county against the city of Breckenridge, its mayor, commissioners, and city secretary, seeking to restrain them from enforcing against him a certain ordinance passed by the board of commissioners, dealing with various matters, and among those with the handling of garbage and creating the office of a licensed garbage officer, and making it an offense for any one but a licensed garbage officer of said city or his assistants "to haul, move, carry, convey or in any way transport along, over, or across any street, road or right of way within said city, any night soil, trash, debris, or any matter which is not valuable." The ordinance provided a penalty of $ 100 for each day that any one not a garbage officer hauled or transported such described garbage over the streets of the city.

Appellee alleged that for some time prior to the filing of the petition for injunction he had been engaged in the legitimate business of hauling and moving from the premises for various **[**2]** and sundry persons the material designated in and defined in said ordinance as "garbage," and that he had earned $ 1,200 per year therefrom; that such occupation was the business of plaintiff whereby he made a living for himself and those dependent on him; that said occupation is a legitimate one, and that it is the desire of plaintiff to perform the duties of said business in a legitimate manner; also that this ordinance excluded and prohibited plaintiff from hauling and moving garbage off his own premises; wherefore he prayed that the city of Breckenridge and its officers be restrained from interfering with plaintiff or any of his employes while hauling the materials designated and defined as "garbage." Upon the presentation of the petition, the judge, in vacation, granted the writ as prayed for, but upon final hearing he perpetuated the injunction only so far as to restrain the city and its officers from interfering with the petitioner **[*1100]** while hauling "any trash, manure, refuse matter, broken ware, discarded tin, dishwater, slops, swill, boxes, discarded meat, bread stuffs, and fruits of all kinds, whether of value or not, so long as the same is hauled and transported **[**3]** in a careful and prudent-like manner."

The court dissolved the temporary restraining order in so far as it restrained the officers of the city from interfering with the petitioner while hauling and transporting over the streets and alleys of Breckenridge "any night soil, offal, dead fowls, dead cats, rats, and all stale and discarded garbage, the accumulation of which or decomposition of which has become nauseous or produces offensive odors." From this judgment, the defendant city of Breckenridge has appealed.

Appellant has filed its brief in this court, but no brief has been filed by appellee, though he cites some authorities claimed to be in support of his contention in his petition.

No question is raised as to the legal requirements being observed in the passage of this ordinance. It is, in effect, conceded that the ordinance was passed with due regard to such requirements, though there is a contention that the ordinance is invalid because it interferes with the lawful exercise of petitioner's business, claimed to be a legitimate one, and creates a monopoly in favor of the garbage officer designated by the city. It is further claimed that the ordinance is in violation **[**4]** of article 1, §19, of the Constitution of the state of Texas, which says:

"No citizen of this state shall be deprived of life, liberty, property, privileges or immunities. or in any manner disfranchised, except by the due course of the law of the

land,"

in that it deprives the plaintiff of his property rights. That the right to pursue a chosen legal occupation and employment is a property right, and that he is entitled to pursue this occupation without the fear of being disturbed and harassed by false arrests and detention and being forced to employ legal advice and counsel, etc.

Ordinarily, a court of equity cannot be invoked to enjoin criminal prosecutions. This is true where the applicant has a plain, adequate, and complete remedy at law. This rule has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances. This general rule is based upon the principle that equity is concerned only with the protection of civil and property rights, and is intended to supplement, and not usurp, the functions of the courts of law. See cases cited in City of Tyler v. Story, 44 Tex. Civ. App. 250, 97 S.W. 856. **[**5]** It has been held that there are some exceptions to this rule, for instance, where the intervention of equity becomes necessary to protect the franchise of a business corporation. City of Austin v. Cemetery Association, 87 Tex. 330, 28 S.W. 528, 47 Am. St. Rep. 114; City of Atlanta v. Gaslight Co., 71 Ga. 106; Southern Express Co. v. Ensley (C.C.) 116 F. 756; and other cases cited in City of Tyler v. Story.

Another exception to the rule is that equity may intervene to restrain a multiplicity or oppressiveness of criminal prosecution. In City of Tyler v. Story, supra, it is said:

"Thus, where some 77 prosecutions were pending under a city ordinance, a court of equity stayed all but one, so the liability of the defendant might be determined without a multiplicity of suits. Third Ave. R. Co. v. New York, 54 N.Y. 159. Also, where complainant was arrested several times under an ordinance for occupying a wharf to which he claimed title, and fined in each case in an amount too small to allow an appeal, equity enjoined further proceedings until claim of title was determined. Shinkle v. Covington, 83 Ky. 420. But to give a court jurisdiction to prevent a multiplicity of suits at law, there **[**6]** must be a right affecting many persons; and, if the right is disputed between two persons only, not for themselves and all others, a bill for an injunction will not lie unless the complainant's rights have been established at law. Chicago, B. & Q.R. Co. v. Ottawa, 148 Ill. 397, 36 N.E. 85; Wallack v. Society for Reformation of Juvenile Delinquents, 67 N.Y. 23."

In the case of Davis v. American Society, 75 N.Y. 362, cited in Greiner-Kelley Drug Co. v. Truett, 97 Tex. 377, 79 S.W. 4, it was alleged that plaintiffs were engaged extensively in the business of slaughtering hogs in the city of New York, and that they conducted their business in the most approved, humane, and painless manner. They further alleged that Bergh, the president of the Society, came to their place of business and announced to them and their employes that they must discontinue slaughtering hogs by the methods then used, and thereupon arrested the plaintiff Crane and one of such employes for alleged cruelty to animals, and threatened that he would return in one week, and, if he then found the plaintiffs or others carrying on said business in the same way, he would arrest all persons engaged in it, and stop the **[**7]** business, as often as he found plaintiffs conducting it in that way. The New York court held that Bergh was acting under a valid law and regular authority, and that he had the right to make the threatened arrests if the plaintiffs were actually engaged in violating the law to prevent cruelty to animals. The only question involved for contestation was whether, as a matter of fact, they were guilty or innocent of such violation, and the court held that a court of equity could not be invoked to determine that question. So, in Greiner-Kelley Drug Co. v. Truett, supra, it was held that a court of equity would not issue an injunction to restrain criminal prosecutions of a wholesale druggist who was selling liquors to retail druggists **[*1101]** in the ordinary course of trade. A local option law prohibiting the sale of intoxicating liquors in Grayson county having been passed, and the drug company, being domiciled in that county, and engaged in selling drugs by wholesale, instituted this proceeding to enjoin the county attorney of Grayson county from prosecuting its salesmen for sales of alcohol as a drug to retail druggists in the ordinary course of plaintiff's business. The court decided **[**8]** this issue without a determination of whether such act would be a violation of the law or not, evidently on the ground that equity will not interpose to prevent criminal prosecutions unless such prosecutions come within some of the exceptions mentioned in the authorities. Equity will intervene to enjoin criminal prosecutions under a law or ordinance which is void or unconstitutional. So equity has power to prevent the enforcement of a law impairing the obligation of a prior contract. 22 Cyc. 884, §3.

But does the ordinance in question come within any of the exceptions, so that applicant below can enjoin its enforcement? The removal of garbage comes under the

powers of a municipality, and it is within the police power of a city to pass ordinances and make regulations governing the same. In 2 Beach on Public Corporations, §995, it is said:

"A by-law of a city prohibiting any person not duly licensed by its authorities from removing the house dirt and offal from the city is not in restraint of trade, but reasonable and valid, on the ground that, in the interest of public health, a city is justified in providing for some general system for removing offensive substances from the streets **[**9]** by persons engaged by the city, and responsible for the work at such times as they are directed to attend to it."

So Dillon on Municipal Corporations, §369, is as follows:

"Our municipal corporations are usually invested with power to preserve the health and safety of the inhabitants. This is, indeed, one of the purposes of local government, and reasonable by-laws in relation thereto have always been sustained in England as within the incidental authority of corporations to ordain. It will be useful to illustrate the subject by reference to some of the adjudged cases. An ordinance of a city prohibiting, under a penalty, any person not duly licensed therefor by the city authorities from removing or carrying through any of the streets of the city any house dirt, refuse, offal, or filth, is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded on a wise regard for the public health. It was conceded that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, but practically it was considered that the main object of the city could be better accomplished **[**10]** by employing men over whom they have entire control, night and day, who are at hand, and able, from habit, to do the work in the best way and at the proper time."

In Walker v. Jameson, 140 Ind. 591, 37 N.E. 402, 39 N.E. 869, 28 L.R.A. 679, 683, 49 Am. St. Rep. 222, the Supreme Court of Indiana sustained a municipal contract for the removal of garbage, giving the contractor the exclusive right to remove it at a certain price per pound payable by the persons who produced the garbage, and specially holding that such contract is not an attempt to create a monopoly. In this case the court said: "It resolves itself solely into a question of power, and not of mere reasonableness. We recognize the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but it is equally well settled that it has the power to treat as a nuisance a thing that, from its character, location, and surroundings, may or does become such. In doubtful cases where a thing may or may not be a nuisance depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation **[**11]** of power like the one we are considering, their action, under such circumstances, would be conclusive of the question. Baumgartner v. Hasty, 100 Ind. 577, 50 Am. Rep. 830. In 15 Am. & Eng. Encyclop. Law, 1173, it is said: "Municipal corporations are usually given authority to pass ordinances providing for the preservation of public health. This is one of the police powers of the state, and there can be no doubt that the sovereignty has the right to delegate this power to municipal a uthorities.' %y(3)5 C Vandine, Petitioner, 6 Pick. 187, 17 Am. Dec. 351; Cooley, Const. Lim. (6th Ed.) p. 739; Tiedeman, Pol. Powers, p. 316; Dill. Mun. Corp. §§141, 142. In the case of Boehm v. Baltimore (1883) 61 Md. 259, it was held that the city, under the power to preserve the health and safety of its inhabitants, had the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officers, regulating the removal of house dirt, night soil, refuse, offal, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever was intrinsically and inevitably a nuisance. The case of Vandine, **[**12]** Petitioner, supra, is in point here. It directly adjudges that a by-law of the city of Boston prohibiting any one not licensed by the city from removing house dirt and offal from the city is valid. On the trial the court instructed the jury that the subject of regulation was one on which it was proper for the city to legislate, it having reference to the public convenience and the health of the inhabitants; %y(3)5C that it was the duty of the city to remove from the streets and houses all nuisances which might generate disease or be prejudicial to the comfort of the inhabitants; and it was both reasonable and proper that it should be in their discretion to contract with persons to perform the work, so that it might be done on a general system. If it were found, on experiment, that the duty would not be thoroughly and faithfully performed, or would be attended with more expense to the city, if individuals should remove **[*1102]** these substances in their own carts and upon their own account, it was competent for the city government to enact a by-law which should subject all such persons to the vigilance of that government, and which should require them to be first licensed. The jury **[**13]** were further instructed that so far as, by virtue of the general laws of the

noted that there was introduced by the defendant an amendment to section 27, which only inhibits the hauling over the streets by any person other than the garbage officer or his assistants, "any night soil, trash, debris, or any matter which is not valuable." The purpose of the amendment seems to limit the list of articles which persons other than the garbage officer are inhibited from hauling. While the statement of facts does not show that these amendments have been passed, and therefore we cannot give them any serious consideration, yet the fact that they have been drawn up and introduced **[*1103]** in the commission indicates a disposition on the part of the commissioners to eliminate some of the features of the old law against which the petitioner **[**18]** below levels his objections.

On the whole, we believe that the trial court erred in not dissolving the temporary injunction granted, and in sustaining in part such injunction. Therefore the judgment rendered by the trial court is reversed, the permanent injunction granted is set aside, and this opinion is ordered certified to the trial court for observance.

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commonwealth, the city council had power to make by-laws for governing the city, these regulations were binding on all persons actually resident within its limits, either for business or pleasure, and whether inhabitants or strangers; that the object of the by-law being to secure to the city the regular and effectual removal, by public authority, of all sources of nuisance which are collected and accumulated in the houses in the city, by not suffering individuals under no obligation of trust to interfere in the same, it amounted to the prohibition of a nuisance, and that, so far as it affected trade, it was not a restraint, but only a regulation, of it. The defendant excepted to these instructions, and, on appeal, urged chiefly that the by-law was void, being in restraint of trade; also, that it created a monopoly, and that the city had no right to say it should be removed only by a person having a license. In ruling on this question the court upheld the instructions of the trial court, and said: "The great object of the city is to preserve the health of the inhabitants. To attain that, they wisely disregard **[**14]** any expenses which are deemed to be requisite. They might probably have these offensive substances carried out of the city without any expense, if they would permit the people from the country to take them away at such times, and in such manner, as would best accommodate them. Every one will see that, if this business were thus managed, there would be continual moving nuisances at all times, and in all the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia. %y(3)5C It seems to us %y(3)5C that the city authority has judged well in this matter. They prefer to employ men over whom they have entire control by night and by day, whose services may be always had, and who will be able, from habit, to do this work in the best possible way and time. Practically, we think the main object of the city government will be better accomplished by the arrangement they have adopted, than by relying upon the labor of others, against whom the go vernment would have no other remedy than by a suit for a breach of contract. The sources of contagion and disease will be speedily removed in small loads, which will not injure the pavements nor annoy the inhabitants. **[**15]** We are satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city."

See the Nebraska case of Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684, to the same effect; 28 Cyc. 715 et seq., and note 81, on page 719.

In Lodge v. Johnson, 98 Tex. 1, 81 S.W. 18, our Supreme Court said:

"It is well settled by the decisions of this court, as well as by the decisions of the Supreme Court of the United States, that the Legislature may classify persons, organizations and corporations according to their business and may apply different rules to those which belong to different classes."

Likewise a municipality may exercise, within its scope, a similar power of classification, and in the exercise of this power it may prescribe what constitutes a nuisance, and such determination should be upheld in doubtful cases where a certain thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion upon the part of the city authorities, in the exercise of their functions.

We believe the city of Breckenridge had authority under **[**16]** the law to classify "manure, any refuse matter, broken ware, discarded tin, paper, trash, boxes, slops, dead fowls, dead cats, rats, all stale and discarded meats, together with any and all other matter or accumulation the decomposition of which becomes nauseous or produces offensive odors," as garbage.

We further believe that the municipal authorities had the power and right to make a contract with a particular person, giving him exclusive right to haul all of the garbage in the city of Breckenridge, and providing the fee or charges to be made for such hauling, etc. 28 Cyc. p. 719. 19 R.C.L. §128, says, in part, as follows:

"In spite of the fact that garbage, after it has been discarded as food for human consumption, has a certain value as food for hogs or for rendering purposes, its value for such purposes is so slight as compared with the danger to the public health if the owner is allowed to dispose of it without restriction that ordinances have been unanimously upheld which prohibit the carrying of garbage through the streets except by certain designated scavengers in the employ or under the control of the municipality, and thus in effect deprive the owner of the opportunity **[**17]** of receiving compensation for his garbage, interfere with the source of supply of hog raisers and renderers, and destroy the means of livelihood of other scavengers."

Under this ordinance, the plaintiff was not prohibited from hauling anything of value over the streets of Breckenridge, but a penalty was provided for hauling any of the articles or things mentioned in section 27, and heretofore quoted in this opinion. It will be further

Breckenridge v. Cozart

Court of Civil Appeals of Texas, Eleventh District, Eastland

March 3, 1972

No. 4524

Reporter
478 S.W.2d 162 *; 1972 Tex. App. LEXIS 2708 **

City Of Breckenridge, Appellant, v. Leman Cozart, Appellee

Subsequent History: [**1] N.R.E.

Prior History: Appealed from the 90th Judicial District Court of Stephens County.

Judges: Austin McCloud, Chief Justice.

Opinion by: McCLOUD

Opinion

[*163] The issue to be decided is the constitutionality of a city ordinance which gives a city the right to discontinue water service to premises when the occupant fails to pay a city garbage collection charge.

Leman Cozart sued the City of Breckenridge alleging that Section 12 of the City's Ordinance No. 204 was unconstitutional and invalid. Section 12 authorizes the City to discontinue water service to the premises of any party who does not pay "sanitary service charges". The case was tried before the court without a jury. The court held that the discontinuance of water service to Cozart's residence because of his refusal to pay the City a garbage collection charge constituted a taking of Cozart's property without due process of law. Judgment was entered declaring Section 12 unconstitutional and the City was enjoined from enforcing the provisions of said section. The City of Breckenridge has appealed. We reverse and render.

The City of Breckenridge is a municipal corporation and operates as a home rule city. The water works, [**2] sewer system and garbage disposal system are all owned and operated by the City as public utilities. Pursuant to the regulations of the Texas Air Control Board the City acquired a sanitary landfill in order to bury garbage and trash collected by its garbage disposal system. On November 3, 1970, the City Commission passed Ordinance No. 204 which was a mandatory garbage disposal ordinance. Section 12 provided that all sanitary service charges should be paid monthly at the office of the water department, and if not paid, the City would have the right to discontinue water service to the premises. The City had previously enacted an ordinance providing for discontinuance of water and sewer service for failure to pay either the water or sewer service charge. Appellee, Cozart, is a resident of Breckenridge and is the owner of a single family residence. His home is connected to the water and sewer system owned and operated by the City. After the enactment of Ordinance No. 204, appellee was billed by the City for water, sewer and trash services. Cozart tendered the charges for water and sewer services, but refused to pay the $2.50 monthly garbage disposal fee. After appellee refused [**3] to pay the monthly garbage disposal fee for the months of November, December, January and February, the City discontinued water service. Appellee testified that he knew the City's disposal system was available to him but that he did not wish to use the City's garbage [*164] disposal system. He places his solid wastes, other than waste food stuffs, in covered metal containers located in his yard. Periodically he moves the waste in these containers to a relative's farm. He buries waste food in his garden.

Appellant, City contends the trial court erred in declaring Section 12 unconstitutional. Appellee, Cozart, argues that shutting off his water supply, because he refuses to pay the garbage collection charge, is a taking of his right to the water supply without due process of law and violates his constitutional guarantee. United States Constitution, 14th Amendment; Texas Constitution, Article 1, Sec. 19.

The constitutionally protected right of property is not an absolute right. In 16 Am.Jur.2d 691, Constitutional Law, Sec. 363, it is stated:

> "The right is subject to such reasonable restraints and regulations established by law as the legislature, under governing [**4] and controlling

> power vested in it by the constitution, may think necessary and expedient. Thus, it is subject to limitation by reason and by means of legitimate exercises of the state's police power.
> The right to own and enjoy property is no higher in the constitutional sense than the right of liberty. And all property is held under the implied obligation that the use of it shall not be injurious to the community."

We find no Texas case dealing with the issue of whether under its police power, the City can discontinue water service for failure to pay garbage and sewer service charges. The Court in Bexar County v. City of San Antonio, 352 S.W.2d 905 (Tex.Civ.App. 1962, writ dism'd.) impliedly recognized that water service can be discontinued for failure to pay the sewer charge. The Court said that such an ordinance was nothing more than a regulation whereby the city could prevent a person who did not pay the sewer charge from using the sewer, and that the ordinance was not penal in nature. The Court in Michelson v. City of Grand Island, 154 Neb. 654, 48 N.W.2d 769 (1951), expressly held that a municipal corporation may discontinue water service to the user, if the user **[**5]** fails to pay the sewer charges.

The question presented in this appeal was decided in favor of the municipal corporation in Cassidy et al. v. City of Bowling Green et al., 368 S.W.2d 318 (Ky.Ct. of App. 1963). There the Court was concerned with the constitutional validity of an ordinance passed by the City of Bowling Green where it was contended that the City had no right to cut off water service to parties whose garbage disposal bills were delinquent. The Court held that exclusive control of garbage disposal by the City was an essential health matter and that the right to regulate same was within the police powers of the city. The Court said garbage disposal fell within the same category as sewage disposal and since the City had the right to require its inhabitants to accept garbage and sewer services, it could require them to bear the expense thereof by payment of reasonable fees. The Court said:

> "The final contention is that the City may not enforce collection of its garbage disposal charges by discontinuance of its water services. We are unable to grasp from appellants' brief what constitutional right is being breached by this method of collecting bills. It is shown **[**6]** by this record that for public health and sanitation purposes the City furnishes water service, sewerage service, and garbage disposal service. They are all inter-related and the City is under no obligation to furnish any or all of these services except upon the payment of reasonable charges. This public health program, while divided into separate administrative units, is a single program. Any reasonable method of collection is justified and certainly deprives appellants of no constitutional rights.
>
> **[*165]** The reasonableness of discontinuing one public service for failure to pay for a related public service was recognized in Rash v. Louisville & Jefferson County Met. Sewer Dist., 309 Ky. 442, 217 S.W.2d 232, and City of Covington v. Sanitation District No. 1, Ky., 301 S.W.2d 885. We are not inclined to say that *interdependence* is necessarily a controlling factor. However, the record shows that garbage disposal and water supply are closely related from a sanitation standpoint and we can find nothing arbitrary or unreasonable about this method of collecting service charges."

The opposite view was expressed in an earlier decision of the Supreme Court of Nebraska. Garner **[**7]** v. City of Aurora, 149 Neb. 295, 30 N.W.2d 917 (1948). There the Court held that the City of Aurora could not discontinue water service for failure to pay garbage collection charges and as a basis for the holding said:

> "The authorities are uniform to the effect that a public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction, not strictly connected with the particular physical service. For instance, electric companies frequently sell electric stoves, refrigerators, and the like. Such a company cannot cut off electric service because the patron is in default in the payment of a bill of that description."

Environmental conditions have changed radically since the *Aurora* case was decided in 1948. Anti-pollution legislation has been enacted at both the federal and state levels. The problem of garbage disposal and waste disposal is of paramount importance. Police power is not static and unchanging. As the affairs of the people and government change and progress, so the police power changes and progresses to meet the needs. 12 Tex.Jur.2d 416, Constitutional Law, **[**8]** Sec. 70.

The Texas Legislature recently enacted Section 13,

Article 4477-8, V.A.C.S., known as the County Solid Waste Control Act, which expressly provides for the precise action taken by the City of Breckenridge. The statute became effective after the trial of the instant case. Section 13 states:

> "Any public agency or any county may offer solid waste disposal service to persons within its boundaries, may require the use of such service by any or all such persons, may charge fees therefor, and may establish said service as a utility separate from other utilities within its boundaries. *To aid in enforcing collection of fees for such solid waste disposal service, any public agency or county may suspend service from any or all other utilities owned or operated by it to any person who may become delinquent in payment of solid waste disposal service fees until such delinquency has been paid in full.*" (emphasis added)

The City furnishes water, sewerage, and garbage disposal services. We think, at least to some extent, such sanitation services are interrelated.

We adopt the rule announced in the *City of Bowling Green* case and hold that Section 12 of Ordinance No. **[**9]** 204 is a valid and reasonable exercise of the inherent police power of the City of Breckenridge. Section 12 is not unconstitutional, illegal, or invalid and the discontinuance of water by the City in accordance with the provisions of Section 12 did not constitute a taking of appellee's property without due process of law.

The judgment of the trial court is reversed and judgment is rendered for appellant.

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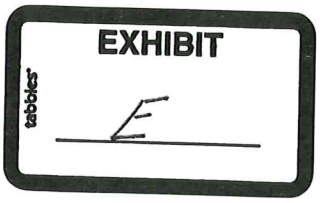

Ayala v. Corpus Christi

Court of Civil Appeals of Texas, Thirteenth District, Corpus Christi

March 19, 1974

No. 812

Reporter
507 S.W.2d 324 *; 1974 Tex. App. LEXIS 2086 **

Henry Ayala, d/b/a Custom Ambulance Service, Appellant v. City of Corpus Christi, Appellee

Prior History: **[**1]** On appeal from the 28th District Court of Nueces County, Texas.

Judges: Paul W. Nye, Chief Justice.

Opinion by: NYE

Opinion

[*325] This is a suit brought by Henry Ayala individually and doing business as Custom Ambulance Service to enjoin the City of Corpus Christi from purchasing and operating ambulances in the use of a public ambulance system. The suit was brought under the authority of Article IX, Sec. 18 of the City Charter which allows any citizen who is a property taxpayer of the City to maintain an action to restrain the execution of any illegal or unauthorized or fraudulent agreement or contract on the part of the City. At the conclusion of all the evidence the trial court held for the City of Corpus Christi and denied plaintiff's application for permanent injunction.

The plaintiff has operated a privately owned ambulance service in the City since 1964. From the beginning of its operation through 1972 the Plaintiff had a contractual arrangement with the City by which the plaintiff would respond to emergency calls from the police department. Plaintiff was paid $5.00 by the City for each of these calls he responded to. Additionally, the plaintiff billed the individual **[**2]** who benefited from the service $25.00. The plaintiff responded to 2,530 of such emergency calls in 1972. In addition to the calls initiated by the police department, the plaintiff received calls for ambulance service from private individuals in the community. The plaintiff billed the individuals requiring the service at the same rate as those calls initiated by the police. The plaintiff made 850 such private calls in 1972.

In the latter part of 1972 the City Council for the City of Corpus Christi passed an ordinance allocating funds from the Federal Revenue Sharing Program for the purchase of 6 ambulances. Bids were invited for this purpose. A contract was proposed in which the City of Corpus Christi and the Nueces County Hospital District would organize and operate this **[*326]** new ambulance service as a joint operation.

The plaintiff attacks the proposed public ambulance service on the grounds that the City Charter in Article IX, Sec. 15 requires a majority vote of the property taxpayers of the City in a special election to approve the purchase, construction or operation of ". . . a system or systems of water works, gas or electric lighting plants, telephones, streetcars **[**3]** and sewers, or any other public utility service or enterprise". The plaintiff claims that since no election was ever held, the City is operating a public utility service illegally, and as a result he will suffer irreparable damage therefrom.

The appellant attacks the ruling of the trial court in denying his application for injunctive relief on two grounds which form his points of error. They are:

> "*First Point*
> The trial court should have held that Henry Ayala, individually and d/b/a Custom Ambulance Service did suffer irreparable damage as a result of the institution by the City of Corpus Christi of a public emergency ambulance system.
>
> *Second Point*
> The trial court should have held that the City of Corpus Christi, Texas was required by its charter and particularly by the provisions of Article IX, Sec. 15 (a), to hold a special election to allow the voters entitled to participate therein to approve the institution of the proposed public emergency ambulance system, or the purchase of ambulance therefor."

Before consideration is given to the points of error set forth by the plaintiff, it is interesting to note that the

plaintiff did not claim a breach of contract **[**4]** by the City or an unjust determination of a franchise. The plaintiff does not challenge the power of the City to purchase an ambulance system. Instead, plaintiff attacks the method which the City used to make this purchase as being illegal and in violation of the City Charter which controls such purchases and/or operations.

Appellant's contention that he would suffer irreparable harm by losing the emergency calls that he is presently getting from the police department is without merit. Plaintiff failed to meet the burden of proof necessary to show irreparable harm. The evidence showed that the plaintiff had a very low collection rate from calls from the police department. He admitted that the business he lost from the police department was of an inferior quality. He stated that he had a net profit of $1,500.00 for 1972. It was his testimony that his total business included a wrecker service, a wrecked storage service, and a personal call ambulance service in addition to those service calls from the police department.

Even if the plaintiff had met his factual burden, it would not be irreparable harm to him if the City had a legal right to institute the ambulance service, irrespective. **[**5]** There is a difference from showing an injury or loss alone and showing that the loss is related to a legally enforceable right or breach of a legal duty. State v. Brewer, 141 Tex. 1, 169 S.W.2d 468 (1943). An action will not lie for an injury resulting from the mere exercise of a legal right, or from the commission of a lawful action in a proper manner. The doctrine of damnum absque injuria (damage without injury) applies, and the loss is not cognizable in the law. Brown v. American Freehold Land Mortgage Company, 97 Tex. 599, 80 S.W. 985 (1904). See 1 Tex.Jur. Actions § 18. Where a non exclusive right or franchise is granted by a City, such City may grant the same right to another, without impairing a contract obligation. This would apply to the City **[*327]** itself. In some cases, a City may also undertake to do that which the same right or franchise permits. See McQuillin, The Law of Municipal Corporations § 19.47 (3rd Ed. 1969). We hold that any loss that this appellant may have suffered because of the competition of this particular business in this City is not an injury which the law will attempt to prevent or remedy. Appellant's first point is overruled.

Article **[**6]** IX, Section 15(a) of the Charter of the City of Corpus Christi requires the approval of the majority of the property taxpayers voting in an election, where the City Council is to buy, construct, or maintain and operate a system or systems of water works, gas or electrical lighting plants, telephone, streetcars and sewers or any other public utility service or enterprise.

The main question before us is whether an ambulance service business is that type of public utility or enterprise envisioned by this Charter language so as to require voter approval for its acquisition and operation. Since it is not listed specifically, we must determine whether or not the general term "other public utility service or enterprise" would bring it within the terms of the Charter provisions.

Although public utility is often used in a broad sense, it is nevertheless limited and restricted here by the particular designations of the named type of utilities listed in the Charter. The latter general words, "other public utility service or enterprise", is necessarily limited to other like utilities which are set out specifically. The rule of ejusdem generis requires this result. Ejusdem generis means literally **[**7]** "of the same kind". The rule is designed to aid in the interpretation of general words which follow specific words and are construed to embrace objects similar in nature. The general words "other public utility service or enterprise" are not to be construed in their broadest sense but are held to apply to things of the same kind or class as specifically mentioned (i.e., water works, gas, electric, telephone, etc.). See Associated Indemnity Corp. v. Bur-Tex Constructors, Inc., 444 S.W.2d 338 (Tex.Civ.App. -- Corpus Christi, 1969, n.r.e.) and authority cited therein. See also Farmers' & Mechanics' National Bank v. Hanks, 104 Tex. 320, 137 S.W. 1120 (1911); Stevenson v. Record Publishing Co., 107 S.W.2d 462 (Tex.Civ.App. -- Eastland 1937 writ dism'd); Huckabee v. Hansen, 422 S.W.2d 606 (Tex.Civ.App. -- Corpus Christi 1967); 28 C.J.S. p. 1049.

The ambulance service company belonging to the plaintiff is a small proprietorship when compared to public utilities generally. Even though plaintiff's business serves the public, it is not the type of business that would qualify as a public utility in the narrow sense enumerated by the City Charter. The businesses or enterprises enumerated **[**8]** in the City Charter, are the corporate type businesses that are usually subjected to public offering or multiple ownerships, if they are not municipally owned. The plaintiff's ambulance service business is not such a business.

The Supreme Court of Texas in Carney v. Southwestern Motor Transport, 153 Tex. 267, 267 S.W.2d 802 (1954) held that an inter-city motor freight carrier, operating on

a certificate of public convenience and necessity, and regulated by the Texas Railroad Commission, although affected with a public interest, did not qualify as a public utility. There is authority for deference to legislative definition of a public utility. In Article 6674u-1, Sec. 1(5), V.A.T.S. concerning Warning Devices on Public Streets and Highways, the Legislature defined public utility as ". . . all telegraph, telephone, water, gas, light and sewage companies or cooperatives, or their contractors, and any other business presently or hereinafter recognized by the Legislature as a public utility." Our search does not reveal where the **[*328]** Legislature has in any other place, defined a public utility to include a public ambulance service or like business.

The institution of an emergency **[**9]** ambulance service is, we believe, a service kindred to the police or fire service. This type of service is incident to the police power of the state: i.e. to protect the health, safety, and general welfare of its citizens. See Attorney General's opinions No. M-231 (1968); No. M-385 (1969); No. C-772 (1966); No. M-806 (1971). It does not require a capital investment such as would a water works system, electric or gas utility. We believe that the purchase and operation of the ambulance service was made in the furtherance of the public health, safety and welfare of the citizens of Corpus Christi and was properly initiated by ordinance as provided in Article IX, Sec. 2 and 3 of the City Charter which reads in part as follows:

> "The enumeration of particular powers in this charter shall not be deemed exclusive, but in addition to the powers enumerated the city shall have power to do all things necessary to efficient management and control of the municipal property and to promote the general welfare, not forbidden by this charter, the general laws or the Constitution of the State of Texas. . . .
> * * *
>
> The city council shall have power to enact and enforce all ordinances **[**10]** necessary to protect health, life and property, . . . to enact and enforce all ordinances necessary to the exercise of its corporate powers and duties."

We hold that an ambulance service purchased and operated by the City of Corpus Christi is not, as such, a public utility within the meaning of Article IX, Sec. 15 of the Charter.

Appellant's second point is overruled. The judgment of the trial court is affirmed.

AFFIRMED.

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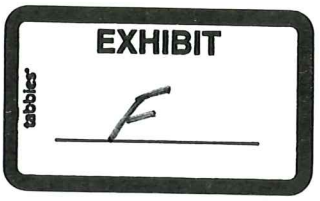

Wichita Falls v. Kemp Hotel Operating Co.

Court of Civil Appeals of Texas, Fort Worth

April 24, 1942, Decided

No. 14427

Reporter
162 S.W.2d 150 *; 1942 Tex. App. LEXIS 285 **

CITY OF WICHITA FALLS ET AL. v. KEMP HOTEL OPERATING CO. ET AL.

Counsel: **[**1]** T. A. Hicks, Thelbert Martin, Leslie Humphrey, B. D. Sartin, and H. W. Fillmore, all of Wichita Falls, for appellants.

Bert King, Harold Jones, John Davenport, and Sam B. Spence, all of Wichita Falls, for appellees.

Judges: SPEER, Justice.

Opinion by: SPEER

Opinion

[*151] This appeal involves the validity of an ordinance passed by the City of Wichita Falls, and a contract made by that city with one Green.

Kemp Hotel Operating Company, a corporation, Henry Ford, Steve Ford, and Paul Montgomery, a co-partnership doing business as Holt Hotel, E. A. Burch, Paul Cameron, Floy Freemen, Fleta Freemen, Jess Gary, Roy Click and T. L. Hestand were plaintiffs below. The City of Wichita Falls, Chris W. Jenson, Chief of Police, and L. B. Green were defendants. They will continue to carry that designation, except when necessary to refer to one or more by name.

Plaintiffs sought and obtained injunctive relief against the named defendants from the enforcement of the ordinance and contract and from that judgment the defendants have appealed.

At and prior to all times involved, material to this appeal, the defendant City was organized and operated under Title 28, Chapter 13, now Article 1165 **[**2]** et seq., R.C.S., Vernon's Ann. Civ. St. Art. 1165 et seq., sometimes referred to as the "Home Rule Act". In addition to the provisions of that Act, the City had a charter containing provisions relating to its duties and functions as a municipality. In an effort to comply with the statutory laws and especially the "Sanitary Code" embraced mainly in Article 4477, R.C.S., Vernon's Ann. Civ. St. Art. 4477, and various provisions of its charter, the City, acting through its Board of Aldermen, passed ordinance No. 1326, which, by its terms, among other things, provides for the gathering and disposition **[*152]** of garbage and other refuse matter accumulating about homes, business houses and industrial plants. The City was divided into zones; residences, rooming houses, boarding houses and business houses were classified. Minimum and maximum charges on each class in the respective zones were fixed. The ordinance also provided for the collection of all such charges by the City at the time of and in connection with bills rendered for water furnished on meter readings. There was also a provision for receiving bids for the gathering and disposition of such garbage and waste matter under restrictions **[**3]** and reservations in the ordinance. Several bids were received and it was officially determined that Green's was the lowest and best bid, whereupon the City instructed the mayor to make a contract with Green for the removal and disposition of said waste matter.

The nature of the contract made with Green was such that for a term of five years, if he performed the contract, he was to have the exclusive right to gather and dispose of the garbage. We shall have more to say about the contract.

The ordinance contained a penal provision against all persons, other than the one to whom the contract should be let, who gathered and hauled garbage.

Since the passage of the ordinance and letting the contract with Green, plaintiffs Gary, Click and Hestand have been arrested and prosecuted for violating the ordinance and are threatened with further prosecution if they continue to violate it. Other named plaintiffs were operators of hotels, coffee shops, cafes and eating places where their waste matter had a value which they sold to persons for varying amounts. The garbage when so sold was used to feed hogs.

There are many grounds alleged as to why the ordinance and contract were **[**4]** void and their enforcement should be enjoined. The trial court enjoined their enforcement but the judgment does not indicate the grounds upon which they were declared void. After the usual provisions of appearances and a hearing, it was decreed by the court that they (the ordinance and contract), "are declared void and of no force and effect". The judgment concludes with the order enjoining the City and its officers from enforcing the ordinance and granting plaintiffs the injunctive relief sought against Green.

Upon application, this case was advanced on our docket for submission and the briefs of all parties indicate that a disposition of the appeal should be determined upon whether or not the contract with Green and the ordinance upon which it was based constituted a franchise to Green for the operation of a public utility. It is obvious, that if there was a franchise granted for operation of a public utility, it is invalid, since the provisions of the charter controlling such matters were not complied with. Plaintiffs (appellees) contend that it was such a franchise and defendants (appellants) deny it.

Plaintiffs below rely upon the provisions of Section 121 of the charter, **[**5]** which reads:

"All public utility franchises and all renewals, extensions and amendments thereof shall be granted or made only by ordinance. No such proposed ordinance shall be adopted by the Board of Aldermen until it has been printed in full and until a public written report containing recommendations thereon shall have been made to the Board by the City Manager, or by the Mayor if there be no City Manager, until adequate public hearings have thereafter been held on such ordinance and until at least two weeks after its official publication in final form. No public utility franchise shall be transferable except with the approval of the Board of Aldermen expressed by ordinance and copies of all transfers and mortgages or other documents affecting the title or use of public utilities shall be filed with the City Clerk within ten days after the execution thereof."

In support of their contentions, in their briefs, plaintiffs say: "The point we urge here is nothing more nor less than that the City had a charter providing how this thing (granting a franchise for the operation of a public utility) could be done, and the council without attempting to comply with the charter, proceeded **[**6]** to undertake to do it in their own way by an ordinance and contract, and without compliance with the provisions of the charter."

We may well ask and answer the questions: (1) Do the gathering and disposition of garbage constitute a public utility? And (2) Do the ordinance and contract with Green amount to a franchise?

In 51 C.J., §1, it is said: "A "public utility' has been described as a business organization which regularly supplies **[*153]** the public with some commodity or service such as gas, electricity, etc. * * *." The same authority states in substance that the term has not been defined and that it would be difficult to construct a definition that would fit all cases. It seems that one of the distinguishing characteristics of a public utility is the devotion of private property by the owner to a service useful to the public and which the public has a right to demand so long as it shall be continued, with reasonable efficiency, under proper charges. 34 Tex. Jur., p. 702, §3, also points out the difficulty in defining the term. There is little doubt that a service by an individual, private corporation or municipality, could be such in the performance of a health **[**7]** regulation within a given area, that it could be classed as a public utility. This conclusion would not be altered by the fact that a different type of service would be required in its performance. Illustrative of this is the fact that it is common knowledge that certain parts of said waste matter may be taken away by means of a sewerage system, while other parts must of necessity be deposited in containers and hauled away at intervals. It is the public service of ridding premises of waste and equipment used in connection therewith which constitute the public utility.

In Moore v. Logan, Tex. Civ. App., 10 S.W.2d 428, writ denied, the court had under consideration whether or not the gathering of garbage as a health measure was a public utility. Under the facts of that case (somewhat different from those before us) it was held that the gathering of garbage in a city constituted a public utility and that its supervision came within the duties enjoined by the City upon the superintendent of public utilities instead of the mayor, who, in a broad sense, is the general supervisor of the city and all its activities. Upon the other hand, it is perceivable that when the Sovereign State in **[**8]** this jurisdiction declares what type of service shall constitute a public utility as contained in Article 1416 et. seq., R.C.S., courts are without authority to so classify others. The point last mentioned is strongly intimated, if not directly so held, in Gulf States Utilities Co. v. State, Tex. Civ. App., 46 S.W.2d 1018,

writ refused. Those primarily interested in the distinction drawn between the two cases cited, may read with profit a discussion to be found in 12 Texas Law Review, page 89.

It would profit little to speculate as to where the line of demarcation should be drawn between services of a quasi public nature, rendered, which cannot be classed as a public utility and those to be rendered under the ordinance and contract before us, which we are inclined to classify as a public utility. We have concluded that for lack of a better guide, what was said in Moore v. Logan, supra, is applicable here, and that the performance of the ordinance and contract constitutes a public utility.

It will be observed that by the provisions of the charter above quoted that all "Public Utility Franchises" shall be granted only after a compliance with that provision in the charter. It **[**9]** must follow, that even if the City of Wichita Falls did promote by the ordinance and contract a public utility, still unless a franchise was granted thereby, the procedure would not be invalidated for lack of a compliance with charter provisions.

A franchise, as the term is to be construed in the instant case, is little less understandable than that of "Public Utilities". Whether or not an instrument, ordinance or contract amounts to a franchise depends largely upon the manner of its performance in compliance with its terms. It has been said that a franchise is usually regarded as a special privilege conferred by the government (the municipality in this case) on individuals which does not belong to them and other citizens as a common right. A franchise, as such, is essentially property and will be safeguarded by the law in all respects as other property. It being an incorporeal hereditament, it is subject to sale and disposition by the owner. Every franchise carries with it certain privileges, but it does not follow that privileges bought and paid for necessarily amount to a franchise. 19 Tex. Jur., pp. 875, 876, §§2 and 3.

As we view the ordinance passed and the subsequent contract **[**10]** made thereunder with Green, it was a means chosen by the governing body of the municipality to keep the city clear of deleterious substances for the promotion of health and to prevent the spread of disease. In the absence of a fraudulent design or purpose, the judgment of the City's governing body in making the choice as it did will not be reviewed by the courts. The City, acting through its Board of Aldermen, had the right--indeed, it was its imperative duty--to provide some means of accomplishing **[*154]** the end sought. It could have provided for gathering garbage by means of its own employees supplied with proper equipment. We also hold that it could, with equal propriety and authority, employ an individual or corporation to perform the necessary functions in carrying out the plan. The City fixed the price chargeable to those to be served, and obligated itself to make the collection of such charges and in turn agreed to pay Green such amounts as it collected. The contract reflects that for the duties to be performed by the City in connection with the enforcement of the sanitary measures so enacted, it was to receive from Green $ 250 per month. We are not concerned with whether **[**11]** or not the contract was a provident one; it evidently was one which the City thought proper. The whole contract is replete with reservations of supervision of the work by the City through the facilities of its health department. There is no contractual relationship between Green and those whom he is to serve. If the heaviest payers were to become delinquent, Green could not properly make demand of them for payment; he must look alone to the City for his compensation. The City only could enforce payment of the charges made for the service; Green was required to execute and keep effective a good and sufficient bond for the performance of the contract. He could not sell, transfer or assign any of the rights acquired by its terms. We conclude therefore that neither the ordinance nor the contract, nor the two combined, constituted a franchise to Green. It follows, then, that they were not void because the provisions of Section 121 of the charter were not observed.

If it could be said that it was necessary for the charter to provide for authority of the City to pass such an ordinance as it did, a thing unnecessary for us to determine, section 148 of the charter provides, in part: "The **[**12]** Board of Aldermen shall further have the right by ordinance to adopt and prescribe rules and regulations for the handling and disposition of all garbage, trash and rubbish within the City of Wichita Falls, and shall further have the right to prescribe that the city alone shall remove all garbage, trash and rubbish, and shall have the right to fix charges and compensation to be charged by the city * * *."

It appears that the ordinance was passed and the contract made to promote public health and to prevent the spread of disease. This duty is imposed upon the City by statutory law. It had no option but to comply with these provisions. In this respect the whole scheme constituted a governmental function. The principle announced and the statutory provisions requiring it will

be found in City of Fort Worth v. George, Tex. Civ. App., 108 S.W.2d 929, writ refused. See, also, City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872.

In view of the fact that the judgment of the trial court does not indicate upon what ground the ordinance was held void and its enforcement enjoined, we think it pertinent to add these further observations: Those plaintiffs in this case who operated eating places **[**13]** and had a property right in the waste food products which they could sell for swine food, could not assert those rights as against the imperative duty of the city to provide adequate protection to the health and welfare of the general public. Private rights in such instances are subordinate to those of the public. City of Breckenridge v. McMullen, Tex. Civ. App., 258 S.W. 1099; Gardner v. State of Michigan, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 212.

Again, the ordinance which carries a penal provision for its violation is not void upon its face; its validity is dependent upon whether or not its passage was in violation of the city charter. It seems to be the settled law in this state that courts of equity will not enjoin the enforcement of a penal ordinance unless its invalidity is apparent upon its face and its threatened enforcement will work substantial and irreparable injury to those against whom it is enforced. Where the penal ordinance is not void upon its face, as in this case, its validity is to be determined by courts of law and not equity. City of San Antonio v. Teague, Tex. Civ. App., 54 S.W.2d 566, writ refused; Ex parte Sterling, 122 Tex. 108, 53 S.W.2d 294.

For **[**14]** the reasons stated, we hold that the ordinance and contract were not void for want of compliance with the provisions of the city charter in the respects herein set out, and that the trial court erred in so holding and in issuing its writ of injunction against their enforcement. The judgment of the trial court is therefore reversed and judgment here rendered for defendants dissolving the writ of injunction **[*155]** issued by the trial court, and upholding the validity of said ordinance and contract, empowering defendants the full right of complete enforcement thereof. Reversed and rendered.

EXHIBIT
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G

Browning-Ferris, Inc. v. Leon Valley

Court of Civil Appeals of Texas, Fourth District, San Antonio

October 17, 1979

No. 16192

Reporter
590 S.W.2d 729 *; 1979 Tex. App. LEXIS 4265 **

Browning-Ferris, Inc., Appellant v. The City of Leon Valley et al, Appellees

Subsequent History: [1]** Rehearing Denied November 14, 1979.

Prior History: Appeal from Bexar County.

Counsel: George J. Carson, Morrison, Dittmar, Dahlgren & Kaine, San Antonio, for appellant.

Harvey L. Hardy, San Antonio, for appellees.

Opinion by: KLINGEMAN

Opinion

[*730] OPINION

This case involves the question of whether certain ordinances of the City of Leon Valley and contracts entered into pursuant thereto granting Sanitas Waste Disposal of San Antonio, Inc., d/b/a Industrial Disposal Service (Sanitas) an exclusive franchise for garbage [1] collection without competitive bids are null and void. Appellant Browning-Ferris, Inc., brought suit seeking a declaration that these ordinances and contracts are unconstitutional, null and void, and also sought injunctive relief and damages. Sanitas filed a petition in intervention but subsequently took a non-suit. Both appellant and appellee filed motions for summary judgment. The trial court denied appellant's motion and granted appellees' motion, ordering that appellant take nothing in its suit.

[2]** The City of Leon Valley is a municipal corporation organized and deriving its powers from the general laws of the State of Texas. Browning-Ferris, Inc., is a corporation in the business of collection, removal and disposal of commercial, industrial and residential solid waste. Appellant, at the time of enactment of said ordinances and awarding of the exclusive franchise and contract here involved, was collecting solid waste material within the City of Leon Valley pursuant to contracts with its customers.

A chronological summary of the pertinent ordinances here involved is as follows:

> September 17, 1974 Leon Valley, after receiving competitive bids, granted an exclusive franchise for garbage collection except for container service to Hill Country Disposal, Inc., by Ordinance 579.
>
> August 25, 1975 When Hill Country was unable to perform the contract Ordinance 621 was enacted, without competitive bids, granting an exclusive franchise **[*731]** to Sanitas for all garbage collection within the city limits, except for container service.
>
> September 6, 1977 Ordinance 714 was enacted, without competitive bids, to amend Ordinance 621, granting Sanitas the sole authority **[**3]** and exclusive franchise to provide All collection service, including commercial container service.

The franchises granted are for limited terms: Ordinance No. 621 from September 1, 1975, to September 30, 1977, and Ordinance No. 714 from October 1, 1977, through September 30, 1979.

Appellant by three points of error asserts that the trial court erred in granting appellee's motion for summary judgment and in denying its motion for summary judgment because, as a matter of law, (1) a municipal corporation is prohibited from granting an exclusive franchise and contract to a private corporation for the collection, hauling and disposal of all solid waste material within the city; (2) a municipal corporation cannot award a contract for the collection, hauling and disposal of solid waste material on behalf of the city to a private corporation without competitive bids; and (3) a

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[1] Both appellant and appellee refer to Garbage and Solid waste material in the same context and use the terms interchangeably, and we will do so in this opinion.

municipal corporation cannot by contract barter away its governmental powers.

Applicable constitutional and statutory provisions relied upon by appellant may be summarized as follows:

> (1) Tex.Const. art. I, § 17: ". . . no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; **[**4]** . . .";
> (2) Tex.Const. art. I, § 26: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . . .";
> (3) Article 2368a section 2 states, in effect, that no county or city shall make any contract calling for or requiring the expenditure of payment of $ 3,000 or more without competitive bids, with certain exceptions hereinafter discussed Tex.Rev.Civ.Stat.Ann. art. 2368a § 2 (Vernon's Supp. 1978-79);
> (4) Another pertinent statute is "County Solid Waste Control Act" Tex.Rev.Civ.Stat.Ann. art. 4477-8 (Vernon's 1976). This Act applies to both cities and counties as seen from the definitions of "city" and "public agency" contained in Section 3(d) and (e).
> Section 13 of this article states that any public agency or any county may offer solid waste disposal service to persons within its boundaries and may require the use of such services for any or all persons.
> Section 4 authorizes "operating agreements" with any person to carry out such disposal.

Appellant, in support of its Points of Error Nos. One and Three relies on the constitutional provisions above referred to, and on two early Texas **[**5]** Supreme Court decisions, City of Brenham v. Brenham Water Co., 67 Tex. 542, 4 S.W. 143 (1887), and Ennis Water Works v. City of Ennis, 105 Tex. 63, 144 S.W. 930 (1912). These cases both involve a city's attempt to grant to an individual an exclusive franchise indefinitely or for a long period of time to sell to its inhabitants an essential commodity, such as water. The court struck down these ordinances as illegal and void condemning them as monopolies and perpetuities repugnant to Article I, Sections 17 and 26, of the Texas Constitution. The power thus sought to be exercised by the city was held to be legislative in character. 4 S.W. at 152.

These cases are discussed and distinguished in a later Commission of Appeals decision, City of San Antonio v. San Antonio Irrigation Co., 118 Tex. 154, 12 S.W.2d 546 (Tex.Comm'n App.1929, opinion adopted). That case involved an exclusive franchise between the City of San Antonio and an individual for a term of 99 years covering sewage of the City of San Antonio and the disposal thereof. The court in reply to the certified question "Did the members of the city council of the city of San Antonio, in office at the time the contract in question **[**6]** was entered into, have the power, under the Constitution and laws of the state, and under the provisions of the city charter, to enter into said contract so as to bind their successors in office thereto during the **[*732]** period stipulated in said contract, to wit, 99 years?", answered in the affirmative.

McQuillin on Municipal Corporations states:

> Generally a municipal corporation can contract with one or more persons or corporations for the collection and removal of waste matters, garbage, filth, trash, refuse, carcasses, and offal. It may grant an exclusive privilege to a contractor or licensee to make such collection and removal for a specified period.
> In any event, it is within municipal legislative competency to decide to have the service performed under a contract. Accordingly, an exclusive contract for the removal of these substances constitutes a proper exercise of the police power.
>
> The common law doctrine that monopolies are odious and therefore illegal refers to franchises and agreements in restraint of trade, and has no application to police regulations designed to promote the health or morality of the public, and, hence, it has no application **[**7]** to an exclusive contract for the removal of waste products such as garbage, refuse, decaying carcasses, and similar waste matters, . . .

7 E. McQuillin, Municipal Corporations § 24.251 at 96-98 (3rd ed. 1968).

40 Tex.Jur.2d, Rev., Part 1, Municipal Corporations § 409 (1976) states:

> It is within the police power of a city to pass ordinances and adopt regulations governing the removal of garbage, ... (p. 166)
> The Council may enter into contracts relating to the disposal of garbage . . . . (p. 167)
> The constitutional provision prohibiting the creation of perpetuities and monopolies is not violated by an ordinance giving a particular person the exclusive right to haul garbage. (p. 168)

In the City of Wichita Falls v. Kemp Hotel Operating Co., 162 S.W.2d 150 (Tex.Civ.App. Fort Worth) Affirmed, Kemp Hotel Operating Co. v. City of Wichita Falls, 141

Tex. 90, 170 S.W.2d 217 (1943), the court held:

> The City, acting through its Board of Aldermen, had the right indeed it was its imperative duty to provide some means of accomplishing the end sought. It could have provided for gathering garbage by means of its own employees supplied with proper **[**8]** equipment. We also hold that it could, with equal propriety and authority, employ an individual or corporation to perform the necessary functions in carrying out the plan.

162 S.W.2d at 153. See also, Town of Ascarate v. Villalobos, 148 Tex. 254, 223 S.W.2d 945 (1949); Ex Parte London, 73 Tex.Crim. 208, 163 S.W. 968 (1915); and City of Breckenridge v. McMullen, 258 S.W. 1099 (Tex.Civ.App. Fort Worth 1923, no writ).

In Gardner v. The City of Dallas, 81 F.2d 425, (5th Cir. 1936), Cert. denied, 298 U.S. 668, 56 S. Ct. 834, 80 L. Ed. 1391, it was held that a contract by the City of Dallas granting an individual an exclusive garbage disposal contract for a period of 15 years was a valid exercise of the police power and not objectionable as a perpetuity, nor repugnant to anti-monopolistic provisions of the Texas Constitution, Tex.Const. art. I, §§ 17, 26. In that case, the court had before it the same contentions made by appellants in this suit. In rejecting such contentions, the court stated:

> Where, as in Texas, the disposal of garbage is regarded as a corporate function, exclusive contracts for the disposal thereof over a fixed period of years, as well as ordinances **[**9]** having the same purposes, are sustained by the overwhelming weight of authority as a lawful exercise, not an abdication, of the police power. The principle has been specially sustained in Texas as with respect to sewage, in San Antonio v. Irrigation Company, 118 Tex. 154, 12 S.W.2d 546, 549, which in **[*733]** principle is not distinguishable from the case at bar.

Id. at 426.

The Court further said

> This is not a case, such as Brenham v. Brenham Water Co., 67 Tex. 542, 4 S.W. 143, 153, or Ennis Water Works v. Ennis, 105 Tex. 63, 144 S.W. 930, and others cited by appellee involving a city's attempt to grant to an individual an exclusive franchise, indefinitely or for a long period of time, to Sell to its inhabitants an innocuous and essential commodity, such as water, and which was condemned as a monopoly and perpetuity, and repugnant to article I, §§ 17 and 26, Constitution of Texas. The power thus sought to be exercised by the city was held to be legislative in character.

Id. at 428.

The Fifth Circuit court also overruled a contention, similar to the one made here by appellants in its third point of error, that a municipal corporation cannot by contract **[**10]** barter away its governmental power, again citing City of San Antonio v. San Antonio Irrigation Co., supra, wherein that court stated:

> Sound discretion, then, was lodged in the city's councilmen to determine what means should be employed for disposal of sewage and safeguarding of health in that regard. That discretion was not bargained; it was used in making the contract.

12 S.W.2d at 549.

Here, the City of Leon Valley did not barter away its governmental power by approving this contract. A careful reading of the contract shows numerous safeguards and restrictions requiring supervision by the city. In the City of Wichita Falls v. Kemp Hotel Operating Co., supra, the court said: "We are not concerned with whether or not the contract was a provident one; it evidently was one which the City thought proper. The whole contract is replete with reservations of supervision of the work by the City through the facilities of its health department." 162 S.W.2d at 154.

Appellant's only remaining point of error is its second point of error in which it asserts that, as a matter of law, a municipal corporation cannot award a contract for the collection, hauling, and disposal of **[**11]** solid waste material on behalf of the City to a private corporation without competitive bids.

In support of this point of error, it relies on the provisions of Article 2368a, Section 2, the pertinent parts of which read as follows:

> No county, acting through its Commissioners Court, and no city in this state shall hereafter make any contract calling for or requiring the expenditure of payment of Three Thousand Dollars ($ 3,000.00) or more out of any fund or funds of any city or county or subdivision of any county creating or imposing an obligation or liability of any nature or character upon such county or any subdivision of such county, or upon such city, without first submitting such proposed contract to competitive bids. * * * Provided, that in case of public calamity, where it becomes necessary to act at once to appropriate

> money to relieve the necessity of the citizens, or to preserve the property of such county, subdivision, or city, Or when it is necessary to preserve or protect the public health of the citizens of such county or city . . . the provisions hereof requiring competitive bids shall not apply . . . . (Emphasis added.)

Tex.Rev.Civ.Stat.Ann. art. 2368a **[**12]** § 2 (Vernon's Supp. 1978-1979).

Appellant cites no cases in support of its second point of error. The only Texas case we have found passing directly on the point is Hoffman v. City of Mount Pleasant, 126 Tex. 632, 89 S.W.2d 193 (1936). The article there under construction was a predecessor statute to the article involved here. However, the applicable provisions are basically similar and the exclusion provision as to public health is identical. In construing the identical provision of Article 2368a § 2, the Commission of Appeals, in an opinion adopted by the Supreme Court of Texas, **[*734]** held that a county could validly expend funds to protect the public health without the necessity of requiring competitive bids otherwise required by that article and that the public health exception to the competitive bid requirement was operative at all times whether or not there was a "case of public calamity." The Court stated:

> The matter is one purely of statutory construction. After careful consideration of the whole act as well as the peculiar language of the exception, in light of the rules usually applicable when statutes concerning public health are involved, we have reached **[**13]** the conclusion that the use of the word "when' clearly indicates the introduction of a new condition and exception not dependent upon a "public calamity,' and that the requirement of competitive bids with publication of notice of letting the contract is dispensed with when such exception exists. In other words, we are of the opinion that, "when it is necessary to preserve or protect the public health of the citizens of a county or city,' a condition requiring prompt and unrestrained action in order to remedy such a situation exists, regardless of whether such condition has been brought about by a public calamity or in some other way. The words "preserve' and "protect,' as applied to public health, carry the idea of timely, efficient, and effective action which keeps intact and unimpaired the good health of the citizens in advance of its impairment.

Id. at 194.

After a careful consideration of the entire record and the applicable authorities, we have concluded that all of appellant's points of error should be overruled. The judgment of the trial court is affirmed.

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Gardner v. Dallas

Circuit Court of Appeals, Fifth Circuit

January 21, 1936

No. 7721

Reporter
81 F.2d 425 *; 1936 U.S. App. LEXIS 3455 **

GARDNER v. CITY OF DALLAS

Prior History: [1]** Appeal from the District Court of the United States for the Northern District of Texas; William H. Atwell, Judge.

Opinion by: STRUM

Opinion

Before FOSTER, Circuit Judge, and DAWKINS and STRUM, District Judges.

[*425] STRUM, District Judge.

Appellant sues for the alleged breach of a garbage disposal contract between the city of Dallas and Edwin Carewe. Demurrer was sustained to plaintiff's petition. Plaintiff declining to amend, final judgment was entered against him, from which he appeals.

By the contract sued on the city granted Carewe, for a period of fifteen years, the exclusive privilege of "buying from the city" all wet garbage collected by the city, to be processed by Carewe into commercial products for his own profit; Carewe agreed to construct an adequate disposal or processing plant, at which the city agreed to deliver the garbage at a stipulated price; and the city purported to further agree that it would "through passage and enforcement of appropriate ordinances and the discharge of the police power of the city" provide for the collection of wet garbage in separate containers from trash and other dry refuse at the source of accumulation. The contract was duly executed **[**2]** by the then officers of the city. There were already in force ordinances of the city which appellant asserts, but the city denies, are appropriate and sufficient to satisfy the terms of the contract concerning separate containers.

Carewe, at large expense, erected the required processing plant. Shortly after its completion, a new set of municipal officers succeeded those who constituted the governing body of the city when the contract was executed. The new administration repudiated and declined to perform the contract, and appellant, Carewe's trustee in bankruptcy, brought this action for damages, not for anticipated profits, but for the difference **[*426]** between the construction cost and salvage value of the processing plant, which is unadaptable to other uses. United States v. Behan, 110 U.S. 338, 4 S. Ct. 81, 28 L. Ed. 168.

Undoubtedly, that portion of section 5 of the contract purporting to bind the city to pass and enforce ordinances regulating the accumulation of garbage in separate containers, being in derogation of the city's police power, is void as against public policy. Even if the existing ordinances are adequate to the purpose, the city can neither abdicate **[**3]** nor limit its police power when the continued use and availability thereof are essential to public welfare, and therefore the city could not lawfully commit itself to the continued enforcement of such existing ordinances. San Antonio v. Irrigation Co., 118 Tex. 154, 12 S.W. (2d) 546; Pierce Oil Corporation v. Hope, 248 U.S. 498, 39 S. Ct. 172, 63 L. Ed. 381; Stone v. Mississippi, 101 U.S. 814, 25 L. Ed. 1079; Pennsylvania Hospital v. Philadelphia, 245 U.S. 20, 38 S. Ct. 35, 62 L. Ed. 124; 3 McQuillin Munic. Corp. (2d Ed.) 813 (1271), 952 (1356); 44 C.J. 73.

The invalidity, however, of that ancillary and dispensable provision does not vitiate the entire contract. It may be disregarded without materially affecting the essential purpose of the parties. 13 C.J. 512 (470). The dominant purpose of this contract is to provide for the disposal of certain classes of the city's garbage. The agreement is that the city will, after collection, sell wet garbage exclusively to Carewe, delivered at the processing plant. The means and methods of collecting the garbage and delivering it at the plant remain within the discretion, and subject to the police power, of the city. The contract specifically **[**4]** provides that Carewe's rights shall always be "subordinate to the rights of the public and the police

power of the city." Indeed, if it should become necessary or desirable in furtherance of the public welfare to adopt a different method of collecting or disposing of the garbage, the city has the indisputable power to work such changes in the lawful exercise of its police power, notwithstanding its contract with Carewe, as that power cannot be lawfully abrogated or limited by contract. Such a course would constitute a lawful subordination of the contract. But the bald repudiation of its contract, wholly independent of any lawful exercise of the police power, is quite another matter.

In Texas it is held that the collection and disposal of garbage is a corporate, not a governmental, function. Ostrom v. San Antonio, 94 Tex. 523, 62 S.W. 909; City of Longview v. Stewart (Tex. Civ. App.) 66 S.W. (2d) 450; Paris v. Jenkins, 57 Tex. Civ. App. 383, 122 S.W. 411; City of Coleman v. Price, 54 Tex. Civ. App. 39, 117 S.W. 905. See. also, City of Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S.W. 833; City of San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S.W. 760; City of San Antonio **[**5]** v. Mackey's Estate, 22 Tex. Civ. App. 145, 54 S.W. 33; City of Pittsburg v. Smith (Tex. Civ. App.) 230 S.W. 1113; City of Fort Worth v. Crawford, 74 Tex. 404, 12 S.W. 52, 15 Am. St. Rep. 840. The city may therefore contract with respect thereto, and such contracts are governed by the same rules as those made by private corporations. San Antonio v. Irrigation Co., 118 Tex. 154, 12 S.W. (2d) 546; Griffin v. Oklahoma Nat. Gas Corporation (C. C.A.) 37 F.(2d) 545; Tuttle Bros. & Bruce v. Cedar Rapids (C. C.A.) 176 F. 86; Omaha Water Co. v. Omaha (C. C.A.) 147 F. 1, 12 L.R.A. (N. S.) 736, 8 Ann. Cas. 614; 3 McQuillin Munic. Corp. (2d Ed.) 172 (970), and cases hereinafter cited.

The contract provides: "That the disposition of garbage is a 'governmental' function and comes within the police powers of the City of Dallas." Undoubtedly, the disposal of garbage is subject to the police powers of the city. But the contract stipulation that it is a "governmental" function is not controlling. The contracting parties can not thus override the Texas courts in the latter's interpretation of the public policy of that state, declaring the disposal of garbage to be a corporate function, with its **[**6]** attendant liabilities.

Where, as in Texas, the disposal of garbage is regarded as a corporate function, exclusive contracts for the disposal thereof over a fixed period of years, as well as ordinances having the same purpose, are sustained by the overwhelming weight of authority as a lawful exercise, not an abdication, of the police power. [1] The principle has been specifically sustained in Texas **[*427]** with respect to sewage, in San Antonio v. Irrigation Co., 118 Tex. 154, 12 S.W. (2d) 546, 549, which in principle is not distinguishable from the case at bar. In that case a contract between the city and an individual for the exclusive disposal of sewage over a period of 99 years was held enforceable and specific performance awarded at the instance of the city, though it was of course held that such contract is always subject to the lawful exercise of the city's police power and right of eminent domain in case the prescribed means of disposal should become a nuisance or changing conditions should require different methods in the interest of the public welfare. That contract was sustained over substantially the same objections here urged.

[7]** By article 2, § 1, of its charter, the city of Dallas, a self-governing city, is given the general power "to protect health, life and property and to prevent and summarily abate nuisances * * * and to protect the lives, health and property of the inhabitants of said city," and by article 2, § 4 (3), of its charter, appellee has specific

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[1] California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S. Ct. 100, 50 L. Ed. 204, and note, thrice cited with approval in San Antonio v. Irrigation Co., 118 Tex. 154, 12 S.W. (2d) 546, 549, California Reduction Co. v. Sanitary Reduction Works (C. C.A.) 126 F. 29; Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355, 27 L.R.A. 540, 47 Am. St. Rep. 684, cited with approval in City of Breckenridge v. McMullen (ten. Civ. App.) 258 S.W. 1099; Valley Spring Co. v. Plagmann, 282 Mo. 1, 220 S.W. 1, 15 A.L.R. 266, and note, page 287 et seq.; also, notes 27 A.L.R. 1013, and 72 A.L.R. 520; Walker v. Jameson, 140 Ind. 591, 37 N.E. 402, 39 N.E. 869, 28 L.R.A. 679, 683, 49 Am. St. Rep. 222, cited with approval in City of Breckenridge v. McMullen (Tex.. Civ. App.) 258 S.W. 1099; National Fertilizer Co. v. Lambert (C. C.) 48 F. 458; Spencer v. Medford, 129 Or. 333, 276 P. 1114; Iler v. Ross, 64 Neb. 710, 90 N.W. 869, 57 L.R.A. 895, 97 Am. St. Rep. 676; Louisville v. Wible, 84 Ky. 290, 1 S.W. 605; Pantland v. Grand Rapids, 210 Mich. 18, 177 N.W. 302, 15 A.L.R. 280; McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am. St. Rep. 191 (sewage); Burns v. Enid, 92 Okl. 67, 217 P. 1038; Grand Rapids v. De Vries, 123 Mich. 570, 82 N.W. 269; Alpers v. City (C.C.) 32 F. 503; State v. Orr, 68 Conn. 101, 35 A. 770, 34 L.R.A. 279; Rochester v. Guberlett, 211 N.Y. 309, 105 N.E. 548, L.R.A. 1915D, 209, Ann. Cas. 1915C, 483; State v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583; Dreyfus v. Boone, 88 Ark. 353, 114 S.W. 718, 719; Urbach v. Omaha, 101 Neb. 314, 163 N.W. 307, L.R.A. 1917E, 1163; Elliott v. Eugene, 135 Or. 108, 294 P. 358; 3 McQuillen Munic. Corp. (2d Ed.) 172 (970).

power "to prevent the deposit * * * and cause the removal of" substances "offensive and dangerous to health and comfort," which necessarily carries with it the power of disposal thereof. City of Breckenridge v. McMullen (Tex.. Civ. App.) 258 S.W. 1099.

The holding thus stated in San Antonio v. Irrigation Co., supra, is apposite here: "Sound discretion, then, was lodged in the city councilmen to determine what means should be employed for disposal of sewage and safeguarding of health in that regard. That discretion was not bargained; it was used in making the contract." As in Texas the disposal of garbage is a corporate, not a governmental, function, Stevenson v. Abilene (Tex. Civ. App.) 67 S.W. (2d) 645, strongly relied upon by appellee, is inconclusive upon the point here under consideration.

In determining the validity of the Texas contract **[**8]** here sued on, between which and the contract involved in San Antonio v. Irrigation Co., supra, there is no tenable distinction in principle, we follow the doctrine adopted in the last-named case by the Supreme Court of Texas, and hold that the contract here sued on, with the exception already noted as to paragraph 5, is enforceable unless and until abrogated in the lawful exercise of the city's police power, to which all such contracts are subject. [2] This, however, the appellee city appears not to have done. From the allegations of the petition it appears that appellee's new officers simply declined to recognize the contract as valid, and refused to perform it, though the method of garbage disposal therein provided has not been declared a nuisance, nor inimical to public health, nor has any other method of disposal been adopted in the lawful exercise of the city's police power.

[9]** **[*428]** This is not a case, such as Brenham v. Brenham Water Co., 67 Tex. 542, 4 S.W. 143, 153, or Ennis Water Works v. Ennis, 105 Tex. 63, 144 S.W. 930, and others cited by appellee involving a city's attempt to grant to an individual an exclusive franchise, indefinitely or for a long period of time, to sell to its inhabitants an innocuous and essential commodity, such as water, and which was condemned as a monopoly and perpetuity, and repugnant to article 1, §§ 17 and 26, Constitution of Texas. The power thus sought to be exercised by the city was held to be legislative in character. These and similar cases are adequately distinguished in San Antonio v. Irrigation Co., 118 Tex. 154, 12 S.W. (2d) 546. This contract gives an individual the exclusive right to buy from the city, for a period of 15 years, noxious substances which must be disposed of in the interest of public health, in the disposal of which the municipal authorities act in a corporate, not a legislative, capacity, and have broad discretion as to the choice of methods. Moreover, in Brenham v. Water Co., supra, it was said: "There are, however, certain classes of exclusive privileges which do not amount to monopolies." **[**10]** Also, "We are not concerned with the question of actionable damages."

From what is said in San Antonio v. Irrigation Co., supra, it necessarily follows, and we hold, that the contract here sued on is not objectionable in Texas as a perpetuity, nor is it repugnant to the antineoplastic provisions of the Texas Constitution. See, also, Walker v. Jameson, 140 Ind. 591, 37 N.E. 402, 39 N.E. 869, 28 L.R.A. 679, 683, 49 Am. St. Rep. 222, cited with approval in City of Breckenridge v. McMullen (Tex. Civ. App.) 258 S.W. 1099; State v. Orr, 68 Conn. 101, 35 A. 770, 34 L.R.A. 279.

Nor is this such a case as Houston v. Southwestern Bell Tel. Co., 259 U.S. 318, 42 S. Ct. 486, 66 L. Ed. 961, nor San Antonio v. San Antonio Pub. Serv. Co., 255 U.S. 547, 41 S. Ct. 428, 65 L. Ed. 777, and similar cases relied upon by appellee involving the fixing of rates for the future, clearly a legislative function which cannot be bargained away by contract. 3 McQuillen, Munic. Corp. (2d Ed.) 172 (970). No question of an attempt to control the legislative power of rate making for the future is here presented. The question here presented also differs from that considered in Fairbanks, Morse Co. v. Texas P. & **[**11]** L. Co. (C. C.A.) 32 F.(2d) 693, 695, where it was also said: "We are not concerned with the question of actionable damages."

The contract sued on carries the provision (paragraph 3) that Carewe shall not be entitled to damages from the city in the event the contract "shall be terminated by the City of Dallas in the exercise of its governmental function * * *." Undoubtedly, the city may subordinate the contract to the lawful exercise of its police power. This, however, the city has not done. The city is not

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[2] Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659, 24 L. Ed. 1036; Galveston Wharf Co. v. Galveston, 260 U.S. 473, 43 S. Ct. 168, 67 L. Ed. 355; Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205; Cincinnati v. Louisville & N.R. Co., 223 U.S. 390, 32 S. Ct. 267, 56 L. Ed. 481; Ortega Co. v. Triay, 260 U.S. 103, 43 S. Ct. 44, 67 L. Ed. 153; St. Louis & S.F.R. Co. v. Mathews, 165 U.S. 1, text 23, 17 S. Ct. 243, 41 L. Ed. 611, text 619; Chicago, B. & Q.R. Co. v. Nebraska, 170 U.S. 57, 18 S. Ct. 513, 42 L. Ed. 948; New Orleans Gaslight Co. v. Drainage Commission, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831.

justified in arbitrarily repudiating the contract, which in effect appellant's petition charges the city has done.

The judgment appealed from is reversed, and the cause remanded for further proceedings consistent with this opinion.

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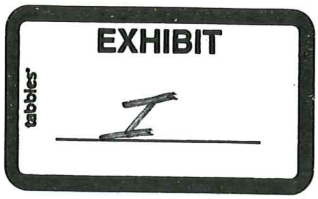

Republic Waste Servs. of Tex. v. Tex. Disposal Sys.

United States Court of Appeals for the Fifth Circuit

December 15, 2016, Filed

No. 15-11035

Reporter
848 F.3d 342 *; 2016 U.S. App. LEXIS 23531 **

REPUBLIC WASTE SERVICES OF TEXAS, LIMITED, Plaintiff - Appellant v. TEXAS DISPOSAL SYSTEMS, INCORPORATED, Defendant - Appellee

Subsequent History: Ordered published by Republic Waste Servs. of Tex. v. Tex. Disposal Sys., 2017 U.S. App. LEXIS 1328 (5th Cir. Tex., Jan. 20, 2017)

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Texas.

Republic Waste Servs. of Tex. v. Tex. Disposal Sys., 2016 U.S. App. LEXIS 22252 (5th Cir. Tex., Dec. 15, 2016)

Counsel: For REPUBLIC WASTE SERVICES OF TEXAS, LIMITED, Plaintiff - Appellant: S. Shawn Stephens, King & Spalding, L.L.P., Houston, TX; Charles Lynde Babcock, Edwin McAllister Buffmire, Patrick R. Cowlishaw, General Counsel, Jackson Walker, L.L.P., Dallas, TX; James Patrick Sullivan, King & Spalding, L.L.P., Austin, TX.

For TEXAS DISPOSAL SYSTEMS, INCORPORATED, Defendant - Appellee: James A. Hemphill, David Austin King, Graves, Dougherty, Hearon & Moody, P.C., Austin, TX.

Judges: Before STEWART, Chief Judge, and CLEMENT and HAYNES, Circuit Judges.

Opinion by: CARL E. STEWART

Opinion

[*343] CARL E. STEWART, Chief Judge:

This case involves a dispute between two waste disposal service entities, Plaintiff-Appellant Republic Waste Services of Texas, Ltd. ("Republic") and Defendant-Appellee Texas Disposal Systems, Inc. ("Texas Disposal"). At issue is a purported conflict between the Texas Health and Safety Code ("the Code") and an exclusive contract for solid waste disposal services entered into by Republic and the city of San Angelo, Texas ("the City"). After a hearing, the district court granted Texas Disposal's Rule 12(b)(6) motion to dismiss the suit and denied as moot **[**2]** Republic's motion for partial summary judgment. For the following reasons, we reverse the part of the district court's order granting Texas Disposal's motion to dismiss, vacate the part of the order denying as moot Republic's motion for partial summary judgment, and remand for further proceedings.

I. Facts & Procedural History

In July 2013, the City issued Texas Disposal a "Solid Waste Hauling Permit," allowing it to transport and dispose of garbage, trash, and debris within city limits, and to render "any service that is allowed by state law or city ordinance that does not conflict with the City's contract with Republic . . . and the exclusive rights granted by that contract[.]"[1] Then, in July 2014, pursuant to a city ordinance,[2] Republic and the City entered into an agreement titled "Special Exclusive Contract for Solid Waste Collection and Disposal Services," with an effective date of August 1, 2014. Under the terms of the contract, Republic was given the exclusive right to collect, transport, and dispose of all residential and non-residential solid waste, including temporary construction and demolition waste. The contract also contained a provision indicating that Republic, not the **[**3]** City, was responsible for enforcing its exclusivity in the event of legal proceedings.

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[1] Although the City issued the permit to Texas Disposal in 2013—a year prior to entering into a contract with Republic in 2014—the terms of the permit nevertheless prohibit Texas Disposal from rendering services that conflict with the City's contract with Republic.

[2] San Angelo, Tex., Code of Ordinances ch. 11, art. 11.04.003(d).

At some point after the contract between the City and Republic went into effect, Texas Disposal began to contract for and provide solid waste disposal services to various construction projects in the City. Consequently, Republic sent Texas Disposal a cease-and-desist letter stating that its own contract with the City precluded Texas Disposal from entering into construction waste disposal contracts with the City's residents and businesses. In response, Texas Disposal acknowledged the contract between Republic and the City but contended that its terms concerning solid waste management services for construction projects were unenforceable **[*344]** due to a conflict with Section 364.034(h) of the Code.[3]

Republic disagreed and sued Texas Disposal in federal district court advancing a state law claim for tortious interference with an existing contract. Republic also sought: (1) a declaratory judgment as to the validity of its exclusive contract with the City, (2) an injunction against Texas Disposal's continued waste disposal servicing of construction projects, and (3) money damages. In lieu of an answer, Texas Disposal filed a **[**4]** Rule 12(b)(6) motion to dismiss, arguing that Section 364.034(h) of the Code precluded the City from entering into exclusive contracts for temporary construction solid waste disposal services. *See* Fed. R. Civ. P. 12(b)(6). Republic then filed a motion for partial summary judgment on its declaratory judgment claim and as to liability on its tortious interference claim.

The district court conducted a hearing on both motions and rendered an order granting Texas Disposal's motion to dismiss and denying as moot Republic's motion for partial summary judgment. In its order, the district court reasoned that the plain wording of Section 364.034(h) conveyed the legislature's "clear intent to take away the City's inherent authority to grant exclusive [contract rights] in the specific instance of 'contracts to provide temporary solid waste disposal services to a construction project.'" Republic filed this appeal.

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[3] Under Section 364.034(a) of the Code, a public agency—which is defined to include municipalities—may enter into an exclusive contract for solid waste disposal services. Tex. Health & Safety Code Ann. § 364.034(a) ("A public agency or a county may: (1) offer solid waste disposal service to persons in its territory; (2) require the use of the service by those persons; (3) charge fees for the service; and (4) establish the service as a utility separate from other utilities in its territory."). Subsection (h) states that "[t]his section does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project." *Id.* § 364.034(h).

II. Standard of Review

"This court reviews a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Harris Cty. v. MERSCORP Inc.*, 791 F.3d 545, 551 (5th Cir. 2015) (internal quotation marks omitted) (citing *Toy v. Holder*, 714 F.3d 881, 883 (5th Cir. 2013)). A district court's Rule 12(b)(6) dismissal may be affirmed on any grounds raised below and supported by the record. *Harris Cty.*, 791 F.3d at 551.

We also conduct **[**5]** a de novo review of a district court's denial of summary judgment, applying the same standard as the district court. *Robinson v. Orient Marine Co.*, 505 F.3d 364, 365 (5th Cir. 2007). Summary judgment is appropriate if the record evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at 366; Fed. R. Civ. P. 56(a).

III. Discussion

"Home-rule" cities in Texas, such as San Angelo, derive their authority from the Texas constitution. *See* Tex. Const. art. XI, § 5. As the Texas Supreme Court has consistently acknowledged, "[h]ome-rule cities have the full power of self-government and look to the Legislature, not for grants of power, but only for limitations on their powers." *S. Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex. 2013) (citing *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975)). "An ordinance of a home-rule city that attempts to regulate a subject **[*345]** matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993). Still, the mere fact that the legislature has enacted a law addressing a subject does not mean the subject matter is entirely preempted. *Id.* Rather, "[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." *Id.* Thus, "if the Legislature decides to preempt a subject matter normally within **[**6]** a home-rule city's broad powers, it must do so with 'unmistakable clarity.'" *S. Crushed Concrete*, 398 S.W.3d. at 678 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002)). Further, "if the limitations arise by implication, the provisions of the law must be 'clear and

compelling to that end.'" *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984) (providing that a statutory enumeration of powers is not to "be construed as an implied limitation on home rule powers").

In the recent case of *Laredo Merchants Ass'n v. City of Laredo*, a Texas appellate court addressed the unmistakable clarity rule in the context of a home-rule city ordinance that purportedly conflicted with part of the Solid Waste Disposal Act. No. 04-15-00610-CV, 2016 Tex. App. LEXIS 8901, 2016 WL 4376627 (Tex. App.—San Antonio Aug. 17, 2016). There, the court was tasked with deciding whether Section 361.0961 of the Code preempted a checkout bag ordinance enacted by the home-rule city of Laredo that prohibited merchants in commercial establishments from providing paper or plastic "one-time-use" checkout bags to customers. 2016 Tex. App. LEXIS 8901, [WL] at *1. Section 361.0961 provides:

> (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[.]

Tex. Health & Safety Code Ann. § 361.0961. In considering this statutory language to be unmistakably clear, the court explained:

> By its plain language, section 361.0961 specifically **[**7]** addresses a particular subject matter—the sale or use of containers or packages for solid waste management purposes—and is unmistakably aimed at prohibiting local governments from enacting certain ordinances. By prohibiting the adoption of an ordinance prohibiting or restricting that particular subject matter, section 361.0961 unmistakably limits a local government's police powers[.]

Laredo Merchs., 2016 Tex. App. LEXIS 8901, 2016 WL 4376627, at *5 (alterations, citations, and internal quotation marks omitted). The court concluded that the language in Section 361.0961 clearly preempted the checkout bag ordinance. 2016 Tex. App. LEXIS 8901, [WL] at *5, *7 ("[W]e hold the Ordinance is inconsistent with section 361.0961 of the Act and therefore unenforceable as a matter of law." (citation omitted)).

Here, Republic argues that the district court erred in similarly concluding that the language in Section 364.034(h) of the Code conveyed the legislature's clear intent to abrogate the City's home-rule authority to enter into an exclusive contract for solid waste disposal services to a construction project. We agree.

Neither party disputes that San Angelo is a home-rule city deriving its broad powers of self-government from the Texas constitution, and thus, any limitation by the legislature on those powers must be imposed with unmistakable clarity. Tex. Const. art. XI, § 5; *S. Crushed Concrete*, 398 S.W.3d. at 678. It is true that **[**8]** Section 364.034(a) of the Code provides that a **[*346]** "public agency"[4] or county may enter into an exclusive contract for solid waste disposal services and, further, that subsection (h) limits the scope of subsection (a) by indicating that it does not apply to construction projects. Tex. Health & Safety Code Ann. § 364.034(a),(h). However, because the City's home-rule authority to enter into an exclusive contract for waste disposal services is inherent, and not derived from Chapter 364 or any other part of the Code,[5] the language in subsection (h) limiting the scope of the general grant of authority conferred by subsection (a) is immaterial. *Id.* At most, the City's inherent authority to enter into exclusive contracts of this kind is merely supplemented by subsection (a)'s language providing the same authority to public agencies and counties and remains intact regardless of subsection (h)'s limiting language. *Id.* This is not to say that the legislature could not limit the City's home-rule authority to enter into an exclusive contract for the disposal of construction waste if it chose to do so with unmistakable clarity. But if the legislature were to limit the City's authority in this respect, it would do so independently of any general grants of authority bestowed by the Code since a home-rule city does not look to the Code or other legislative **[**9]** acts for grants of power, only for limitations on its power. *S. Crushed Concrete*, 398 S.W.3d at 678.

Moreover, as Republic points out, subsection (f)—which employs very different language from subsection (h)—

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[4] Section 364.003(3) provides: "Public agency means a district, municipality, regional planning commission created under Chapter 391, Local Government Code, or other political subdivision or state agency authorized to own and operate a solid waste collection, transportation, or disposal facility or system." Tex. Health & Safety Code Ann. § 364.003(3).

[5] Chapter 363 of the Code is short-titled the "Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act" and also provides municipalities and counties with the authority to contract for solid waste disposal services. *Id.* §§ 363.001, 363.117(4).

does indicate an unmistakably clear legislative intent to limit the City's home-rule authority. There, the statutory language clearly and unmistakably limits the City's home-rule authority to restrict the rights of other entities to contract for the removal of grease, grit, lint, and sand trap waste. Tex. Health & Safety Code Ann. § 364.034(f) ("Notwithstanding the other provisions of this section . . . a county or a municipality [] may not restrict the right of an entity to contract with a licensed waste hauler for the collection and removal of domestic septage or of grease trap waste, grit trap waste, lint trap waste, or sand trap waste."). Unlike the language in subsection (h), the language in subsection (f) operates independently of any general grant of authority conferred by the Code and reads similarly to the language construed as unmistakably clear legislative intent in *Laredo Merchants*. *See Laredo Merchs.*, 2016 Tex. App. LEXIS 8901, 2016 WL 4376627, at *5 (citing Tex. Health & Safety Code Ann. § 361.0961) ("A local government . . . may not adopt an ordinance . . . 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 **[**10]** law[.]"); *S. Crushed Concrete*, 398 S.W.3d at 679 (holding that a statute stating that "a city ordinance 'may not make unlawful a condition or act approved or authorized under [the Act] or the [C]ommission's rules or orders'" was unmistakably clear); *cf. Quick v. City of Austin*, 7 S.W.3d 109, 122-23 (Tex. 1998) (reasoning that silence will not be construed as unmistakably clear legislative intent to limit a home-rule city's authority on an issue). In contrast, the language in subsection (h) is not unmistakably **[*347]** clear in this regard and, at best, appears to only define the limitations of the section itself—as opposed to the City's limitations. *See* Tex. Health & Safety Code Ann. § 364.034(h) ("*This section does not apply* to a private entity that contracts to provide temporary solid waste disposal services to a construction project." (emphasis added)).[6]

In light of these reasons, we hold that the language in Section 364.034(h) fails to indicate with unmistakable clarity that the legislature intended to restrict a home-rule city's authority to enter into an exclusive contract for solid waste disposal services to a construction project. *See S. Crushed Concrete*, 398 S.W.3d at 678. Accordingly, we hold that the district court erred in granting Texas Disposal's Rule 12(b)(6) motion to dismiss.

IV. CONCLUSION

The part of the district court's order granting Defendant-Appellee's Rule 12(b)(6) motion to dismiss is reversed and the **[**11]** part of the order denying as moot Plaintiff-Appellant's motion for summary judgment is vacated. The case is remanded for further proceedings consistent with this opinion.

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[6] The record reveals that the district court and both parties—with good reason—indicated uncertainty as to what effect, if any, subsection (e) has on subsection (h). *See* Tex. Health & Safety Code Ann. § 364.034(e). Subsection (e) provides in relevant part that "[n]othing in this section shall limit the authority of a public agency, including a county or a municipality, to enforce its grant of a franchise or contract for solid waste collection and transportation services within its territory." *Id.* It is unclear if all or only part of subsection (e) is removed from the purview of subsection (h). *Id.* However, because the effect of subsection (e) on subsection (h) is not dispositive to our holding on appeal, we decline to decide the issue today. *Id.*