**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**SAN ANGELO DIVISION**

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| REPUBLIC WASTE SERVICES OF TEXAS, LTD.<br><br>*Plaintiff*, | § | |
| | § | CIVIL ACTION NO.: |
| | § | 6:14-CV-00067-C |
| v. | § | **JURY TRIAL DEMANDED** |
| TEXAS DISPOSAL SYSTEMS, INC.<br>*Defendant.* | § | |

**RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

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Plaintiff Republic Waste Services of Texas, Ltd. ("Republic") hereby files its Response to Defendant's Motion to Dismiss and shows the Court as follows:

## 1. INTRODUCTION

Defendant Texas Disposal Systems ("TDS") asks this Court to void a provision in Republic's waste collection contract with the City of San Angelo, in direct disregard of municipalities' long-recognized authority to comprehensively regulate waste within their borders. The Court can, and should, decline that invitation by answering no to the only issue raised in Defendant's motion:

> Texas Health & Safety Code § 364.034(h) provides that the regulatory authority granted by section 364.034 does not apply to temporary construction waste services. Chapter 363 of the Code authorizes municipalities to contract with private entities for all waste collection

> services. Republic possesses an exclusive contract to provide temporary construction waste services in San Angelo. Does 364.034(h) strip San Angelo of the power granted it under Chapter 363?

TDS singularly focuses on one subsection of Chapter 364 of the Texas Health & Safety Code to contend that construction waste is immune from municipal regulation and that, therefore, TDS's construction waste services in San Angelo, in direct interference with Republic's contractual rights, are immune from liability. But TDS ignores that a city's power to regulate waste and to contract with private entities to collect waste, including construction waste, independently derives from its inherent police power as well as Chapter 363 of the Texas Health & Safety Code. Further, the remaining subsections of Chapter 364 contradict TDS's proposed interpretation of subsection (h). Accordingly, Defendant's motion to dismiss should be denied.[1]

## 2. BACKGROUND

Republic brought this action to stop TDS's defiance of Republic's rights under its "Special Exclusive Contract for Solid Waste Collection and Disposal Services" with the City of San Angelo ("2014 Contract"). TDS was a competitive bidder for that contract, but lost.

The claims are simple: the City duly granted to Republic the exclusive right to collect and haul solid waste generated within the City, which expressly includes

[1] Indeed, as Republic presents by separate motion, TDS very directly admits that its construction services activity in San Angelo is contrary to the express terms of the Republic contract. As a result, there are no material fact disputes here, and resolution of the single legal issue presented by this motion to dismiss—whether the City's grant of an exclusive contract to provide construction waste services is void—should result in entry of summary judgment for Republic.

construction waste. Specifically, paragraph 6(A) of the 2014 Contract provides Republic "the exclusive right to collect residential and Non-Residential Acceptable Waste and *temporary Construction & Demolition Waste*." *See* Complaint at ¶ 5.1.3, Oct. 24, 2014, ECF No. 1 (emphasis added). The 2014 Contract became effective August 1, 2014, at the expiration of Republic's prior exclusive contract with San Angelo. Texas Disposal Systems, in disregard of Republic's contract and rights thereunder, is soliciting and providing construction waste services to customers located within the City, actively seeking to expand its unlawful activity. In response to a demand to cease and desist, Defendant provided a letter to Republic acknowledging its awareness of Republic's contract, the rights granted under it, and Defendant's intent to continue to usurp those rights, relying entirely on the legal issue now presented by its motion to dismiss. Complaint at Exhibit C (Letter from TDS stating "this dispute is ripe for the courts to settle"). Republic then brought this suit, seeking this Court's declaration that the City's grant of an exclusive franchise to provide construction waste services is valid and enforceable, and seeking to end and remedy TDS's interference with Republic's contract rights.

TDS has now moved to dismiss Republic's claims under Federal Rule of Civil Procedure 12(b)(6), arguing that Republic failed to state any plausible claim for relief. *See* Defendant Texas Disposal Systems, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Nov. 20, 2014, ECF No. 8 (hereinafter "TDS Motion").

## 3. ARGUMENT

"A motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted." *Settlement Capital Corp. v. BHG Structured Settlements, Inc.*, 319 F. Supp. 2d 729, 732 (N.D. Tex. 2004). Republic's claims should not be dismissed unless the Court determines "that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). When construing a statute or ordinance, a court may consider among other matters the object sought to be attained, the common law, former statutes, laws on the same or similar subjects, the title, preamble, as well as administrative construction of the statute. Tex. Gov't Code § 311.023.

### 3.1 Chapter 363 of the Texas Health & Safety Code expressly authorizes Republic's contract, which is also validated by the City of San Angelo's inherent authority to regulate waste, so the limiting language of Section 364.034(h) does not void Republic's contractual right to serve as the exclusive provider of construction waste services in the City.

Defendant's reliance on Section 364.034(h) of the Texas Health & Safety Code to summarily defy Republic's exclusive contract is misplaced. Chapter 364 sets out the County Solid Waste Disposal Act. TDS argues that section 364.034(a) grants municipalities the authority to "offer solid waste disposal service to persons in its territories," and that section (h) restricts that authority when a private entity "contracts to provide waste services to a construction project." TDS Motion at 2. Section (h) provides, "[t]his section does not apply to a private entity that contracts

to provide temporary solid waste disposal services to a construction project." Tex. Health & Safety Code § 364.034(h). According to TDS, because section (a) grants all authority possessed by a municipality to regulate waste, subsection (h) wholly strips that authority as to construction waste, and therefore Republic's contract to be exclusive provider of construction waste services to San Angelo customers is invalid. That argument disintegrates if municipalities possess authority to regulate waste outside of Chapter 364. And they do.

Home-rule municipalities in Texas have long held the power to regulate solid waste. "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." *City of Breckenridge v. McMullen*, 258 S.W. 1099, 1101 (Tex. Civ. App.—Fort Worth 1923, no writ). The Fort Worth Court of Appeals recognized the breadth of that authority nearly 100 years ago, "[w]e 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." *Id.* at 1102. Defendant's attempt to circumscribe the City of San Angelo's power withers under scrutiny.

Beyond its historical police power, a separate chapter of the Texas Health & Safety Code specifically provides the authority for the City to enter into its contract with Republic. Chapter 363 of the Texas Health & Safety Code is titled the "Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act." Tex. Health & Safety Code § 363.001. It provides that a

municipality may "enter into contracts to enable it to furnish or receive solid waste management services on the terms considered appropriate." *Id.* at 363.116(a). Specifically, Chapter 363 grants municipalities the authority to "contract with a person or other public agency for the operation of *all* or any part of a solid waste management system." *Id.* at 363.117(4) (emphasis added). The Chapter goes on to explicitly provide that such contracts include "contracts for the collection and transportation of solid waste." *Id.* at 363.117(7). Chapter 363 contains no exception for temporary construction waste, so Republic's contract, duly authorized by Chapter 363, is valid. TDS's construction of Chapter 364 would render Chapter 363 completely meaningless. *See* TDS Motion at 2 (contending that Chapter 364 is the only source of a municipality's authority).

The few judicial and administrative decisions addressing the source of a Texas municipality's authority to manage waste agree that the provisions of Chapter 364, insofar as they apply to cities, are merely supplemental to the inherent and statutory power that cities already and otherwise possessed.[2] In *Grothues v. City of Helotes*, the plaintiffs challenged the city's[3] authority to award

[2] Indeed, the only decision to arguably view section 364.034 differently was an unpublished memorandum order from the Corpus Christi Court of Appeals that addressed grease trap waste and in which "the parties seemingly agree[d] that [the City] had both statutory and inherent police power to grant a franchise for garbage or grease collection." *See Adams v. City of Weslaco*, No. 13-06-00679-CV, 2009 WL 1089442, at *6 (Tex. App.—Corpus Christi-Edinburg April 23, 2009, no pet.) (reversing summary judgment that had been granted to sludge transporter to haul grease trap waste). Aside from its dubious precedential value and murky analysis, *Adams* does not apply to this case for several reasons, including the fact that the decision addressed a different subsection, subsection (f), of 364.034 that does not control the construction of subsection (h). *See id.* at *1 (describing the issues raised as to grease trap waste collection).

[3] The municipality in *Grothues* was the City of Helotes, a general law municipality. While San Angelo is a home-rule municipality, that distinction only further supports Republic's position. As a home-rule municipality, San Angelo possesses the full authority for self-government under the Texas

an exclusive contract to collect and dispose of solid waste within the city. 928 S.W.2d 725, 727 (Tex. App.—San Antonio 1996, no writ). The city also enacted an ordinance making the failure to pay waste collection fees punishable by fine. *Id.* Like TDS, the *Grothues* plaintiffs argued that Chapter 364 did not permit the city's ordinance and that absent an express provision in 364.034, the city's action was unenforceable. *Id.* As the court explained, "[plaintiffs] assert that the sole weapon in a city's arsenal for garbage collection enforcement is the County Solid Waste Control Act." *Id.* at 728. The court acknowledged the power conferred by Chapter 364, but it rejected plaintiffs' interpretation, explaining, "[t]o 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." *Id.* at 729. Also, the court held that "the enforcement of a comprehensive garbage collection plan such as the City has adopted is clearly within the police power granted all municipalities." *Id.* (citing Tex. Local Gov't Code § 54.001). TDS asks this Court to similarly ignore relevant authorities outside of Chapter 364—such as Chapter 363 and the City's police power, from which San Angelo independently derives the power to contract for solid waste services for its citizens, including the power to exercise its policy judgment and confer an exclusive contract that extends to construction waste.

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Constitution. *See Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948) ("It was the purpose of the Home-Rule Amendment and the enabling statutes to bestow upon accepting cities and towns of more than 5000 population full power of self-government, that is *full authority to do anything the legislature could theretofore have authorized them to do.* The result is now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.") (emphasis added).

Chapter 364 of the Texas Health & Safety Code cannot be the only authority under which a municipality possesses authority to enter into a contract such as Republic's. Case law reflects that municipalities held and exercised such authority before Chapter 364 was enacted. *See City of Breckenridge v. Cozart*, 478 S.W.2d 162 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.) (holding that a waste control ordinance was a valid exercise of the inherent police power of the City, after citing but not relying upon the contemporaneously enacted County Solid Waste Control Act); *McMullen*, 258 S.W. at 1101 (recognizing the grant of an exclusive solid waste contract as within the police power, as quoted *supra* at 5). *Cozart* noted, "[t]he problem of garbage disposal is of paramount importance," and explained that a municipality's power to regulate waste includes using means not expressly contemplated by statute. *Id.* Chapter 364 simply appends to municipalities' previously possessed authority to regulate waste.

Several administrative decisions from the Attorney General of Texas agree. In 1999, the Attorney General concluded that a home-rule municipality was empowered to adopt an ordinance requiring residential construction contractors to use the franchisee selected by the municipality for collection and disposal of solid waste generated during construction. Tex. Att'y Gen. Op. No. JC-0035 (1999). The Attorney General explained that "[b]ecause a municipality has comprehensive powers to regulate garbage collection, we conclude that it may adopt the ordinance." *Id.* In addition to Chapter 364, the Attorney General pointed to *Grothues*, the police power, and a municipality's power to regulate building construction. *Id.* Specifically,

he wrote, "[t]he enforcement of such restriction is a necessary function of municipal government to promote the common welfare of the greater metropolitan area." *Id.* Again, in 2000, the Attorney General explained that "courts have recognized that cities have implied authority, based on their police power to protect public health and safety, to enforce ordinances related to garbage collection." Tex. Att'y Gen. Op. No. JC-0219 (2000) (citing *City of Breckenridge v. Cozart*, 478 S.W.2d 162 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.)). Like *Grothues*, the Attorney General's opinions also cited to Chapter 364 and preceded the enactment of subsection (h). But their reasoning and consistency are nonetheless authoritative—Chapter 364 is not the sole source of a municipality's authority to regulate solid waste services.

San Angelo's inherent police power and the power conferred by Chapter 363 enabled it to contract with Republic to provide construction waste services. Chapter 364—the County Solid Waste Disposal Act—may supplement that authority, and more directly supplement the authority of non-municipal local-government units to regulate and cooperate to regulate waste. But subsection (h) applies only to authority created under Chapter 364. It in no way impairs San Angelo's long-held municipal police power and the authority conferred explicitly under Chapter 363. Each suffices to sustain the City's exercise of its authority here. Thus, Republic's duly executed contract is valid and enforceable, including its grant to Republic of the right to serve as the exclusive provider of construction waste generated within the City.

### 3.2 Chapter 364 internally forecloses the construction of subsection (h) that Defendant proposes.

Even if one ignores all other Texas law that authorizes the City's contractual grant of an exclusive contract, including for construction waste services, TDS's motion to dismiss still fails because Chapter 364 itself makes clear that no provision therein shall limit the enforceability of a municipality's waste collection contract. TDS selectively quotes from Chapter 364 to suggest that the statute equally addresses counties and municipalities, but the statute's title, terms, and purpose bely Defendant's position. Counties and other non-municipal units of local government are the focus of Chapter 364, not municipalities. Any authority-limiting impact of subsection (h) is likewise directed to non-municipal units of local governments. So much so that the statute expressly clarifies that 364.034, and any provision therein, cannot be construed to limit the authority otherwise possessed by municipalities to regulate waste.

Chapter 364 is entitled the "County Solid Waste Control Act" and was enacted 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 § 364.001–2. Subsection (b) provides that, "[a] fee for a service provided under this section may be collected by: (1) the *county*; (2) a private or public entity that contracts with the *county* to provide the service; or (3) another private or public entity that contracts with the *county* to collect the fees." Tex. Health & Safety Code § 364.034(b)(1)–(3) (emphasis added). Further, subsection (c) provides that, "[a] *county* may contract

with a public or private utility to collect a fee for a service provided under this section." *Id.* at 364.034(c) (emphasis added). Subsection (d) continues the theme: "[t]o aid enforcement of fee collection for the solid waste disposal service: (1) a *county* or the public or private entity that has contracted with the *county* . . . may suspend service to a person." *Id.* at 364.034(d)(1)–(2) (emphasis added). Not one of those provisions addresses municipalities, they all delegate to counties. If Chapter 364 were the only delegation of authority for municipalities to regulate waste, as TDS suggests, no municipality could contract to provide solid waste services unless it contracts through a county. This cannot be.

Instead, Chapter 364 readily co-exists, if at times overlaps, with the powers conferred by Chapter 363. One need only look to Chapter 364's express purpose, "to authorize a cooperative effort" to regulate waste. Tex. Health & Safety Code 364.002. Section 364.034 clarified that counties were authorized to cooperate with municipalities (and other entities) for the regulation of waste in rural areas within a county's jurisdiction. Subsections (b)–(d) provide several mechanisms to do so. All are directed at counties. Far from the sole fountain of municipal authority that TDS asserts, Chapter 364 has relatively little to do with municipalities.

But further, subsection (e) expressly precludes the result TDS seeks. It provides, "[n]othing in this section shall limit the authority of a public agency, including a county or municipality, to enforce its grant of a franchise or contract for solid waste collection." *Id.* at 364.034(e). Thus, neither the grant of authority in subsection (a) nor the exception in subsection (h) limits the authority of a

municipality, like San Angelo, to enter into a contract to provide comprehensive solid waste services within its boundaries. Subsection (e) makes clear that the construction-waste exception of subsection (h) cannot invalidate the City's contract with Republic for construction waste collection for two reasons: first, subsection (e) states directly that nothing in section 364.034 can limit the power of a municipality to contract for solid waste collection; and second, subsection (e)'s reference to a municipality's authority "to enforce its grant of a franchise or contract for solid waste collection" affirms that municipalities derive that authority from Texas law external to 364.034—namely, their inherent police power and the power provided under chapter 363.[4]

Thus, the statute relied upon by TDS cannot support its contention that Republic's contract as it relates to construction waste is "unauthorized and unenforceable." TDS Motion at 2. Accordingly, Republic's contract is enforceable in its entirety. TDS lacks a justification to intentionally interfere with it, and Republic has alleged valid tortious interference and declaratory judgment claims.

[4] This approach to section 364.034 is further bolstered by its ability to give meaning to both Chapters 363, Chapter 364, and each subsection therein, including subsection (h). Under this approach, (h) would nonetheless operate to permit private entities to provide temporary construction waste services where a county has not chosen to grant an exclusive contract or franchise. Subsection (e) clarifies that where a county or municipality has chosen to grant an exclusive franchise, (h) cannot impair enforcement of that contract. But if no contract exists, subsection (h) assures that the powers conferred by (a) will not be interpreted to foreclose private contracts in the temporary construction waste context. That said, whatever the scope of (h) may be, it cannot operate to strip a municipality to choose, in the interests of the health and welfare of its citizens, to contract with a single waste services provider in order to comprehensively manage waste within its borders, including construction waste.

## 4. CONCLUSION

TDS admits that it is usurping a right that the City expressly granted to Republic alone. Defendant's motion to dismiss seeks a judicial endorsement of its unlawful conduct, asserting that the contract's grant of exclusivity is void as applied to construction waste. Section 364.034(h), the only authority on which TDS relies, cannot support Defendant's proposition. Texas law both internal and external to that statute establishes that the City of San Angelo was well within its authority to contract with Republic to be the exclusive provider of solid waste services, including construction waste collection, within the City. Republic's claims are therefore founded in an enforceable contract, and Defendant's motion to dismiss should be denied.

## 5. PRAYER

WHEREFORE Plaintiff Republic Waste Services of Texas, Ltd. requests that Defendant Texas Disposal Systems, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure be denied in its entirety.

Respectfully submitted,

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By: */s/ Edwin Buffmire*

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## CERTIFICATE OF SERVICE

This is to certify that on this 11th day of December, 2014, this document was served electronically via the Court's ECF system upon the persons on the service list below:

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