UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

REPUBLIC WASTE SERVICES OF TEXAS, LTD.,	§	
	§	
Plaintiff,	§	Cause No. 6:14-CV-00067-C
v.	§	
	§	
TEXAS DISPOSAL SYSTEMS, INC.	§	
	§	
Defendant.	§	

DEFENDANT TEXAS DISPOSAL SYSTEMS, INC.'S
REPLY IN SUPPORT OF MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant Texas Disposal Systems, Inc. ("Texas Disposal") and files this Reply in Support of its Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 8), and in reply to Plaintiff Republic Waste Services of Texas, Ltd.'s ("Republic") Response to Defendant's Motion to Dismiss (Doc. 10).

The Texas Legislature has spoken, clearly: A municipality's authority to enter into exclusive contracts for the hauling and disposal of waste "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).

The Legislature passed this statute in 2007. Republic relies on pre-2007 law to argue that municipalities may enter into exclusive waste contracts under their inherent police powers or under a different statute. If municipalities once had such police power, the Legislature has exercised its authority to limit that power through passing the statute. Likewise, the specific 2007 statute controls over the earlier, general statutes relied upon by Republic. The City of San Angelo exceeded its authority, and Republic's lawsuit must be dismissed.

ARGUMENT AND AUTHORITIES IN REPLY

I. Chapter 363 Does Not Expressly Authorize Exclusive Waste Contracts, and in Any Event, the Later-Adopted, Specific Provisions of Chapter 364 Govern.

A. The issue before the Court is not whether cities have the general authority to regulate waste, but rather the source of their authority to enter into exclusive construction waste contracts.

Republic misreads Texas Disposal's motion to dismiss as arguing that Chapter 364 of the Texas Health & Safety Code "is the only source of a municipality's authority" to "regulate waste." Republic Response at 5, 6. Not so. Municipalities do have authority to impose some regulations on waste under both Chapters 363 and 364 of the Health & Safety Code, as well as under their police powers. That is not the issue. This case raises the question of whether municipalities have the authority to enter into exclusive waste contracts for construction waste, in light of the Texas Legislature's 2007 adoption of a statute specifically stating that cities' authority to enter into exclusive waste contracts "does not apply" to contracts with private entities to provide temporary construction waste services. The authorities relied upon by Republic do not address the issue presented here.

B. Chapter 363 contains no authorization for exclusive contracts; municipalities have explicit statutory authority for such contracts only under Chapter 364.

Republic argues that the portion of its contract with the City of San Angelo purportedly granting Republic exclusive rights to collect construction waste is "duly authorized" by Chapter 363 of the Health & Safety Code. Republic Response at 6. Specifically, Republic relies on Section 363.117, arguing that this statute's general provision allowing governmental subdivisions to contract with private entities "for the operation of all or any part of a solid waste management system" gives San Angelo the power to enter into exclusive construction waste contracts.

But neither Section 363.117 specifically, nor Chapter 363 generally, grants municipalities authority to enter into *exclusive* waste contracts, let alone exclusive construction waste contracts. The word "exclusive" does not appear anywhere in Chapter 363. Nor does that chapter have language authorizing governmental entities to "require" their residents to use a waste disposal company chosen by the government. In contrast, Chapter 364 specifically authorizes municipalities to "offer solid waste disposal service to persons in its territory," and to "require the use of the service by those persons." Tex. Health & Safety Code § 364.034(a). This is the only provision in the Health & Safety Code explicitly authorizing exclusive municipal waste contracts.[1]

Tellingly, the key case relied upon by Republic – *Grothues v. City of Helotes*, 928 S.W.2d 725 (Tex. App. – San Antonio 1996, no writ) – does not rely on Chapter 363 in its discussion of exclusive waste contracts. The case never cites any provision of that chapter, even though Section 363.117 was in effect when the case was decided. *Grothues* does not support Republic's position. Rather, its lack of reliance on Chapter 363 supports Texas Disposal's argument that exclusive construction waste contracts are not authorized by that chapter.

C. Chapter 364 does not conflict with Chapter 363, but if there were a conflict, Section 364.034 takes precedence.

Because Chapter 364's language is specific, while the authority granted by Chapter 363 is general and does not authorize exclusive contracts, those provisions can be read in harmony,

[1] Republic's assertion that "Chapter 364 has relatively little to do with municipalities," Republic Response at 11, is both erroneous and irrelevant. In fact, both Chapters 363 and 364, in various places, deal with both municipalities and counties. More importantly, the statute at issue in this case – Section 364.034 – applies to "public agencies," which includes municipalities. Tex. Health & Safety Code § 364.003(3) (including "municipality" in the definition of "public agency"). Likewise, Republic's focus on the title of Chapter 364, "County Solid Waste," does not limit its express application to municipalities. This is confirmed by the Texas Code Construction Act, which provides that "[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." Tex. Gov't Code § 311.024.

giving effect to both. Tex. Gov't Code § 311.026(a) (requiring general and specific statutes to be read as giving effect to both, if possible). Even if the statutes could be read as conflicting, the Code Construction Act and principles of statutory construction mandate that Section 364.034 take precedence over the language in Chapter 363 relied upon by Republic, and that Section 364.034(h) be interpreted to forbid exclusive construction waste contracts.

As discussed above, Chapter 363 grants to municipalities only general regulatory authority over waste, whereas Section 364.034 specifically grants the authority to execute exclusive contracts and excepts construction waste contracts from that authority. If Chapter 363's general grant is interpreted to include the power to enter into exclusive contracts, dismissal is still required, because Section 364.034(h) specifically disallows exclusive construction waste contracts, and specific statutory provisions govern over general provisions. Tex. Gov't Code § 311.026(b) (if there is an irreconcilable conflict between general and specific statutory provisions, the specific statute prevails); *Columbia Hosp. Corp. v. Moore*, 92 S.W.3d 470, 473 (Tex. 2002) (applying "the statutory construction principle that the more specific statute controls over the more general one").

This conclusion is reinforced by another statutory construction principle: that a later-adopted statute governs over an earlier statute if the statutes conflict. Tex. Gov't Code § 311.025(a) ("if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails"). The prohibition on exclusive construction waste contracts was passed by the Legislature in 2007. Ex. A (2007 Tex. Sess. Law Serv. Ch. 1394 (H.B. 1251), showing the adoption of Section 364.034(h) in 2007). In contrast, Section 363.117 – the provision relied upon by Republic that grants general regulatory authority

over waste without authorizing exclusive contracts – was adopted in 1989 and has not been amended since.

Further, Republic's interpretation of Section 364.034(h) would render the statute meaningless. Even though its plain language states that the authority of a municipality to enter into exclusive waste contracts "does not apply" to private construction waste contracts, Republic argues that municipalities still have the authority to execute such contracts. This interpretation would violate yet another key principle of statutory construction: that an "entire statute is intended to be effective." Tex. Gov't Code § 311.021(2). *See also Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (in construing a statute, a court does "not treat any statutory language as surplusage if possible"); *Beldon Roofing & Remodeling Co. v. San Antonio Water Sys.*, 898 S.W.2d 351, 354 (Tex. App. – San Antonio 1995, writ denied) (avoiding statutory construction that would render a provision nugatory). Texas Disposal's interpretation gives effect to Chapter 363, which grants regulatory authority, and Section 364.034(h), which restricts that authority in a narrow, specific manner. In contrast, Republic's interpretation would render Section 364.034(h) nugatory.[2]

In addition to these fundamental statutory construction principles, the Legislature has clearly stated that nothing in Chapter 363 can be read as restricting the terms of Chapter 364. The relevant provision of Chapter 363 specifically provides that "[t]his chapter does not affect … Chapter 364." Tex. Health & Safety Code § 363.007. Chapter 363's grant of general authority does not and cannot negate Section 364.034(h)'s specific terms.

[2] In a footnote, Republic suggests that Subsection (h) applies only "where a county has not chosen to grant an exclusive contract or franchise." Republic Response at 12 n.4. The actual, plain statutory language provides no support for this interpretation, nor does any principle of statutory construction.

Republic's argument that Section 364.034(e) precludes the application of 364.034(h) is without merit. First, such an interpretation would, again, render Section 364.034(h) nugatory. Second, the interpretation is not supported by the statute's plain language. Subsection (e) provides, in full:

> ***Except as provided by Subsections*** (f), (g), and ***(h)***, this section does not apply to a person who provides the public or private entity, public agency, or county with written documentation that the person is receiving solid waste disposal services from another entity. Nothing 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. Except as provided by Subsection (f), the governing body of a municipality may provide that a franchise it grants or a contract it enters into for solid waste collection and transportation services under this subchapter or under other law supersedes inside of the municipality's boundaries any other franchise granted or contract entered into under this subchapter.

Tex. Health & Safety Code § 364.034(e) (emphases added). The purpose of subsection (e) is to allow persons to continue to receive waste services from another entity even after the adoption of an exclusive franchise under certain circumstances, when those persons have pre-existing contracts with the other entity. Republic takes one sentence out of context – "Nothing 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" – and argues that it means a city can enforce an exclusive construction waste contract. That interpretation is not supportable. The interpretation not only fails a plain-language reading, but subsection (e) specifically states that its terms are subject to the subsection (h) exception disallowing exclusive construction waste contracts. Further, subsection (h) states that "[t]his section" – meaning Section 364.034, *including* subsection (e) – "*does not apply*" to private construction waste contracts. Thus, by the statute's own express terms, subsection (e) simply has no effect on subsection (h).

This conclusion is consistent with the Corpus Christi Court of Appeals' interpretation of subsection (e), in a different context, in *Adams v. City of Weslaco*, 2009 WL 1089442 (Tex. App. – Corpus Christi 2009, no pet.) (not published in S.W.3d). The *Adams* court correctly held that subsection (e) provides an exception to the grant of authority for exclusive franchises in Section 364.034(a), so that persons with pre-existing contracts for waste disposal can keep those contracts even when a governmental entity subsequently establishes an exclusive franchise. Subsection (e)'s provision stating that the subsection does not "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" addresses authority to *enforce* a franchise, not to *grant* a franchise – meaning that a city can enforce a franchise to the extent of its authority to grant a franchise, but also that subsection (e) (and, by the same reasoning, subsection (h)) creates an exception to the city's authority to grant an exclusive franchise. *See also Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S.W.930, 934 (Tex. 1912) (use of the term "franchise" does not imply "exclusive franchise" without express terms or clear implication).

Republic's argument that Chapter 363 renders Section 364.034(h) meaningless has no support in statutory language and violates fundamental principles of statutory construction. Chapter 363 cannot be read to authorize the exclusive construction waste provision of Republic's contract with the City of San Angelo.

II. The City's Police Power Does Not Authorize Exclusive Construction Waste Contracts.

In addition to its reliance on Chapter 363 of the Health & Safety Code, Republic argues that the City has authority to enter an exclusive construction waste contract under its police power. Just like its argument regarding Chapter 363, however, this interpretation would render

Section 364.034(h) nugatory, contrary to the Texas Code Construction Act and fundamental principles of statutory construction, as discussed above.

Further, even assuming that a city could enter exclusive construction waste contracts under its police power before 2007 (which Texas Disposal does not concede), the Legislature exercised its authority to limit municipalities' police power when it adopted Section 364.034(h) in 2007. While a municipality's general police power is derived from the Texas Constitution, that power can be statutorily limited by the Legislature. An ordinance of a home-rule city (such as San Angelo) that attempts to regulate in a manner inconsistent with a state statute is unenforceable to the extent it conflicts with the statute. *See, e.g.*, *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993) (home-rule cities "look to the Legislature not for grants of power, but only for limitations on their power"); Tex. Const. art. XI, § 5 (home-rule cities may not adopt ordinances "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State").

Republic's heavy reliance on *Grothues v. City of Helotes*, 928 S.W.2d 725 (Tex. App. – San Antonio 1996, no writ), is misplaced for at least three reasons. First, the case does not deal with Section 364.034(h) at all, because the case pre-dates the 2007 adoption of the statute. Second, the primary issue in *Grothues* was the authority of a municipality to *enforce* a grant of a franchise, not the scope of the city's authority to *grant* a franchise. *See, e.g.*, *Adams v. City of Weslaco*, 2009 WL 1089442 at *5 (*Grothues*' "holding deals once again with enforcement, rather than the grant of a franchise"). Third, even if *Grothues* did hold that municipalities have authority under their police power to grant exclusive waste franchises, that power was limited by the Legislature in 2007 when it created an exception for a "private entity that contracts to provide

temporary solid waste disposal services to a construction project" from a city's power to adopt exclusive waste franchises, by adopting Section 364.034(h).

III. Republic Does Not Dispute that If the Exclusive Construction Waste Provision is Not Enforceable, then Republic Has No Tortious Interference Claim.

In its motion to dismiss, Texas Disposal showed that a party has no cause of action for tortious interference with contract if the contractual provision sought to be enforced is actually unenforceable. Republic's Response does not contest this point of law. Therefore, if this Court finds the exclusive construction waste provision unenforceable – which it is, as explained herein and in Texas Disposal's motion to dismiss – then Republic's tortious interference claim must be dismissed, along with its declaratory judgment cause of action.

CONCLUSION AND PRAYER

Wherefore, premises considered, Defendant Texas Disposal Systems, Inc. prays that this Court grant its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6); dismiss the claims brought against Texas Disposal by Plaintiff Republic Waste Services of Texas, Ltd.; tax all costs against Republic; and further grant to Texas Disposal all other relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was served on counsel of record for Plaintiff via CM/ECF, with courtesy copies transmitted via email, on this 26th day of December as follows:

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Additions are indicated by Text; deletions by
~~Text~~. Changes in tables are made but not highlighted.

CHAPTER 1394
H.B. No. 1251
PUBLIC AGENCY'S, COUNTY'S, OR MUNICIPALITY'S AUTHORITY TO ENFORCE A SOLID WASTE COLLECTION AND TRANSPORTATION SERVICES FRANCHISE OR CONTRACT

AN ACT relating to a public agency's, county's, or municipality's authority to enforce a solid waste collection and transportation services franchise or contract.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 364.034, Health and Safety Code, is amended by amending Subsection (e) and adding Subsections (f), (g), and (h) to read as follows:

<< TX HEALTH & S § 364.034 >>

(e) Except as provided by Subsections (f), (g), and (h), this ~~This~~ section does not apply to a person who provides the public or private entity, public agency, or county with written documentation that the person is receiving solid waste disposal services from another entity. Nothing 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. Except as provided by Subsection (f), the governing body of a municipality may provide that a franchise it grants or a contract it enters into for solid waste collection and transportation services under this subchapter or under other law supersedes inside of the municipality's boundaries any other franchise granted or contract entered into under this subchapter.

(f) Notwithstanding the other provisions of this section, a political subdivision, including 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.

(g) Except as provided by this subsection, a person is exempt from the application of a requirement adopted by a public agency or county under Subsection (a) if the person, on the date the requirement is adopted, is receiving under a contract in effect on that date solid waste disposal services at a level that is the same as or higher than the level of services that otherwise would be required. The exception provided by this subsection does not apply to a requirement adopted under this section by a municipality. To qualify for the exemption provided by this subsection, the person must provide to the public agency or county written documentation acceptable to the public agency or county not later than the 30th day before the date the otherwise required services are scheduled to begin. The person who provides solid waste disposal services to a person who qualifies for the exemption shall notify the public agency or county that the services under the contract have stopped not later than the 15th day after the date those services are stopped for any reason.

(h) This section does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project.

SECTION 2. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2007.

Passed by the House on April 12, 2007: Yeas 130, Nays 10, 1 present, not voting; the House refused to concur in Senate amendments to H.B. No. 1251 on May 18, 2007, and requested the appointment of a conference committee to consider the differences between the two houses; the House adopted the conference committee report on H.B. No. 1251 on May 27, 2007: Yeas 135, Nays 5, 2 present, not voting; passed by the Senate, with amendments, on May 15, 2007: Yeas 30, Nays