



Office of the Attorney General
State of Texas

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April 11, 1997

The Honorable J. E. (Buster) Brown
Chair, Natural Resources Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 97-037

Re: Whether a municipality that displaces private
solid waste haulers after annexing an area violates
the haulers' constitutional rights (ID# 39336)

Dear Senator Brown:

You ask whether a municipality that displaces private solid waste haulers after annexing an area violates the Texas Constitution. You state that private hauling companies often collect solid waste in unincorporated areas adjacent to municipalities, either under contract with individual customers, pursuant to contracts with counties or municipal utility districts, or "in an open market, without contracts." You explain that when municipalities annex an adjoining area, it is commonplace for municipalities to displace the solid waste haulers serving the area at the time of annexation. You state that municipalities appropriate the haulers' customers and deny the haulers permission to continue to offer collection services in the area, without compensating the haulers for their losses. You ask whether this practice by municipalities constitutes an illegal taking under article I, section 17,¹ a violation of due process under article I, section 19,² or an impairment of contract under article I, section 16.³

Before turning to an analysis of private solid waste haulers' rights under these constitutional provisions, we briefly review the role of the state, counties, and municipalities in solid waste collection. The regulation of garbage collection and waste disposal, which implicates public health and safety, is a police power vested in the state. *Grothues v. City of Helotes*, 928 S.W.2d 725, 729 n.6 (Tex. App.—San Antonio 1996, no writ). The legislature has delegated this power to municipalities, counties, and other public agencies⁴ pursuant to chapter 364 of the Health and Safety Code. Section 364.034 of the Health and Safety Code expressly authorizes a county, municipality, or other public agency to offer solid waste disposal service to persons in its territory, to require the use of the service, and to establish the service as a utility. In addition, the legislature has delegated to municipalities the authority to regulate solid waste collection by ordinance. "The legislature and

¹"No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation. . . ." Tex. Const. art. I, § 17.

²"No citizen of this State shall be deprived of . . . property . . . except by the due process of law." *Id.* § 19.

³"No . . . law impairing the obligation of contracts, shall be made." *Id.* § 16.

⁴See Health & Safety Code § 364.003(3) (defining "public agency").

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 . . . is clearly within the police power granted to all municipalities." *Grothues*, 928 S.W.2d at 729 (relying upon Local Gov't Code § 54.001); *see also* Attorney General Opinion DM-401 (1996) (discussing power of municipalities to adopt ordinances governing the removal of garbage) (citing cases).

With this background, we turn to your constitutional questions. Loss of business is one element of a constitutional taking of property, but not the sole element. A person is not entitled to compensation under article I, section 17 unless he or she can establish that the loss of business caused by a governmental action was attendant to the taking of some property right. *Alford v. City of Denton*, 546 S.W.2d 672, 674 (Tex. Civ. App.--Fort Worth 1977, writ ref'd n.r.e.). Similarly, the article I, section 19 due process guarantee presupposes the existence of a protected right or interest. "Property interests are not determined by the constitution. They are created and defined by state law." *Alamo Carriage Serv., Inc. v. City of San Antonio*, 768 S.W.2d 937, 940 (Tex. App.--San Antonio 1989, no writ) (citations omitted).

Your query assumes that private solid waste haulers have a vested property right in contracts to haul waste in annexed areas. Texas courts have long held, however, that "[a] person operating a business in, under or over the streets, alleys and other public places within an incorporated municipality without a franchise has no property right in the continued use of such premises for conducting his business." *Alford*, 546 S.W.2d at 674 (quoting *Brown v. Town of Corinth*, 515 S.W.2d 722 (Tex. Civ. App.--Fort Worth 1974, no writ)); *see also West Texas Util. Co. v. City of Baird*, 286 S.W.2d 185 (Tex. Civ. App.--Eastland 1956, writ ref'd n.r.e.). In *City of San Antonio v. Bee-Jay Enterprises, Inc.*, 626 S.W.2d 802 (Tex. App.--San Antonio 1981, no writ), the court applied this principle to garbage collection and concluded that a company that had hauled garbage under contract with a water supply corporation in an area that was later annexed by the City of San Antonio "had no vested property right in the use of the streets and alleys" of the annexed area to haul garbage. *Id.* at 804. On the basis of this authority, we believe it is very likely that a court would conclude that a private solid waste hauler company that has collected waste in an area has no vested property right in the collection of waste in the area after it is annexed and thus has no cause of action against the annexing municipality under article I, section 17 or 19.

Finally, it seems unlikely that a court would conclude that the displacement of private solid waste haulers by an annexing municipality constitutes an impairment of contract under article I, section 16. The obligations of a contract are not impaired, within the meaning of this constitutional provision, by a statute in effect when the contract was made. *City of Brownsville v. Public Util. Comm'n*, 616 S.W.2d 402, 410 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.) (citing *Barton v. Wichita River Oil Co.*, 187 S.W. 1043 (Tex. Civ. App.--Fort Worth 1916, writ ref'd)). Courts presume that parties to contracts are aware of the law in effect at the time the contracts are executed: It is "considered that [contracts are] executed in full recognition of the law and [are] intended to be subject to or modified by the law's provisions." *Id.* (citing *Winder Bros. v. Sterling*, 12 S.W.2d 127 (Tex. 1929); *Trinity Portland Cement Co. v. Lion Bonding & Surety Co.*, 229 S.W. 483 (Tex. Comm'n App. 1921, judgment adopted)). As noted above, section 364.034 of the Health and Safety Code authorizes a municipality to require persons within its territory to use the solid waste disposal

service offered by the municipality and municipalities are authorized under the Local Government Code to enact ordinances regulating solid waste disposal. We believe that a court would conclude that a municipality's exercise of authority under these provisions cannot impair a contract executed subsequent to their enactment.⁵

S U M M A R Y

A municipality that denies a private solid waste hauler permission to collect waste in an annexed area where the hauler collected waste prior to the annexation does not violate rights of the hauler under the Texas Constitution, article I, section 16, 17, or 19.

Yours very truly,



Mary R. Crouter
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Opinion Committee

⁵The statutory predecessor to Health and Safety Code section 364.034 was enacted in 1971. Act of May 29, 1971, 62d Leg., R.S., ch. 516, 1971 Tex. Gen. Laws 1757, 1757. Municipalities' authority to enact and enforce waste-collection health and safety ordinances predates this provision. See *City of Breckenridge v. McCullen*, 258 S.W. 1099 (Tex. Civ. App.--Fort Worth 1923, no writ) (concluding that it is within police power of city to enact ordinance regulating garbage collection); Attorney General Opinion DM-401 at 3 (noting that Health and Safety Code, section 364.034 codifies some of cities' powers over collection and disposal of solid waste).