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ID# 13956

February 9, 1993

Honorable Dan Morales
Attorney General of Texas
State Capitol
Capitol Station
Austin, Texas 78711

RQ-535

Re: Bowie County Texas Ordinance Relating to Non-Permitted
Landfills Adopted December 28, 1992

Request for an Attorney General's Opinion

Question: Does the Bowie County Commissioner's Court have the authority under Chapter 361 of the Texas Health and Safety Code to pass and enforce an ordinance regulating industrial landfill sites located outside municipal city limits?

Dear Mr. Morales:

On December 28, 1992, the Commissioner's Court of Bowie County, Texas adopted an Ordinance titled "Ordinance Relating to Non-Permitted Landfills" (the "Ordinance"). The Ordinance relates "to the regulating of non-permitted landfills in Bowie County, Texas including permitting, design, construction, physical location, operations and inspections of landfills and the imposition of fines for violations". A non-permitted landfill is defined as "any landfill for which a permit is not required by the Texas Water Commission or any other state regulatory agency" and includes industrial solid waste disposal practices and landfills covered by Sect. 361.090 of the Texas Health and Safety Code. A copy of the Ordinance is attached hereto as Exhibit "A".

Texana Tank Car and Manufacturing, Inc., ("Texana"), is in the process of constructing a non-hazardous industrial solid waste disposal facility on a tract of land effectively in its control, located within fifty miles of its plant. The industrial solid waste which will be placed in this disposal facility is produced at the Texana manufacturing plant. Texana's non-hazardous industrial solid waste disposal facility is now near completion. The site location adjoins a primarily residential area which relies on individual water wells for local water supply.

The Ordinance purports to require Texana to obtain a permit from the Bowie County Commissioner's Court after public notice and public hearings

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conducted by the Commissioner's Court. The Ordinance also purports to regulate the construction and operation of Texana's disposal facility, or landfill, and to allow the County Judge or his designated enforcement officer to enter the landfill site during business hours for the purpose of inspecting or sampling the landfill, to enter Texana's place of business during normal business hours for the purpose of inspecting all records and reports regarding the operations of the landfill and to authorize him to take samples of actual waste materials and/or solid samples from the landfill site and surrounding areas. The Ordinance provides criminal penalties and fines for any person violating the Ordinance.

Government has the inherent power to protect the health safety and welfare of its citizens. In order to more effectively insure the enforcement of such duties, government has divided itself into political subdivisions. Among those subdivisions are the state, county and city. Cities are unique in that they have been empowered to govern by home-rule charters. Counties are unique in that they essentially are an extension of the State existing for the convenience of the State. The County, as a local unit of government for the State, is limited in its power so as not to interfere with those of the State. Article 5, Sect. 18 of the Texas Constitution authorizes the County to "exercise such powers . . . over County business". Any power the County has must be specifically set forth in the Constitution or Statutes.

In Texas, counties are legal subdivisions of the State. TEX. CONST. Art. XI, Sec. 1. The county is also declared to be a corporate and political body. TEX. LOCAL GOV'T. CODE SECT. 71.001. However, unlike a private or municipal corporation, a county does not have broad powers. Rather, a county has only those powers which are clearly set forth and defined by the Constitution and state statutes. Harrison County v. City of Marshall, 253 S.W. 2d 67 (Tex. Civ. App. - Fort Worth 1952, writ ref'd); Tex. Atty. Gen' 1 Op JM-1160 (1990); Tex. Atty. Gen'l Op DM-111 (1992). Therefore, unless a particular action is authorized by the Constitution or a statute, the County will not be allowed to exercise it. Crane v. State of Texas, 534 F. Supp. 1237 1244 (N.D. Tex. 1982), aff'd in part and rev'd in part on other grounds 759 F2d 412 amended in part 766 F2d 193, cert denied 474 U.S. 1020. See also, Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1951); Miller v. El Paso County, 150 S.W.2d 1000 (Tex. 1941). These limited constitutional and statutory powers given to counties are generally interpreted more narrowly than those granted cities. Their powers are "measured by the terms of the statutes which authorize their creation and {counties} can exercise no authority that has not been clearly granted by the legislature." Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann, 142 S.W.2d 945 (Tex. 1940); Crane, supra. Thus, the powers granted counties are to be carried out in the manner prescribed by the state. Orndorff v. State, 108 S.W.2d 106 (Tex.App. - El Paso 1937, writ ref'd n.r.e.).

Likewise, Commissioner's Courts "can exercise only such powers as the Constitution itself or statues have 'specifically conferred upon them'". Canales, supra, at 453, quoting Mills County v. Lampasas County, 40 S.W. 403, 404. Accord, Zummelman v. Harris County, 819 S.W. 2d 178 (Tex. App.

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Houston {1st Dist.} 1991, no writ); Schope v. State, 647 S.W.2d 675 (Tex. App. - Houston {14th Dist} 1982, writ ref'd n.r.e.); Renfro v. Shropshire, 566 S.W.2d 688 (Tex.Civ.App. - Eastland 1978, writ ref'd n.r.e.); Tex. Atty. Gen'l Op JM-1120 (1989). Thus, the legal basis for any action by a Commissioner's Court must be ultimately found in the Constitution or the statutes. Canalas, supra, at 453. Any Ordinance passed by the Commissioner's Court exceeding its powers granted by the Constitution or statute is void. Chenault v. Bexar County, 782 S,W,2d 206 (Tex. 1989). Canalas, supra.

In 1989, the Texas Legislature passed comprehensive legislation designed to regulate the storage, processing and disposal of solid waste. This legislation, the Solid Waste Disposal Act, is codified in Chapter 361 of the Texas Health and Safety Code. Under this Act, the primary duty of licensing, permitting and regulating solid waste processing, storage and disposal is vested in the Texas Water Commission. Sect. 361.011, et seq. However, the Act specifically excludes from the Commission's powers and authority, the power to:

require a permit . . . for the collection, handling, storage, processing, and disposal of industrial solid waste that is disposed of within the boundaries of a tract of land that is:

- (1) owned or otherwise effectively controlled by the owners or operators of the particular industrial plant, manufacturing plant, mining operation or agricultural operation from which the waste results or is produced; and,
- (2) located within fifty (50) miles from the plant or operation that is the source of the industrial solid waste.

Sect. 361.090(a).

Thus, the Commission cannot require a permit for the collection, handling, storage, processing and disposal of industrial solid waste produced by a manufacturing plant and disposed of on property effectively controlled by the owners or operators of the manufacturing plant. As has been seen, Texana's proposed landfill for its industrial waste qualifies under Sect. 361.090 and no permit may be required by the Commission.

However, the Commission may adopt rules to control these activities to protect the property of others, public property and rights-of-way, groundwater, and other rights. The Commission may also require a person to submit to the Commission information that is reasonably required to enable the Commission to determine if Sect. 361.090 applies to the waste

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disposal activity. Sect. 361.090(d) and (e). In fact, the Commission does require any person covered by Sect. 361.090 to notify the executive director of the Commission in writing at least ninety (90) days prior to engaging in the storage, processing or disposal activities. 31 TEX. ADMIN. CODE SECT. 335.6. Further, the Commission requires the submission of other information which will enable the executive director to determine whether the storage, processing, or disposal is in compliance with the statute. Id.

Texana has complied with all of these requirements. Pursuant to 31 TEX. ADMIN. CODE SECTS. 335.2(d) and 335.6, the Texas Water Commission was notified on May 12, 1992 by letter from Alliance Environmental Consulting, Inc. ("Alliance") that Texana intended to conduct burial on land that is effectively controlled by the owner or operator of Texana. By letter dated June 30, 1992, Alliance provided the executive director of the Texas Water Commission with a forty-one (41) page document, with attachments, containing information concerning the design, construction, and operation of Texana's proposed land disposal facility for non-hazardous industrial solid waste.

Although the Texas Water Commission has primary and superior jurisdiction over solid waste management, the Solid Waste Disposal Act confers upon each county specific solid waste management powers. Sects. 361.151 - 361.162 and Sects. 364.011 and 364.012. However, the legislature placed specific limitations on a county's powers concerning industrial solid waste. Section 361.152 provides:

The powers specified by Sections 361.154 - 361.162 and Sections 364.011 and 364.012 (County Solid Waste Control Act) may not be exercised by a county with respect to the industrial solid waste disposal practices and areas to which Section 361.090 applies.

Sect. 361.152 (Emphasis added).

Thus, although the legislature has given counties the power to license the operation and maintenance of facilities used to process, store, or dispose of solid waste (Sect. 361.154); adopt and enforce rules for the management of solid waste (Sect. 361.154); collect a license fee (Sect. 361.158); amend, extend, remove and revoke licenses (Sects. 361.159 -361.160); designate land area suitable for solid waste facilities (Sect. 361.162); enforce the state statutes and rules adopted by the Board of Health and the Commission concerning the management of solid waste (Sect. 361.164); regulate solid waste collection, handling, storage and disposal (Sect. 364.011); and prohibit solid waste disposal (Sect. 364.012), counties are specifically forbidden from exercising any of these powers with respect to industrial solid waste disposal practices and areas to which Sect. 361.090 applies. Sect. 361.152.

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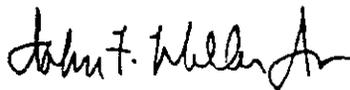
However, although forbidden to do so by Sect. 361.152, the Bowie County Ordinance relating to non-permitted landfills attempts to regulate those industrial solid waste disposal facilities to which Sect. 361.090 applies. The Ordinance states specifically that its intent is "to regulate non-permitted landfills within Bowie County, Texas". "Non-Permitted Landfill" is defined as "any landfill for which a permit is not required by the Texas Water Commission or any other state regulator agency." Since Sect. 361.090 specifically states that "the Commission may not require a permit . . . for the collection, handling, storage, processing, and disposal of industrial solid waste . . ." it is obvious that the Ordinance is intended to regulate those landfills to which Sect. 361.090 applies. The Ordinance goes on to require a permit from the county, require public hearings, adopts rules for construction and operation, provides for inspections by county officials and contains enforcement provisions including penalties for non-compliance. Although, all of these powers have been generally granted to Bowie County regarding the regulation of solid waste disposal, these powers are specifically forbidden to be exercised by Bowie County with respect to the industrial solid waste disposal practices and areas covered by Sect. 361.090, such as Texana.

Therefore, it is my opinion that the Bowie County Ordinance related to non-Permitted landfills appears to conflict with Sect. 361.152 insofar as it attempts to regulate industrial solid waste disposal practices and areas to which Sect. 361.090 applies. The section also appears to conflict with the authority of government to regulate the general health, safety and welfare of its citizens. Because of the conflict the Ordinance may be void and unenforceable to such industrial waste disposal practices and areas in general, and specifically, to Texana's industrial solid waste disposal facility. Because of potential liability by enforcement of this Ordinance, I have advised the County to delay enforcement pending an answer to the legal question. If the State determines that the law as it exists does not permit the County to regulate such landfills, then I would suggest that the Legislature address the inadequacy and correct the same so as to protect the health, safety and welfare of its citizens.

I would appreciate you issuing an Attorney General's Opinion on this question.

Thank you for your consideration of this matter.

Yours very truly,



John F. Miller, Jr.
Criminal District Attorney
Bowie County, Texas

JFMjr/pc
Attachment