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OPINION COMMITTEE

HOUSE COMMITTEE ON RULES & RESOLUTIONS

August 31, 2012
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The Honorable Greg Abbott
Attorney General of Texas
209 W. 14th Street
Austin, Texas 78701

RO-1081-GA

Dear General Abbott:

As Chair of the House Committee on Rules & Resolutions, I respectfully request a formal opinion from you regarding the following questions:

(1) May a county, through a contract under Chapter 791, Government Code, or otherwise, provide mandatory solid waste disposal service in an area of the county that is within the extraterritorial jurisdiction of a municipality and that is not receiving such service from the municipality?

(2) If a county may not now provide mandatory solid waste disposal service in an area described by Question (1), what legislative action, including amendments to Chapter 791, Government Code, Chapters 361 and 364 of the Health and Safety Code, and other relevant statutory and constitutional provisions would need to be taken, in order to authorize a county to provide such service to such an ETJ area, and collect appropriate fees for the service?

These questions arise in light of a situation that exists in certain areas of the extraterritorial jurisdiction of the City of San Antonio. Bexar County provides various services, but neither the city nor the county provides solid waste disposal service in the ETJ areas. Some property occupants manage their own solid waste disposal adequately through private arrangements, and others do not. Some vacant lots are being used as unauthorized dumping grounds, presumably to avoid the expense of contracting for trash pickup, or to avoid the landfill fees and other expense of taking solid waste (old tires, mattresses, and the like) to a landfill. These issues are creating health and safety problems for the other property occupants in some of the ETJ areas, in addition to the dilemma of not being able to prevent this unauthorized dumping or inherent difficulties of identifying those who do it and hold them accountable. These issues are not limited to San Antonio or Bexar County. They have existed for decades across the state, as indicated by the many legislative proposals and opinions sought from previous Attorney Generals. An effective solution needs to be determined in the interest of improving the public health and safety in these areas.

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Chapter 364, Health and Safety Code, governs the management of solid waste by counties. Section 364.034(a) of that code provides as follows:

- (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.

That section would appear to grant authority for a county to provide mandatory solid waste disposal service throughout its territory. However, Section 364.011(a), Health and Safety Code, provides as follows:

- (a) Subject to the limitation provided by Sections 361.151 and 361.152 (Solid Waste Disposal Act), a commissioners court by rule may regulate solid waste collection, handling, storage, and disposal in areas of the county not in a municipality or the extraterritorial jurisdiction of a municipality.

Does Section 364.011(a), Health and Safety Code, prohibit a county from providing mandatory solid waste disposal service in an area of the county that is within the extraterritorial jurisdiction of a municipality, even if the area is not receiving such service from the municipality? May a county and municipality enter into a memorandum of understanding or other appropriate agreement under Chapter 791 of the Government Code, in order to accomplish the mutual goal of comprehensive solid waste disposal in defined ETJ areas?

Chapter 791, Government Code, governs interlocal cooperation contracts. Section 791.011(a) of that code provides in part that a local government may contract with another local government to perform "governmental functions and services." Section 791.003 of that code defines "governmental functions and services" to include waste disposal and defines "local government" to include a county and a municipality. Arguably, even if a county were not authorized on its own initiative to provide mandatory solid waste disposal service in an area of the county that is in the extraterritorial jurisdiction of a municipality and that is not receiving such service from the municipality, a municipality could contract with a county under Chapter 791, Government Code, for the county to provide such service in such an area. However, Section 791.011(c) of that code provides in part that an interlocal contract may be to provide a governmental function or service "that each party to the contract is authorized to perform individually." If Section 364.011(a), Health and Safety Code, prohibits a county from providing mandatory solid waste disposal service in an area of the county that is in the extraterritorial jurisdiction of a municipality even if the area is not receiving such service from the municipality, does Chapter 791, Government Code, allow a county and a municipality to enter into a contract under which the county would undertake responsibility for providing such service in such an area?

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In conjunction with the above questions, it is not clear what impact the 2011 enactment of SB 760 and the voters' approval of SJR 26 may have on these specific interlocal contracting issues. It appears that the enabling legislation in SB 760 made it possible to create an interlocal contract for a term of years without being restricted to any specific number of years, but it is not clear what other effect SB 760 or the approval of SJR 26 would have on the interpretation of Chapters 791 of the Government Code and Chapters 391 and 394 of the Health and Safety Code. Is there an interpretation that would harmonize all these provisions and resolve the ambiguities without the need for further legislation?

If a county is not authorized currently to provide mandatory solid waste disposal service in an area of the county that is within the extraterritorial jurisdiction of a municipality and that is not receiving such service from the municipality, then what legislative action, including amendments to Chapter 791, Government Code, Chapters 361 and 364 of the Health and Safety Code, and / or other relevant statutory and constitutional provisions, would need to be taken in order to authorize a county to provide such service to such an ETJ area?

Thank you in advance for your consideration of this important matter. Please do not hesitate to contact me if you need any additional information regarding this request.

Sincerely,

A handwritten signature in black ink, reading "Ruth Jones McClendon". The signature is written in a cursive style with a large, prominent "R" at the beginning.

Representative Ruth Jones McClendon
Chair, House Committee on Rules & Resolutions