2016 WL 4376627
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SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, San Antonio.

LAREDO MERCHANTS ASSOCIATION,
Appellant
v.
CITY OF LAREDO, Texas, Appellee

No. 04-15-00610-CV
|
Delivered and Filed: August 17, 2016

Synopsis
Background: Merchants association brought action against home-rule city, seeking a declaratory judgment that an ordinance making it unlawful for commercial establishments to provide plastic checkout bags to customers was unenforceable. The 341st Judicial District Court, Webb County, Rebecca Ramirez Palomo, J., entered summary judgment in favor of city. Association appealed.

Holdings: The Court of Appeals, Marialyn Barnard, J., held that:

[1] a checkout bag, within the meaning of the ordinance, was a type of "container" or "package" within the meaning of the provision of the Solid Waste Disposal Act prohibiting local governments from adopting an ordinance that prohibits or restricts, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law, and

[2] ordinance regulated the sale or use of plastic bags for "solid waste management" purposes, within the meaning of the Act, and thus ordinance was inconsistent with and preempted by Act.

Reversed and rendered and remanded.

Luz Elena D. Chapa, J., dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] Environmental Law State preemption of local laws and actions

A checkout bag, as defined by an ordinance making it unlawful for commercial establishments to provide checkout bags to customers, is a type of "container" or "package" within the meaning of the provision of the Solid Waste Disposal Act prohibiting local governments from adopting an ordinance that prohibits or restricts, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law. Tex. Health & Safety Code Ann. § 361.0961.

1 Case that cites this headnote

[2] Environmental Law State preemption of local laws and actions

Home-rule city ordinance making it unlawful for commercial establishments to provide plastic checkout bags to customers regulated their sale or use for "solid waste management" purposes, within the meaning of the provision of the Solid Waste Disposal Act prohibiting local governments from adopting an ordinance that prohibits or restricts, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law, and thus ordinance was inconsistent with and preempted by Act under State Constitution provision prohibiting a home-rule city from enacting an ordinance containing a provision inconsistent with the

Constitution or general laws of the state; ordinance was adopted to control the generation of solid waste as produced by litter resulting from discarded checkout bags. Tex. Const. art. 11, § 5; Tex. Health & Safety Code Ann. §§ 361.003(18), 361.003(34), 361.0961.

1 Case that cites this headnote

From the 341st Judicial District Court, Webb County, Texas, Trial Court No. 2015-CVQ-00-1077-D3, Honorable Rebecca Ramirez Palomo, Judge Presiding

Attorneys and Law Firms

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Raul Casso, IV, City Attorney, Kristina Laurel-Hale, Assistant City Attorney, Laredo, TX, for Appellee.

Sitting: Sandee Bryan Marion, Chief Justice, Marialyn Barnard, Justice, Luz Elena D. Chapa, Justice

MEMORANDUM OPINION

Opinion by: Marialyn Barnard, Justice

***1** This is a statutory construction case in which we must determine whether section 361.0961 of the Solid Waste Disposal Act ("the Act") preempts a checkout bag ordinance enacted by the City of Laredo ("the City")—City of Laredo Ordinance No. 2014-O-064, codified at section 33-455 of the Laredo City Code of Ordinances ("the Ordinance"). On appeal, appellant Laredo Merchants Association ("the Merchants") argues the trial court erred in granting the City's motion for summary judgment because the Ordinance is preempted by section 361.0961. Because we conclude the Ordinance is inconsistent with section 361.0961 and therefore preempted by it, we reverse the trial court's judgment, render judgment in favor of the Merchants, and remand the cause to the trial court to determine whether the Merchants are entitled to an award of attorney's fees.

BACKGROUND

In December 2003, the City implemented a strategic plan aimed at creating a "trash-free city." As part of this strategic plan, the City adopted the Ordinance on June 2, 2014, with an effective date of April 30, 2015. Designed to "reduce litter from discarded plastic bags," the Ordinance makes it unlawful for commercial establishments to provide checkout bags to customers. Laredo, Tex., Laredo City Code §§ 33-451, 33-455. According to the Ordinance, the phrase "checkout bag" refers to any "plastic one-time-use carryout bag that is provided by a commercial establishment to a customer at the point of sale and is less than 4 Mils thick ... or a single-use paper bag." *Id.* § 33-454. The Ordinance also includes a list of exceptions[1] and provides that a violation subjects retailers to a fine of up to $2,000.00 per violation. *Id.* § 33-461.

Approximately one month before the Ordinance was to take effect, the Merchants filed suit against the City, seeking declaratory and injunctive relief. In its suit, the Merchants asked the trial court to declare the Ordinance unenforceable because it is preempted by section 361.0961 of the Act. *See* TEX. HEALTH & SAFETY CODE § 361.0961 (West 2016) (prohibiting local governments from adopting ordinance that prohibits or restricts, for solid waste management purposes, sale or use of container or package in manner not authorized by state law). The Merchants also sought a temporary restraining order to enjoin the City from enforcing the Ordinance.[2]

***2** Ultimately, the City filed a traditional motion for summary judgment, contending section 361.0961 of the Act does not preempt the Ordinance because, as a matter of law, section 361.0961 does not clearly and unmistakably prohibit a city from banning checkout bags as defined by the Ordinance. In its motion, the City argued: (1) a "checkout" bag as defined by the Ordinance is not a "container" or "package" within the meaning of section 361.0961; (2) the Ordinance does not regulate checkout bag use for solid waste management purposes;

(3) the City is authorized to regulate checkout bags under section 551.002 of the Local Government Code; and (4) the Ordinance is a valid exercise of the City's police power. *See* TEX. LOC. GOV'T CODE § 551.002 (West 2015) (providing that home-rule municipality may prohibit pollution and protect watersheds).

In response, the Merchants filed a cross motion for partial summary judgment, arguing section 361.0961 of the Act preempts the Ordinance because the Ordinance is essentially inconsistent with, and therefore preempted by, section 361.0961 as a matter of law. According to the Merchants, the Ordinance is inconsistent with section 361.0961 because: (1) a "checkout bag" as defined by the Ordinance is a "container" or "package" as provided in section 361.0961; and (2) the Ordinance's purpose is to regulate solid waste management. The Merchants also argued that whether the Ordinance is within the City's authority under section 551.002 of the Local Government Code or within its police power is irrelevant to the preemption issue. *See id*.

After reviewing the motions, the trial court granted summary judgment in favor of the City and denied the Merchants' motion. In its final judgment, the trial court declared a reasonable construction exists under which both the Ordinance and section 361.0961 of the Act could be effective, and therefore, section 361.0961 does not preempt the Ordinance. The Merchants then perfected this appeal.

ANALYSIS

On appeal, the Merchants argue the trial court erred in granting the City's traditional motion for summary judgment because the Ordinance is inconsistent with and therefore preempted by section 361.0961 of the Act as a matter of law. According to the Merchants, the Ordinance is preempted by section 361.0961 because: (1) it prohibits or restricts the sale or use of "containers" or "packages;" (2) it was adopted for a "solid waste management purpose;" (3) the manner in which it prohibits the use of "checkout bags" is not within the City's police power; and (4) it is clearly and unmistakably at odds with section 361.0961.

Standard of Review

We review a trial court's grant of summary judgment de novo. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015); *City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 600 (Tex. App.–San Antonio 2013, pet. denied). Traditional summary judgment is proper only when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *BCCA Appeal Grp., Inc. v. City of Hous.*, No. 13-0768, 2016 WL 1719182, at *2 (Tex. April 29, 2016); *Katy Venture*, 469 S.W.3d at 163; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600-01. We take all the evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Katy Venture, Ltd.*, 469 S.W.3d at 163; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600. Once the movant meets this burden of establishing each element of its claim as a matter of law, the burden shifts to the nonmovant to disprove or raise a fact issue as to at least one of the elements of the movant's claim. *Katy Venture, Ltd.*, 469 S.W.3d at 163.

***3** When, as is the case here, both parties move for summary judgment and the trial court grants one motion but denies the other, we review both motions and render the judgment the trial court should have rendered. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

Applicable Law—Preemption

Laredo is a home-rule city. *See City of Laredo v. Webb Cty.*, 220 S.W.3d 571, 574 (Tex. App.–Austin 2007, no pet.). Home-rule cities possess broad discretionary powers of self-government and look to the Legislature for limitations on their powers. TEX. LOC. GOV'T CODE § 51.072(a) (West 2008); *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2 (citing *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 490-91 (Tex. 1993)); *Southern Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 678 (Tex. 2013); *RCI Ent. (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 595 (Tex. App.–San Antonio 2012, pet. ref'd) (specifying courts do not determine whether Legislature made grants of authority). A home-rule city cannot enact

an ordinance that contains a provision inconsistent with the constitution or general laws of the state. TEX. CONST. art. XI, § 5(a); *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 490-91; *RCI Ent.*, 373 S.W.3d at 595. A home-rule city ordinance that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it is inconsistent with the state statute. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595.

If the Legislature chooses to preempt a particular subject matter that is usually part of a home-rule city's broad discretionary powers, the Legislature must do so with "unmistakable clarity." *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3; *Southern Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. Merely because the Legislature has enacted a law addressing a particular subject matter does not automatically mean all of the subject matter is completely preempted. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. This is because "[a] general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *see also Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595-96; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600. In other words, both the city ordinance and general law will be enforced so long as it is possible under any reasonable construction. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595-96; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600-01. Nevertheless, if it is not possible to reconcile the city ordinance and general law, then the general law trumps the ordinance, making the ordinance unenforceable. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595-96; *Greater San Antonio Builders Ass'n*, 419 S.W.3d at 600-01.

Application

***4** As stated above, the Merchants contend the Ordinance is preempted by section 361.0961 of the Act because it is inconsistent with section 361.0961 for the following reasons: (1) it prohibits or restricts the sale or use of "containers" or "packages;" (2) it was adopted for a "solid waste management purpose;" (3) the manner in which it prohibits the use of "checkout bags" is not within the City's police power; and (4) it is clearly and unmistakably at odds with section 361.0961.

1. Police Powers and Unmistakable Clarity

We begin our analysis by addressing the Merchants' third and fourth arguments regarding whether the Ordinance is within the City's police powers and whether the Act limits that police power with unmistakable clarity. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3 (addressing whether legislative limitation on home-rule municipality's police power appears with unmistakable clarity first); *S. Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491. Because these issues are similar, we will address them together.

The City argues section 551.002 of the Local Government Code authorizes it to regulate litter from discarded plastic bags. Under that section, a home-rule city may prohibit the pollution of watersheds by policing water sources. *See* TEX. LOC. GOV'T CODE § 551.002. However, as set out above, the Legislature may limit a home-rule city's police power regarding a particular subject matter so long as that limitation appears with unmistakable clarity. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3; *S. Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. Thus, we must determine whether section 361.0961 of the Act limits the City's police power to prevent the pollution of watersheds with unmistakable clarity. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3; *S. Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. To do this, we must conduct a statutory construction analysis and ascertain the intent of the Legislature. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3.

Statutory construction is a question of law we review de novo. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3. When construing a statute, we must give effect to the Legislature's intent. *Id.* To determine the Legislature's intent, we start with the plain language of the statute and view the statute as a whole as opposed to viewing isolated provisions. *Id.* at *3, *6; *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). This is because the plain meaning of the text is the best expression of legislative intent. *BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3;

Molinet, 356 S.W.3d at 411. We do not consider statements made during the legislative process as evidence of the Legislature's intent. *Molinet*, 356 S.W.3d at 414. Rather, "the Legislature expresses its intent by the words it enacts and declares to be the law." *Id.*

When a statute defines a word, we are bound by that definition; however, we will apply ordinary meanings to undefined words unless a different or more precise meaning is apparent from the word's use. *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 556 (Tex. 2015); *City of Hous. v. Bates*, 406 S.W.3d 539, 543-44 (Tex. 2013); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). When a statute is unambiguous, "we adopt the interpretation supported by the plain language unless such an interpretation would lead to absurd results." *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439. With these rules in mind, we now consider whether section 361.0961 of the Act expresses the Legislature's intent to limit the City's police power to prevent the pollution of watersheds with unmistakable clarity.

***5** To begin, the Act governs the management and control of solid waste materials. TEX. HEALTH & SAFETY CODE § 361.002; *Citizens Against the Landfill in Hempstead v. Tex. Commission on Envtl. Quality*, No. 03-14-00718-CV, 2016 WL 1566759, at *3 (Tex. App.–Austin April 13, 2016, no pet.) (mem. op.) Its policy and purpose is "to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste, including accounting for hazardous waste that is generated." TEX. HEALTH & SAFETY CODE § 361.002; *Citizens Against the Landfill in Hempstead*, 2016 WL 1566759, at *3. In an effort to achieve this purpose, the Act authorizes the Texas Commission on Environmental Quality's ("TCEQ") to regulate the management of municipal solid waste disposal. TEX. HEALTH & SAFETY CODE § 361.011; *Citizens Against the Landfill in Hempstead*, 2016 WL 1566759, at *3.

Section 361.0961 of the Act states a local government may not adopt an ordinance that "prohibit[s] or restrict[s], for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law." TEX. HEALTH & SAFETY CODE § 361.0961. By its plain language, section 361.0961 specifically addresses a particular subject matter—the sale or use of containers or packages for solid waste management purposes—and is unmistakably aimed at prohibiting local governments from enacting certain ordinances. By prohibiting the adoption of an ordinance prohibiting or restricting that particular subject matter, section 361.0961 unmistakably limits a local government's police powers, including the police power outlined in section 551.002 of the Local Government Code. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3; *S. Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595.

Accordingly, we conclude the language of section 361.0961 of the Act unmistakably expresses the Legislature's desire to preempt any ordinance that prohibits the sale or use of a container or package for solid waste management purposes. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *3; *S. Crushed Concrete*, 398 S.W.3d at 678; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. Because section 361.0961 expressly prohibits the adoption of any such ordinance, any ordinance prohibiting the sale or use of a container for solid waste management purposes cannot be in harmony with the statute. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *10. Thus, our next inquiry in determining whether the Ordinance is preempted is whether the Ordinance prohibits or restricts the sale or use of a container or package for solid waste management purposes. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *7; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595. This requires us to consider an analysis of the Merchants' first and second arguments.

2. Whether the Ordinance Prohibits or Restricts the Sale or Use of "Containers" or "Packages"

According to the Merchants, the Ordinance is inconsistent with, and therefore preempted by, section 361.0961 of the Act because a "checkout bag" as defined by the Ordinance is a "container" or "package" within the meaning of section 361.0961. To support its position, the Merchants point to a Texas Attorney General opinion, which concludes that a "single-use plastic bag is a container within the meaning of [section 361.0961 of the Act]." *See* Tex. Att'y Gen. Op. No. GA-1078 (2014). The Merchants also point to a number of cases in which Texas courts have recognized plastic bags are a type of package. *See, e.g.*, *Davis v. State*, 202 S.W.3d 149, 156-57 (Tex. Crim. App. 2006) (noting "that drugs are commonly packaged, carried, or transported in plastic bags"); *Yamaha Motor Corp. v. Motor Vehicle Div., Tex. Dep't of Transp.*, 860 S.W.2d 223, 228 (Tex. App.–Austin 1993,

writ denied) (holding plaintiff had obligations in regard to parts packaged in resealable plastic bags); *Furr's Supermarkets, Inc. v. Arellano*, 492 S.W.2d 727, 728 (Tex. Civ. App.–El Paso 1973, writ ref'd n.r.e.) (stating in slip and fall lawsuit product that spilled was packaged in plastic type bag).

***6** Neither section 361.0961 nor the Act define the terms "container" or "package;" therefore, we must apply an ordinary meaning to the terms. *See PlainsCapital Bank*, 459 S.W.3d at 556; *Bates*, 406 S.W.3d at 544; *TGS-NOPEC Geophysical*, 340 S.W.3d at 439. When determining the plain and ordinary meaning of a word, Texas courts often consult dictionaries to ascertain a word's natural meaning. *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011). Here, *Webster's Third New International Dictionary* defines "bag" as a type of "*container* made of paper, cloth, mesh, metal foil, plastic, or other flexible material." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 162 (2002) (emphasis added); *see also* THE NEW OXFORD AMERICAN DICTIONARY 119 (2d ed. 2005) (defining bag as "a container of flexible material with an opening at the top, used for carrying things"). Under an ordinary meaning analysis, we conclude a "checkout bag"—or more specifically, a "plastic one-time-use carryout bag" or "single-use paper bag"—is a type of "container" or "package" within the meaning of section 361.0961. *See PlainsCapital Bank*, 459 S.W.3d at 556; *see also* Tex. Att'y Gen. Op. No. GA-1078 (2014) (concluding that single-use plastic bag is container within the meaning of section 361.061).

The City argues that by using the terms "package" and "container," the Legislature intended to refer only to closed vessels or wrappings and not checkout bags. We disagree. The plain language of section 361.0961 or the Act does not limit the terms "containers" or "packages" to closed vessels or wrappings as the City contends. *See* Tex. Att'y Gen. Op. No. GA-1078 (2014). And although the City points to an explanation by the bill's sponsor that the bill was intended to prohibit municipalities from adopting rules regulating "wasteful packaging, Styrofoam cups and bottle returns," we decline to consider or give weight to that explanation as such statements are not evidence of the Legislature's intent. *See Molinet*, 356 S.W.3d at 414. Instead, we must look to the plain language of section 361.0961 to determine what the Legislature intended. *See id.* Here, the plain language of section 361.0961 does not limit the types of "containers" or "packages" to closed vessels or wrappings; rather, it uses the words "containers" or "packages," which by their plain meaning includes checkout bags.

[1]Accordingly, we conclude a "checkout bag" as defined by the Ordinance is a type of "container" or "package" as those terms are used in section 361.0961 of the Act. We now turn to our attention to our next inquiry: whether the Ordinance prohibits the sale or use of checkout bags for "solid waste management purposes." *See* TEX. HEALTH & SAFETY CODE § 361.0961.

3. Whether the Ordinance Was Adopted for "Solid Waste Management" Purposes

[2]The Merchants argue the Ordinance's express purpose is to manage solid waste by controlling the issuance of checkout bags by retailers to their customers. To support its position, the Merchants point to the language of the "Purpose and Goals" section of the Ordinance, which states the Ordinance seeks to promote the prevention of litter. The City argues the Ordinance was not adopted for "solid waste management" purposes because the Ordinance does not regulate the management of solid waste. According to the City, the Ordinance was adopted with the intention of regulating the act of "providing single-use bags to customers for holding and carrying away their purchases." The City explains that by regulating this activity, the Ordinance aims to prevent litter as opposed to managing solid waste. We, again, disagree with the City.

To determine whether the Ordinance was adopted for a "solid waste management" purpose, we must once again conduct a statutory construction analysis and examine the meaning of "solid waste management" as defined by the Act. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *PlainsCapital*, 459 S.W.3d at 556; *Bates*, 406 S.W.3d at 544. Here, the Act defines "solid waste" as "garbage, rubbish, [and] refuse" and "management" as "the systematic control of the activities of generation, source separation, collection, handling, storage, transportation, processing, treatment, recovery, or disposal of solid waste." TEX. HEALTH & SAFETY CODE § 361.003(18), (34).

***7** With this in mind, we turn our attention to the purposes outlined by the Ordinance. The Ordinance seeks to:

A. To promote the beautification of the City through

prevention of litter generated from discarded checkout bags.

B. To reduce costs associated with floatable trash controls and the maintenance of the municipal separate stormwater sewer system.

C. To protect life and property from flooding that is a consequence of improper stormwater drainage attributed in part to obstruction by litter from checkout bags.

Laredo, Tex., Laredo City Code §§ 33-451. When considering these purposes, we conclude the Ordinance was adopted to control the generation of solid waste as produced by litter resulting from discarded checkout bags. Here, the Ordinance identifies discarded checkout bags as litter, which is naturally understood as "refuse or rubbish," which in turn is a type of "solid waste" as defined by the Act. *See id*; *see also* TEX. HEALTH & SAFETY CODE § 361.003 (34); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1322 (2002). The Ordinance then goes on to state it seeks to prevent the generation of litter—a type of management activity. *See* TEX. HEALTH & SAFETY CODE §§ 361.003 (18), (34).

Although the City argues the "prevention of litter" is not within the meaning of "management," we disagree because by prohibiting the sale and use of bags to prevent them from becoming litter, the Ordinance is regulating the generation of litter. Controlling the generation of solid waste is the "management" of solid waste as that term is defined by the Act. Furthermore, the City's argument ignores the underlying effect of the Ordinance. *See id.* § 361.003 (18), (34). The Texas Supreme Court has stated that when determining whether an ordinance is preempted by a state law, Texas courts must consider not only the purpose of an ordinance as defined by that ordinance, but also the actual effect of that ordinance. *See S. Crushed Concrete*, 398 S.W.3d at 678-79 (recognizing that city can circumvent preemption by passing ordinances that "purport to regulate something other than" a subject matter reserved by the state). Here, the actual effect of the Ordinance is to manage solid waste by regulating litter produced from discarded checkout bags. *See id.*

Thus based on the foregoing analysis, we hold the Ordinance is inconsistent with section 361.0961 of the Act and therefore unenforceable as a matter of law. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182 at *2; *Dall. Merch.'s*, 852 S.W.2d at 491; *RCI Ent.*, 373 S.W.3d at 595; *Greater San Antonio Builders Ass'n*, 419 W.W.3d at 600. The Ordinance does exactly what the Act intends to prevent—regulate the sale or use of plastic bags for solid waste management purposes. We, therefore, hold the trial court erred in granting summary judgment in favor of the City, and we reverse the trial court's judgment and render judgment that the Ordinance is preempted by section 361.0961 of the Act as a matter of law.

Remand for Attorney's Fees

The Declaratory Judgment Act states, "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2015); *North Tex. Municipal Water Dist. v. Ball*, 466 S.W.3d 314, 323-24 (Tex. App.–Dallas 2015, no pet.) (remanding appeal involving cross motions for summary judgment to trial court for determination of attorney's fees). Here, in its petition and motion for summary judgment, the Merchants pled for attorney's fees as provided under the Declaratory Judgment Act. Because we are reversing the trial court's judgment and rendering summary judgment in the Merchants' favor, we remand the cause for the trial court to reconsider the issue of attorney's fees. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2015); *North Tex. Municipal Water Dist.*, 466 S.W.3d at 323-24.

CONCLUSION

***8** Based on the foregoing, we reverse the summary judgment in favor of the City and render judgment in favor of the Merchants, holding that section 33-455 of the Ordinance is preempted by section 361.0961 of the Act, and therefore unenforceable as a matter of law. We also remand the cause to the trial court to determine whether the Merchants are entitled to an award of attorney's fees under the Declaratory Judgment Act.

Dissenting Opinion by: Luz Elena D. Chapa, Justice

I respectfully dissent because when section 361.0961 of

the Solid Waste Disposal Act is construed within the context of the entire statute, the SWDA does not preempt the City of Laredo's Checkout Bag Reduction ordinance.

The majority construes section 361.0961 as prohibiting a type of source reduction that reduces the generation of municipal solid waste. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.0961 (West 2016). This construction is unreasonable because it contradicts "the state's goal, through source reduction, to eliminate the generation of municipal solid waste." *See id.* § 361.022(a). When we consider the legislature's intent in enacting the SWDA, the manner in which the legislature consistently used the term "container," and the legislature's placement of section 361.0961 within the SWDA's overall structure, section 361.0961 may reasonably be construed in harmony with the state's goal of promoting source reduction. More specifically, "container" in section 361.0961 may reasonably be construed as referring only to *solid waste containers* used to store, transport, process, or dispose of solid waste. Because the Ordinance does not apply to *solid waste containers*, the SWDA and the Ordinance may both be given effect.

I. Does the SWDA preempt the Ordinance?

An ordinance is unenforceable to the extent that it is inconsistent with a state statute preempting that particular subject matter. *BCCA Appeal Grp., Inc. v. City of Hous.*, No. 13-0768, 2016 WL 1719182, at *2 (Tex. Apr. 29, 2016). The mere entry of the state into a field of legislation does not necessarily preempt all related municipal ordinances, especially when the municipal ordinance is "ancillary to and in harmony with the general scope and purpose of the state enactment." *Id.* A statute that may reasonably be construed as not conflicting with a challenged ordinance must be given that construction so both the statute and the ordinance may be given effect. *See id.* To determine whether a statute preempts an ordinance, a court must construe the statute. *See id.* at *3.

A court's primary objective when construing statutes is to give effect to legislative intent. *Id.* To determine legislative intent, a court first looks to the plain meaning of the text as the sole expression of legislative intent, unless a different meaning is apparent from the context. *Id.* A court must "view[ ] the statute as a whole, not just as specific provisions in isolation." *Id.* at *6. "[O]ne provision will not be given a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex. 1978). "[Absent] language clearly indicating a contrary intent, a word or phrase used in different parts of a statute is presumed to have the same meaning throughout, and where the meaning in one instance is clear, this meaning will be attached in all other instances." *Sw. Props., L.P. v. Lite-Dec of Tex., Inc.*, 989 S.W.2d 69, 71 (Tex. App.–San Antonio 1998, pet. denied); *see Brown v. Darden*, 121 Tex. 495, 500, 50 S.W.2d 261, 263 (1932). A court should "avoid ascribing one word a meaning so broad that it is incommensurate with the statutory context." *See Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015). A court's construction of a statute should also be consistent with its underlying purpose and the policies it promotes. *N.W. Nat'l Cty. Mut. Ins. Co. v. Rodriguez*, 18 S.W.3d 718, 721 (Tex. App.–San Antonio 2000, pet. denied).

***9** Additionally, a court's construction of a statutory provision should be consistent with the statute's organizational structure. *See TIC Energy & Chem., Inc. v. Martin*, —— S.W.3d ——, No. 15-0143, 2016 WL 3136877, at *6-7 (Tex. June 3, 2016) (noting "the structure of the subchapter in which sections ... reside is instructive"). Sections should not be viewed in isolation, but in context of surrounding sections. *See id.* A court should "thus begin by looking at the structure of [the statute] and the placement of [the section] within it." *See Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 398 (Tex. 2000); *see, e.g.*, *Lumbermens Mut. Cas. Co. v. Manasco*, 971 S.W.2d 60, 63 (Tex. 1998) (reaching a construction of a section "[b]ased on the wording and placement of [the section] in the statutory framework").

A. How did the legislature structure the SWDA?

The SWDA, codified as chapter 361 of the Health & Safety Code, generally governs solid waste management. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.992 (West 2016). The SWDA declares it the public policy of the state to eliminate the generation of

municipal solid waste through source reduction. *Id.* § 361.022(a). For municipal solid waste that is generated, the SWDA's purposes are "to safeguard the health, welfare, and physical property of the people and to protect the environment by controlling the management of solid waste." *Id.* § 361.002(a). The SWDA's twenty-four subchapters aim to further the state's public policy and the underlying goals of the statute. *See id.* §§ 361.001-.992.

To further its municipal source reduction goals, subchapter B establishes the Texas Commission on Environmental Quality's Office of Pollution Prevention, which "direct[s] and coordinate[s] all [TCEQ] source reduction and waste minimization activities." *Id.* § 361.0216. The TCEQ has three such activities under the SWDA. First, subchapter B requires the TCEQ to develop a public awareness program "to encourage participation in source reduction, composting, reuse, and recycling." *Id.* § 361.0202(a). As part of this program, the TCEQ may "consult with individuals, businesses, and manufacturers on source reduction techniques and recycling." *Id.* § 361.0202(b)(1). Second, subchapter N requires the TCEQ to measure progress toward the state's source reduction and waste minimization goals and to incentivize composting and recycling programs. *Id.* §§ 361.422(a), (c); 361.423-.430. Subchapter N defines "source reduction" as:

> [A]n activity or process that avoids the creation of municipal solid waste in the state by reducing waste at the source and includes:
>
> (A) redesigning a product or packaging so that less material is ultimately disposed of;
>
> (B) changing a process for producing a good or providing a service so that less material is disposed of; or
>
> (C) changing the way a material is used so that the amount of waste generated is reduced.

Id.§ 361.421(9). Third, subchapter Q addresses industrial source reduction, defined by reference to federal law, and waste minimization for generators of industrial solid waste. *Id.* §§ 361.131(4); 361.501(7), (11); 361.504(a).

Contemplating that source reduction will not entirely eliminate municipal solid waste, the SWDA confers responsibility upon the TCEQ "for the management of municipal solid waste" and requires the TCEQ to "coordinate municipal solid waste activities." *Id.* § 361.011(a); *id.* § 361.022 (requiring source reduction and waste minimization "to the extent technologically and economically feasible"). The SWDA governs the management of various forms of solid waste, including municipal waste, industrial waste, medical waste, and hazardous waste. *See id.* § 361.003(12), (16), (18-a), (20), (35). The SWDA's subchapters governing solid waste management provide the TCEQ's and local governments' powers and duties; the TCEQ's permit and regulatory system for solid waste facilities; enforcement procedures; environmental remediation; diversion of materials from solid waste streams; land-use restrictions and designations; and liability and immunity therefrom. *See id.* §§ 361.001-.992.

B. Where did the legislature place section 361.0961 within the SWDA's overall structure?

***10** The first and lengthiest subchapter regarding the TCEQ's specific responsibilities under the SWDA relates to the TCEQ's permitting and regulation of solid waste facilities. *See id.* §§ 361.061-.126. Subchapter C, "Permits," generally authorizes the TCEQ to "require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under this chapter." *Id.* § 361.061. Subchapter C also requires the TCEQ to ensure its permitting and regulation of solid waste facilities are compatible with local solid waste management plans. *Id.* § 361.062. Several sections in subchapter C relate to the use of containers to store, transport, process, and dispose of solid waste and authorize the TCEQ to regulate and permit such activities. *See, e.g.*, *id.* §§ 361.0905(e)(8), 361.091(a).[1]

***11** Also contained in subchapter C is the section at issue, section 361.0961, which provides:

> (a) A local government or other political subdivision may not adopt an ordinance, rule, or regulation to:
>
> (1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law;
>
> (2) prohibit or restrict the processing of solid waste

> by a solid waste facility, except for a solid waste facility owned by the local government, permitted by the commission for that purpose in a manner not authorized by state law; or
>
> (3) assess a fee or deposit on the sale or use of a container or package.

Id.§ 361.0961(a). Section 361.0961 "does not prevent a local government or other political subdivision from complying with federal or state law" or "limit the authority of a local government to enact zoning ordinances." *Id.* § 361.0961(b), (c).

C. When we consider the legislature's placement of section 361.0961 within subchapter C, may section 361.0961 be reasonably construed as not conflicting with the Ordinance?

The issue is not whether the SWDA and the Ordinance may be construed as conflicting with each other, but whether they may reasonably be construed as *not* conflicting with each other and both given effect. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182, at *2. We must determine whether section 361.0961, which provides that cities "may not ... adopt an ordinance ... to prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law," can be given no other reasonable construction than one that conflicts with the Ordinance, which makes it "unlawful for any commercial establishment to provide checkout bags to customers." Laredo, Tex., Code of Ordinances § 33-455; *accord BCCA Appeal Grp., Inc.*, 2016 WL 1719182, at *2. Section 361.0961 would preempt the Ordinance only if section 361.0961 and the Ordinance applied to the same containers in irreconcilable conflict with each other. *See State v. DeLoach*, 458 S.W.3d 696, 698 (Tex. App.–San Antonio 2015, pet. ref'd) (citing *RCI Entm't, Inc. v. City of San Antonio*, 373 S.W.3d 589, 596 (Tex. App.–San Antonio 2012, no pet.)).

The legislature consistently used the term "container" in subchapter C of the SWDA to refer to *solid waste containers* used to store, transport, process, or dispose of solid waste or to those containing solid waste:

- The definition of "disposal," which is used in the subchapter C, describes solid waste in terms of being "containerized or uncontainerized," TEX. HEALTH & SAFETY CODE ANN. § 361.003(7);
- Subchapter C, "Permits," authorizes the TCEQ to "act on an application to renew a permit for storage of hazardous waste in containers, tanks, or other closed vessels" in specified circumstances, *id.* § 361.088(e)(1);
- Subchapter C confers responsibility upon the TCEQ for regulating medical waste and mandates that TCEQ adopt permit requirements "related to ... the storage of waste ... to ensure the use of sufficient containers between collections," *id.* § 361.0905(e)(8);
- Subchapter C generally prohibits some permitted landfills from "accept[ing] solid waste that is in a completely enclosed container or enclosed vehicle," *id.* § 361.091(a); and
- ***12** Subchapter C authorizes a permit holder to accept certain solid waste when it has "been transported to the land application unit in a covered container with the covering firmly secured at the front and back," *id.* § 361.121(l).[2]

Because the legislature consistently used the term "container" in subchapter C to refer to *solid waste containers* used for storing, transporting, processing, or disposing of solid waste, the word "container" in section 361.0961 may reasonably be construed to have the same meaning. *See Brown*, 121 Tex. at 500, 50 S.W.2d at 263; *Sw. Props., L.P.*, 989 S.W.2d at 71. Construing "container" in section 361.0961 as *any* container that might become solid waste is out of harmony and inconsistent with the manner in which the legislature used "container" in all other instances in subchapter C. Thus, "container" in section 361.0961 may reasonably be construed as limited to *solid waste containers* used to store, transport, process, or dispose of solid waste. *See Barr*, 562 S.W.2d at 849 (noting courts may not give "one provision ... a meaning out of harmony or inconsistent with other provisions, although [the provision] might be susceptible of such a construction if standing alone."). This is in contrast to chapter 369 of the Health & Safety Code and section 361.425(a)(1), which clearly relate to containers that might become solid waste. *See* TEX. HEALTH & SAFETY CODE ANN. § 361.425(a)(1); *id.* §§ 369.001-.003 (West 2016).

Given the SWDA's structure and the placement of section 361.0961 within it, the purpose of section 361.0961 may reasonably be understood as preventing local governments from interfering with the availability and the proper use of *solid waste containers* and the TCEQ's permitting and regulation of solid waste facilities' activities and medical waste management. *See Cont'l Cas. Ins. Co.*, 19 S.W.3d at 398; *Lumbermens Mut. Cas. Co.*, 971 S.W.2d at 63. Subchapter C authorizes the TCEQ to regulate and issue permits for solid waste facilities. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 361.061-.126. Some provisions of subchapter C relate to the containerization of solid waste within the TCEQ's permitting and regulatory scheme and are intended to ensure the availability and the proper use of *solid waste containers* for storing hazardous waste at facilities and medical waste between collections. *See, e.g., id.* §§ 361.088(e)(1), 361.0905(e)(8), 361.091(a), 361.121(l). Subsection C also requires the TCEQ to ensure compatibility between its waste management plans and local governments' waste management plans. *Id.* § 361.062(a). Thus, section 361.0961 may reasonably be construed as prohibiting local governments from banning or restricting the sale or use of *solid waste containers* for the storing, transporting, processing, and disposal of solid waste because doing so might create a patchwork of local regulations that compromise the TCEQ's state-wide permitting and regulatory scheme.

***13** The TCEQ's permitting and regulatory authority is in no way compromised by the Ordinance. Although the Ordinance restricts the use of checkout bags, the Ordinance expressly excludes waste bags that are intended for use as *solid waste containers*. *See* Laredo, Tex., Code of Ordinances §§ 33-454, 33-457. The Ordinance expressly excludes waste bags in the definition of "checkout bags" and exempts "packages of multiple bags intended for use as garbage." *Id.* The Ordinance's restriction on the use of checkout bags does not restrict the use of any *solid waste containers* or containers used to store, transport, process, and dispose of solid waste or medical waste. *See id.* Therefore, the Ordinance does not interfere with the availability or the proper use of *solid waste containers* or the TCEQ's permitting and regulation of solid waste facilities or medical waste management.

D. Does construing section 361.0961 in isolation yield a reasonable construction?

Construing "container" in section 361.0961 as *any* container that might become solid waste requires viewing section 361.0961 in isolation. The majority construes "container" by referring to dictionary definitions and does not address subchapter C's provisions that demonstrate "a different meaning is apparent from the context." *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182, at *3 (noting courts do not rely on the plain meaning of the text as the sole expression of legislative intent when a different meaning is apparent from the context). When the SWDA is viewed as a whole, it becomes apparent that such a construction is not reasonable. *See id.* at *6 (noting courts must construe statutes as a whole and may not construe provisions in isolation).

The majority's construction contradicts the SWDA's express declaration that it is the public policy goal of the state to eliminate the generation of solid waste "through source reduction." *See* TEX. HEALTH & SAFETY CODE ANN. § 361.022(a). "Source reduction" includes "changing a process for ... providing a service so that less material is disposed of." *Id.* § 361.421(9)(B). The Ordinance requires commercial establishments to change the process for providing checkout services so that fewer checkout bags are disposed of. *See* Laredo, Tex., Code of Ordinances §§ 33-451, 33-455. By holding that section 361.0961 preempts the Ordinance, the majority construes section 361.0961 as prohibiting a type of source reduction, the purpose of which is to reduce solid waste generated by the discarding of checkout bags. *Id.* §§ 33-451. The majority's construction of section 361.0961 in isolation is not reasonable because a court's construction of a statute should be consistent with the statute's underlying purpose and the policies it promotes. *See N.W. Nat'l Cty. Mut. Ins. Co.*, 18 S.W.3d at 721.

The Laredo Merchants Association argues section 361.0961 is a "carve out" to the state's public policy goal of eliminating the generation of municipal solid waste through source reduction. Merchants' argument has no merit or support under a holistic construction of the SWDA. No other provision of the SWDA expressly prohibits or regulates, or authorizes the TCEQ to prohibit or regulate, municipal source reduction. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-361.992. The SWDA's provisions relating to source reduction require the TCEQ to develop a public awareness program and to establish rules to measure state-wide source reduction. *See id.* §§ 361.0202(b), 361.0216, 361.422(a), (c). When measuring municipal source reduction, the SWDA permits the TCEQ to consider "community source reduction," including changes in processes for providing

consumer services so that less material is used. *Id.* §§ 361.421(9)(B), 361.422(c). The SWDA expressly contemplates municipal source reduction being community efforts—and the SWDA's preferred alternative to solid waste management—to achieve the state's declared public policy goal of eliminating the generation of solid waste. *See id.* §§ 361.022(a), 361.422(c).

***14** Unlike the provisions of the SWDA that expressly relate to municipal source reduction, section 361.0961 is placed within the framework of subchapter C relating to permits. Subchapter C does not contain any reference to "source reduction" or any provision relating to source reduction. *See id.* §§ 361.061-.126. When a court construes a statute, the court must account for the statute's structure and the relevant section's placement within the statute. *See Cont'l Cas. Ins. Co.*, 19 S.W.3d at 398; *Lumbermens Mut. Cas. Co.*, 971 S.W.2d at 63. Subchapter C relates to the TCEQ's permitting and regulation of solid waste facilities, coordinating TCEQ and local governments' management plans, and local governments' powers and duties relating to the TCEQ's permitting and regulatory scheme for those facilities. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 361.061-.126. Subchapter C also regulates (and authorizes the TCEQ to regulate) "the handling, transportation, storage, and disposal of medical waste" that is generated by health care-related facilities. *See id.* §§ 361.003(18-a), 361.0905. Subchapter C's scope is limited to regulating solid waste facilities' activities and the management of medical waste. *See id.* §§ 361.061-.126. If section 361.0961 is viewed in its statutory context, it may reasonably be construed—like all other sections in subchapter C—as pertaining to medical waste management and the activities of solid waste facilities and not to municipal source reduction. *See Greater Hous. P'ship*, 468 S.W.3d at 61; *Cont'l Cas. Ins. Co.*, 19 S.W.3d at 398; *Lumbermens Mut. Cas. Co.*, 971 S.W.2d at 63. Thus, Merchants' argument requires viewing section 361.0961 in complete isolation and not within the framework of subchapter C and the entire context of the SWDA. The Supreme Court of Texas has rejected this method of construing a statute to determine whether it preempts an ordinance. *See BCCA Appeal Grp., Inc.*, 2016 WL 1719182, at *2

II. CONCLUSION

Section 361.0961 of the SWDA may reasonably be construed as applying to *solid waste containers* used to store, transport, process, or dispose of solid waste, particularly those used by solid waste facilities and those used in medical waste management. This construction is supported by the manner in which the legislature consistently used the word "container" and the legislature's placement of section 361.0961 within the SWDA's statutory structure. The majority does not account for this context. The majority's construction also contradicts the state's public policy goal of encouraging source reduction to reduce the generation of municipal solid waste.

The Ordinance does not conflict with the SWDA. Instead, the Ordinance advances the state's public policy goal by requiring commercial establishments to change the process by which they provide checkout services to customers. Simply stated, the Ordinance does not apply to *solid waste containers*. Instead, by promoting source reduction, the Ordinance is ancillary to and in harmony with the general scope and the purpose of the SWDA. *See id.* Because I conclude section 361.0961 may be reasonably construed as not conflicting with the Ordinance, I would hold the SWDA does not preempt the Ordinance. *See id.* at *2-3.

All Citations

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Footnotes

[1] The Ordinance does not apply to the following bags:

1. Laundry dry cleaning bags, door-hanger bags, newspaper bags, or packages of multiple bags

intended for use as garbage, pet waste, or yard waste;

2. Bags provided by pharmacists or veterinarians to contain prescription drugs or other medical necessities;

3. Bags used by restaurants to take away prepared food;

4. Bags used by a consumer inside a business establishment to [contain bulk food, frozen food, flowers and plants, or prepared food]; and

5. Bags used by a non-profit or charity to distribute [food and household items].

Id. at § 33-459.

[2] After a temporary injunction hearing, the Ordinance was amended to clarify it prohibited the sale of checkout bags. The amended version reads, "It shall be unlawful for any commercial establishment to provide in any manner including for free, by sale or otherwise, checkout bags to customers except as outlined by this article." Laredo, Tex. Ordinance 2015-O-057 (April 27, 2015). This amended version has not yet been codified.

[1] Pursuant to its authority under the SWDA, the TCEQ has adopted numerous rules pertaining to *solid waste containers* and the packaging of solid waste, and regulating how solid waste is stored and packaged in those containers. *See, e.g.*, 30 TEX. ADMIN. CODE §§ 330.3(34) (Texas Comm'n on Envtl. Quality) (defining "container" as "Any portable device in which a material is stored, transported, or processed."); 330.7(c)(1) (granting permits by rule for persons that compact and transport waste in enclosed containers to a Type IV facility under certain conditions based, in part, on information regarding container size); 330.7(c)(2) (granting permits by rule for transporters using enclosed containers to collect and transport brush, construction or demolition wastes, and rubbish along special collection routes); 330.7(e) (requiring ash from incinerated animals to "be stored in an enclosed container that will prevent release of the ash to the environment"); 330.15(e)(6) (generally prohibiting containers of liquid waste except those containers "similar in size to that normally found in household waste" or "designed to hold liquids for use other than storage"); 330.133(f)(1) (requiring Type IV landfills that accept rubbish to establish a written procedure to ensure no containers with any putrescible wastes are accepted); 330.133(g) (generally prohibiting Type IV landfills from accepting wastes from completely enclosed containers); 330.169 (regulating Type IV landfills' acceptance of waste in enclosed containers based on whether the container has all required approvals and/or permits and is accepted at designated times on designated days); 330.171(c)(3)(E)-(G) (regulating the particular types of containers and packaging of containers used to contain regulated asbestos-containing material (RACM)); 330.209(a) (requiring the use of storage containers "of an adequate size and strength, and in sufficient numbers, to contain all solid waste generated in the period of time between collections"); 330.209(c) (requiring certain waste and recycled materials to be stored in enclosed containers); 330.211 (requiring all solid waste containing food waste to "be stored in covered or closed containers that are leakproof, durable, and designed for safe handling and easy cleaning"); 330.213 (requiring citizen's collection stations to be provided "with the type and quantity of containers compatible with areas to be served"); 330.245(c) (requiring all solid waste to "be stored in odor-retaining containers and vessels"); 330.671(a)(1) (subjecting those who deliver waste in enclosed containers to a Type 4 facility to certain fees); 330.991(a)(3) (permitting controls to minimize matter emissions "includ[ing] loading and storing in enclosed containers"); *see also* §§ 326.17 (requiring health-care related facilities to identify and segregate medical waste prior to packaging the medical waste); 326.19(a) (requiring generators of medical waste to "place the container which contains medical waste in an outer container that is rigid, leak

resistant, impervious to moisture, of sufficient strength to prevent tearing and bursting under normal conditions of use and handling, and sealed to prevent leakage"); 326.21 (requiring labeling of medical waste containers); 326.41(c)(2) (permitting large quantity generators that treat their own medical waste to identify certain treated waste "by the use of color-coded, disposable containers"); 326.43 (regulating hospitals' packaging of medical waste); 326.53(b)(6)(A)(iii) (granting registration by rule for transporters of medical waste and requiring the transportation unit to "carry spill cleanup equipment including ... leak-proof containers or packaging materials"); 326.53(b)(15) (prohibiting transporters of medical waste from accepting containers of waste that are leaking or damaged "unless or until the shipment has been repackaged"); 326.53(b)(19) (requiring transporters of medical waste to repackage containers damaged in a traffic accident); 326.55(a), (b)(6)(A) (granting registration by rule for mobile treatment units conducting on-site treatment of medical waste and requiring such units to carry "leak-proof containers or packaging materials"); 326.75(d)(3) (requiring containers of medical waste that are mechanically handled to "be designed to prevent spillage or leakage during storage, handling, or transport").

[2] In promulgating rules to enforce chapter 361, the TCEQ has defined and used the term "container" consistent with this limited construction of section 361.0961. *See* 30 TEX. ADMIN. CODE § 330.3(34) (defining "container" as including "portable device[s] in which a material is stored, transported, or processed"). With the exception of discarded containers that were used to contain certain chemicals, the TCEQ also consistently uses the term "container" to refer to *solid waste containers*. *See id.* §§ 330.03(20), (25), (44), (111), (146), (147), (148)(g), (148)(k), (157), (158), (162); 330.7(c), (c)(1)(A), (c)(2), (e)(3), (i)(1)(E)(iii); 330.11(e)(5); 330.15(e)(6); 330.133(f)(1), (g); 330.155; 330.169; 330.171(c)(3)(E)-(H), (c)(5); 330.209(a), (c); 330.211; 330.213(a); 330.245(c); 330.671(a)(1); 330.991(a)(3)(A).