

CAUSE NO. D-1-GN-13-000688

TEXAS RETAILERS ASSOCIATION, § IN THE DISTRICT COURT OF  
§  
*Plaintiff,* §  
v. § OF TRAVIS COUNTY, TEXAS  
§  
CITY OF AUSTIN, TEXAS, §  
§  
*Defendant.* § 53rd JUDICIAL DISTRICT  
§

**PLAINTIFF’S FIRST AMENDED PETITION**

The Texas Retailers Association (*Retailers*) files this First Amended Petition against the City of Austin (*City*) and in support shows the Court as follows:

**INTRODUCTION**

The Texas Retailers Association supports several of the City’s environmental initiatives and private-public partnerships that keep Austin green. But while the City’s goals are both laudable and widely shared, the City’s ordinances implementing those goals must comport with State law. Unfortunately, the City’s “Bag Ban” Ordinance does not. Although unknown to the City and the Retailers when the Ordinance was enacted, the Texas Health and Safety Code expressly prohibits the City from banning the sale or use of packages or containers for solid waste management purposes. Because the City’s Ordinance conflicts with Texas statutory law, it is preempted, invalid, and of no force or effect. Accordingly, by this Original Petition, the Retailers seek a Declaratory Judgment invalidating the Ordinance.

**DISCOVERY CONTROL PLAN**

1. Discovery in this case should be conducted under Texas Rule of Civil Procedure 190.3 as a Level 2 case.

## **PARTIES**

2. Plaintiff Texas Retailers Association is a non-profit trade association established to assist and promote the retail industry, including advocating for the interests of the Retailers before the Legislature and in judicial proceedings. The Texas Retailers Association is comprised of several hundred diverse retail companies operating tens of thousands of stores throughout Texas, including stores operating in the City of Austin.

3. Defendant, the City of Austin, is an incorporated city in Travis County, Texas. The City of Austin may be served pursuant to Section 17.024(b) of the Texas Civil Practice and Remedies Code by serving the City's mayor, clerk, secretary, or treasurer at the City's offices at 301 West 2nd Street, Austin, Texas 78701.

## **JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court pursuant to Article V, Section 1 and 8 of the Texas Constitution and Sections 24.007 and 24.008 of the Texas Government Code.

5. Venue is appropriate in Travis County pursuant to Section 15.002(a) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events giving rise to the claim occurred in Travis County.

## **FACTUAL BACKGROUND**

6. We have all been asked the question, "paper or plastic?" Regardless of one's preference, embedded in the age-old question, and consistent with the consumer's expectation, is the unstated premise that, as an integral part of the consumer transaction, the retailer will be providing the consumer a bag—a means for the consumer to transport the goods purchased from the retailer. Although consumers expect to be provided bags at retail establishments, the City

has sought to prohibit or restrict that practice. State law, however, stands in the way of the City's plans.

7. Section 361.0961 of the Texas Health and Safety Code provides: "A local government or other political subdivision may not adopt an ordinance, rule, or regulation 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." TEX. HEALTH & SAFETY CODE §361.0961. Texas law is clear: a city may not ban bags, unless authorized by the State to do so, which it has not. But this is exactly what Austin did.

8. Austin's "Bag Ban" Ordinance provides, in part, "Beginning March 1, 2013, a business establishment within the City limits may not provide single-use carryout bags to its customers or to any person." Ordinance No. 20120301-078, AUSTIN, TEX. CITY CODE §15-6-122(C). On first reading, it is apparent that the City's bag ban prohibits the use of a container or package, in apparent conflict with State law. On second reading, and third, the conclusion is inescapable.

9. Section 361.0961 of the Texas Health and Safety Code has seven "elements": "A [1] local government or other political subdivision may not [2] adopt an ordinance, rule, or regulation to: [3] prohibit or restrict, [4] for solid waste management purposes, [5] the sale or use of a [6] container or package [7] in a manner not authorized by state law." The Retailers cannot imagine the City disputing any of these elements, or how they could.

10. There is quite simply no "gray" area for the City to exploit with respect to these elements—these issues are black and white: (1) Austin is a local government or political subdivision, (2) Austin adopted an Ordinance, and (3)/(5) the bag ban "prohibits or restricts" the "sale or use" of single-use bags.

11. Further, although it is commonly understood that a “bag” is a “container,” and while other statutes, cases, and dictionaries can be cited to show a bag is a container, it is worth noting for demonstrative purposes how indisputable this proposition is. The ASTM (American Society for Testing and Materials) “Standard Terminology of Packaging and Distribution Environments,” defines a bag as, “a preformed *container* of tubular construction made of flexible material, generally enclosed on all sides except one forming an opening that may or may not be sealed after filling.” Conversely, ASTM defines a container as, “a nonspecific term for a receptacle capable of closure (see also: *bag* [etc.].)” ASTM D 996-04 (2010).

12. Regarding element (4), the City included numerous “findings” in its Ordinance explaining the Ordinance was adopted for the express purpose of managing solid waste. For example, “[t]he successful reduction of single use carryout bags entering the City's *solid waste stream*, along with the integration of reusable bags and increase in recycling and composting, will help the city achieve its goal of ‘Zero Waste’ by the year 2040.” Ordinance No. 20120301-078, Part 1(2); *see also id.* at (3) (noting “a plan to reduce by 50% the plastic bags entering the City’s *solid waste stream* by June 2009”).

13. Finally, the City might claim that it has banned bags in a “manner . . . authorized by state law.” But the Retailers have not been able to discover a single state law authorizing the banning of bags in any manner, let alone the manner adopted by the City.

14. Consequently, the bag ban both infringes the Retailers legally protected interests and poses an imminent harm to those interests: the bag ban deprives the Retailers of the value of their stock of single use carryout bags and requires the Retailers to incur additional expenses related to the waste or transfer costs of non-compliant bags, and related to the purchase, placement, and storage of bags complying with the Ordinance. The Retailers will also incur

costs to train their employees regarding the Ordinance. In addition, the Retailers must incur significant expense to comply with the bag ban's "signage" requirement: "Beginning March 1, 2013, a business establishment within the City limits must provide prominently displayed signage advising customers of the benefit of reducing, reusing and recycling and of the need to use reusable carryout bags. The language and placement of signs under this Section shall be as prescribed by rule." Ordinance 20120301-078, § 15-6-122(D). Finally, the Retailers will be harmed due to the loss of customers to stores outside Austin (seeking stores providing bags), and the loss of customers because of increased prices (due to passing on the cost of new bags). Of course, the citizens of Austin will also be harmed by increased prices and health risks associated with reusable bags.

## **CAUSES OF ACTION**

### **Count I – Declaratory Judgment**

15. The Retailers seek a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, generally, and Section 37.004 thereof, in particular, which provides: "A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, *or other legal relations are affected by a statute, municipal ordinance, contract, or franchise* may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC & REM. CODE §37.004.

16. Specifically, the Retailers seek a declaration from this Court that City of Austin Ordinance 20120301-078, codified at Austin City Code §§ 15-6-121 through 15-6-132, is preempted by Section 361.0961 of the Texas Health and Safety Code, and thus, unenforceable.

## **Count II -- Request for Attorneys' Fees**

17. The Retailers seek recovery of their attorneys' fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, in general, and Section 37.009 thereof, in particular. Section 37.009 provides: "In 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 §37.009. The Retailers further seek their attorneys' fees, costs, and expenses pursuant to Texas Rule of Civil Procedure 131, which provides: "The successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." TEX. R. CIV. P. 131

## **JURY DEMAND**

18. The Retailers request a trial by jury on all questions so triable pursuant to Article 1, Section 15 of the Texas Constitution and Texas Rule of Civil Procedure 216.

## **REQUEST FOR DISCLOSURE**

19. Pursuant to Texas Rule of Civil Procedure 194, the Retailers request that the City disclose within fifty (50) days of service of this request, the information or material described in Rule 194.2(a)-(1).

## **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff Texas Retailers Association respectfully requests the following relief:

- (1) That this matter be set for a jury trial;
- (2) That upon trial, or hearing, the Court enter a Declaratory Judgment that the "Bag Ban" Ordinance is preempted and unenforceable in its entirety because it conflicts with Texas Health & Safety Code §361.0961;
- (3) That upon trial, or hearing, the Court award the Retailers its reasonable attorneys' fees as permitted by law, including reasonable fees for the cost of successfully

making or responding to an appeal to the court of appeals and the Texas Supreme Court; and

- (4) That upon trial, or hearing, the Court award the Retailers its costs of court; and
- (5) For all such other relief, at law or equity, to which the Retailers may show themselves entitled.

Respectfully submitted,

JACKSON WALKER, L.L.P

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