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Texas Supreme Court Rules on Construction-Site Waste Hauling License Fees; Distinguishes Such Fees from More Traditional Solid Waste Franchise Fees

The Supreme Court of Texas recently issued a [ruling](#) in *Builder Recovery Servs., LLC v. The Town of Westlake*, finding that the Town of Westlake as a general law city exceeded its authority when it assessed a percentage-of-revenue license fee on construction-site waste hauling businesses. Notably, the Court expressly stated that its opinion was not intended to address the ability of general law cities to impose solid waste franchise fees (more on this issue below).

The Town of Westlake passed an ordinance, which required third-party construction trash haulers to obtain a license in order to provide temporary construction waste services, imposed certain regulations on the licensee, and assessed a licensing fee based on 15 percent of the licensee's gross revenue.

Builder Recovery Services, LLC (BRS) sued the Town asserting, among other things, that: (1) the Town as a general law city lacks authority to require BRS to obtain a license to haul construction waste; (2) the Town lacks statutory authority to impose a licensing fee based on a percentage of

BRS's revenue; (3) the license fee was not tied to actual administrative costs; and (4) the ordinance was preempted by state law. After a bench trial, the trial judge found largely in favor of the Town, but invalidated the license fee calculation. BRS appealed.

The appellate court rejected BRS's argument that Section 361.111 of the Texas Health and Safety Code does not empower the Town to issue licenses as a license is an inherent part of the Town's regulatory power. The court further determined the license fee issue was moot due to an amended ordinance adopted by the Town during the pendency of the litigation, which lowered the licensing fee to three percent of gross revenues. However, due to an outstanding issue of attorney's fees, the court sent the case back to the trial court for disposition. BRS appealed.

The Texas Supreme Court reversed, finding that: (1) the Town's downward adjustment of the amount of the license fee did not moot the license fee issue; and (2) a general law city's express power to regulate construction trash hauling does not include the implied authority to charge a license fee based on a percentage of revenue, and such fees would have to be tethered to the cost of providing services. The Court opined that because a percentage-of-revenue fee "fluctuates based on market forces having nothing to do with the Town's regulatory expenses, and because it resembles a business tax in its calculation method, a percentage-of-revenue fee is different in kind from cost-recovery fees a general-law city might validly charge incident to its power to regulate trash hauling." The Court provided that a "more conventional, volume-based fee under which the Town charged fixed amounts per license application or per construction site, for instance, could be calibrated to offset staffing or paperwork expenses incurred by the Town because of the regulation."

The Court sent the case back to the appellate court to determine whether the remainder of the Town's ordinance is severable from the invalid fee. The Town plans to file a motion for rehearing with the Texas Supreme Court asking the Court to reconsider its ruling on this case.

Although the Court determined that a general law city cannot charge the kind of percentage-of-revenue fee assessed by the Town to a licensee who hauls construction waste, the Court clearly noted that its decision does not apply to exclusive franchise agreements between a general law city and its residential and commercial solid waste providers adopted pursuant to Section 364.034 of the Health and Safety Code. Specifically, the Court states:

Turning to the merits of [the authority to impose a percentage-of-revenue fee] claim, an initial distinction should be drawn between the licensing fee imposed on BRS and the franchise fee imposed on Republic. Republic is the Town's conventional residential and commercial trash-hauling franchisee. The Town's relationship with Republic is governed by an exclusive franchise agreement as described in section 364.034 of the Health and Safety Code. Republic is not a party to this case, and nothing in our decision should be construed to comment on the rights of the Town, of Republic, or of similarly situated parties operating under section 364.034 or under franchise agreements. Instead, we address the Town's authority under section 363.111 of the Health and Safety Code, the primary statutory provision on which the Town relies for its authority to charge licensing fees to companies like BRS.

Following the Court’s decision, the League has received questions from several general law cities about whether this ruling calls into question the exclusive franchise fee agreements between those cities and solid waste providers. It is the League’s opinion that this ruling does not affect a general law city’s ability to collect franchise fees from residential and commercial solid waste providers providing services in the city pursuant to an exclusive franchise fee agreement, given the Court’s language distinguishing the Town’s licensing fee from a franchise fee.

Some solid waste providers have contacted general law cities and indicated that they will cease remitting certain fees under existing agreements beginning August 1 in order to enter a dialogue with the city on the most appropriate path forward in light of the ruling. Cities are encouraged to discuss the ramifications of the decision with their city attorneys, and to reach out to any holder of an exclusive solid waste franchise as soon as possible.

The League will continue to monitor this case and report on any new developments.

The Bipartisan Safer Communities Act

On Saturday, June 25, 2022, President Biden signed into law new federal gun legislation one month after the elementary school shooting in Uvalde. The new law, the [Bipartisan Safer Communities Act](#), will provide states with resources aimed at gun safety, mental health, and school security measures. Below is an overview of the key provisions of the new law.

Firearms

Juvenile Records

- Enhances background checks with regard to the proposed transfer of a firearm to an individual under the age of 21 to include checking state mental health records and juvenile criminal records to determine if the person has a disqualifying juvenile record. Under this provision, the FBI will be given seven additional days to conduct the enhanced review.

Defining “Engaged in the Business”

- Defines the term “to predominately earn a profit,” to clarify who is considered a gun seller and would be required to comply with licensing requirements.

Use of Byrne Grants or Implementation of State Crisis Intervention Programs

- Allows states to use Byrne Justice Assistance Grants (JAG) to implement crisis intervention court programs, including mental health courts, drug courts, veterans courts, and/or extreme risk protection order programs (or “red flag” programs).
- If states choose to implement “red flag” programs, the law would require states to follow guidelines to ensure strict protections for due process as well as heightened evidentiary standards of proof.
- \$750 million has been allocated for the JAG program.

Stop Illegal Trafficking in Firearms Act

- Creates new federal offenses of **straw purchasing of firearms** (purchasing a firearm for someone who is not permitted by law to purchase a firearm) and **trafficking in firearms**, which makes it a crime to traffic illegal firearms into the United States.

Misdemeanor Crime of Domestic Violence

- Closes the “boyfriend loop hole” by making it illegal for those convicted of domestic assault against a victim with whom the person was in a dating relationship, to purchase a firearm.
- After five years, if the person has not been subsequently convicted of a similar crime, the person’s record will be updated to reflect eligibility to purchase a firearm.

Children and Family Mental Health Provisions

Expansion of Community Mental Health Services Demonstration Program

- Makes additional grants available to states to expand community behavioral health centers that provide mental health services.
- \$250 million has been allocated for this initiative through the Substance Abuse and Mental Health Services Administration (SAMHSA) Community Mental Health Block Grant Program.

Medicaid and Telehealth

- Requires the U.S. Secretary of Health and Human Services to provide states with technical assistance and guidance on how to improve access to telehealth for mental and behavioral health services covered under Medicaid and the state children’s health insurance program (CHIP) for children and families.

Supporting Access to Health Care Services in Schools

- Requires the U.S. Secretary of Health and Human Services and Secretary of Education to provide guidance and technical assistance to State Medicaid agencies and schools on how to facilitate medical assistance to Medicaid and CHIP beneficiaries in school-based settings.
- Makes grants available to states to fund school-based mental health services, including early and periodic screening, diagnostic, and intervention treatment services.
- \$240 million in grant funding has been allocated for these initiatives.

Review of State Implementation of Early and Periodic Screening, Diagnostic, and Treatment Services

- Requires the U.S. Secretary of Health and Human Services to review state implementation of the Medicaid early screening and intervention program, identify deficiencies, provide technical assistance, and give guidance on Medicaid coverage requirements. In addition, the Secretary will report results to Congress.

Pediatric Mental Health Care Access Grants

- Extends Pediatric Mental Health Care Access Program grants through 2027 for states to assist pediatricians and mental health specialists with training, technical assistance, and improving access to telehealth for children and adolescents.
- \$140 million in grant funding has been allocated for these initiatives.

State Leadership Announces \$105.5 Million for School Safety Initiatives

On Tuesday, Governor Abbott, Lt. Governor Patrick, and Speaker Phelan [announced](#) the transfer of \$105.5 million to support school safety and mental health initiatives. Included in the initiatives are:

1. \$50 million to the Trusteed Programs within the Office of the Governor for the purchase of bullet-resistant shields to be distributed to police officers directly employed by school districts, police officers contracted by school districts, and other local law enforcement officers that may respond to school safety emergencies.
2. \$7 million to Texas State University for the Advanced Law Enforcement Rapid Response Training (ALERRT) Center for rapid response training and \$3 million to the trusteed Programs within the Office of the Governor for grants to local law enforcement agencies to offset travel expenditures associated with the training.

The full list of initiatives can be found [here](#).

Don't Forget: Resolutions for 2022 Annual Conference Due August 22

Resolutions for consideration at the Annual Conference are due no later than 5:00 p.m. on **August 22, 2022**. The TML Constitution provides that resolutions must be submitted by any member city, TML region, or TML affiliate to the TML headquarters 45 calendar days prior to the first day of the Annual Conference.

The League's advocacy efforts are based on a legislative program that is developed by member city officials in two ways.

First, a member city, TML region, or TML affiliate may submit a resolution for consideration at the business meeting of each year's Annual Conference. Each city is asked to provide one delegate to serve as its liaison at the meeting. The representatives will be briefed on the content of the resolutions and given a chance to discuss and vote on whether they merit inclusion in the legislative program. The resolutions form the basis of a fixed legislative program, under which – each session – modifications to the program will be made only if needed.

Second, member city officials can participate in the League's Municipal Policy Summit during the summer of 2022. The report of the Summit takes the form of a resolution that is submitted to the

Annual Conference in interim years. The summit participants will be appointed by the TML President based on volunteers and others chosen to balance the demographics of the TML membership at large.

Details on the submission process can be found [here](#).

Federal Infrastructure Bill Update

In November 2021, the federal Infrastructure Investment and Jobs Act (IIJA) was signed into law. The IIJA is altogether a \$1.2 trillion bill that will invest in the nation's core infrastructure priorities including roads, bridges, rail, transit, airports, ports, energy transmission, water systems, and broadband.

The League will monitor state and federal agencies and work with the National League of Cities (NLC) to access the latest information relating to the IIJA. We will be providing periodic updates in the Legislative Update on resources for Texas cities on how to access IIJA funding for local infrastructure projects.

U.S. Department of Commerce (Commerce)

On June 21, Commerce opened the application period for [Enabling Middle Mile Broadband Infrastructure Program](#) as part of the "Internet for All" initiative. Applications will be accepted until September 30.

Environmental Protection Agency (EPA)

The EPA will host a [webinar](#) about the IIJA funding. The funds can help communities improve their water and wastewater infrastructure. The webinar will focus on:

- How state revolving fund (SRF) program funds work;
- How the Bipartisan Infrastructure Law (BIL) funding can help communities address water infrastructure challenges;
- What resources are available for information and technical assistance; and
- Where to go for more information

The webinar will include an opportunity to submit questions. The presentation will be recorded and posted online for future reference. To register, click [here](#).

Federal Highway Administration (FHWA)

The FHWA published its [Notice of Proposed Rulemaking](#) regarding the IIJA's National Electric Vehicle Infrastructure Program. Public comments are due August 22.

National League of Cities (NLC)

On June 23, NLC published an article entitled “[Get Ready to Apply for the Bridge Investment Program](#)” outlining key information in applying to the program. NLC has previously published an article entitled “[Best Infrastructure Grants for Small Cities](#),” which focuses on six specific programs funded under the IIJA. The article also references three good resources to help small cities navigate the IIJA – the White House’s [Rural Playbook](#); the forthcoming [Local Infrastructure Hub](#); and the archived “[Infrastructure School](#)” webinars.

House and Senate Committee Interim Hearings

The Texas House and Senate Committees are underway studying interim charges outlined by Speaker Phelan and Lt. Governor Dan Patrick.

Below is a full list of committee hearings set to hear certain city-related charges. All hearings will be held at the Texas Capitol unless otherwise indicated. If a committee has newly posted notice and was not included in last week’s edition of the *Legislative Update*, it is indicated as such.

Senate Finance Committee

The committee will meet on Monday, July 11 at 10:00 a.m. to hear invited and public testimony on the following interim charges:

Federal Funds: Report on the state use of federal COVID-19 relief funds provided under the Coronavirus Aid, Relief, and Economic Security Act, Coronavirus Response and Relief Supplemental Appropriations Act, the American Rescue Plan Act, Infrastructure Investment and Jobs Acts, and similar federal legislation. Examine local use of federal relief funding, including funding provided to school districts through the Elementary and Secondary School Emergency Relief (ESSER) Fund. Evaluate the overall fiscal impact of the COVID-19 pandemic on state agencies, including costs incurred due to federal mandates. Identify barriers to the effective utilization of funds and make recommendations on the expenditure of unappropriated funds. In addition, evaluate and report on the spending by state agencies that have been utilizing "one-time" federal funding (temporary enhancements, e.g. FMAP and ESSER) sources, where federal funding will likely be significantly reduced in future biennia.

Information on the hearing, including how to register and testify at the committee hearing, can be found [here](#).

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