

DENNIS BONNEN

CAPITOL OFFICE:
P.O. Box 2910
AUSTIN, TX 78768-2910
(512) 463-0564
FAX (512) 463-8414



DISTRICT OFFICE:
122 E. MYRTLE
ANGLETON, TX 77515
(979) 848-1770
FAX (979) 849-3169

HOUSE OF REPRESENTATIVES
Committees: Chair, Environmental Regulation · Natural Resources

July 12, 2006

RECEIVED

JUL 12 2006

FILE # ML-44888-06

I.D. # 44888

OPINION COMMITTEE

RQ-0508-GA

The Honorable Greg Abbott
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for Attorney General's Opinion

Dear General Abbott:

It has come to my attention that several cities in the State of Texas, such as Plano, Brenham, Denton and Texarkana have formed business ventures to sell compost/mulch to compete with private enterprises. In addition, several other cities are considering getting into the compost/mulch business.

The three most aggressive cities in marketing and selling compost/mulch and soil products are Plano, Denton, and Brenham. These three cities actively compete with private business in the State of Texas and bid on large commercial landscape projects. Many of the jobs involve hundreds of thousands of dollars, and the cities are easily able to underbid private businesses in this industry.

One prime example is the City of Plano that formed a business named "Plano Pure Products." Plano Pure Products is bidding jobs in North Texas and has a full line of products similar to the products produced by private businesses in this industry. Its products are available in bulk or in bags, just like the ones that are used by the companies in private business. In fact, the bagged products are actually sold through nurseries and hardware stores throughout North Texas. In addition, Plano Pure Products attends the trade shows in order to compete with private enterprise, and it has a full-time sales staff calling on customers throughout North Texas.

Another example of a city competing with private enterprise is the City of Brenham. It recently began advertising and selling "Country Compost" for a price of \$7.50 a ton, which has been double ground by the city's grinders. Private companies in the same business that sell double ground compost normally charge approximately \$20 per cubic yard, and there are three cubic yards in a ton. Needless to say, the City of Brenham is greatly undercutting all private enterprise in the State of Texas.

For your information, the compost/mulch business in Texas is a huge industry. There are in excess of 45 private companies in the compost/mulch business, and these companies employ



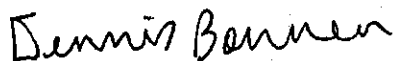
hundreds, if not thousands, of Texas residents. All of these companies have to buy their own equipment, buy or lease real estate to operate their business, pay employees, and pay taxes. On the other hand, the cities often use equipment provided by state grant funds, pay no taxes, operate on real estate owned by the city, and have no requirement to operate a compost/mulch business at a profit.

The private businesses in the compost/mulch industry in Texas do not have any problem with cities returning the compost/mulch to the homeowners in their own communities, providing the compost/mulch to homeowners in their communities free of any charge, or using compost/mulch in their city parks and common areas. The cities, however, should not be permitted to compete with private enterprises in the State of Texas nor in any way supply landscape contractors or sell bagged products to nurseries.

As you know, the word "municipality" is defined as "a body politic created by the incorporation of the people of a prescribed locality invested with subordinate powers of legislation to assist in the civil government of the state and to regulate and administer local and internal affairs of the community." Texas courts have stated that each municipality has both governmental as well as proprietary functions. Governmental functions are those "public acts which the municipality performs as the agent of the State and furtherance of the general law for the interest of the public at large." Proprietary functions are those that are "performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality rather than for the use by the general public." These proprietary functions are to benefit the residents of the city and no one else. Clearly, the cities that are in the compost/mulch business are conducting a proprietary function as opposed to a governmental function.

The question presented here is whether or not a city can operate a well-organized, competitive and commercial compost/mulch business and sell its products outside its city limits in direct competition with private enterprise. There is no question but that several Texas cities have entered into the market place in the compost/mulch business as a market participant and that the cities are competing in the context of provider/consumer transactions, as opposed to providing a tax supported community service. By selling the compost/mulch in a competitive market outside their own city limits, these cities pose a significant threat to the free markets in Texas. As such, it is my opinion that this activity is beyond the scope of what a municipality is intended for in the State of Texas. In addition, if allowed to continue in these ventures, private companies will eventually be unable to compete with these municipalities and will be forced out of business. If this occurs, this could lead to these municipalities monopolizing this industry.

Sincerely,



Dennis Bonnen
District 25