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Judge:MCCARTHY, GEORGE P

IN THE COURT OF COMMON PLEAS
ATHENS COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

CITY OF ATHENS, et al.,

Defendants.

Case No. 23CI0287

Judge George P. McCarthy

DECISION AND ENTRY

Now comes the Court upon Plaintiff State of Ohio's Motion for Summary Judgment as well as City of Athens' Motion for Summary Judgment. The Court has reviewed the record and all filings relevant thereto and proceeds to render its decision.

This action addresses the City of Athens, Ohio's (hereinafter "City") ordinance Athens City Code (hereinafter "ACC") Section 11.03.02(A) which prohibits local businesses from providing single use plastic bags to customers so they can carry their purchased items out of the store. It states: "No store or vendor shall provide or sell a single-use, plastic carryout bag to a customer at the checkout stand, cash register, point of sale or other location for the purposes of transporting food or merchandise from the store after January 1, 2024." The City claims their ordinance prohibiting single use plastic bags falls under the Ohio Home Rule provision and therefore the City can permissibly regulate such usage within the City limits. The Ohio Attorney General brings suit against the City asserting that the Ohio Legislature's previous passing of R.C. 3736.021 controls and cannot be supplanted by the City ordinance.

The State of Ohio (hereinafter "State") asserts that the City of Athens'

ordinance 11.13.02(A) prohibiting single use plastic bag conflicts with R.C. 3736.021, a general State law allowing the use of plastic bags by retail establishments. The City of Athens ordinance arguably conflicts with Ohio's statute R.C. 3736.021. The State argues R.C. 3736.021 is tied to its statewide plan concerning solid waste regulation and is a general law with which the City ordinance conflicts. And because the City is seeking to use its police power to enforce its conflicting law, the State argues the City ordinance cannot override a general state law with which it conflicts.

The State further contends the home rule provision does not apply here and state law governs and supersedes the desire of the city to prohibit such use of single use plastic bags. Basically, the City ordinance results in a return to the days of stores providing paper bags even though plastic bags have been promoted for decades as the better alternative to paper bag use for ecological and other reasons – including they are recyclable.

The issue is whether the state law R.C. 3736.021 allowing businesses to provide single use plastic bags to customers supersedes Athens City Code Section 11.13.02(A) prohibiting businesses from providing single use plastic bags to customers for their purchased goods.

Procedurally, Plaintiff and Defendant are both before the Court on their respective motions for summary judgment. Civ. R. 56 dictates in order to grant a motion for summary judgment, a "movant must show that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgement as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving

party." *Grafton v. Ohio Edison Co.,* 1996-Ohio-336.

The Court finds there are no facts in dispute. In 2021, R.C. 3736.021 was passed allowing the use of plastic bags and the City later passed ordinance 11.13.02(A) prohibiting the use of single use plastic bags. As there are no facts in dispute, the Court can decide as a matter of law whether the state statute overrides the local ordinance. The Court begins its analysis by reviewing whether Athens City Code Section 11.13.02(A) conflicts with RC 3736.021 and whether R.C. 3736.021 is a general law.

A. State Statute v. City Ordinance

The test to determine whether an ordinance conflicts with a general law is "whether the ordinance permits or licenses that which the statute forbids or prohibits, and vice versa." *Struthers v. Sokol*, (1923), 108 Ohio St. 263, 1 Ohio Law Abs. 485, 2 Ohio Law Abs. 9, 140 N.E. 519, at paragraph two of the syllabus. The importance of that determination, in part, is because according to the Ohio Home Rule Amendment to the Ohio Constitution, "municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." See Section 3, Article XVIII, Ohio Constitution (hereinafter referred to as "Home Rule."). The Home Rule provides local governments can act independently of the State as long as their laws fall within the guidelines set forth in the Home Rule Amendment and do not conflict with the State's general laws.

Where a state law and a local ordinance conflict, a state statute takes precedence when: 1) the ordinance is in conflict with the statute, 2) the ordinance is an

exercise of police power, rather than of self-government, and 3) the statute is a general law. *Canton v State*, 2002-Ohio-2005. A municipality's exercise of police power must yield in the face of a conflicting general state law. *Am. Fin. Servs. Assn. v. City of Cleveland,* 2006-Ohio-6043, at 23.

Whether the Ordinance is in Conflict with a State Statute General Law

In determining whether the ordinance is in conflict with the statute that is a general law, the Court finds the State permits businesses to provide single use plastic bags but does not mandate their use or another auxiliary container but instead leaves it up to the individual business to choose. Other types of auxiliary containers (E.g. paper bags) may be used in addition to, or in place of, the single use plastic bag. The State statute authorizing the use of auxiliary containers includes single use plastic bags (and more). The City ordinance specifically prohibits retail businesses from providing a single use plastic bag (a type of auxiliary container) to customers at a point of sale (payment station).

The state defines an "auxiliary container" as a bag, *** or other packaging to which all of the following apply:

> (a) It is designed to be either single use or reusable.
>
> (b) It is made of cloth, paper, *plastic*, * * *
>
> (c) It is designed for consuming, transporting, or protecting merchandise, food, or beverages from or at a food service operation, retail food establishment, grocery, or any other type of retail, manufacturing, or distribution establishment.
>
> (Emphasis Added).

See *R.C. 3767.32(D)(4); R.C. 3736.01(K).* For the purposes of Chapter 3736, "'[a]uxiliary container' has the same meaning as in section 3767.32 of the Revised Code". The State distinguishes types of auxiliary containers mostly by the different sorts of materials used, including plastic bags. On the other hand, the City only specifies the "single use plastic bags" used at point of sale as being problematic.

The City defines "single use plastic bag" in A.C.C. 11.13.01 as "any bag that is made predominately of non-compostable plastic derived from petroleum or bio-based sources, and that is not machine washable and not designed for multiple uses. Single-use, plastic carryout bags do not include produce, meat, or product bags." The Court notes the City excludes the retailer's "meat, produce, or product bags" under the City definition even though they also are a type of single use plastic bag.

Since the State statute confers a right of retailers to use single use plastic bags and the City prohibits the use of single use plastic bags by retailers, the Court finds the City ordinance A.C.C. 11.13.02(A) prohibiting single use plastic bags is in direct conflict with Ohio Received Code Section 3736.021. Further, the Court finds 3736.021 is a general law that uniformly applies across Ohio.

Are ACC 11.13.02(A) and R.C. 3736.021 an exercise of their Police Powers.

The Court next reviews if ACC 11.13.02(A) amounts to an exercise of the City's police power. If an ordinance is a police regulation, and for R.C. 3736.021 to pass as a general law it must pass a four-part test. To qualify, "a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts

of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally." *Canton v. State,* 2002-Ohio-2005, syllabus.

The City concedes in its motion brief A.C.C. Chapter 11.13 is an exercise of its police power and not the product of local self-government (*See Defendant's Motion for Summary Judgment*, p. 6.) A.C.C 11.13 titled "Reduction of Single-Use Plastic Bags" sets forth prohibitions concerning the use of single use bags and penalties for any infractions. A.C.C. 11.13.02(A) prohibits retailers and vendors from providing single use plastic bags to the public for their purchased goods. Retailers and vendors who violate the section are punishable by administrative fine of $150. The Court finds the prohibition can be linked to the police, sanitary and health of the community as it is linked to solid waste reduction and litter control.

In 2021 the Ohio General Assembly passed a law that provided people and businesses could choose what type of auxiliary container to use to carry for customers to carry their purchased items which included paper and plastic bags. *See R.C. 3736.021.* R.C. 3736.021 provides "[a] person may use an auxiliary container for purposes of commerce or otherwise." The term "person" includes "an individual, corporation, business trust, estate, trust, partnership, and association." R.C. 1.59(C). Thus, most stores (corporations) are "persons" under R.C. 3736.021. Although, limited liability corporations (LLCs) were not specifically mentioned in the definition, the Court finds that they

are a hybrid type of corporation partnership and therefore included in the definition and considered to be a "person" as well. *Dexxon Digital Storage Inc., v. Haenszel*, 2005-Ohio-3187, 161 Ohio App.3d 747. The auxiliary container could be a bag made of "cloth, paper, plastic, foamed or expanded plastic, cardboard, corrugated material, aluminum, metal, glass, postconsumer recycled material, or similar materials or substances, including coated, laminated, or multilayered substrates."

Solid waste is defined in RC 3734.01(E). The general definition provides, in part, solid waste is "unwanted residual solid or semisolid material." This definition mentions some specific types of items such as tires, for example, which require special attention during disposal. R.C. 3724.01(E). The Court finds "auxiliary containers" are designed for use in commerce and disposal is subject to enforcement under the State's littering prohibitions. See R.C. 3767.32(C), (D)(4) & (E). Further, plastic bags eventually become "solid waste" as defined in the Revised Code. R.C. 3734.01(E). Consequently, "auxiliary containers" are addressed within Ohio's "state solid waste management plan," the implementation of which is governed by R.C. 3734.50. Therefore, a single use plastic bag after being used for its intended purpose (like tires), is found to be a solid waste item subject to state laws concerning solid waste management and recycling.

The goal of Ohio's solid waste management plan includes reducing reliance on the use of landfills, R.C. 3734.50(A), and establishes objectives for solid waste reduction, recycling, reuse, and minimization. *See for example, R.C. 3734.50(B); R.C. 3734.50(C)-(H).*" The Court finds the law permitting Ohioans to use

plastic bags, therefore, is rationally linked to solid waste reduction, recycling, reuse, and minimization. It can reduce littering as the plastic bags can be turned in to several stores for recycling.[1] It may also prevent littering, waste, and increase of landfill use of an alternative material that may be used in its place or is more labor intensive to produce or use. Therefore, the Court finds that the state has a rational basis for regulating plastic bags as part of its solid waste plan and that the statute relates to, in part, the protection of its citizens health and therefore is an exercise of its police power.

The City also suggests local reduction of plastic waste is a goal and states that single use plastic bags are not accepted in Athens' single stream recycling program which results in such bags ending up in landfills. Even if proven true, that does not determine if single use plastic bags are recyclable. It is more likely that the City's recycling services refuses to accept them for recycling because they may tend to jam the machines. This may result in down time caused by the need to remove jammed bags so normal operations can be resumed. But the bags do not necessarily go to the landfill even though they are not accepted by Athens' single stream recycling service. The single use plastic bags can be reused by consumers or returned to several stores that accept such bags. And those bags can go on to be recycled. For example, one wood alternate product manufacturer had partnered with local community organizations to turn plastic film (like that used for single use plastic bags) into useful products such as park benches.[1] One specific example locally is seen where the Athens Ohio Lions collected single film plastic

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1 See https://www.trex.com/deck-ideas/trex-rei-bryce-canyon-sustainability-partnership.

and donated a plastic bench made from recycled plastic film to the Southeast Ohio History Center.[2] Local businesses such as Piggly Wiggly, All American Trophy, Classic Brands, Kroger, OhioHealth O'Bleness Hospital, Court Street Coffee, The Plains Post Office, The Market on East State, Athens Edward Jones, and others had collected and/or donated plastic single use film for local community collection projects in 2021.[3] Therefore, the Court finds the single use plastic bag *is* an item that can be recycled.

R.C. 3736.021 specifically permits the use of this film plastic that can be recycled. Therefore, the Court finds that the statute which allows Ohioans to use plastic bags is linked to Ohio's plan regarding solid waste reduction, recycling, reuse, and minimization. The City ordinance provides penalties for businesses that do not comply with ACC 11.13.02(A). Accordingly, as it can be found to reasonably related to health and sanity regulation as well, the passing of ACC 11.13.02(A) is found to be an exercise of the City's police power. However, the State has the authority to regulate solid waste and to permit the use of single use plastic bags in commerce as part of their solid waste plan. Accordingly, R.C. 3736.021 is found to be a general law. The City ordinance exercising police powers are, therefore, conflicting with the State exercising its own police

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2 See https://www.facebook.com/AthensOhioLionsClub/posts/the-athens-lions-club-presented-a-trex-recycled-plastic-bench-to-the-southeast-o/2202655843218752

3 Recognized were The Plains Lions Club, Kiwanis Club of Athens, Kiwanis Club of Downtown Athens, Athens Lions Club, Alexander Lions Club, Alexander Leo Club, Middleport-Pomeroy Lions Club, Chancey-Dover Lions Club and all the partner organizations and businesses for their efforts. They collected over 25,000 lbs of plastic to be recycled into park benches from people all over our region as part of a recycling project. *See Athens-Hocking Solid Waste District*, Facebook Post, Oct. 25, 2021. https://www.facebook.com/AthensHockingSWD/posts/many-thanks-to-the-the-plains-lions-club-kiwanis-club-of-athens-kiwanis-club-of-/1248858099244413/

powers.

The State statute regulating the use of single use bag relates to the health, safety and general welfare of Ohio and its citizens. Although most plastic items, including single use bags, may find their way into landfills, the State chose to implement R.C. 3736.021 authorizing plastic bags (and certain other materials) to legally be used for auxiliary containers which may help prevent the use of alternative and more problematic materials ending in landfills or causing other recycling issues.[4] So the legislature's permitting single use plastic bags is reasonably included in its plan as it may preclude some other more detrimental or problematic material being used in its place. Therefore, the Court finds the decision to regulate its use lies within the legislature's discretion. The Court also finds R.C. 3706.021 is rationally related to the State's underlying policy of waste reduction and recycling.

Because single use plastic bags are a solid waste and subject to disposal and recycling, it is clear that the state legislature can regulate its use. As the State has an overriding statewide interest in curbing solid waste and promoting recycling, the Court concludes the State statute addressing auxiliary containers, which include single use plastic bags, is part of the State's overall waste management plan. The State has demonstrated a rational basis connecting the State statute and their waste management plan. The State addresses recycling and their materials and the single use plastic bag is made of material that is subject to the plan. As a result, the Court finds Ohio Revised

4 As low as 5% to a high of 21% of recyclable plastic is estimated to actually be recycled according to a 2022 National Public Radio (NPR) report. https://www.npr.org/2022/10/24/1131131088/recycling-plastic-is-practically-impossible-and-the-problem-is-getting-worse.

Code Section 3736.021 is a general law which can be (and has been) uniformly applied. If anything, the Athens City Ordinance actually prevents the statewide uniform application of the State statute. As R.C. 3736.021 is found to be part of a statewide scheme to regulate waste including recyclables, it is a general law.

The Court next reviews whether the State statute is an appropriate exercise of the State's police powers throughout the state and whether it is tied to a comprehensive statewide plan addressing solid waste disposal and recycling.

Is R.C. 3736.021 an Appropriate Exercise of the State's Police Power?

Is R.C. 3736.021 "aimed at protecting public health, safety, and general welfare" of the people of Ohio? Police, sanitary, and similar regulations are ones that are necessary to protect public health, safety, and general welfare. As the State has an overriding statewide interest in curbing solid waste and promoting recycling of materials for various reasons including reducing litter, waste control, landfill reduction, and promoting recycling of materials, the Court finds that the statute authorizing the use of single use plastic bags is a regulation that is "aimed at protecting public health, safety, and general welfare" of the people of Ohio and therefore is an exercise of the State's police power.

The Court also finds that R.C. 3736.021 applies to all parts of the state alike and operates uniformly throughout the state. Although a few communities have sought to prohibit single use plastic bags, it appears that at least one has stayed its implementation of its ordinance due to the conflicting state statute. In any case, the

state statute is designed to apply uniformly across the state. Further, the statute prescribes a rule of conduct upon citizens generally by only authorizing auxiliary containers made of specific materials, including plastic. Additionally, the unlawful disposing of such plastic bags by littering is a misdemeanor of the third-degree criminal offense, punishable by fine and/or jail throughout the state uniformly. *See R.C. 3767.32*.

Additionally, the Court has found, and the City concedes, the City ordinance prohibiting single use plastic bags is an exercise of its police power. *Canton v State*, 2002-Ohio-2005. The ordinance is a law the City passed to address certain issues, including littering and recycling, which is a health and sanitary issue subject to the City's police powers.

Also, regarding the City argument that the Athens City Service Safety Director can establish glass free zones, those zones are temporary in nature for special events and seem to be related to safety concerns (and not litter) since cans and cups are still allowed in the same area. See ACC 9.06.04 (B). Therefore, the Court finds ACC 9.06.04(B) are dissimilar and the glass free zone ordinance does not impact the issues herein.

The fact that the state statute was passed, in part, due to any lobbying efforts has no bearing on the Court's analysis. There was likely lobbying going on when paper bags were ousted in favor of plastic bags decades ago even with same citizen concerns for plastic contamination the City argues today. And the shift from glass to

plastic bottles was also a likely influenced by lobbying as well. Outside motivation to pass a law is not considered by the Court in its analysis and does not alter its conclusions.

Likewise, the single subject rule for passing legislation is not fatal to the State's position. The mere fact that a bill embraces more than one topic is not fatal under the one-subject rule of the State Constitution as long as a common purpose or relationship exists between the topics. *Professionals Guild of Ohio v. Lucas County Correctional Treatment Facility Governing Board* (Ohio App. 10 Dist., 06-25-2019) 140 N.E.3d 90, 2019-Ohio-2522, appeal not allowed 157 Ohio St.3d 1466, 133 N.E.3d 533, 2019-Ohio-4419. Further, in the relevant bill herein, R.C. 3736.021 deals with plastic being used as an auxiliary container, is a solid waste product and is a recyclable material. There are several sections in the bill which address the leavening and apportionment of fees some of which deal with solid waste and recycling which would, of course, impact plastic bags. For example, see R.C. 3734.57 which addresses fees levied on the transfer or disposal of solid wastes which would include the aforementioned plastic bags discussed herein. And R.C. 3734.57(G)(9) allows for the providing of financial assistance to individual municipal corporations and townships to district to defray the costs of maintaining roads, etc., furnishing a solid waste management or recycling facility. Additionally, just last year the Athens-Hocking Solid Waste District received $90,000 from the Ohio EPA for litter outreach, cleanup and education of solid waste, of which single use plastic bags are a small part.[4] Auxiliary containers, such as plastic bags, are addressed in R.C. 3736.32

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4. Ohio EPA Grants $177,201 for Recycling and Litter Prevention in Southeast Ohio. https://epa.ohio.gov/about/media-center/news/ohio-epa-grants-177,201-for-recycling-and-litter-prevention-in-southeast-ohio

- the littering statute. The location of the definition of an auxiliary container does not detract from plastic bags being a solid waste item subject to disposal in a solid waste district pursuant to the State's comprehensive plan.

Whether Injunctive Relief is Indicated

In determining whether to grant injunctive relief, Courts take into consideration the following four factors: (1) the likelihood of a plaintiff's success on the merits, (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff, (3) what injury to others will be caused by the granting of the injunction, and (4) whether the public interest will be served by the granting of the injunction. *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44, 49, 619 N.E.2d 1145. The decision whether to grant or deny an injunction rests in the sound discretion of the trial court and will not be disturbed by a reviewing court absent a clear abuse of discretion. *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496.

In our present case the Court finds the likelihood of Plaintiff's success on the merits is great, and the issuance of a permanent injunction will prevent injury to the Plaintiff as it will avoid conflict and confusion between the local ordinance and state law as well as protect Ohioans choice to use single use plastic bags. Additionally, there is no demonstratable injury proven by Defendant that will be caused by granting of the injunction. Only the status quo is maintained. Further, the Court finds if an injunction were granted, the public interest of Ohioans is served by continuing to allow them to decide what bags to use.

Any other arguments of Defendant City and those raised in the amicus briefs not specifically addressed herein have been considered and found not to be compelling nor supported by the record.

Conclusion

Both the City and the State have passed laws they each feel best addresses the use of plastic bags. Each standing alone independently without the other existing is a permissible use of its respective police power. However, the Court finds that R.C. 3736.021 is a general law that falls within the State's solid waste management plan. The Court finds, in part, in passing 11.13.02(A) the City is exercising its police power which is in conflict with the State statutes and is not strictly a matter of self-governance. Further, that the State statute was not passed strictly to inhibit the City's effort at policing single use plastic bags in the City but falls within the State's solid waste management plan. The City ordinance would be permissible if it were not for R.C. 3736.021. However, when confronted with R.C. 3736.021, the City's ordinance runs into a direct conflict.

Therefore, the Court finds that the City's ordinance does not fall under the Home Rule Amendment exemption and that the Athens City Code Section 11.13.02(A) is in direct conflict with Ohio R.C. 3736.021, which is a general law. Consequently, the Court finds the City ordinance must give way to the state statute. *Am. Fin. Servs. Assn. v. City of Cleveland,* 2006-Ohio-6043, at 23. The City ordinance is not a permissible

use of the City's police and sanitary regulations authority under these facts and R.C. 3736.021 takes priority over ACC 11.13.02(A).

Accordingly, the Court finds there are no genuine issues of material fact, the issues are purely legal, Plaintiff is entitled to the requested declaratory and injunctive relief as a matter of law. It appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the City, and that conclusion is adverse to the City. For good cause shown, Plaintiff's Motion for Summary Judgment is found to be well taken and is granted. *Grafton v. Ohio Edison Co.,* 1996-Ohio-336.

Based upon the above, Defendant City of Athens' Motion for Summary Judgment is found not to be well taken and hereby denied. *Grafton v. Ohio Edison Co.,* 1996-Ohio-336.

Based on the above, the Court issues a declaratory judgment in favor of Plaintiff and against Defendant finding Athens City Code Ordinance Section 11.03.02(A) unconstitutional and issues a permanent injunction in favor of Plaintiff and against Defendant City of Athens and its employees who are hereby permanently enjoined from enforcing Athens City Code Chapter 11.13 forthwith.

IT IS SO ORDERED.

This is a final appealable order.



Judge George P. McCarthy

TO THE CLERK:

This is a judgment or final order, which may be appealed. The Clerk, pursuant to Civ. R.58(B), shall serve notice of the judgment and its date of entry upon the journal on all parties who are not in default for failure to appear. Within three (3) days after journalization of this entry, the clerk is required to serve notice of the judgment pursuant to Civ. R. 5(B) and shall note the service in the appearance docket including:

Ohio Attorney General, Dave Yost, by and through OAG Attorney Julie M. Pfeiffer and OAG Attorney Michael A. Walton, 30 East Broad Street, 16th Floor Columbus, Ohio 43215 at Julie.pfeiffer@OhioAGO.gov and Michael.Walton@OhioAGO.gov on behalf of Plaintiff State of Ohio

City of Athens Law Director Lisa Eliason and Asst. City Law Director Jesse Brammer, at leliason@ci.athens.oh.us and jbrannerhittle@ci.athens.oh.us on behalf of Defendant City of Athens