

March 26, 2014

Office of the Attorney General of Texas  
Opinion Committee  
Post Office Box 12548  
Austin, Texas 78711-2548

Re: Section 361.0961 of the Texas Health and Safety Code and “Bag Bans”

Dear Opinion Committee:

This letter brief is submitted to you on behalf of the signatories below who come from a variety of background local government officials, former state elected officials, businesspeople and environmental and conservation organization. On March 4, 2014, your office received a request from the Honorable Dan Flynn, Chair, Select Committee on Transparency in State Agency Operations, relative to the legality of municipal ordinances banning single-use checkout bags, and associated fees, in light of Section 361.0961 of the Texas Health and Safety Code. That request was assigned as RQ-1189-GA. For the reasons set forth below, municipal “bag bans” are not in violation of Section 361.0961 of the Texas Health and Safety Code and in fact, Section 361.0961 by its express terms is significantly limited in its application.

There is a serious question whether Section 361.0961 applies at all to municipal ordinances that address single-use checkout bags. Chapter 361 of the Texas Health and Safety Code (the Solid Waste Disposal Act) addresses the permitting of solid waste facilities and hazardous waste facilities. By focusing on Section 361.091 in a vacuum, Representative Flynn must overlook other relevant provisions of the Solid Waste Disposal Act, including declarations of public policy such as Section 361.022, which sets forth Texas’ “Public Policy Concerning Municipal Solid Waste and Sludge”:

(a) To protect the public health and environment, it is the state's goal, through source reduction, to eliminate the generation of municipal solid waste . . . to the maximum extent that is technologically and economically feasible. Therefore, it is the state’s public policy that, in generating, treating, storing, and disposing of municipal solid waste . . . , the methods listed under Subsections (b) and (c) are preferred to the extent economically and technologically feasible. . . .

(b) For municipal solid waste, . . . the following methods are preferred, in the order listed:

(1) *source reduction and waste minimization; . . . .*

Tex. Health & Safety Code § 361.022 (emphasis added). The municipal single-use checkout bag ordinances in question do not attempt to restrict or prohibit the type of container used for solid waste purposes. The municipal ordinances in question are obviously aimed at source reduction

and waste minimization. *See also* Texas Health & Safety Code§ 361.119 (the Texas Commission on Environmental Quality shall adopt rules, including “limitations on the storage of recyclable material, to ensure that: (1) recyclable material is reused and not abandoned or disposed of; and (2) recyclable material does not . . . threaten or impair the environment or public health and safety.”). Therefore, the more appropriate reading of Section 361.0961 is in conjunction with Section 361.022 and when harmonized, a strong argument may be made that the “container or package” provisions of Section 361.0961 do not apply to single-use checkout bags at all; instead, it refers to “containers or packages” related to solid waste disposal. Further, Section 361.022(b)(1) declares it to be the policy of the State to encourage source reduction and waste minimization. The municipal ordinances in question are fully compliant with the public purposes articulated in Section 361.022 of the Texas Health and Safety Code.

**Statutory Construction Principles Related to  
the Interpretation of Section 361.0961**

Section 361.0961(a) of the Texas Health and Safety Code provides, in pertinent part, as follows:

(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; [or]

\* \* \*

(3) assess a fee or deposit on the sale or use of a container or package.

This statute was adopted by the Legislature in 1993 (introduced as Senate Bill No. 963) and was effective September 1, 1993. There is no analysis of Senate Bill No. 963 relative to Section 361.0961 specifically and therefore, assuming only for the sake of argument that this section of the Texas Health and Safety Code in fact does apply to single-use checkout bags, in an attempt to interpret its meaning, one must resort to accepted principles of statutory construction.

The Texas Code Construction Act is found in Chapter 311 of the Texas Government Code and its companion provision, Chapter 312, provides the rules of construction for civil statutes. In general, the first rule of statutory construction is that courts interpret statutes in accordance with the plain meaning of their language unless the statutory language is ambiguous or the plain meaning leads to absurd results.

When we interpret statutes . . . we seek to effectuate the “collective” intent or purpose of the legislators who enacted the legislation. . . . We do so because our state constitution assigns the law *making* function to the Legislature while assigning the law *interpreting* function to the Judiciary.

When attempting to discern this collective legislative intent or purpose, we necessarily focus our attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. We do this because the text of the statute *is the law* in the sense that it is the only thing actually adopted by the legislators, probably through compromise, and submitted to the Governor for her signature. We focus on the literal text also because the text is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law. There really is no other certain method for determining the collective legislative intent or purpose at some point in the past, even assuming a single intent or purpose was dominant at the time of enactment. Yet a third reason for focusing on the literal text is that the Legislature is *constitutionally entitled* to expect that the Judiciary will faithfully follow the specific text that was adopted. . . .

There is, of course, a legitimate exception to this plain meaning rule: where application of a statute’s plain language would lead to absurd consequences that the Legislature could not *possibly* have intended, we should not apply the language literally. . . . If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only then*, out of absolute necessity, is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extratextual* factors as executive or administrative interpretations of the statute or legislative history.

*Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex.Crim.App. 1991)(citations omitted)(emphasis in original). Therefore, resort to statutory construction principles is necessary only if a statute is either ambiguous or its language would lead to absurd results.

It is clear that Section 361.0961(a) is *not* ambiguous.\* The statute specifically provides that a municipality, among other political subdivisions, “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. . . .” Therefore, if a Texas municipality adopts a “bag ban” or similar prohibition or restriction on single-use checkout bags for any reason other than “for solid waste management purposes,” then that ordinance would *not* be in violation of Section 361.0961(a) of the Texas Health and Safety Code.

### **Permissible Purposes for Prohibition or Restrictions on Single-Use Checkout Bags**

While a prohibition or restriction on single-use checkout bags may not be premised upon a solid waste management purpose by the express terms of Section 361.0961(a) of the Texas Health and Safety Code, municipal prohibitions or restrictions indeed may be premised upon other valid public health, safety and welfare concerns: litter abatement and costs incurred by

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\* The “absurd results” principle is not relevant to this discussion.

local governments associated with such litter abatement,<sup>†</sup> tourism and economic development, cattle and wildlife protection,<sup>‡</sup> and aesthetic reasons, among others. Litter abatement in particular is a permissible purpose for a municipal regulation prohibiting or restricting single-use checkout bags, and Texas law contains provisions authorizing litter abatement restrictions (both civil and criminal) and litter abatement programs. *See, e.g.*, Texas Health and Safety Code Chapter 365 (Texas Litter Abatement Act, and specifically § 365.012, which provides for criminal penalties for littering); Texas Local Government Code § 54.012(7) (municipalities may bring civil actions “relating to conditions caused by accumulations of refuse. . . .”). *See generally* Texas Local Government Code §§ 51.001 (governing body of any municipality may adopt ordinances that are “for the good government, peace, or order of the municipality”); 51.012 (Type A general law municipalities may adopt ordinances “for the government, interest, welfare, or good order of the municipality”); 51.032 (Type B general law municipalities may adopt ordinances “that the governing body considers proper for the government of the municipal corporation”); 51.071 (home-rule municipalities have “full power of local self-government”). Perhaps no state in the nation has a more effective anti-litter campaign than the “Don’t Mess With Texas” program administered by the Texas Department of Transportation. The bottom line is straightforward: Other than for solid waste management purposes, local governments are empowered by state law to adopt ordinances and restrictions that enhance, or attempt to enhance, the cleanliness, orderliness and aesthetic beauty of communities, and Section 361.0961 does nothing to limit that authority except as to “solid waste management purposes” and nothing else. Therefore, municipal regulations prohibiting or restricting single-use checkout bags are legally authorized if the purpose of the prohibition or restriction is not for the sole impermissible purpose of solid waste management.

### **Public Policy Purposes Support Municipal Regulation**

Notwithstanding the clear legislative intent to allow municipalities to prohibit or otherwise regulate single-use checkout bags except for solid waste management purposes, public policy also supports such municipal ordinances. While various reasons for such ordinances are

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<sup>†</sup> For example, data provided by the City of Austin to the Mayor and City Council estimated that the annual cost to the community at large to manage plastic bag waste was \$331,000 to \$804,000 based on impacts to wildlife, wildlife habitat, water quality, storm water systems, among others.

Further, in Austin alone, 14 organizations expressed various concerns regarding the continued dependence on single-use plastic bags.

<sup>‡</sup> *See, e.g.*, [http://www.itla.net/Longhorn\\_Information/index.cfm?con=plastic](http://www.itla.net/Longhorn_Information/index.cfm?con=plastic). The International Texas Longhorn Association describes plastic ingestion as “one real killer of cattle today with almost no known cure. . . . It is just a quiet and painful way for cattle to die with several difficult symptoms to confuse the issue. . . . Today . . . most people live within a mile of an open construction dumpster, trash pickup container or uncovered disposal site of plastic and litter. Add to that condition a strong wind and various plastics will float into your cattle grazing or growing areas. From bread wrappers hanging on a fence to grocery bags, hay bale wraps, weather balloons, party balloons, to pallet wrappings; some people even toss plastic bale strings on the ground. It is all lethal once inside a critter. . . . When a critter eats a large piece of plastic the end is often imminent and generally no one ever knows why.”

listed above, the principle of local control should be respected by the Legislature, the courts and the Attorney General's Office. For example, while Fort Stockton may be particularly concerned about single-use checkout bags and livestock health, South Padre Island about beach litter and Austin about environmental concerns, it should be the role of the State to permit local governments to legislate about those local concerns without State oversight. That indeed has been the State's response to local anti-litter and litter abatement ordinances—most cities in Texas in fact have adopted and currently enforce municipal ordinances regulating litter in some manner.<sup>§</sup> Consequently, as now is the case, Texas municipalities should be permitted to regulate single-use checkout bags as an exercise of local authority. While this local authority is not unbridled,\*\* it should remain the prerogative of local governments to fashion regulations that address local concerns, without oversight from the Legislature.

For the foregoing reasons, we believe it is clear that Section 361.0961 of the Texas Health and Safety Code does not proscribe municipalities from adopting and enforcing prohibitions and restrictions on single-use checkout bags as long as those regulations are not for the purpose of solid waste management.

Sincerely,

Hill Abell  
Owner, Bicycle Sport Shop

Jose Aliseda  
District Attorney for the 156th Judicial District, Bee, Live Oak, and McMullen Counties.  
Former State Representative, District 35

Rose Cardona  
Mayor, City of Sunset Valley

Mike Garver  
Founding Member Texas for Clean Water

Jeff George  
Executive Director, Sea Turtle Inc.

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<sup>§</sup> See, e.g., Dallas Code of Ordinances, ch. 7A, "Anti-Litter Regulations"; Houston Code of Ordinances, ch. 39, art. 5, "Litter Control"; Austin Code of Ordinances, ch. 10-5, art. 3, "Prohibition on Litter"; San Antonio Code of Ordinances, § 29-3, "Depositing Litter, Trash and Waste Material"; Fort Worth Code of Ordinances, § 11A-27, "Littering Prohibited"; El Paso Code of Ordinances, § 9.04.670, "Litter and Illegal Dumping Prohibited."

<sup>\*\*</sup> For example, any municipal ordinance restricting or prohibiting single-use checkout bags must pass state and federal constitutional muster.

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Cinda Hitchcock  
The Woodlands GrassRoots Environmental Education Network

Darren Hodges  
Mayor Pro Tem, Fort Stockton

Steven Lanoux  
Port Aransas City Council

Lanham Lyne  
President Lyne Energy Partners  
Former State Representative, District 69  
Former Mayor Wichita Falls

Neil McQueen  
Vice Chair/Skip the Plastic Coordinator  
Texas Coastal Bend Chapter, Surfrider Foundation

Ellis Pickett  
Chairman, Surfrider Foundation Texas Upper Coast Chapter

Evelyn Remmert  
Landfill neighbor & rancher, Manor TX

Raul Rodriguez  
City Manager, Fort Stockton

Gil Saenz  
City Attorney, City of Freer

Robin Schneider  
Executive Director, Texas Campaign for the Environment

Doug Young  
City Attorney, City of Sunset Valley



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 29, 2014

The Honorable Dan Flynn  
Chair, Select Committee on Transparency in  
State Agency Operations  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768

Opinion No. GA-1078

Re: Whether section 361.0961 of the Texas  
Health and Safety Code prohibits municipalities  
from adopting ordinances that ban plastic bags  
(RQ-1189-GA)

Dear Representative Flynn:

You ask whether section 361.0961 of the Health and Safety Code prohibits municipalities from “enact[ing] bans on plastic bags and adopt[ing] fees on replacement bags.”<sup>1</sup> You point to nine Texas cities that have adopted such ordinances in recent years and question whether the ordinances are legal in light of section 361.0961. Request Letter at 1. Each of the nine ordinances differ to some extent in the specific requirements and prohibitions they impose and the types of businesses to which they apply.<sup>2</sup> Questions regarding construction of specific city ordinances are outside the purview of an attorney general opinion. Tex. Att’y Gen. Op. No. GA-0648 (2008) at 6–7. This office will, however, address the legal question of whether a certain type of ordinance conflicts with state law. Tex. Att’y Gen. Op. No. GA-0433 (2006) at 1. All the ordinances you cite prohibit businesses from providing single-use plastic bags to customers. Thus, while this opinion should not be read to construe the specific terms of a particular municipal ordinance, we can advise you about the general question whether state law prohibits a municipality from prohibiting businesses from providing single-use plastic bags to customers.

The cities that have adopted these ordinances include both home-rule and general-law cities. Neither a home-rule city nor a general-law city may adopt an ordinance that is inconsistent with the Texas Constitution or Texas statutes. TEX. CONST. art XI, § 5; *see* TEX. LOC. GOV’T CODE ANN. §§ 51.012, .032 (West 2008) (authorizing general-law cities to adopt ordinances not

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<sup>1</sup>Letter from Hon. Dan Flynn, House Select Comm. on Transparency in State Agency Operations, to Hon. Greg Abbott, Tex. Att’y Gen. at 1 (Feb. 27, 2014), <http://www.texasattorneygeneral.gov/opin> (“Request Letter”).

<sup>2</sup>*See* AUSTIN, TEX., ORDINANCES tit. 15, ch. 15-6, art. 7 (2012); BROWNSVILLE, TEX., ORDINANCES pt. II, subpt. A, ch. 46, art., II, §§ 46-47–46-51 (Sept. 20, 2010); FORT STOCKTON, TEX., ORDINANCES art. 1, §§ 12-8–12-11 (Aug. 23, 2011); FREER, TEX., ORDINANCES 2012-05, §§ 1–3 (Dec. 10, 2012); KERMIT, TEX., ORDINANCES 13-05, §§ 98-01–98.10 (2013); LAGUNA VISTA, TEX., ORDINANCES 2012-23 (Sept. 11, 2012); LAREDO, TEX., ORDINANCES pt. II, ch. 33, art. VIII, §§ 33-501–33-507 (Aug. 19, 2013); SO. PADRE ISLAND, TEX., ORDINANCES 10-38, §§ 12-30–12-30.3 (Jan. 19, 2011); SUNSET VALLEY, TEX., ORDINANCES §§ 93.60–93.63 (Feb. 19, 2013).

inconsistent with state law). “[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.” *Dallas Merch. 's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993) (citation omitted).

The statute about which you ask is found in chapter 361 of the Health and Safety Code, which is titled the “Solid Waste Disposal Act” (“the Act”). TEX. HEALTH & SAFETY CODE ANN. § 361.001 (West 2010). Section 361.0961 of the Act states, in relevant part:

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; [or]

...

- (3) assess a fee or deposit on the sale or use of a container or package.

*Id.* § 361.0961(a)(1), (3). Answering your question requires analyzing whether a single-use plastic bag is a “container or package” within the meaning of section 361.0961, and if so, whether the municipal ordinances prohibit single-use plastic bags for “solid waste management purposes.”

The Act does not define “container or package.”<sup>3</sup> Undefined terms in a statute are given their ordinary meaning unless a different or more precise definition is apparent from the term’s use in the statute’s context. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). The common understanding of the word “container” is a “receptacle for holding goods.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 269 (11th ed. 2003). Also relevant to the question is the common understanding of “bag,” which is a “flexible *container* that may be closed for holding, storing, or carrying something.” *Id.* at 91 (emphasis added). Based on the common understanding of these terms, a court is likely to conclude that a single-use plastic bag is a container within the meaning of section 361.0961.

Briefing submitted to this office argues that the phrase “container or package” as used in section 361.0961 is limited to only those containers or packages that are intended to store solid

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<sup>3</sup>The terms “container” and “package” are defined in unrelated contexts in other statutes, and some expressly include a “bag” or “plastic bags” in the definition, while others do not. *See, e.g.*, TEX. AGRIC. CODE ANN. § 141.001(5) (West 2004) (defining “container” to include, among other things, a bag or package in which commercial feed is packed); TEX. HEALTH & SAFETY CODE ANN. § 431.002(27) (West 2010) (defining “package” as “any container or wrapping in which a consumer commodity is enclosed . . .”). While definitions of words from unrelated statutes may sometimes be informative, these incongruities provide little guidance with regard to how the terms should be construed in chapter 361.



waste.<sup>4</sup> While the Legislature limited the application of the statute to ordinances, rules, or regulations adopted for solid waste management purposes, the plain language of section 361.0961 does not limit the types of containers or packages to which it applies. Furthermore, during the Legislature's debate on section 361.0961, the bill's sponsor explained that the bill was intended to prohibit municipalities from adopting rules about Styrofoam containers, suggesting that the language could apply to containers beyond those used to store solid waste. Debate on Tex. S.B. 963 on the Floor of the Senate, 73d Leg., R.S. (May 24, 1993) (digital recording available from Texas State Archives Comm'n); *see also* House Research Org., Bill Analysis, Tex. S.B. 963, 73d Leg., R.S. (1993) at 5 (explaining that opponents argue the bill would "prohibit a city from banning wasteful packaging or Styrofoam cups or imposing a bottle return fee"). While legislative history is often unreliable and is not determinative of our interpretation of section 361.0961, these relatively clear statements of legislative intent provide added support for the text-based construction of section 361.0961 adopted here. Construing the scope of "container" narrowly as suggested by some briefers would both depart from the statute's plain text and ignore the available legislative history.

Because a single-use plastic bag is likely a container under section 361.0961, it is necessary to analyze the purposes for which the municipal ordinances prohibit single-use plastic bags. In order for an ordinance to be prohibited by section 361.0961, the city must have adopted it "for solid waste management purposes." TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(1) (West 2010). "[S]olid waste" is defined in chapter 361 to include, among other items, "rubbish, [or] refuse." *Id.* § 361.003(35). "Rubbish" is in turn defined as "nonputrescible solid waste . . . that consists of," among other items, "plastics." *Id.* § 361.003(31). "Management" is defined as "the systematic control of the activities of generation, source separation, collection, handling, storage, transportation, processing, treatment, recovery, or disposal of solid waste." *Id.* § 361.003(18). It is conceivable that a city adopting an ordinance that prohibited single-use plastic bags would do so to control the generation of solid waste, which single-use plastic bags will most likely become. Other purposes may also exist for such an ordinance, however. For example, two of the ordinances you inquire about state that their purpose is the protection of animal life. *See* FREER, TEX., ORDINANCES 2012-05 (Dec. 10, 2012) ("there is a strong possibility that plastic bags . . . can end up in the ranch land, . . . and create . . . potential hazard to wildlife"); LAGUNA VISTA, TEX., ORDINANCES 2012-23 (Sept. 11, 2012) ("there is a strong possibility that plastic bags . . . create . . . potential hazard to marine life").

Determining whether a city adopted an ordinance for solid waste management purposes will require a factual inquiry into the intent of the governmental body. Such factual inquiries are beyond the scope of an attorney general opinion. Tex. Att'y Gen. Op. No. GA-0090 (2003) at 5 (determining intent is beyond the scope of an attorney general opinion). Thus, we cannot determine whether any specific ordinance is prohibited by section 361.0961 but can advise only

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<sup>4</sup>*See* Brief from Karen Kennard, City Attorney, City of Austin at 4 (Mar. 26, 2014); Brief from H. Abell, et. al. at 2 (Mar. 26, 2014) (briefs on file with Op. Comm.).

that section 361.0961 would likely prohibit a city ordinance adopted for solid waste management purposes that prohibited single-use plastic bags.

You also ask about the legality of a municipal ordinance that assesses “fees on replacement bags” under section 361.0961. Request Letter at 1. The plain language of subsection 361.0961(a)(3) prohibits a political subdivision from adopting an ordinance that “assess[es] a fee or deposit on the sale or use of a container or package.” TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(3) (West 2010). Unlike the language in subsection 361.0961(a)(1), the prohibition on fees or deposits is not limited to instances when the assessment is for solid waste management purposes. Because a court is likely to conclude that a bag is a container in the context of section 361.0961, a court would also likely conclude that a city is prohibited from assessing a fee on the sale or use of a replacement bag.<sup>5</sup>

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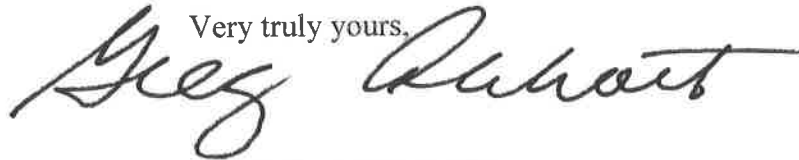
<sup>5</sup>Section 361.0961 applies only to “a local government or other political subdivision” and therefore does not impact the authority of a private business to, at its own choosing, charge a fee for the sale of a replacement bag. TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a) (West 2010).

S U M M A R Y

A court would likely conclude that a city ordinance prohibiting or restricting single-use plastic bags is prohibited by subsection 361.0961(a)(1) of the Health and Safety Code if the city adopted the ordinance for solid waste management purposes. Whether a specific city's single-use plastic bag ordinance was adopted for such purposes will require a factual inquiry that is beyond the scope of an attorney general opinion.

A court would likely conclude that section 361.0961(a)(3) prohibits a city from adopting an ordinance that assesses a fee on the sale or use of a single-use plastic bag.

Very truly yours,

A handwritten signature in black ink, appearing to read "Greg Abbott", written in a cursive style.

G R E G A B B O T T

Attorney General of Texas

DANIEL T. HODGE  
First Assistant Attorney General

JAMES D. BLACKLOCK  
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER  
Chair, Opinion Committee

Virginia K. Hoelscher  
Assistant Attorney General, Opinion Committee