

CAUSE No. D-1-GV-09-000916

Ex Parte
CITY OF FRIENDSWOOD

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IN THE DISTRICT COURT

419th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AMICUS BRIEF IN SUPPORT OF INTERESTED PARTIES

A. Identity of Amicus

1.01. Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) non-profit organization dedicated to maintaining, improving and defending the conditions for economic prosperity and free enterprise. AFPF is dedicated to defending the rights of taxpayers against the depredations of rapacious officials engaged in excessive and illegal taxation and spending, as in this case. The subject matter of this lawsuit is reasonably related to the core purposes of AFPF. This brief is filed in support of members of AFPF who are citizens and taxpayers in Friendswood, and on behalf of the taxpayers and citizens of Friendswood and Texas, in order to hold accountable the officials of the City of Friendswood.

B. Parties

2.01. The City of Friendswood, a Texas municipality, as represented by its attorneys, Vinson & Elkins, L.L.P., acting on behalf of the City Council and the Mayor.

2. 02. Interested parties,¹ the "Friendswood Five," citizens of the City of Friendswood, Janis Lowe, Kathy Rogers, Deborah Winters Chaney, Mel Austin, and Leslie Rocque, acting by and through the their attorney Jack McKinley.

C. Issues Presented

3. 01. The City of Friendswood has filed a request for bond against the Friendswood Five as interested parties, invoking Texas Government Code §1205.101. Serious questions arise as to the Constitutionality of the statute. As the Attorney General is already a party to this suit, and the Motion for Bond remains live despite the passing of the initial setting for a hearing on the motion, it is appropriate for the Court to consider the question of whether or not Texas Government Code §1205.101 runs afoul of the Texas Open Courts provision (TEX. CONST., Art. 1, §13)².

3. 02. The City of Friendswood proposes to use the funds provided by the Certificates of Obligation for a purpose expressly outlawed by the Statutes of the State of Texas, specifically by Texas Local Government Code §331.001(c)³, and in violation of the

¹ The "Friendswood Five" are "interested parties" as described by Texas Government Code, §1205.041(a).
Sec. 1205.041. NOTICE TO INTERESTED PARTIES. (a) The court in which an action under this chapter is brought shall, on receipt of the petition, immediately issue an order, in the form of a notice, directed to all persons who:

- (1) reside in the territory of the issuer;
- (2) own property located within the boundaries of the issuer;
- (3) are taxpayers of the issuer; or
- (4) have or claim a right, title, or interest in any property or money to be affected by a public security authorization or the issuance of the public securities.

² Sec. 13. **EXCESSIVE BAIL OR FINES; CRUEL AND UNUSUAL PUNISHMENT; REMEDY BY DUE COURSE OF LAW.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. *All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.*

(emphasis added.)

³ (c) Land acquired by a municipality under Subsection (b) may be situated inside or outside the municipality but *must be within the county in which the municipality is situated*, and land acquired by a county under Subsection (b) must be within the limits of the county. The land may be acquired in any size tract considered suitable by the governing body of the municipality or county.

Ordinances of City of Friendswood, §8.08⁴, and in violation of the Charter of the City of Friendswood, §2.04.⁵ As the Attorney General noted in his answer, home rule cities only possess those powers expressly granted in its charter which are not denied by either the statutes or the Constitution of the State of Texas. (*See Original Answer of Greg Abbott, Attorney General*, at 2-3 and *H.B. Zachry v. City of San Antonio*, 296 S.W.2d 299, 301 (Tex. Civ. App.—San Antonio 1956 (citing *Foster v. City of Waco*, 255 S.W. 1104 (Tex. 1923)), *aff'd on other grounds*, 305 S.W.2d 558 (Tex. 1957) “Stated negatively, a city’s failure to include in its charter a certain power, is a self-denial of the power.”). As the Attorney General notes, the legality of this proposed purchase is a “central legal question” in this case. That question must be resolved against the City, and in favor of its taxpayers and citizens.

3.03. The issuance of the certificates of obligation may be void because of self-dealing; to wit, one member of the city council that desires to issue these certificates is a self-described business partner of the primary beneficiary of the issuance of the

See also TEX. LOC. GOV'T CODE §331.001(a)-(b)(1)

Sec. 331.001. GENERAL AUTHORITY. (a) A municipality or county may improve land for park purposes and may operate and maintain parks. The authority to improve the land includes the authority to construct buildings, lay out and pave driveways and walks, construct ditches or lakes, and set out trees and shrubs.

(b) A municipality or county may by gift, devise, purchase, or eminent domain proceeding acquire:

(1) land and buildings to be used for public parks, playgrounds, or historical museums;

⁴ Sec. 8.08 Purchasing

All purchases made and contracts executed by the City shall be made in accordance with the requirements of the constitution and the statutes of the State of Texas.

⁵ Sec. 2.04. Streets and public property.

The City shall have exclusive dominion, control and jurisdiction in, upon, over and under the public streets, sidewalks, alleys, highways, public squares and public ways within the corporate limits of the City, and in, upon, over, and under all public property of the City. With respect to each and every public street, sidewalk, alley, highway, public square, public park or other public way within the corporate limits of the City, the City shall have the power to establish, maintain, improve, alter, abandon, or vacate the same; to regulate the use thereof including but not limited to the right to erect traffic signals, lights and signs

certificate, the owner of the Brazoria County land that is the intended target of the park acquisition money authorized by the certificates of obligation.

3.04. The issuance of the certificates of obligation may be void because the certificates of obligation purport to obligate the city to the same purchases as those proposed in a bond election in May of 2009, which bond election was resoundingly defeated by the voters of the City of Friendswood. The city may not issue certificates of obligations for obligations decisively rejected by the voters mere days before. To do so would vitiate every reasonable tenet of republican and democratic self-governance. The voters have spoken. The city officials cannot turn a deaf ear. As elected officials, they must obey the specific commands of the citizens.

3.05. The issuance of the certificates of obligation may be void for violation of the 1997 Charter Amendment that requires that all certificates of obligation may not create any obligation that may not be paid for out of **current tax revenues** without recourse to tax increases.⁶

thereon; and to abate and remove in a summary manner any encroachment thereon. The conveyance or lease or authorization of the conveyance or lease of any lands of the City shall be by ordinance.

⁶ Friendswood City Charter, §8.05(f)

“(f) Elections to authorize debt: Notwithstanding any other provision contained in this Section 8.05 to the contrary, *the council shall be prohibited* from incurring debt not payable from *then current revenues* unless a proposition therefore has been approved by the voters at a special election held for such purposes; provided, however, except where otherwise required by law, no election shall be required if any such debt is incurred for the purpose of constructing capital improvement or acquiring equipment or facilities necessary to provide *essential government services*. For the purposes hereof, *essential government services shall mean only* those services which preserve or protect public health and safety, and which shall be limited to, police, firefighting, emergency medical, potable water, sanitary sewage, solid waste disposal, surface water drainage, and maintenance of a network of streets and sidewalks. (emphasis added.)

D. Facts

4. 01. This litigation was begun on behalf of the Friendswood city council regarding its authority to issue certificates of obligation on or about May 22, 2009. No public vote authorizing this litigation appears in the public records of the City of Friendswood prior to that date. No public notice regarding this litigation appears in the public records of the City of Friendswood prior to that date. These proposed certificates of obligation, in the amount of \$11.3 million, include no less than \$3 million for park improvement, of which 2.57 million was for purchase of and improvements to the Brazoria County land—inside the City of Alvin.

4. 02. The City of Friendswood exists in parts of Harris County and parts of Galveston County. No part of the City of Friendswood extends into Brazoria County.

4. 03. This certificate of obligation proposal was put forward less than one month after voters had decisively rejected a similar bond proposal, including \$1.4 million in funds for the Brazoria County land.

E. The Unconstitutionality of Texas Government Code §1205.101

5. 01. The Constitutionality of the pre-codification version of TEXAS GOVERNMENT CODE §1205.101 was challenged on right of trial by jury (Art.I, Sec. 10, 15) grounds in 1982, and it was upheld.⁷

5. 02. Though some cases had been decided on the basis of the Open Courts provision prior to 1982, much of the development of law in that area has occurred since 1986, beginning with *Lecroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), which held that a \$40

“tax[] on the right to litigate that pay[s] for programs other than the judiciary—are unreasonable impositions on the state constitutional right of access to the courts.” Similarly, more than a hundred years ago, construing the same Constitutional open courts provision, the Texas Supreme Court held that “a party’s right to appeal to this court cannot be made to depend on his ability to give a bond.” *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303, 304 (1890).

5. 03. While there is a presumption of validity whenever the Legislature has enacted a statute,⁸ “[w]hen the Legislature has done that which the Bill of Rights forbids, then it becomes the duty of the judiciary to declare such enactments null and void.” *Satterfld v. Crown Cork & Seal Co., Inc.* 268 S.W.3d 290 (Tex.App.—Austin 2008, citing *Bronson v. Kinzie*, 42 U.S. 311, 1 How. 311 11L.Ed. 143 (1843), *Sturges v. Crowninshiled*, 17 U.S. 122, 4 Wheat. 122, 4 L.Ed. 529 (1819)).

5. 04. Given the Texas Supreme Court’s holding that a \$40 fee for non-judiciary support purposes was void, and that a party’s right to appeal cannot be conditioned on bond, the language of §1205.101, which gives the City of Friendswood in this case the authority to require a multi-million dollar bond before citizens may pursue litigation to protect their rights, it must be that §1205.101 violates the Texas Open Courts provision, and therefore “it becomes the duty of the judiciary to declare such enactments null and void.”

⁷ *Buckholts I.S.D. v. Glaser*, 632, S.W.2d 146 (Tex. 1982).

⁸ *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996).

F. The Ultra Vires nature of purchasing parkland outside the City limits

6. 01. The creation, maintenance, and control of a park, together with the exercise of city police and fire department control and services to such a park, is clearly a municipal function.⁹ While it is true that a city may, under some circumstances, purchase real property outside its city limits (e.g., for a municipal airport, *see* TEXAS TRANSPORTATION CODE, §22.074), it may not exercise control over property that is outside its extra-territorial jurisdiction (*see, e.g.,* TEXAS GOV'T CODE §29.003¹⁰.) As section 29.003 limits the judicial power of a municipality to its city limits and extra-territorial jurisdiction ("ETJ"), it is self-evident that the power of the municipality generally cannot exceed its ETJ. Though the City of Friendswood asserts that *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1986) provides contrary authority, the case is not on point. *Turtle Rock* is a platting case in which College Station demanded park dedication in exchange for subdivision plat approval. Needless to say, the subdivision in question was inside the relevant city limits. The parkland in question is not.

⁹ TEX. CIV. PRAC. & REM. CODE Sec. 101.0215. LIABILITY OF A MUNICIPALITY. (a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

(1) police and fire protection and control;

...
(13) parks and zoos;

(emphasis added.)

¹⁰ Sec. 29.003. JURISDICTION. (a) A municipal court, including a municipal court of record, shall have exclusive original jurisdiction within the municipality's territorial limits and property owned by the municipality located in the municipality's extraterritorial jurisdiction in all criminal cases that:

(1) arise under:

(A) the ordinances of the municipality; or

(B) a resolution, rule, or order of a joint board operating an airport under Section 22.074, Transportation Code;

6. 02. The Brazoria County property is outside the ETJ of Friendswood. The property is inside the Friendswood ISD, but as is often the case, the boundaries of the City and its eponymous school district are not coterminous.

6. 03. The City of Friendswood may not purchase and operate a park outside its city limits. See TEXAS LOCAL GOV'T CODE, §331.001(c), requiring that parkland acquired by a city be within its city limits, and Friendswood City Charter §2.04, granting the city the limited power to acquire and exercise sovereignty over land for parks when such land is “*within* the corporate limits of the city.” (emphasis added.) Even were the State not explicit in its limitation of authority, the doctrine of sovereignty necessarily limits any sovereign entity to sovereign (governmental) control of entities inside of its borders. Thus, Texas may not establish a Texas State Park in the Louisiana Bayous, and the United States may not establish a U.S. National Park in Accapulco. Similarly, Brazoria County may not establish a County Park in Friendswood, nor may Friendswood establish a city park outside its boundaries¹¹. To explicate the proposition is to expose its absurdity.

6. 04. The City of Friendswood relies on *Turtle Rock* language (citing *Lower Colorado River Authority v. City of San Marcos*, 523 S.W. 2d 641 (Tex. 1975) that “Home rule cities have ‘full power of self-government’ and ‘look to the acts of the legislature not for grants of power . . . but only for limitations of their powers.’” But even if we adopt, *arguendo*, City of Friendswood’s construction of this language, their argument fails, because the City of Friendswood seeks to exercise governmental control over an area *outside* its self-governing area. The people who exercise self-government in Brazoria

County and the City of Alvin are not the inhabitants or officials of Friendswood—they are the citizens of Brazoria County and the City of Alvin.

G. The Earnest Money Contract is likewise *Ultra vires*

7.01 As Tex. Loc. Gov't Code §331.001 makes clear, no city may purchase land in a county in which it is not located. Friendswood is located in Galveston County and Harris County. It is undisputed that the land the City wishes to purchase, as described by the Earnest Money contract, is in Brazoria County.¹² The Earnest Money contract is void *ab initio* as it is in violation of the statutes and public policy of the state of Texas. Q.E.D. The certificates of obligation the City government wishes to issue for this illegal purpose may not be issued under the Ordinances of the City of Friendswood §8.08. The facts recited above and the exhibits attached to the previous filings in this case show that the contract is unenforceable against the City of Friendswood, though of course the contracting party may pursue damages against those individuals responsible for misleading them about the legality of the contract.

7.02 Though amicus AFPP expresses no view on the ultimate validity of such claims, AFPP denies that any such person could have been acting in “official capacity,” since there is no “official capacity” to induce any person to agree to a void contract (barring a

¹¹ except in the county in which is located. See Texas Local Gov't Code §315.001.

¹² See, e.g., City of Friendswood's First Amended Petition at 8, Section D. “The proceeds of the certificates will be used by the City . . . for acquisition of certain park land in Brazoria County, Texas.” The Earnest Money Contract also identifies the land as being in Brazoria County. The September 23, 2009 Earnest Money Contract commits the City to pay \$2.57 million for the Brazoria County property. The Council had unanimously authorized up to \$2.0 million the day before. The closing date identified in the Contract was set for May 31, 2009. At a meeting the day after the Mayor signed the contract at nearly 30% over the amount approved by the unanimous council, the council, based a motion made by Councilman Barker, unanimously approved the dramatically inflated price which the Mayor had committed the City to without authorization. The title commitment performed 10 days later showed that the purported seller owned only half the Brazoria County land he had committed to sell to the city.

law enforcement "sting" operation, such as a "hit" murder-for-hire contract). AFPP therefore denies that any such person is eligible for litigation defense at taxpayer's expense.

H. Certificates of obligation voidable because of self-dealing

8.01. City Councilman Mike Barker is a long-time business associate of the owner and would-be seller of the Brazoria County property, a fact he did not publicly acknowledge until June 11, 2009.¹³ Despite this conflict of interest, Barker failed to recuse himself from any City Council actions regarding the Brazoria County property. Moreover, beginning no later than August 19, 2008, Barker was negotiator with the Brazoria County landowner, instead of the City Attorney.

8.02. The conflict of interest, and the failure to disclose that conflict, may violate state and city conflict of interest laws, including Texas Local Gov't Code §171.001 *et. seq.*¹⁴ and Friendswood City Code § 11.03¹⁵. Furthermore, because the votes and participation

¹³ Barker first revealed his conflict of interest at a public meeting on June 11, 2009—more than two weeks after this litigation was commenced by the City of Friendswood government, represented by Vinson & Elkins, L.L.P. (see <http://youtube.com/watch?v=39cjlQfG6cs>)

¹⁴ Sec. 171.004. AFFIDAVIT AND ABSTENTION FROM VOTING REQUIRED. (a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

¹⁵ Sec. 11.03. Personal financial interest.

No member of the Council or other Officer or Employee of the City shall have a pecuniary interest in any contract, the expense, price, or consideration of which is paid from the City treasury, or have a pecuniary interest in any matter or item requiring the approval or consent of the City, unless in compliance with

in discussion of these matters may have made the passage of such certificates of obligation or purchases possible, and those certificates of obligation and purchases may not have been possible in the absence of Mr. Barker's participation, those actions by the City of Friendswood government may be voidable.¹⁶ Furthermore, Mr. Barker's participation in these activities may be a criminal offense.¹⁷

I. Certificates of obligation void because of purported obligation of the city to the same purchases as those proposed in a defeated bond election in May of 2009

9.01. The City of Friendswood submitted to the voters a bond proposal on May 9, 2009.¹⁸ The voters overwhelmingly defeated that proposition.¹⁹

9.02. The defeated bond proposal included at least \$1.4 million for the Brazoria County property. The proposed certificates of obligation include \$2.57 million in funds for the Brazoria County property. The relationship between the defeated proposition and the certificates of obligation proposed two weeks later is painfully obvious, and, of course, in violation of the relevant state law.²⁰

applicable laws of the State of Texas governing conflicts of interest.
(Res. No. R2002-10, § 7, 2-18-2002, election 5-4-2002)

¹⁶ Sec. 171.006. EFFECT OF VIOLATION OF CHAPTER. The finding by a court of a violation under this chapter does not render an action of the governing body voidable unless the measure that was the subject of an action involving a conflict of interest would not have passed the governing body without the vote of the person who violated the chapter.

¹⁷ TEXAS LOCAL GOV'T CODE § 171.003(a); *see also Walk v. State*, 841 S.W.2d 430 (Tex. App.-Corpus Christi 1992, writ ref'd) (discussing "knowing" violation as well as other issues involved in criminal prosecution under chapter 171 of Local Government Code).

¹⁸ There were two bonds on the ballot. Proposition One called for expenditure of \$3.2 million on parks and recreational facilities. Proposition Two called for \$6.5 million for a library and civic center. Both were defeated.

¹⁹ The margin was 61%-39%. *See* <http://galvestondailynews.com/story.lasso?ecwd=bc9303ae80376ace>.

²⁰ *Inter alia*, TEXAS GOV'T CODE § 1201.005, 1202.003(c), 1205.024(3), (8).

J. Certificates of obligation void for violation of the 1997 Charter Amendment

10.01. The proposed certificates of obligation violate the provisions of the 1997 Charter Amendment 14, incorporated into the Charter as subsection (f) of Section 8.05 of Article VIII. Subsection (f) provides "*the council shall be prohibited from incurring debt not payable from then current revenues unless a proposition therefore has been approved by the voters at a special election held for such purposes.*" An exception is provided that does not apply to parks. The debt must be "payable"—that is, not merely serviceable as interest-only payments but payable meaning principal must be paid. The maximum allowable debt service under the Texas Local Government Code, Section 1201.022, is 40 years. The proposed certificates of obligation cannot be paid under "current revenues." Amicus asks the Court to note the plain and literal language here is quite restrictive—it does not state "current revenue rates," or "*projected revenues under current revenue rates*"—it says "current revenues." The city must, for the purposes of complying with subsection (f), therefore, assume static revenues, and prove that the debt incurred can be paid from current revenues. Under current revenues, the city cannot pay this debt.

10.02. It is possible that the city could pay this debt in the future under any number of reasonable scenarios, including but not limited to a tax increase to pay off this debt. The people of Friendswood, however, in the exercise of the sovereignty recognized by Article I, Section 2 of the Texas Constitution²¹, have declined to grant such flexibility in funding for government acquisitions and expenditures to their elected representatives without

²¹ **Sec. 2. INHERENT POLITICAL POWER; REPUBLICAN FORM OF GOVERNMENT.** All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

their express approval in a bond election. This court must heed that exercise of sovereign power.

K. Prayer

11.01 For these reasons, amicus Americans for Prosperity requests that the Court DENY the request of the City of Friendswood for permission to issue the aforementioned certificates of obligation which are the subject of this litigation, find that TEXAS GOVERNMENT CODE §1205.101 violates Texans' Constitutional right to open courts (Art.I, Sec. 13) and grant to interested parties all relief to which they are justly entitled.

Respectfully submitted,

By: /s/
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been sent via fax to counsel for the City of Friendswood, on July 9, 2009, to:

Patrick W. Mizell
Michael Marin
Deboarh C. Milner
Vinson & Elkins, L.L.P.
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FAX (713) 615-5912
Houston, Texas 77002

I hereby certify that a true and correct copy of the foregoing document has been sent via fax to counsel for the interested parties, the Friendswood Five, on July 9, 2009, to:

Jack McKinley
740 Bering Drive, Suite 600
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I hereby certify that a true and correct copy of the foregoing document has been sent via fax to counsel for the state of Texas, the Attorney General, on July 9, 2009, to:

Leslie Brock
Assistant Attorney General
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/s/

David Rogers