

Vinson & Elkins

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June 17, 2009

Via Certified Mail

Deborah Winters Chaney
18100 Upper Bay Road
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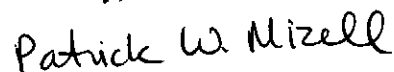
1008 Applewood Dr.
Friendswood, TX 77546-5202

Re: *Ex Parte City of Friendswood*, No. D-1-GV-09-000916, in the District Court of
Travis County, Texas, 419th Judicial District

Dear Ms. Chaney:

Please find enclosed true and correct copies of the City of Friendswood's Motion for
Security, which was filed with the court today, and the signed Order to Show Cause.

Sincerely,



Patrick W. Mizell

Enclosures

EX PARTE	§	IN THE DISTRICT COURT
	§	
CITY OF FRIENDSWOOD	§	TRAVIS COUNTY, TEXAS
	§	
	§	419th JUDICIAL DISTRICT

CITY OF FRIENDSWOOD’S MOTION FOR SECURITY

The City of Friendswood (the “City” or “Friendswood”) submits its Motion for Security.

I.

INTRODUCTION

The City filed this lawsuit pursuant to the Expedited Declaratory Judgment Act, codified at Chapter 1205 of the Texas Government Code, to validate certain certificates of obligation (the “Certificates”) that it proposes to issue for the purpose of funding (1) necessary improvements to the City Animal Control Center and the City’s Record Retention Center, (2) the construction and rehabilitation of City streets, and (3) the purchase of park land in Alvin, Texas pursuant to its home rule authority. The City also asked the Court to declare that these proposed expenditures are legal and valid.

This motion could not be filed until an intervenor or opposing party appeared. On June 15, 2009, five interested parties, Janis Lowe, Kathy Rogers, Deborah Winters Chaney, Mel Austin, and Leslie Roque, attended the trial and stated their names for the record. Now that opposing parties have come forward,¹ the City hereby requests a show cause order be signed by

¹ Section § 1205.062 of the Expedited Declaratory Judgment Act permits interested parties to intervene by one of two methods: “filing an answer with the court at or before the time set for trial under Section 1205.041” or intervening after the trial date with leave of court. The interested parties did not file an answer before the time set for trial, which was June 15, 2009. The interested parties also have not sought leave of court to intervene, stated that they intend to intervene, or taken any steps to formally intervene or otherwise join in this lawsuit. Nonetheless, the City files this motion out of an abundance of caution. The City does not waive any defenses it may have related to improper intervention or joinder.

the Court, pursuant to Section 1205.101, and the matter be set for hearing no earlier than 5 days after the date the order is signed and no later than 10 days after the date the order is signed, in accordance with the statute.

II.

ARGUMENT AND AUTHORITIES

A. **The Provisions of the Expedited Declaratory Judgment Act Strongly Favor a Bond.**

The Motion for Security -- Section 1205.101 of the Expedited Declaratory Judgment Act permits the City to

file a motion with the court for an order that any opposing party or intervenor . . . be dismissed unless that person posts a bond with sufficient surety, approved by the court, and payable to the issuer for any damage or cost that may occur because of the delay caused by the continued participation of the opposing party or intervenor in the action if the issuer finally prevails and obtains substantially the judgment requested in its petition.

The Court's Standard and the Intervenor's Burden of Proof – Section 1205.102 of the Expedited Declaratory Judgment Act provides that the “court *shall grant* an issuer’s motion for security under Section 1205.101 *unless, at the hearing on the motion, the opposing party or intervenor establishes that the person is entitled to a temporary injunction against the issuance of the public securities*” (emphasis added). Thus, Section 1205.102 mandates the granting of the motion for security unless the opposing party or intervenor can prove that she would be entitled to a temporary injunction against the issuance of the public securities. *See, e.g., See also Charleston v. Waller Indep. Sch. Dist.*, 244 S.W.3d 555, 561-62 (Tex. App.—Houston [1st Dist.] 2007, mand. denied); *In re Talco-Bogata Consolidated Indep. Sch. Dist. Bond Election*, 994 S.W.2d 343, 345 (Tex. App.—Texarkana 1999, no pet.). As explained in *Talco-Bogata*, the temporary injunction standard requires the opposing party or intervenor to “establish a probable right on final trial to the relief sought” by the opposing party or intervenor. *Id.* at 347. In other

words, as in a temporary injunction hearing, the intervenor must prove she is likely to succeed on the merits. The temporary injunction standard further requires the intervenor to show probable, imminent, and irreparable injury. *See, e.g., Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

The Amount of the Bond -- Section 1205.103 of the Expedited Declaratory Judgment

Act provides that:

[the] bond must be in an amount . . . sufficient to cover any damage or cost, including an anticipated increase in interest rates or in a construction or financing cost, that may occur because of the delay caused by the continued participation of the opposing party or intervenor in the acts if the issuer finally prevails and obtains substantially the judgment requested in its petition.

As recognized by the Expedited Declaratory Judgment Act and by the Texas Supreme Court, a citizen's continued involvement in litigation holds up the issuance of public securities and can cost the public substantial amounts of money, including increased construction costs and increased financing costs. *See Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 149 (Tex. 1982). As the Texas Supreme Court recognized in *Buckholts*, it was reasonable for the legislature to place the burden of increased costs and damages on the person contesting the bonds (as opposed to the public and other taxpayers), if the challenger is unsuccessful in the suit. *See id.* at 149 (finding that the bond requirement did not deny any right of due process or right to a jury trial). Someone must bear the risk of damages and additional costs, and the legislature decided that the opposing party or intervenor (not the public) should bear that risk.

Dismissal If Intervenor Does Not Post Bond -- Section 1205.104 of the Expedited Declaratory Judgment Act provides that "the court shall dismiss an opposing party or intervenor who does not file a required bond before the 11th day after the date of entry of the order setting the amount of the bond." *See also Charleston*, 244 S.W.3d at 563 (affirming dismissal for

failure to post security as ordered); *Rio Grande Valley Sugar Growers, Inc. v. Attorney General of Texas*, 670 S.W.2d 399, 401-02 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

B. This Court Should Require the Intervenor to Post a Bond.

The opposing parties can avoid the bond only by proving that they are likely to succeed on the merits of the case. As explained in detail in the City's Amended Petition and supporting evidence, the City has the authority to issue the Certificates; the form of the Certificates is legal and valid; and the City has the authority to use the funds from the Certificates for the proposed expenditures. The City will not repeat here all of its arguments on the underlying merits, but will instead refer to, and incorporate herein, its Amended Petition and supporting evidence presented to the Court.

In addition to being unable to show likelihood of success, the opposing parties cannot satisfy any of the other applicable temporary injunction requirements. Specifically, the opposing parties are unable to show probable, imminent, and irreparable injury to them.

At the show-cause hearing, the City will provide the Court with evidence showing damages, including costs associated with the contractual right of the seller of the ball parks in question to reimbursement for improvements and increased costs to the other public projects as a result of the delay. Pursuant to Section 1205.103 of the Expedited Declaratory Judgment Act, the total damages and costs "that may occur because of the delay caused by the continued participation of the opposing party or intervenor" will exceed more than a million dollars.

REQUESTED RELIEF

The City respectfully prays that this Court grant its motion and enter an order requiring the opposing parties to post a bond.

Respectfully submitted,

/s/ Patrick W. Mizell

Patrick W. Mizell

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Michael Marin

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ATTORNEYS FOR CITY OF FRIENDSWOOD

CERTIFICATE OF SERVICE

I certify that a true copy of the City's Motion for Security was served on Janis Lowe, Kathy Rogers, Deborah Winters Chaney, Mel Austin, and Leslie Roque by certified mail and on the Attorney General of Texas by electronic mail on this the 17th day of June, 2009.

/s/ Patrick W. Mizell

Patrick W. Mizell

JUN 17 2009 TH

At 2:25 P.M.
Amalia Rodriguez-Mendoza, Clerk

NO. D-1-GV-09-000916

EX PARTE

CITY OF FRIENDSWOOD

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IN THE DISTRICT COURT

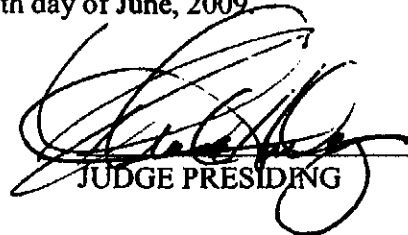
TRAVIS COUNTY, TEXAS

419th JUDICIAL DISTRICT

ORDER TO SHOW CAUSE

Now before the Court is the City of Friendswood's Motion for Security. After reviewing the pleadings, motion, and applicable law, and hearing the arguments of counsel, the Court ORDERS that all intervenors and all other interested persons must appear on the 29th day of June, 2009, at 9:00 a.m. and show cause why they are entitled to a temporary injunction against the issuance of the proposed certificates of obligation.

SO ORDERED AND ADJUDGED on this 15th day of June, 2009.


JUDGE PRESIDING