

NO. D-1-GV-09-000916

EX PARTE

CITY OF FRIENDSWOOD

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, T E X A S

419TH JUDICIAL DISTRICT

FRIENDSWOOD 5's MOTION FOR LEAVE TO INTERVENE

TO THE HONORABLE COURT:

Janis Lowe, Deborah Winters, Mel Austin, Kathy Rogers and Leslie Roque (“the Friendswood 5”), residents of and real property owners in the City of Friendswood (“plaintiff” or “the city”), and interested parties, file this precautionary Move for Leave to Intervene in this proceeding (via their June 29, 2009 answer to the city’s First Amended Petition) because the city contends their answer was late and that they now require the court’s permission to intervene.

AN ANSWER HAS BEEN ON FILE FOR 2 WEEKS, AND IS NOT LATE

1. The Friendswood 5 filed their answer to the city’s First Amended Petition on June 29, 2009. This court had set a hearing on June 15, 2009 at which any interested parties could show cause why the city’s requested declaratory relief should not be granted. The Friendswood 5 appeared in this court in person on June 15, in response to the court’s order. A transcript of that hearing is attached as Exhibit A. The court took the appearances of lawyers and interested parties, and there followed this discussion:

THE COURT: All right, is there anything else that we need to address with the attorneys here? Have you all discussed a reset date for the actual hearing?

MR. MIZELL: The lawyers have talked about a reset date. I have not spoken with—to Ms. Lowe or the citizens. The date we were looking at was July 13th, and I don’t know if that works from you all’s standpoint. But we would come back for a full

trial on July 13th.

THE COURT: And that would be at 9:00 o'clock?

MR. MIZELL: Yeah, that time wouldn't be a statutory time, so you could do it whenever the Court wants.

The court then ordered that the parties return on July 13 for the hearing/trial.

2. As is apparent from the hearing transcript, the city made no complaint about the July 13, 2009 setting for the hearing. It did not claim the Friendswood 5's participation would be late, and therefore not permitted, because their appearance on June 15 in open court preceded their answer. Indeed, it is apparent that counsel had discussed resetting the hearing before the city's counsel even talked to the Friendswood 5. It is clear the court contemplated the Friendswood 5 filing a responsive pleading, given its statement (apparently to them) that "I'm assuming that you may want to file your petitions to intervene between now and then, okay." (Ex. A, p. 6, lines 2-4) (all references are to internal pagination).

THE JUNE 15 PROCEEDING WAS NOT THE START OF A TRIAL

3. The city apparently bases its allegation of a tardy answer upon its request that the court adjourn the hearing rather than reset it. (Ex. A, p. 6, lines 5-8). Counsel for the city did not give the court the reason for that request, but the reason now appears. The city apparently means to claim the parties were actually put to trial on June 15, and trial has simply been adjourned until July 13. The court's accession to requested use of the word "adjourn" came without the city having stated the reason or intended effect of its word choice, and without the court having referred to what was being adjourned on June 15 as a "trial." The city inducing the court to use its label for the resetting does not the reality of what the parties and the court did on June 15. The parties were not put to trial. The court did not ask for announcements. No lawyer or party made an announcement of

“ready” or “not ready.” No witnesses were identified or sworn. No exhibits were identified or marked. There were no pre-trial proceedings at all.

4. The court, apparently addressing the Friendswood 5, referred to the need to file “your petitions to intervene” between June 15 and July 13. There was no discussion of the applicable statutes and Rules of Civil Procedure in court on June 15, so there is no reason to believe the court was distinguishing between an intervention and an answer. The court may not have realized at the moment of its statement that (a) the city’s First Amended Petition for an expedited declaratory judgment automatically made parties of all persons in the position of the Friendswood 5 (citizens of Friendswood who own real property in the city and pay taxes) under Texas Gov’t Code §§1205.041(a) and 1205.044; (b) such interested parties can, under Texas Govt’ Code §1205.062, appear by filing a petition in intervention *or* an answer; and (c) the Friendswood 5 are not “intervening” in someone else’s lawsuit, but are statutory parties to this lawsuit as members of a class of defendants under Texas Govt’ Code §1205.023.

5. The Friendswood 5 deny they have any need to intervene, and note that if they need to do so they can do so as a matter of right under §1205.062(2) until after “the trial date.” The “trial date” is when a trial starts. No trial has started; the court has not even asked for “ready” announcements.

REQUEST FOR LEAVE TO INTERVENE, AS A PRECAUTIONARY MEASURE

6. This motion is filed as a precautionary measure, given the city’s position (stated in its Trial Brief) that persons appearing before the court in response to the city’s First Amended Petition are “purported intervenors.” Granting this motion, and treating the Friendswood 5’s June 29 answer as the permitted intervention, confirms the legitimacy of their citizen participation as invited by their

city.

7. There is no prejudice to the city in allowing the answer (or treating it as an “answer in intervention”) of the Friendswood 5. The city has known of their appearance by name since June 15 and has known of their intended participation in the July 13 hearing since that date. The city has known their stated legal defenses since their June 29 answer. The city stated no objections to its citizens’ appearance or the court’s declaration that they needed to file a responsive pleading before July 13. The city has waived any objection to the alleged tardiness of the Friendswood 5's answer and any claim that they now require leave of court for an intervention (as though they were never parties, and were put to trial). Still, granting this motion for leave to allow the June 29 answer as an “answer in intervention” is important because the court’s permission eliminates any argument the city might otherwise continue to make against its own citizens’ participation in a declaratory judgment lawsuit to which their city has summoned them.

CONCLUSION AND PRAYER

The Friendswood 5, citizens Janis Lowe, Deborah Winters , Mel Austin, Kathy Rogers and Leslie Roque, therefore pray that the court grant this Motion for Leave to Intervene, treat the June 29 answer of the Friendswood 5 as an “answer in intervention” in addition to a routine answer, and for such other and further relief and orders to which the Friendswood 5 may be entitled at law or in equity.

Respectfully submitted,

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