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CITY OF FRIENDSWOOD

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, T E X A S

419TH JUDICIAL DISTRICT

**TRIAL BRIEF FROM THE FRIENDSWOOD 5  
REGARDING PROPOSED DECLARATORY RELIEF**

TO THE HONORABLE COURT:

Janis Lowe, Deborah Winters Chaney, Mel Austin, Kathy Rogers and Leslie Roque (“the Friendswood 5”) respond to the issues raised and the briefing included in the First Amended Petition (“Petition”) of the city of Friendswood (“the City”) by showing that the Texas Legislature has explicitly limited municipal acquisition of park land and playgrounds to land “within the county in which the municipality is situated,” and the statutes and precedent by the City in part III.C. of its Petition do not indicate otherwise.

**SUMMARY OF ARGUMENT**

The City seeks a declaratory judgment that it has the power to purchase land in Brazoria County for use as its own municipal park or sports playground, although the city itself is located in Galveston County and Harris County. The issue is the applicability of Texas Local Government Code §331.001(c) to the City. The City is a municipality as defined in section 1.005(3) of the Code.<sup>1</sup> It therefore cannot acquire land outside its home county, for use as a park or playground, unless §331.001 is construed to apply only to a “general law” municipality (and a county) rather than a “home rule” municipality. This court should give effect to the Legislature’s rational choice to limit the park-acquisition powers of a

<sup>1</sup> All references to “the Code” are to the Texas Local Government Code, unless otherwise specified.

“municipality” (defined to include *all* municipalities) to land within the county in which it is situated.

#### **THESE INTERESTED PARTIES**

The Friendswood 5 are before the court in response to the City’s summons to all interested parties who might wish to appear and show cause why the City should not receive the declaratory relief it seeks: endorsement of its planned debt, in part to acquire land in another county for use as a park or playground. Texas Government Code §1205.041(a) gives each of the Friendswood 5 the status of an interested party. Each resides in, owns land in, and is a taxpayer in the City, and each is affected by the City’s proposed actions and the court’s possible rulings.

#### **LOCAL GOVERNMENT CODE §331.001**

The Texas Local Government Code, applicable to cities and counties, makes constant reference to the powers of a “municipality,” and defines that word in §1.005(3) to include a “general-law municipality, home-rule municipality, or special-law municipality.” The City, throughout its Petition, trumpets its status as a home rule municipality whose existence is authorized by Article XI, Section 5 of the Texas Constitution. The City’s constitutional roots do not elevate it above general law cities when considering the effect of a legislative prohibition. Home rule cities are special cases only in their lack of need for legislative authorization—a point not in issue here. The very constitutional provision that grants the city its existence also specifies that its ordinances cannot be inconsistent with the “general laws enacted by the Legislature of this State.” The City is subject to all provisions of the Local Government Code that apply to a “municipality,” except where the Code singles out home rule municipalities for different treatment.

§331.001, captioned “General Authority,” is not one of the places in which the Code distinguishes between home rule and general-law municipalities. §331.001 appears in Title 10 (“Parks and Other

Recreational and Cultural Resources”), Subtitle C (“Parks and Other Recreational and Cultural Resources and Provisions Applying to More Than One Type of Local Government”), Chapter 331 (“Municipal and County Authority to Acquire and Maintain Parks, Museums and Historic Sites”). Despite the structure and headings of Title 10 of the Code, the City fancies itself exempt from limitations that are directed to every “municipality,” as defined (and also to every county).

§331.001(a) is a grant of general authority for a municipality or county to “improve land for park purposes” and “operate and maintain parks.” §331.001(b) grants municipalities and counties the power to acquire, “by gift, devise, purchase, or imminent domain proceeding . . . land and buildings to be used for public parks, playgrounds, or historical museums.”

§331.001(c) declares the limitation at the heart of this dispute: “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.” Likewise, land acquired by a county for use as a park must be within the county. This provision could hardly have a more clear meaning. The City of Friendswood is “a municipality” that admittedly proposes to acquire land in Brazoria County, outside the county of its own location (Harris/Galveston County). The land is admittedly to be used as a public park or playground, and the City proposes to purchase it, bringing the transaction within the plain meaning of §331.001(c).

#### **IS §331.001 ONLY A GRANT OF AUTHORITY, OR ALSO A LIMITATION OF AUTHORITY?**

Given the undisputed facts and the plain meaning of §331.001, the City can only argue that §331.001 is a grant of authority for counties in general-law municipalities, and its restrictions apply only to them—not to home rule cities. That position is inconsistent with plain meaning and the structure and content of the Local Government Code, and is not supported by the precedent the city cites at pages 7-8 of its Petition. First, as indicated above, §1.005 defines “municipality” to include a home rule

municipality. Thus, when §331.001(c) states that “land acquired by a municipality under Subsection (b) . . . must be within the county in which the municipality is situated,” it is talking about the City of Friendswood and every other home rule city, no less than counties and general-law cities.

The City offers no rationale for two propositions implicit in its position: (1) that the existence of a home rule city is more rooted in the Texas Constitution than is the existence of a county; and (2) that a home rule city is less subject to legislative proscription than is a county. Counties are typically larger governmental units, with much broader jurisdiction than cities of any type. It would be a strange choice by the Legislature to forbid counties from purchasing out-of-county park land, but to allow cities to do so. §331.001(c) indicates the Legislature has made the opposite of so strange a choice, as expected.

Neither does the City indicate why the Legislature, after having carefully defined “municipality” to include home rule cities, would fail to differentiate home rule cities from other cities in §331.001 if it intended that its prohibition of out-of-county park land acquisitions apply only to counties and general law cities. When the Legislature intends to treat home rule municipalities distinctly from other local governments, it knows how to do so, as shown in Subchapter E (“Provisions Applicable to Home-Rule Municipality”) in Title 2 of the Local Government Code. Section 51.072 (“Authority of Local Self-Government”) in that subchapter states what *City of College Station* holds: “The grant of powers to the municipality by this Code does not prevent, by implication or otherwise, the municipality from exercising the authority incident to local self-government.” *See also* §306.001 of the Code (Chapter 306, regarding park boards and bonds, applies only to home rule municipalities).

It is true, as both *City of College Station* and the City of Friendswood say, that a home rule city’s authority to act does not depend upon provisions such as §331.001. The City’s authority to act is nevertheless circumscribed by legislative prohibitions such as §331.001(c). The alternative would leave

cities with more than their maximum possible extra-territorial reach—and with out-of-county land holdings that even counties cannot have.

### THE CITY’S CITATIONS TO PRECEDENT DO NOT SUPPORT ITS POSITION

The City’s interpretation of §331.001 is not only inconsistent with plain meaning and the structure of the Code, but is also unsupported by the precedent the City offers to justify its purchase of park land in another county. The City begins with general propositions about which there is no disagreement—that the home rule city has state-level powers to the extent not forbidden by the Legislature, and such legislation must be “unmistakably clear” in limiting the city’s power. *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998); *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975). Saying that park land “must be within the county in which the municipality is situated” satisfies that requirement, as a matter of plain English.

The high court made clear in *Proctor* and prior decisions that municipalities (including home rule cities) are “agencies of the state, and subject to state control.” 972 S.W.2d at 734. Article XI, §5 of the Texas Constitution confirms that, forbidding ordinances inconsistent with state laws. The Texas Supreme Court also held, in *Lower Colorado River Authority*, that the powers of home rule cities are limited by their charters, in addition to the Constitution and enactments by the Legislature. 523 S.W.2d at 644.<sup>2</sup> Further, either legislation or a City Charter may limit the power of a home rule city by “either an express

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<sup>2</sup> This is particularly relevant to the City’s request that the court approve its issuance of Certificate of Obligation—not approved by the voters—to fund the acquisition of park land in another county and other public works projects the voters have specifically *rejected* in an election. The City Charter can be found on the City’s website, and at <http://www.municode.com/resources/gateway.asp?pid=13883&sid=43>. The Friendswood 5 ask the court to take judicial notice of it. §8.05(f) forbids the issuance of debt not payable from current revenues, absent an emergency or urgent public necessity, unless approved by a vote of the citizens of Friendswood. No such vote has been obtained or sought for debt funding of the Brazoria County park land and other projects proposed in the City’s Petition. The purchase of land in another county for a park and/or playground is not an emergency or urgent public necessity, however vital it seems to be to council members.

limitation or one arising by implication.” *Id.* at 645.

The City, in order to legitimize its planned outpost in Brazoria County, must establish that §331.001 is only a grant of authority intended for general law municipalities and counties, without any limitation applicable to a home rule municipality. The closest it comes to precedent in support of that argument is *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984), which it characterizes as holding that the predecessor of §331.001 “did not limit the power of home rule cities to acquire park land.” (Pet., p. 8). That description misses the essence of the case.

The issue in *City of College Station* was not the City’s authority to acquire park land at all, much less to do so in another county. The issue was whether the city’s acquisition of park land could be done on the cheap by expropriating (requiring dedication of) a small part of each subdivision developed within its borders, for use as a city park. The developer contested the dedication on the basis that the city was taking private land for public use without adequate compensation, in violation of Art. I, §17 of the Texas Constitution. The city said it was engaged in a valid exercise of its police power—a zero-cost act. The court of appeals ruled that the city ordinance requiring dedication of a part of each subdivision for use as a park was inconsistent with Art. 6081e, Tex. Rev. Civ. Stat. (which, like §331.001 of the Code, stated options for park acquisition). The court of appeals held the city could only acquire park land consistent with that statute, and thus not via its police power (which was not mentioned in the statute). The supreme court reversed because College Station, as a home rule city, had authority to acquire a park pursuant to its police power unless the Legislature had clearly indicated otherwise—which it had not.

The situation presented here is entirely distinct from the one before the court in *City of College Station*. The Friendswood 5 do not seek to limit their city’s powers to those enumerated in a statute, as was the case in *City of College Station*. Instead, the Friendswood 5 invoke a statutory prohibition. Here

the law forbids a “municipality” (defined to include a home rule city) purchasing land in another county. *City of College Station* holds that a home rule city does not require legislative authorization to enact a park land dedication ordinance.

The City also quotes the court’s statement in *City of College Station* that the predecessor of §331.001 “serves as a grant of specific power to” counties and general law cities, and does not “unmistakably” limit the power of home rule cities. (Pet., p. 8). That was clearly true on the facts before the court, because nothing in the statute so much as hints at restricting a home rule city’s exercise of its police power. *City of College Station* is easily harmonized with rejection of the City’s plea to endorse its purchase of park land in another county. Here the statute specifically prohibits that act—by any city.

**CERTIFICATES OF OBLIGATION ARE DEBT, SO AND REQUIRE VOTER  
APPROVAL, ACCORDING TO THE CITY CHARTER**

The City seeks a judgment declaring that it can validly issue certificates of obligation to fund certain purchases and/or public works, including but not limited to its intended outpost in Brazoria County. It correctly points out that the Certificate of Obligation Act (“the CO Act”) broadly grants municipalities the opportunity to incur debt without an election, yet the City’s Charter is very specific in prohibiting the City Council “from incurring debt not payable from then-current revenues unless a proposition therefor has been approved by the voters at a Special Election held for such purpose.” FRIENDSWOOD, TEXAS, CITY CHARTER §8.05(f)(2008). The City invokes the CO Act and its home rule status as authority to embrace debt without regard to its charter, although the charter is the City’s governing document and a bond of trust with citizens. The City in essence says the people, even through the City Charter, cannot stop determined spenders (while in office) from fulfilling their wish lists on the

people's credit without having obtained the people's required approval.<sup>3</sup>

The Certificate of Obligation Act is not so useful to the City as it says. The CO Act gives cities an end-around their voters for debt issuance, but only to the extent a city's governing documents allow it to exercise such powers. That typically occurs, for home rule cities, via charter provisions stating that the city can act to the limits of home rule authority. The City of Friendswood's Charter does not do that.

To the contrary, the City has constrained its home rule authority as follows:

Sec. 2.01. General powers.

*Except as otherwise specifically provided in this Charter, the City shall have all powers possible for a home rule City to have under the Constitution and laws of the State of Texas as fully and completely as though they were expressly enumerated in this Charter.*

(Emphasis added). The intent of the Friendswood citizenry to make city government their servant, not their master, is further confirmed in the Preamble to the City Charter:

#### PREAMBLE

Good government can only be defined as that which is wholly and justly participated in by the people who are under its jurisdiction. For that purpose the citizens of Friendswood, in exercising their rights of self-government, do ordain the provisions set forth in the ensuing Charter of this City. This is just one more step of progress by the people of Friendswood.

The City should not get the court's approval to offset that initial step forward with two steps backward.

#### **HOME RULE POWER IS LIMITED BY A CITY CHARTER, ACCORDING TO LONG-SETTLED HIGH COURT PRECEDENT**

It is not just the Friendswood 5 who believe a city charter really does limit a city government's power. The Texas Supreme Court, a useful ally, has seen things that way for a very long time. *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1923) explains:

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<sup>3</sup> Perhaps not coincidentally, this City Council ceased the widespread and long-time practice of having its newly elected members swear to uphold the City Charter, including its limitations, as part of their oath of office.

Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.

The city of Waco was, at that time, a home rule city. *Zane-Cetti v. City of Ft. Worth*, 269 S.W. 130, 132 (Tex.Civ.App.—Austin 1924). Ten years later, *Davis v. City of Taylor*, 67 S.W.2d 1033, 1034 (Tex. 1934) reiterated that a charter limits the power of a (home rule) city:

A municipal corporation may exercise such powers, and only such powers, as are expressly granted to it in its charter, or such implied powers as are incident to the powers granted, or those essential and necessary to make effective the objects and purposes of the corporation.

The court more fully explained the controlling limitations of city charters—again, for a home rule city—in *Anderson v. City of San Antonio*, 67 S.W.2d 1036, 1037 (Tex. 1934):

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. *Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto.*

(Emphasis added).

This controlling precedent appropriately exalts a city's charter as its controlling and power-limiting document. This high court line of precedent has gone unchallenged for 75 years. The City does not acknowledge it, much less attempt to explain it away. How could it? The Texas Supreme Court, not just these citizens, very clearly insists that a home rule city is not born with legal authority to act to the limit of constitutionally permitted powers. The powers are not mandated or automatic; they must be assumed in a governing document—a charter. Here, via Charter §2.01, the City assumed less power than

the Constitution of the State of Texas allows. Its citizens chose to limit the power of city government. The officeholders who were elected to govern the City under the Charter do not respect the Charter's limitation of their power. They want to rule, not govern. There is indeed a need for a declaratory judgment to deal with this problem, but not the judgment the City has in mind.

The Friendswood 5 also oppose the proposed debt for the same reasons stated in the Amicus Brief of Americans for Prosperity Foundation. The Friendswood 5 adopt that Amicus Brief's explanation why the Certificates of Obligation are illegitimate, *ultra vires* and not properly subject to this court's approval.

#### **DEBT WITH HONOR? SELF-EXECUTING RESIGNATIONS? ... FOR A LATER DAY**

The remedy for council members' approval of debt without the voter approval required by the City Charter (if permitted by this court) is declared in §3.06(b)(2) of the City Charter: the council members lose their offices. That issue (loss of office) is not ripe for adjudication in this proceeding because the effect of council members' vote upon their officeholder status is not and could not be part of the City's Petition. It is likewise not within the scope of the Expedited Declaratory Judgment Act. The effect of §3.06(b)(2) of the City Charter will not be an issue unless and until this court rules for the City, and City Council approves certificates of obligation in violation of the Charter. At that point, §3.06(b)(2) of the Charter should be self-executing. Any council member or the mayor who violated the §8.05(f) prohibition against incurring debt (not payable from current revenues) absent prior voter approval should feel compelled by honor (what once attended the now-discontinued oath of office) to resign his office.

The possibility that council members who approved debt without prior voter approval will resign as directed by the City Charter may seem remote, given their decision to file this lawsuit for a judicial endorsement that state law trumps the City Charter and permits their issuance of debt in violations of its provisions. Nevertheless, until confirmed otherwise, one must hold open the possibility that council

members endorsing the City's course of action see the proposed certificates of obligation and associated public works projects as more important than their offices, and mean to keep some modicum of faith with voters by resigning for having violated the City Charter.<sup>4</sup> It is also possible that at least five percent of voting-eligible citizens of Friendswood will petition for an election regarding the proposed debt before it is issued, in which event the forfeiture of offices by voting for unapproved debt will not be an issue unless city council members also ask the court to ignore a scheduled election.

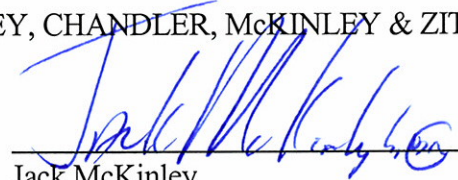
#### CONCLUSION AND PRAYER

The Friendswood 5, Janis Lowe, Deborah Winters Chaney, Mel Austin, Kathy Rogers and Leslie Roque, therefore pray that the court reject the requested declaratory relief because the proposed acquisition of park land in another county violates state law and the proposed certificates of obligation violate the City Charter and are *ultra vires* in nature. The Friendswood 5 also request an award of reasonable attorney's fees and their costs of court in view of the city's unreasonable insistence upon pursuing and seeking judicial approval of a course of action that is inconsistent with legislative prohibition and flouts the obligations to Friendswood votes that each council member and the mayor assumed upon taking office.

Respectfully submitted,

RAMEY, CHANDLER, MCKINLEY & ZITO, P.C.

By: \_\_\_\_\_

  
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<sup>4</sup> The court's declaration—if given—that the proposed certificates of obligation can validly be issued under state law would be the ruling requested by the City, and would be entirely separate from the question (not before the court, and over which the court has no jurisdiction) of such council members forfeiting their offices in the act of voting for debt not approved by voters, even if allowed by state law and ruled as such by the court.

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**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the foregoing **Trial Brief from the Friendswood 5 Regarding Proposed Declaratory Relief** has been served upon all counsel of record in accordance with the rules on this 10th day of July, 2009.

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