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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-GV-09-000916

EX PARTE) IN THE DISTRICT COURT
)
) TRAVIS COUNTY, TEXAS
)
CITY OF FRIENDSWOOD,) 419TH JUDICIAL DISTRICT
TEXAS)

COURT HEARING

On the 14th day of July, 2009, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Scott H.
Jenkins, Judge presiding, held in Austin, Travis County,
Texas;

Proceedings reported by machine shorthand.

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A P P E A R A N C E S

FOR THE CITY OF FRIENDSWOOD:
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PATRICK W. MIZELL
SBOT NO. 14233980
MICHAEL MARIN
SBOT NO. 00791174
DEBORAH "CARLY" MILNER
SBOT NO. 24065761
VINSON & ELKINS
1001 Fannin Street, Suite 2300
Houston, Texas 77002
(713) 758-2932

10 FOR THE THE FRIENDSWOOD CITIZENS:

11 JACK MCKINLEY
12 SBOT NO. 13716300
13 RAMEY, CHANDLER, MCKINLEY & ZITO
14 750 Bering Drive, Suite 600
Houston, Texas 77057
(713) 266-0074

15 FOR GREG ABBOTT, ATTORNEY GENERAL OF TEXAS:

16 ADRIAN HENDERSON
17 SBOT NO. 24025422
18 THOMAS E. GRIESS, JR.
19 SBOT NO. 08454455
Assistant Attorney General
Financial Litigation Division
20 P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-2929

21 LESLIE BROCK
22 SBOT NO. 00787883
Assistant Attorney General
23 Public Finance Division
P.O. Box 12548, Capitol Station
24 Austin, Texas 78711-2548
(512) 475-2929

25

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1 A P P E A R A N C E S
2 (CONTINUED)

3

4

FOR AMICUS AMERICANS FOR PROSPERITY FOUNDATION:

5

6 DAVID ROGERS
7 SBOT NO. 24014089
TEXAS LEGAL FOUNDATION
P.O. Box 926
Austin, Texas 78767
(512) 923-6188

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9
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11
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1 PROCEEDINGS

2 THE COURT: We're on the record in Cause

3 No. GV-09-000916, which is styled Ex Parte City of

4 Friendswood. That's a misnomer because it's not really

5 ex parte at all anymore. But in any event, here we are.

6 Would everyone announce their presence for the record.

7 MR. MIZELL: Pat Mizell with Vinson &

8 Elkins for the City of Friendswood.

9 THE COURT: Mr. Mizell, will you be the

10 only lawyer making any argument today at this hearing?

11 MR. MIZELL: Deborah Milner from our

12 office is our parks lawyer.

13 THE COURT: Will she be using some of your

14 time?

15 MR. MIZELL: Yes.

16 THE COURT: All right.

17 MR. MIZELL: And Michael Marin.

18 THE COURT: Will he also be arguing?

19 MR. MIZELL: He may say something.

20 THE COURT: Okay.

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21 MR. MARIN: Good afternoon.

22 THE COURT: Good afternoon to all of you.
23 I just need to know who's actually going to make the
24 argument, though it's great to have you all here. But
25 if we introduce everybody, we use all our time.

7

1 From the opposing side?

2 MR. MCKINLEY: Your Honor, I am Jack
3 McKinley. I represent Janice Lowe, Deborah Winters, Mel
4 Austin, Kathy Rogers and Leslie Roque, whom we've dubbed
5 the Friendswood 5.

6 THE COURT: Okay. I like that.
7 All right.

8 MR. ROGERS: David Rogers, Your Honor, for
9 amicus Americans for Prosperity Foundation.

10 THE COURT: Mr. McKinley, do you intend to
11 share your time with Mr. Rogers? He is just filing an
12 amicus brief.

13 MR. MCKINLEY: Yes, Your Honor.

14 THE COURT: He's not a party in the case.

15 MR. MCKINLEY: If he doesn't take too
16 much, that's fine.

17 THE COURT: All right. However you want
18 to use --

19 MR. MCKINLEY: I'll kick him if he does.

20 THE COURT: However the parties want to
21 use their time. Also here for the State is?

22 MR. HENDERSON: Your Honor, my name is
23 Adrian Henderson.

24 THE COURT: I'm sorry. Slow down just a
25 little bit.

1 MR. HENDERSON: Adrian Henderson.

2 THE COURT: Adrian Henderson.

3 MR. HENDERSON: Yes, sir. And my
4 co-counsel Leslie Brock and Tom Griess.

5 THE COURT: who will be actually making an
6 appearance or making any statements for the State?

7 MR. HENDERSON: Mr. Griess will be and --

8 THE COURT: would you spell Mr. Griess'
9 name? Or maybe he can do it.

10 MR. HENDERSON: G-r-i-e-s-s. And
11 potentially --

12 THE COURT: And the first name,
13 Mr. Griess, is --

14 MR. GRIESS: Tom, Thomas.

15 THE COURT: And I understood from the
16 announcement the other day on the docket call that the
17 AG was not asking for any time in this hearing. The
18 parties -- that is, the movant, the City, wanted an hour
19 and 15 minutes total for everything they wished to do.
20 The opponents, that is, the Friendswood 5 and anyone
21 else they want to share their time with, was going to
22 take an hour and 15 minutes. Does the AG actually need
23 some time to present something? I understood you to say
24 earlier you were not taking any position on this and did
25 not need to need any court time.

1 MR. HENDERSON: Unless we need to clarify
2 some issue regarding statutory construction and things

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3 like that.

4 MR. MIZELL: He can have some of my time.

5 THE COURT: Okay. But you're not taking
6 the position that the City's position is correct or
7 incorrect?

8 MR. HENDERSON: We are not taking any
9 position either way.

10 THE COURT: All right. Thank you.

11 MR. GRIESS: We did take a position with
12 respect to the first issue but not the second.

13 THE COURT: The first issue being --

14 MR. GRIESS: whether there's an
15 affirmative requirement of an election under the City
16 charter in order for certificates of obligation to be
17 issued.

18 THE COURT: I didn't see anything filed in
19 the record indicating that you were taking a position on
20 that, but maybe I missed it. In fact --

21 MR. MIZELL: I have it right here if you
22 want to --

23 THE COURT: That's in your answer? In
24 your answer?

25 MR. GRIESS: It was in our answer,

□

10

1 Your Honor.

2 THE COURT: Okay. I'll go get that right
3 now. I've already printed it. I just neglected to
4 staple it and bring it out here. All right. Thank you,
5 Counsel.

6 With that, you get to go first. You don't
7 want to use your entire hour and 15 minutes because then

8 you don't get to stand up again. So I'll let you know
9 if you ever want to know how much you've used. And with
10 that, your time begins.

11 MR. MIZELL: Okay. Your Honor, I had --
12 and I will defer to Your Honor. I had intended to give
13 a brief opening, but I'm -- if the Court wants to hear
14 that and do fast exhibits and then we'll go right into
15 argument. No point in doing the opening, five-minute
16 witness and then closing, so --

17 THE COURT: However you want to spend your
18 time.

19 MR. MIZELL: Okay.

20 THE COURT: I have read the briefs, albeit
21 fairly quickly, so I think I'm ready for you, although
22 you're the -- I've had several matters before you this
23 week, but I think I'm ready for you.

24 MR. MIZELL: All right. With that said,
25 let me go ahead and call the mayor, David Smith.

11

1 THE COURT: Please step forward in front
2 of me first and raise your right hand.

3 (The witness was sworn.)

4 DAVID SMITH,
5 having been first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. MIZELL:

8 Q. State your name, please.

9 A. David Smith.

10 Q. And you are the mayor of Friendswood?

11 A. Yes, sir.

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12 Q. We're going to do this in fast fashion,
13 all right? So if you'll open the notebook and turn to
14 Exhibit No. 1. Exhibit No. 1 is an agenda posted to
15 approve the ratification and authorization of this
16 lawsuit, correct?

17 A. Yes, sir.

18 MR. MIZELL: We offer 1.

19 MR. MCKINLEY: No objection, Your Honor.

20 THE COURT: 1 is admitted.

21 (Petitioner's Exhibit 1 admitted.)

22 Q. (BY MR. MIZELL) If you'll turn to No. 2, No. 2
23 is the actual vote of city council and resolution
24 authorizing and ratifying these proceedings and the
25 hiring of Vinson & Elkins to bring suit, correct?

12

1 A. Correct.

2 MR. MIZELL: We offer 2.

3 MR. MCKINLEY: No objection, Your Honor.

4 THE COURT: 2 is admitted.

5 (Petitioner's Exhibit 2 admitted.)

6 Q. (BY MR. MIZELL) Mayor, No. 3, if you'll turn
7 to that. No. 3 is a proposed ordinance that would in
8 substantial form be voted on in the future by counsel
9 which would be the actual instrument, the actual
10 government instrument, that would authorize the sale of
11 the certificates of obligations, correct?

12 A. Yes.

13 MR. MIZELL: We offer No. 3.

14 MR. MCKINLEY: Object to No. 3,
15 Your Honor. I don't believe it's relevant. It isn't
16 signed. It isn't passed. It does not --

17 THE COURT: Why don't you explain what the
18 significance is --

19 MR. MIZELL: Yes.

20 THE COURT: -- when it hasn't been signed
21 or passed. It's proposed by whom? Drafted by whom?
22 what significance --

23 MR. MIZELL: It --

24 THE COURT: What significance does it
25 have?

13

1 MR. MIZELL: It's drafted by --

2 THE COURT: Do you want to do that through
3 Q&A or do you want to argue it? Either way.

4 MR. MIZELL: Well, I think --

5 THE COURT: Because I don't understand
6 from the answer to his question what it means that it's
7 proposed. It's --

8 MR. MIZELL: It is -- this is another
9 technical thing that only is required from the
10 standpoint of subsequent approval by the Attorney
11 General --

12 THE COURT: Okay.

13 MR. MIZELL: -- at their request. I've
14 included in this the actual instruments that will be in
15 substantially correct form.

16 THE COURT: Why don't you walk me through,
17 either through Q&A, or if you want to keep explaining to
18 me you can, why the law requires you to have a proposed
19 ordinance in the record. I don't know. I mean, I've
20 done the gamut of civil litigation in the last three

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21 weeks. I mean the gamut. So bonding cases are not
22 something we see but very, very rare.

23 MR. MIZELL: No, I understand. And if
24 Mr. Griess wants to help --

25 I don't mean to put you on the spot, Tom.

14

1 It is -- it is a technical requirement
2 because the court supplants the traditional role of the
3 Public Finance Division of the Attorney General's Office
4 in validating the bonds. And --

5 THE COURT: If you want to argue, you have
6 to stand. I'm sorry. I didn't know you were going to
7 launch into argument.

8 MR. MIZELL: Oh, I'm sorry.

9 THE COURT: I thought you were going to go
10 back to a question to let him answer what it means that
11 it was proposed. Proposed by whom, I still don't know.
12 But go ahead and explain the law to me.

13 MR. MIZELL: Okay. The Tex -- if this
14 lawsuit didn't exist, the Texas Attorney General would
15 receive a transcript from the City that would include
16 the proposed ordinance and the -- what the next exhibit
17 is, which is the notice of intent to pass the ordinance.
18 In this circumstance, that's what triggers the 30 days
19 for opponents to the bonds to gather signatures to force
20 an election.

21 THE COURT: Okay.

22 MR. MIZELL: Because this, once -- if the
23 Court -- not being presumptuous, but if the Court were
24 to sign a final judgment approving the bonds and the
25 lawfulness of the bonds, it is the opinion, I believe,

1 of the Attorney General's Office that the Court, as a
2 subpart of validating the bonds, has to actually
3 validate in general terms the sufficiency of the
4 proposed ordinance --

5 THE COURT: And I hear you saying that a
6 couple times now, and that's great. I still haven't
7 heard any law explaining why it is I have to have this
8 as an exhibit and somehow approve this proposal. I
9 still don't know who drafted the proposal. The city
10 council hasn't acted on it. I'm confused still as to
11 what the law is that requires this other than you saying
12 the AG likes it and then how it achieves the official
13 status of a proposal. Does some process take place that
14 make it the official proposal or the City simply files
15 it as their -- the mayor can appear on behalf of the
16 City and say this is our proposal that we anticipate
17 putting before the council?

18 MR. MIZELL: It is -- it's nothing more
19 than what we anticipate council would vote on if the
20 Court were to approve the bonds and if -- and if the --
21 if the action were to take place because this is a --

22 THE COURT: And if the Court does approve
23 the bonds, you must pass this proposal and only this
24 proposal. Is that right?

25 MR. MIZELL: In substantially correct

1 form.

2 THE COURT: well --

3 MR. MIZELL: And that's -- it's a -- let
4 me explain this way. Mr. Griess is standing up. But
5 this isn't -- this isn't so much for you as it is for
6 the Public Finance Division of the Attorney General's
7 Office.

8 THE COURT: That's okay. I'm trying to
9 deal with his objection.

10 MR. MIZELL: Right.

11 THE COURT: And it's an easy overrule if
12 you simply tell me the statute requires this and where
13 that is. That's why I keep asking, what is the law that
14 requires this? And then I'll say overruled; the law
15 requires them to put this in the record. Just tell me
16 what it is. I still haven't heard an answer.

17 MR. MIZELL: And I think Mr. Griess --

18 MR. GRIESS: Your Honor, in the statute,
19 specifically section 1205.024 --

20 THE COURT: Of?

21 MR. GRIESS: Of the Government Code.

22 THE COURT: Not the local government code,
23 but the Government Code.

24 MR. GRIESS: The Government Code, yes.

25 THE COURT: All right. I don't think I've

17

1 got that one out, but go ahead and read it to me.

2 MR. GRIESS: It requires that a petition
3 in an action brought under this statute must briefly set
4 out by allegation, reference or exhibit a copy of or a
5 pertinent excerpt from each public security
6 authorization. And so what the City is seeking to have
7 introduced into evidence are two important official

8 actions that their governing body would take. One is a
9 resolution that authorizes a notice of intention to
10 issue certificates of obligation to be published in a
11 local --

12 THE COURT: That's going to be our next
13 exhibit, I gather.

14 MR. GRIESS: Correct.

15 THE COURT: All right.

16 MR. GRIESS: And then the second document
17 would be the actual ordinance adopted by the city
18 council authorizing the issuance of the certificates in
19 which sets forth all of the substantive terms that
20 govern the rights and obligations of the City and the
21 certificate holders.

22 THE COURT: And this statute requires them
23 to make this an exhibit before they pass the resolution
24 and before they pass the ordinance; is that right?

25 MR. GRIESS: It's an unusual statute in

18

1 that the statute is clear that a petitioner is entitled
2 to bring an action before the public securities are
3 actually authorized, issued or delivered. And that's in
4 Section 1205.025, which is what they're doing in this
5 case.

6 THE COURT: And then surely you agree with
7 my sort of assumption of what the law would require; if
8 these are admitted as the basis for the approval, then
9 they must pass this ordinance and this resolution. Is
10 that right?

11 MR. GRIESS: Correct, in substantially the

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12 form as they would be admitted into evidence, because if
13 the Court approves the certificates and if in time the
14 City is able to issue the certificates, before they
15 could actually do so, they would have to submit the
16 documents to the Attorney General for our approval. And
17 at that point, we would review the documents, the
18 ordinance and the resolution to verify that they, in
19 fact, were adopted substantially in conformity with the
20 forms as approved by the board.

21 THE COURT: Thank you. Unless you can
22 persuade me that the law is not as they just explained
23 it, I'm going to admit them for that limited purpose.

24 MR. MCKINLEY: For that limited purpose,
25 Your Honor -- I'll have a couple of questions on cross.

19

1 But for that limited purpose, we have no objection.

2 THE COURT: Great. We've gotten through
3 that.

4 MR. MIZELL: Okay. Thank you.

5 THE COURT: Exhibit 3 is admitted for that
6 purpose. I guess you can move on to the next one.

7 (Petitioner's Exhibit 3 admitted.)

8 Q. (BY MR. MIZELL) And Your Honor -- I'm sorry.
9 Mayor, if you'll turn to Exhibit No. 4, No. 4 is the
10 proposed resolution providing for the notice of intent
11 to issue the certificates of obligation that starts the
12 period of time by which notice has to be put in the
13 paper and citizens, if they desire, could gather the
14 petitions and force a vote, correct?

15 A. Yes, sir.

16 MR. MIZELL: We offer No. 4.

17 MR. MCKINLEY: Your Honor, if it's offered
18 for the same limited purpose as No. 3 --

19 THE COURT: It is.

20 MR. MCKINLEY: -- we have no objection.

21 THE COURT: It is, I'm sure. And it's
22 admitted for that purpose.

23 (Petitioner's Exhibit 4 admitted.)

24 Q. (BY MR. MIZELL) And No. 5, if you'll turn to
25 it, is an aerial view of the park in question, correct,

20

1 Mayor?

2 A. Yes, sir.

3 Q. All right. And if you'll point out to the
4 Court, the proposed park or ball fields that are being
5 built are down to the left, correct?

6 A. Yes.

7 Q. And then the border between Galveston County
8 and Brazoria County runs the red line, red check line,
9 correct?

10 A. Correct, right next to it.

11 Q. And then the existing ball field, which I guess
12 would be the girls softball fields, is also to the
13 right, correct?

14 A. That's correct.

15 Q. Okay. Now, I made an error, and just so I
16 don't mislead anyone -- you pointed this out
17 yesterday -- the actual overcrowded fields that are
18 going to be relieved if the parks allow is actually
19 somewhere just north -- directly north of where the park
20 is?

21 A. Correct, just --

22 Q. Another several hundreds yards up?

23 A. Uh-huh, just off the page, more north of the
24 picture.

25 Q. I think that's the wrong ball field, but it's

21

1 in close proximity to these parks, right?

2 A. That's correct.

3 Q. All right. And this will be important in a
4 second, but is there a water tower just south of the
5 ball fields?

6 A. Yes, sir. Just underneath the caption that's
7 entitled -- or just above the caption that's entitled
8 "Existing ball fields," there is a water tower just
9 north of that.

10 MR. MIZELL: We offer Exhibit No. 5.

11 MR. MCKINLEY: No objection, Your Honor.

12 THE COURT: Thank you, Counsel. Exhibit 5
13 is admitted.

14 (Petitioner's Exhibit 5 admitted.)

15 Q. (BY MR. MIZELL) And I only have one copy of
16 this, but I'm going to skip to the end to Exhibits 9A,
17 B, C and D, which I've previously shown counsel, and ask
18 you to describe for the Court whether these are true and
19 correct depictions of the actual ball field, the
20 construction going on currently at the ball field and
21 its relationship to the water tower.

22 A. That's correct. These are pictures of the
23 proposed park, and they show its proximity to our city
24 boundaries and the work that's going on.

25 Q. Okay.

1 MR. MIZELL: So we offer 9A, B, C and D.

2 MR. MCKINLEY: No objection, Your Honor.

3 THE COURT: Thank you, Counsel. 9A, B, C
4 and D are all admitted.

5 (Petitioner's Exhibits 9A, 9B, 9C
6 and 9D admitted.)

7 MR. MIZELL: And may I hand this up to
8 Your Honor?

9 THE COURT: Sure.

10 MR. MIZELL: Turn to Exhibit No. 6.

11 MR. MCKINLEY: No objection to that,
12 Your Honor.

13 MR. MIZELL: We offer 6.

14 THE COURT: He's really trying to help you
15 now.

16 MR. MIZELL: Good.

17 THE COURT: All right. 6 being offered
18 and there being no objection, 6 is admitted.

19 (Petitioner's Exhibit 6 admitted.)

20 Q. (BY MR. MIZELL) All right. Exhibit No. 7 is a
21 financial statement for the -- a summary of a financial
22 statement for the City of Friendswood ending
23 September 30th, 2008, correct?

24 A. Yes, sir.

25 Q. Let me just ask a technical question. The

1 earnest money contract that is Exhibit 8, which I will
2 offer in a moment, was made between the City and the

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3 developer on the 23rd of September, 2008, correct?

4 A. That's correct.

5 Q. All right. And at the time that the earnest
6 money contract was made, were there funds available cash
7 in hand of the City that could have paid this earnest
8 money contract at the time it was made?

9 A. Yes, sir. The financial statement here shows
10 that there was cash available to take care of that.

11 Q. Okay. And Exhibit No. 7 is the balance sheet
12 which reflects undesignated general fund revenues of
13 \$8,911,147, correct?

14 A. Yes, sir.

15 Q. Okay.

16 MR. MIZELL: We offer 7.

17 MR. MCKINLEY: Your Honor, I object to
18 No. 7. It is, first of all, a balance sheet and doesn't
19 have anything to do with revenue. And as well, it's
20 from September 30 of 2008. It's last year. I don't
21 know how often the City does balance sheets, but
22 presumably quarterly. It isn't current and not even
23 close to current.

24 MR. MIZELL: If I can explain.

25 THE COURT: Sure.

24

1 MR. MIZELL: The earnest money contract
2 was entered into the 23rd of September. This is another
3 technical AG public finance question. But in order for
4 this to be a constitutional contract, when entered into,
5 the City has to be able to pay it if it is a current
6 expense. So this is just to prove that the City -- that
7 the underlying earnest money contract of the park was

8 not illegal.

9 THE COURT: At the time the contract was
10 entered into?

11 MR. MIZELL: Correct.

12 MR. MCKINLEY: Your Honor --

13 THE COURT: Excuse me. So this balance
14 sheet is the balance sheet closest in time to the date
15 when the contract was entered into?

16 MR. MIZELL: Correct.

17 THE COURT: Okay.

18 MR. MCKINLEY: Your Honor --

19 THE COURT: You see his point. Apparently
20 that's not even the argument in dispute. I was
21 concerned he was going to make this somehow relevant to
22 whether or not they've complied with city charter 8.05,
23 something you're arguing about.

24 MR. MCKINLEY: And my --

25 THE COURT: He's not taking that position.

25

1 This is just, as he says, the technical requirement that
2 they have the money at the time they enter into the
3 contract.

4 MR. MCKINLEY: My actual concern was that
5 they're offering this as evidence that they can buy the
6 land outright. If they're only offering it to prove
7 they had the earnest money sum available at the time --

8 MR. MIZELL: No, no, no, that at the time
9 it was entered into, right then and there, the money to
10 pay for it. I'm not proffering this to say that's
11 what's going to happen because that's not what we hope

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12 happens. We hope to be able to issue a certificate of
13 obligation and issue it as debt to pay for the park.
14 But it is -- because the contract itself doesn't recite
15 the then available funds, it is simply a requirement
16 that cities have to have cash available in this certain
17 type of contract at the time that it's entered into,
18 being a legal contract.

19 THE COURT: And I think we can work our
20 way through this like we did Exhibits 3 and 4. Would
21 you illuminate for everyone the source of this legal
22 requirement as we did with those exhibits so that maybe
23 counsel can be satisfied and I'm satisfied and we
24 understand there's no reason for me to do any heavy
25 lifting on this objection, though I'm happy to do that?

26

1 I just need to understand why I'm overruling or granting
2 the objection.

3 MR. MIZELL: It is a nuance of public
4 finance law.

5 THE COURT: And do you need to turn to the
6 AG again?

7 MR. MIZELL: Mr. Griess will now stand up
8 and explain to the Court why a contract has to have then
9 available funds in order to be a constitutional
10 contract.

11 MR. MCKINLEY: And Your Honor --

12 THE COURT: And Mr. Griess, this has
13 nothing to do with Section 805 of the city charter,
14 right?

15 MR. GRIESS: No, Your Honor, it does not.

16 THE COURT: All right.

17 MR. MCKINLEY: That actually isn't my
18 objection. The funds that they're talking about that
19 they say are available we contend are a rainy day fund
20 that they cannot tap for this purchase. And they have
21 not established that the money, although on the balance
22 sheet, actually could have been used for this purchase.

23 THE COURT: Great. I'll let you cover
24 that in cross-examination. I don't think that renders
25 this inadmissible, however. Don't you agree? I don't

27

1 know how it would be.

2 MR. MCKINLEY: Well, I was going to try to
3 take the witness on voir dire --

4 THE COURT: No. I'll let you do that on
5 cross-examination. And if it doesn't show what they
6 need to show, then you'll be able to point that out.

7 I guess you can save some time on this. I
8 assume you're going to say what he says is right and the
9 law requires it, what the plaintiff says is right and
10 the law requires it. No? Not quite?

11 MR. GRIESS: Well, what I would advise
12 you, Your Honor, is that a multi-year contract of the
13 City that does not have a pledge of ad valorem taxes
14 needs to either be a current expense to be paid from the
15 revenues of that fiscal year or it needs to be basically
16 an obligation that the City is able to pay from funds
17 that it has on hand. And I think the City is seeking to
18 introduce this evidence to substantiate that in the
19 event they're not able to issue that, the contract was
20 lawfully entered into because it could be paid from

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21 legally available funds they have on hand.

22 THE COURT: Okay. And it may be enough
23 evidence, it may not be enough evidence, but that's the
24 purpose for which it's being offered, which made sense
25 to you. All right. With that, the objection, if there

28

1 still is one, is overruled. And we'll determine what
2 its significance is later.

3 (Petitioner's Exhibit 7 admitted.)

4 Q. (BY MR. MIZELL) Turn to No. 8.

5 A. Yes, sir.

6 Q. It is the earnest money contract that was
7 entered into between the City and Mr. Wight, Wight
8 Realty Interests, correct?

9 A. Yes, sir.

10 MR. MIZELL: Offer 8.

11 MR. MCKINLEY: No objection to No. 8,
12 Your Honor.

13 THE COURT: All right. There being no
14 objection, 8 is admitted.

15 (Petitioner's Exhibit 8 admitted.)

16 Q. (BY MR. MIZELL) And I have already offered 9.
17 And there is a sub issue with respect to whether these
18 COs were included in the referendum that failed.
19 They're mostly footnotes --

20 THE COURT: I'm sorry. Whether what was
21 included?

22 MR. MIZELL: Whether the park, the roads,
23 the animal control shelter and the storage facility were
24 really bundled into a referendum that was held in May
25 and failed and whether I'm trying to -- whether we're

1 trying to resurrect that through a --

2 THE COURT: Do you have some more
3 questions about that?

4 MR. MIZELL: No, no, just as an
5 introductory statement. That's what I'm about to do,
6 Your Honor.

7 THE COURT: Okay.

8 MR. MIZELL: And I know that's unusual,
9 the way I just did it, but just sign posting.

10 Q. (BY MR. MIZELL) Let me hand you what's been
11 marked as 10.

12 MR. MIZELL: I don't think you have an
13 objection.

14 MR. MCKINLEY: No, we don't.

15 MR. MIZELL: Okay. We offer 10 with no
16 objection, I believe.

17 THE COURT: 10 is offered.

18 MR. MCKINLEY: No objection, Your Honor.

19 THE COURT: Thank you, Counsel. 10 is
20 admitted.

21 (Petitioner's Exhibit 10 admitted.)

22 Q. (BY MR. MIZELL) Okay. And Mayor, just
23 quickly, the certificates of obligation which are the
24 basis for this validation suit, was any dime of money
25 that's proposed included in the referendum that was --

1 that failed in May of this year?

2 A. No.

3 Q. Okay. And prior to the election, was there a
4 mailing -- was 10 a mailing sent out to the citizens
5 about the bond election?
6 A. Yes, sir.
7 Q. Okay. And in that there is a free page that
8 has what's in the bond election, correct?
9 A. Yep.
10 Q. And on the back what's not in the bond
11 election, right?
12 A. Purposefully.
13 Q. And what's not in the bond election on the back
14 of this page is what we're talking about now, correct?
15 A. That's right.
16 Q. All right. Briefly describe, because I don't
17 think we've talked about it, what are the four separate
18 projects that are proposed in the certificates of
19 obligation?
20 A. Streets, records retention facility, a dog
21 pound and the park.
22 Q. Okay. One last subject and then I'll pass the
23 witness. In -- construction has begun in earnest on the
24 parks, correct?
25 A. Yes, sir.

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1 Q. And if the parks do not close, will the City
2 suffer a penalty and have to pay the improvements that
3 the developer has already incurred on that park
4 property?
5 A. Yes, sir, we would.
6 Q. Okay. And the improvements are approximately a
7 million and a half dollars to date, correct?

8 A. We would estimate that that's what they could
9 be.

10 Q. Okay. And then there's a 180,000-dollar
11 penalty on top of that?

12 A. That's correct.

13 Q. All right.

14 MR. MIZELL: Your Honor, I pass the
15 witness.

16 THE COURT: Just out of curiosity, what
17 does that have to do with the issue before me other than
18 to generate sympathy for the City?

19 MR. MIZELL: That.

20 THE COURT: That's it?

21 MR. MIZELL: Yeah.

22 THE COURT: Okay. I thought so.

23 MR. MIZELL: It's like not tearing the
24 building down once it's up.

25 THE COURT: Okay.

□

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1 CROSS-EXAMINATION

2 BY MR. MCKINLEY:

3 Q. Mr. Mayor, I'm Jack McKinley. I represent the
4 five citizens here before you. With regard to that last
5 question and answer, the City paying improvements and a
6 penalty, that presupposes a valid contract, right? If
7 you didn't have a valid contract, there would be no
8 obligation to pay improvements or a penalty. You'd
9 agree with that?

10 A. That that would be the case?

11 Q. Yes.

12 A. Yes.

13 Q. Okay. And you understand people have alleged
14 the contract is not a valid contract, that it's
15 ultra vires, that it's taken without authority of law
16 because it is a purchase that state law doesn't allow
17 the City to make? You understand that's a contention,
18 right?

19 A. I understand that's what they've alleged.

20 Q. And if the Court were to agree with that, then
21 there wouldn't be any penalty and there wouldn't be any
22 obligation to the seller because it would be a void
23 contract, right?

24 A. It would be up to the Court.

25 THE COURT: Do you want to go ahead and

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1 use your microphone, too, while you're at it?

2 MR. MCKINLEY: I will, Your Honor.

3 Q. (BY MR. MCKINLEY) Mr. Mayor, let's talk about
4 this land in Friendswood -- I'm sorry, in Galveston
5 County -- in Brazoria County that the City wants to buy.
6 How many miles is it from the existing ball fields? we
7 see the photograph, but that doesn't give us mileage.

8 A. From which field, sir?

9 Q. From the ball fields that are -- do you have
10 the photograph in front of you --

11 A. Yes.

12 Q. -- with the county line marked in red showing
13 existing ball fields within Friendswood and showing the
14 proposed park purchase? How many miles separate those
15 two tracts of land?

16 A. I'm not sure that it's miles. I don't know if

17 it's that far away.

18 Q. It's quite a few miles, right?

19 A. From --

20 Q. I'm sorry. I couldn't hear you.

21 A. I would estimate that it's approximately a mile
22 from the existing softball field, perhaps a little bit
23 more.

24 Q. Have you ever had it measured? Does anyone
25 actually know how far apart they are?

1 A. I haven't measured it.

2 Q. Have you considered undeveloped land in
3 Friendswood for this purchase --

4 A. Yes, sir.

5 Q. -- that actually would be in your county?

6 A. Yes, sir.

7 Q. Have you made any offers to purchase any
8 undeveloped land in Friendswood, "you" meaning the City?

9 A. Not during my tenure, no, sir.

10 Q. When did your tenure begin?

11 A. Six years ago, seven years ago.

12 Q. So why haven't you, before coming to court and
13 trying to purchase land in another county, at least made
14 some offers to buy land in your own city and your own
15 county?

16 A. The lands that we looked at in the research
17 that we did showed the land to be well substantially
18 more than what we could afford.

19 Q. But I guess you don't really know what it's
20 going to cost you to buy until you make an offer, right?

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21 A. We don't know for certain until we enter into
22 an earnest money contract with someone, but we did
23 research and we did see what people were asking for
24 their properties.

25 Q. Did you actually go to any landowner, whether

35

1 his property was posted for sale or not, and say, "we'd
2 like to buy your land; let's talk price"? Did you ever
3 do that inside Friendswood or inside your own county?

4 A. Not me personally, but I understand other
5 council members did.

6 Q. What about the -- you have a large park in your
7 city, right, about 60 acres?

8 A. Yes, sir.

9 Q. Is it called Founders Park?

10 A. Are you speaking of Centennial Park?

11 Q. Centennial Park.

12 A. Yes, sir.

13 Q. That park has plenty of land that you could use
14 for ball fields if you wanted to, doesn't it?

15 A. It's already being used for that.

16 Q. It has vacant land where you could put
17 ball fields, does it not?

18 A. It has fields that are being used for practice
19 fields or could be used for fields in the future.

20 Q. Right. My point being that of the 60 acres at
21 Centennial Park, you could put sports facilities such as
22 you're proposing to do in another county?

23 A. Yes, sir. We have sports venues that are
24 fighting over that land already.

25 Q. Well, why didn't you use the existing park that

1 you actually already own that you wouldn't have even had
2 to buy? why didn't you use this improvement budget to
3 put new and improved fields into that park?

4 A. Actually, we asked the citizens about spending
5 their dollars on existing parks, and they said no.

6 Q. well, do you really think that the citizens
7 were saying no to spending dollars on existing parks or
8 do you think they were saying no to spending the money
9 at all?

10 A. It could have been both.

11 Q. You don't think they really said no to actually
12 developing parks in Friendswood and want you to go buy
13 land in another county, do you?

14 A. I guess I'll never know for sure.

15 Q. Okay. Have you talked to -- has council
16 actually taken a vote in public on purchasing this land
17 in another county as an agenda item at which council
18 voted?

19 A. Yes, sir.

20 Q. Now, what was the vote?

21 A. Unanimous.

22 Q. There was a five-to-two vote previously, was
23 there not? Two council members thought it was illegal
24 to buy the land. Do you recall that?

25 A. I don't. You'd have to help me with it.

1 Q. There was a five-to-two vote the first time
2 this came up before it was revoted. Do you recall that?

3 A. Not particularly. I understand what you're
4 saying, but I'm trying to --
5 Q. Hurricane Ike hit your city along with other
6 parts of Galveston County and Houston on September 15th,
7 correct?

8 A. Yes.

9 Q. It caused some considerable damage?

10 A. Yes.

11 Q. That damage probably is measured in the
12 millions?

13 A. Yes, sir.

14 Q. You were talking to the Court about a
15 September 30 balance sheet that was 15 days after Ike,
16 and that's at a point where you know Ike is going to
17 cost you millions of dollars; you just don't know how
18 much, right? So you don't really know how much of that
19 money in cash in the balance sheet is even available to
20 go buy parkland because you know you have to use it for
21 Ike.

22 A. Well, at that point Ike hadn't happened yet, so
23 we didn't know Ike was going to hit us.

24 Q. I understand that, sir, but I'm asking you
25 about what you're presenting to the Court today as

□

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1 though it's proof that you could afford to buy the land
2 at that time. In fact, Ike came along. The purchase
3 has never occurred. And you don't have the money now
4 because of Ike having occurred and the millions of
5 dollars you've got to spend on Ike, right?

6 A. That's not exactly all the information or the
7 whole truth of it, no.

8 Q. Let's put it this way. We're here in court
9 today and you're asking the Court today to approve this,
10 but you couldn't buy this out of current cash, could
11 you?

12 A. I believe we could.

13 Q. The City has something called a rainy day fund,
14 don't you?

15 A. That's a way to say it.

16 Q. And the rainy day fund is for emergencies?

17 A. Yes, sir.

18 Q. You're not going to -- are you seriously
19 proposing to raid the rainy day fund --

20 A. No, sir.

21 Q. -- to buy this parkland?

22 A. No, sir.

23 Q. How much money is in the rainy day fund?

24 A. At the moment, I think there's four and a half
25 to five million dollars.

□

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1 Q. How much money does the City have in cash now
2 that isn't in the rainy day fund that is free and clear
3 for expenditure?

4 A. The correct answer to your question is not
5 much, if anything, and that's because we're still
6 waiting on receivables.

7 Q. Indeed, we wouldn't be here in court today if
8 you could do this deal for cash. You wouldn't have
9 needed to spend all this money on a certificate of
10 obligation petition, right?

11 A. That's not necessarily the case.

12 Q. Well, then why are we here?
13 A. To get the answer --
14 Q. You're asking the Court --
15 THE COURT: She can't take this down.
16 You've got to let him finish his answer before you start
17 another question.
18 MR. MCKINLEY: I'm sorry.
19 Q. (BY MR. MCKINLEY) Did you finish, sir?
20 A. Yes, sir.
21 Q. Your point of being here is that you're not
22 going to use cash; you want to do it with debt, right?
23 A. No, sir.
24 Q. Are you going to use cash to buy this property?
25 A. That decision hasn't been made yet.

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1 Q. So this is all sort of speculative, contingent.
2 You may do it; you may not do it?
3 A. It's part of the plan that we are considering
4 on how to pay for these things.
5 Q. Mr. Mayor, are you a lawyer?
6 A. No, sir.
7 Q. Nevertheless, you are the mayor. You've been
8 the mayor for six years. Do you know what the source of
9 your city's authority is to be a city?
10 A. I've been the mayor for three years.
11 Q. Three years. I'm sorry.
12 A. And could you ask the question again?
13 Q. What is the legal source of Friendswood's
14 authority to function as a city as currently
15 constituted?
16 A. I believe our state constitution.

17 Q. It's Article 11, Section 5 of the state
18 constitution, rights of a home-rule city, right?

19 A. Yes, sir.

20 Q. That's not a self-executing provision, right?
21 The constitution doesn't create your city; it allows you
22 to go out and create your city, right?

23 A. I would agree.

24 Q. What is the statute or ordinance or document by
25 which the City of Friendswood was created?

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1 A. Our charter.

2 Q. That's right, the charter. And thus, doesn't
3 it stand to reason that since the State allows you to
4 create -- to incorporate your own municipality through a
5 home-rule charter, that the charter is your governing
6 document?

7 A. You're asking my legal opinion?

8 Q. No. I'm asking -- you're the mayor. Isn't the
9 charter your governing document? Isn't it the
10 implementing document for your home-rule permission from
11 the constitution?

12 A. I would say yes.

13 Q. So doesn't that mean that anything you do needs
14 to be subordinate to the charter if it is indeed your
15 governing document of constitutional dimensions?

16 A. I agree with you.

17 Q. So why are you violating Section 8.05?

18 A. We're not.

19 MR. MIZELL: Object to form. First of
20 all, it's asking for a legal opinion.

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21 THE COURT: He already answered "we're
22 not," but if you want me to consider striking his
23 answer, I'll hear your objection.
24 MR. MIZELL: No, that's fine.
25 THE COURT: But I think the court

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1 reporter -- I thought she got that down.
2 THE REPORTER: Yes, I did.
3 THE COURT: She's pretty fast. In fact,
4 she's fastest in the state.
5 Q. (BY MR. MIZELL) And the reason, Mr. Mayor,
6 that you say you're not violating it is not because it
7 doesn't forbid it, right? Section 8.05 is used to go
8 and incur debt without a vote. Do you agree with that?
9 A. No, sir.
10 Q. I'm sorry.
11 A. No, sir.
12 Q. You think that you can incur debt without a
13 vote and not violate 8.05?
14 A. That's what it says in the charter.
15 Q. All right. And is that because you're focusing
16 on the word "revenues"?
17 A. That's only part of it.
18 Q. Okay. Do you -- are you saying to the Court
19 that the citizens of Friendswood don't have the ability
20 to enforce 8.05, or are you saying that 8.05 doesn't
21 forbid what you're doing?
22 A. No to the first half of your question.
23 Q. Okay.
24 A. And the second part again, please?
25 Q. The second part is, you're saying that 8.05

1 doesn't forbid what you're doing?

2 A. Correct.

3 Q. And if you're wrong about that, then you should
4 lose? That sort of narrows the issue. If you're wrong
5 about that, then you should lose; do you agree?

6 MR. MIZELL: Your Honor, let me object.
7 He's having a legal argument with him.

8 THE COURT: You really are using witnesses
9 to make what essentially are the arguments you're making
10 in your briefing to me.

11 MR. MCKINLEY: Yes.

12 THE COURT: I don't know how helpful this
13 is going to be to me.

14 MR. MCKINLEY: Okay, Your Honor. I'm
15 going to wrap it up.

16 THE COURT: We need to just get the
17 factual record established, and then let's argue the law
18 and see how the law applies to it. I don't really think
19 there's a wide dispute on what the factual record is, if
20 any.

21 MR. MCKINLEY: Actually, Your Honor, that
22 was sliding into argument. It was transitional argument
23 because it was my last factual question.

24 THE COURT: Okay. All right.

25 MR. MIZELL: And I have no further

1 questions of the mayor. You can step down.

2 THE COURT: You may step down.

3 MR. MIZELL: Sorry.
4 THE COURT: Actually, I get to say that.
5 MR. MIZELL: Sorry. It's old habit.
6 THE COURT: Do you have any other
7 witnesses?
8 MR. ROGERS: Your Honor --
9 THE COURT: Excuse me.
10 MR. ROGERS: I'm sorry, Your Honor.
11 THE COURT: He hasn't finished. It's
12 still his case.
13 MR. ROGERS: I just wanted to cross the
14 witness, Your Honor.
15 THE COURT: But you're not a party, are
16 you?
17 MR. ROGERS: No, Your Honor.
18 THE COURT: If you're not a party, you
19 don't get to cross the witness.
20 MR. ROGERS: Thank you, Your Honor.
21 THE COURT: Yeah.
22 MR. MIZELL: I would like, if I can do it,
23 in a very, very brief fashion, to call Cheryl Rosenberg,
24 who's a bond lawyer, to offer some very -- I don't have
25 any other factual way of proving it up other than to ask

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1 her these very brief set of questions.
2 THE COURT: Without hearing the
3 questions -- I don't know what they are, but if she's
4 going to get on the stand and tell me what the law is --
5 MR. MIZELL: She's not.
6 THE COURT: -- I don't think that's a
7 proper use of testimony.

8 MR. MIZELL: She's not.

9 THE COURT: All right.

10 MR. MIZELL: She -- well, let me --

11 THE COURT: That's fine.

12 MR. MIZELL: I'll pretest it.

13 THE COURT: Take a run at it and put her
14 on the stand.

15 MR. MIZELL: Your Honor, I'll call Cheryl
16 Rosenberg.

17 THE COURT: Please step forward in front
18 of me and raise your right hand.

19 (The witness was sworn.)

20 CHERYL ROSENBERG,
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MIZELL:

24 Q. State your name for the record.

25 A. Cheryl Rosenberg.

□

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1 Q. Ms. Rosenberg, yesterday you had your cell
2 phone on in the courtroom, and now you're going to
3 apologize to the judge.

4 THE WITNESS: Mea culpa, Judge. I'm very
5 sorry.

6 THE COURT: That's a pretty serious one,
7 but I accept that.

8 Q. (BY MR. MIZELL) You are a bond lawyer at
9 Andrews & Kurth?

10 A. Yes.

11 Q. And how long have you been a bond lawyer at

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12 Andrews & Kurth in Houston?

13 A. Twenty-one years.

14 Q. Okay. And is the issuance of certificates of
15 obligation a major -- or a part of your practice as a
16 bond lawyer?

17 A. Yes, it is.

18 Q. Okay. And I'm not going to -- I'm going to
19 skip it and just get to the core of this. Does the City
20 of Houston have a very similar charter provision as the
21 City of Friendswood?

22 A. Yes, it does.

23 MR. MCKINLEY: Your Honor, I object to
24 that as irrelevant.

25 THE COURT: I'd have to see the charter

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1 provision. This is not going to help me at all unless I
2 see the charter provision and know -- and can compare it
3 myself to this charter provision. And I don't know --
4 I mean, your argument, Counsel, on the plaintiff's side
5 is that you do not have to, as a matter of law, comply
6 with 8.05, correct?

7 MR. MIZELL: Correct.

8 THE COURT: Okay. Their argument is that
9 as a matter of law you do have to comply with 8.05.

10 MR. MIZELL: Right.

11 THE COURT: I get to decide that question,
12 but I don't know what factual -- you're not putting on
13 evidence. And that's why I asked you at the outset. I
14 was concerned that perhaps you were going to change your
15 position and try to show me that factually you are
16 complying with 8.5 in the event I rule that you have to.

17 But if it's a pure question of law whether you have to
18 or you don't, and you think you can persuade me as a
19 matter of law that you don't, but you concede that if
20 you do have to comply with 8.5 you lose, then this is
21 just a matter of lawyer argument and judge decision. I
22 don't know -- I mean, no disrespect to Ms. Rosenberg,
23 but I don't know how her factual recitation of what
24 Houston does is going to be helpful to me at all.

25 MR. MIZELL: The only point that --

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1 THE COURT: People violate the law all the
2 time; they just never get in front of a judge to find
3 out.

4 MR. MIZELL: Except that in this case,
5 it's the Attorney General's position and clearly stated
6 in their answer that they have a longstanding tradition
7 of approving COs absent an election even when the
8 charter says so to the contrary and that it is done
9 regularly and often in the biggest home-rule cities --

10 THE COURT: What I'm really interested in
11 is, who has ever gotten that legal question analyzed?
12 Is there an AG opinion on that? Is there a court case?
13 If so, it has not been cited in any of the briefing I've
14 seen that tells me whether 805 or some similar provision
15 applies or not. Do you see what I mean? And so --

16 MR. MIZELL: But the Attorney General does
17 issue an opinion, a bond opinion --

18 THE COURT: I understand that.

19 MR. MIZELL: -- every time one's entered.
20 And, you know, in my humble opinion, it's done with an

07-14-09 Ex Parte City of Friendswood done totally.txt
21 objective detached third-party view. My only point --

22 THE COURT: well, I'm going to let you
23 make the record you want to make.

24 MR. MIZELL: All right.

25 THE COURT: You know that. I mean, your

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1 jobs are hard, harder than mine. I remember that. I'm
2 going to let you make the record you're going to make,
3 but I'm just letting you know what's important to me and
4 what's not and --

5 Q. (BY MR. MIZELL) Okay. Cheryl, let me just do
6 this -- Ms. Rosenberg, let me do this very rapidly.
7 Does the City of Houston have a similar charter
8 provision that would apply to certain --

9 MR. MCKINLEY: Objection, Your Honor,
10 irrelevant.

11 THE COURT: It probably is, but -- I don't
12 know where we're headed. Does it have a similar -- I'll
13 allow that question to be answered.

14 A. Yes, it does.

15 Q. (BY MR. MIZELL) All right. And does the City
16 of Houston issue certificates of obligation without an
17 election through the years on a fairly routine basis?

18 MR. MCKINLEY: Objection, Your Honor,
19 irrelevant.

20 THE COURT: I think it probably is, too,
21 but I'll allow you to make the record on it. But go
22 ahead.

23 A. Yes, it does.

24 Q. (BY MR. MIZELL) All right. Does the City of
25 Austin have a similar charter provision that would

1 preclude tax revenue bonds absent an election?

2 MR. MCKINLEY: Same --

3 MR. MIZELL: I'm sorry, revenue bonds.

4 THE WITNESS: Revenue bonds.

5 MR. MCKINLEY: Same objection, Your Honor,
6 not relevant.

7 THE COURT: Go ahead.

8 A. Yes, with respect to revenue bonds.

9 Q. (BY MR. MIZELL) Okay. And does the City of
10 Austin issue revenue bonds with the Attorney General
11 approving those revenue bonds absent an election despite
12 the fact that the charter of the City of Austin requires
13 it?

14 MR. MCKINLEY: Objection, Your Honor, not
15 relevant, and we have no predicate as to whether anyone
16 ever objected to that, as we are today.

17 THE COURT: I'll let you point that out in
18 your examination of the witness.

19 A. Yes, it does.

20 Q. (BY MR. MIZELL) All right. And, in fact, does
21 the City of Friendswood issue revenue bonds on a regular
22 basis that would be subject to this charter provision?

23 A. Yes, it does.

24 Q. In fact, they did a couple of weeks ago,
25 correct?

1 A. Yes, they did.

2 Q. Water and sewer bonds, right?

3 A. Correct.

4 Q. All right. And those would be technically
5 subject to 8.05 of this charter provision, correct?

6 A. Yes.

7 Q. All right. But they are approved by the
8 Attorney General and sold, correct?

9 A. Yes. The ones that were approved a few weeks
10 ago I don't think have been approved by the Attorney
11 General, but many other issues -- water and sewer
12 revenue issues by Friendswood have been approved.

13 Q. Okay. On a statewide basis, there are other --
14 many examples of other state law, public finance laws,
15 that trump expressly charter provisions with respect to
16 issuing debt, correct?

17 MR. MCKINLEY: Objection, Your Honor,
18 calls for a legal conclusion.

19 THE COURT: I really -- I do think it
20 does. You're now getting her to tell me what the law is
21 as a witness.

22 MR. MIZELL: No. I just want to point out
23 that there are other things other than elections like --

24 THE COURT: Then you need to be more
25 specific because that question is unhelpful to me. I'm

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1 going to construe it as asking for her to tell me what
2 the law is, and I'm not going to allow that and just
3 move on to argument.

4 Q. (BY MR. MIZELL) Are there other provisions in
5 state law that trump charters other than elections?

6 MR. MCKINLEY: Objection, Your Honor.
7 Again, it calls for an opinion.

8 THE COURT: Are there provisions in state
9 law that trump -- that's a question of law, Counsel.
10 Let's just ask questions about the facts. I'm sorry,
11 but --

12 MR. MIZELL: No, that's all right. And
13 it's not a big thing. And with that, I'll pass the
14 witness.

15 THE COURT: All right.

16 CROSS-EXAMINATION

17 BY MR. MCKINLEY:

18 Q. Just a couple, Ms. Rosenberg. Would you agree
19 that revenue bonds may be allowed in a charter where the
20 bonds that you previously just described to Mr. Mizell
21 may not be? In other words, some bonds are allowed and
22 some are not?

23 A. I don't understand the question.

24 Q. For example, water and sewer bonds --

25 A. Okay.

□

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1 Q. -- may be specifically permitted by a city
2 charter and don't require a vote. Have you encountered
3 that in your work? Not all bonds are equal, in other
4 words?

5 A. Yes, that's true, but I still don't understand
6 your question. There are different state laws that
7 apply to the issuance of water and sewer revenue bonds
8 than apply to ad valorem tax bonds.

9 Q. I understand. But your point that other cities
10 issue bonds without voter approval despite similar
11 charter provisions would, number one, require a

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12 comparison of their full charter to know whether they
13 approve -- they don't require an election for certain
14 types of bonds, right?

15 A. I don't understand what you're saying.

16 Q. Have you studied the charter -- the full
17 charter of these other cities with which you are
18 comparing Friendswood?

19 A. Oh, I understand what you're saying. I'm just
20 familiar with the sections that deal with municipal
21 finance.

22 Q. All right. In other words, you have not
23 attempted to determine whether these various city
24 charters treat some bonds as requiring voter approval
25 and other bonds as not requiring voter approval?

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1 A. No, I believe I have.

2 Q. Is it fair to say also that some cities have
3 citizens that simply don't protest when an illegal bond
4 is proposed or voted on or passed? It never becomes an
5 issue before the court as it is today unless someone
6 acts and protests, right?

7 A. I would -- I wouldn't agree with your
8 characterization of the bonds being illegal, but yes,
9 it's -- I can't speak to whether the public in one place
10 is more or less likely to object than the public
11 somewhere else.

12 Q. To the extent that your testimony is offered to
13 cite -- to show some sort of precedent for the Court
14 that people do this all the time, it's really only
15 relevant if it occurs over citizen objection and a court
16 rules on it, right?

17 A. I can't speak to that. I can't speak to
18 whether it's relevant.

19 THE COURT: I'm sorry. I can't understand
20 your answer. You can't what? I just couldn't hear what
21 you said.

22 THE WITNESS: He asked me whether it's
23 relevant.

24 THE COURT: I know. I just couldn't hear
25 what you said.

55

1 THE WITNESS: Oh, he asked me --

2 THE COURT: I just need to know what it is
3 you said because I could not hear you.

4 THE WITNESS: Oh, I said I cannot speak to
5 whether it's relevant.

6 THE COURT: Thank you.

7 Q. (BY MR. MCKINLEY) In other words, you're able
8 to say what cities do, including what they get away
9 with. You're not here to tell the Court that they've
10 been able to do this over voter objection, have you?
11 You're not saying that?

12 A. I suppose that's correct.

13 Q. Okay. Thank you. That's all.

14 REDIRECT EXAMINATION

15 BY MR. MIZELL:

16 Q. Ms. Rosenberg, is the notion that people are
17 getting away with it -- Mr. Griess to your right, what's
18 his title?

19 A. He is the -- I believe he's the interim head of
20 the Public Finance Division of the Office of the

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21 Attorney General of Texas.

22 Q. All right. And they have a staff of lawyers
23 that look at your transcripts and are rigidly
24 enforceable of the laws of the state of Texas as it
25 pertains to these issuances, correct?

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1 A. Yes. Am I allowed to make one point?

2 Q. Yes. Do you want to expand on that answer?

3 A. All I want to say is that the certificate of
4 obligation Act specifically provides that there is a
5 remedy for disgruntled citizens, and that is to submit a
6 petition of five percent and then force an election to
7 be held on that issue. There's a remedy.

8 Q. He knows that.

9 A. All right.

10 Q. That's why we don't need to --

11 A. Okay.

12 Q. The Court doesn't need to hear that. He's
13 aware of that.

14 A. Oh, okay.

15 Q. So we're not here to tell him the law.

16 THE COURT: Well, you are, just not as a
17 witness.

18 MR. MIZELL: Right.

19 THE COURT: It's really just lawyer
20 argument.

21 MR. MIZELL: Right, right.

22 THE COURT: You're always here to tell me
23 the law, I hope.

24 MR. MIZELL: Well, except that having an
25 expert tell you the law.

1 THE COURT: Exactly.

2 MR. MIZELL: Right. No problem. And I
3 think I just stepped on -- oh, and I have no further
4 questions. I have no further questions.

5 MR. MCKINLEY: Nothing further,
6 Your Honor.

7 THE COURT: You may step down.

8 THE WITNESS: Thank you.

9 MR. MIZELL: And the City rests.

10 MR. MCKINLEY: Your Honor, the
11 Friendswood 5 have no evidence to put on because our
12 only submissions to the Court are law.

13 THE COURT: Great. All right. You've
14 read their brief. You've read -- you know the
15 opposition. There are two main points. One, they
16 contend you must comply with Section 8.05 of the city
17 charter. You say the general code provisions trump that
18 and that you don't have to require that -- or you don't
19 have to comply with that. I guess that's your point --

20 MR. MIZELL: Yes, Your Honor.

21 THE COURT: -- right, in your brief? What
22 I don't understand is 8.05 does seem to be more
23 restrictive than what the code allows. And I don't
24 understand why citizens, by virtue of the charter,
25 cannot choose to have less government power exercised by

1 their home-rule municipality than others. Some
2 home-rule municipalities may want more power to issue

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3 bonds and some don't. Apparently, as evidenced by this
4 charter, they don't want their governing officials to be
5 able to authorize debt in excess of this limitation that
6 by charter they've placed on them in 8.05.

7 what law tells me -- I understand
8 apparently it's routinely done, and I'm really
9 interested in this now, especially given the fact that I
10 am inferring that the AG concludes that it's not
11 necessary to comply with the city charter. What's the
12 authority for that?

13 MR. MIZELL: Your Honor, it's two-fold.
14 If you will turn to No. 3, if I may be so bold to tell
15 you to turn to something in the pamphlet.

16 THE COURT: Just one second.

17 MR. MIZELL: Okay.

18 THE COURT: Okay. Which tab again?

19 MR. MIZELL: 3. The State -- the
20 legislature implemented a very important public policy
21 provision which was to allow for a vote. And if a
22 requisite number of petitions, five percent, are
23 gathered and then that would force a vote, and
24 specifically in the --

25 THE COURT: That would apply even if there

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1 were no charter limiting this.

2 MR. MIZELL: Correct.

3 THE COURT: This is even a greater
4 limitation, right? They don't have to have a petition
5 with five percent. An election is required under 8.05.
6 You agree with that, right? You agree with that?

7 MR. MIZELL: I think they conflict.

8 THE COURT: I'm sorry?

9 MR. MIZELL: I do not think that they can
10 coexist. I do not think --

11 THE COURT: Show me how they cannot
12 coexist.

13 MR. MIZELL: If you have a requirement for
14 a vote, a bond requirement for a vote, that could not
15 coexist at the same time with a state legislative
16 requirement that you only have a vote if there is five
17 percent of the voters sign a petition and then enact it.
18 And that is embodied in -- that is embodied in the act
19 itself --

20 THE COURT: well, it's clearly more
21 restrictive, but why -- where does the law say that by
22 charter citizens cannot choose by charter to have their
23 local government more restrictive? where does it say
24 that other than this home-rule municipality may use this
25 subchapter regardless of any provision in the

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1 municipality's charter to the contrary?

2 MR. MIZELL: That law, that says it. It
3 says the state law is expressing an important public
4 policy position that -- and this is not just a conflict
5 provision in the statute. This is an actual directive
6 by the legislature to cities that says you can choose
7 the five percent rule over something to the contrary,
8 which is the vote without the five percent petition.

9 THE COURT: So your point is a home-rule
10 municipality has the greater -- has the greater powers
11 of this subchapter despite any restrictions to the

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12 contrary in their charter, and so those restrictions are
13 meaningless?

14 MR. MIZELL: Correct.

15 THE COURT: Okay.

16 MR. MIZELL: Because the legislature has
17 the ability to preempt it.

18 THE COURT: Okay.

19 MR. MIZELL: And in this circumstance and
20 in very limited circumstances, which is certificates of
21 obligation -- and there are important public policy
22 reasons why this law exists. There are -- it is --
23 certificates of obligations can only be issued in very
24 limited public works projects. And cities must have the
25 ability to fund these projects without having to put

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1 them up for a vote, or at least having, in the view of
2 the legislature, to put them up for a vote unless a
3 substantial number of petitioners move to block it. And
4 in this circumstance, those limited things are public
5 necessities, things which the legislature has deemed to
6 be under the Certificate of Obligation Act which can be
7 done and to be done without having to put them for a
8 vote every single time.

9 Now, I will say without any drama in this
10 that the certificate of obligation as I've come to
11 understand -- and I'm not a bond lawyer. I'm just a
12 sore back med mal defense lawyer that turned into a bond
13 litigator because med mal went away, but I have done
14 a lot of these suits and come to hang out with these
15 bond lawyers and have come to understand that the
16 Certificate of Obligation Act is an extremely important

17 public finance mechanism in the state. And if you had
18 to put certificate of obligations to vote every single
19 time --

20 THE COURT: Well, only with those cities
21 who insist on it by virtue of their charter.

22 MR. MIZELL: Right, which is many and
23 encompass a large swath of the population of the state.

24 THE COURT: But that's the question.
25 You're saying that they don't -- that citizenry does not

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1 have the power through their charter to restrict their
2 local government more than this state act.

3 MR. MIZELL: Correct, because the
4 legislature says the city, the municipality, may use
5 this subchapter regardless of any provision in the
6 municipality's charter to the contrary. And the
7 constitution -- the Texas Constitution on Tab 4 says no
8 charter or ordinance passed under said charter shall
9 contain any provision inconsistent with the constitution
10 of the state or the general laws enacted by the
11 legislature or the state. And so -- and this is a --
12 this is a hypothetical conflict. But you could not --
13 you couldn't have a situation --

14 THE COURT: Let me ask you this. Why is
15 it inconsistent if they put this particular controlling
16 language in 8.05? Maybe if they said in every bond
17 election in this city you have to have an election, and
18 the -- I just lost my tab now, doggone it. Under --
19 I've got it under Tab 1. Under 271.049(c), it says
20 holding an election is when there's a petition with five

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21 percent. And they said -- and the city charter says,
22 no, we want it in every one. But that's not what this
23 city charter says. It says only with respect to those
24 where the debt is not payable from then current
25 revenues. That's why I asked you that question about

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1 whether your record was going to suggest that you
2 complied with this. You conceded that the City does not
3 comply with 8.05 of their charter.

4 MR. MIZELL: And --

5 THE COURT: But your point is they don't
6 have to. And my point is, I don't see that this is
7 necessarily inconsistent with the five percent. The
8 five percent is sort of in every kind of bond. You get
9 five percent of the people to ask for an election, you
10 may stop it, right?

11 MR. MIZELL: No, just certificates of
12 obligation.

13 THE COURT: well, certificates of
14 obligation. All right.

15 MR. MIZELL: which is what -- okay.

16 THE COURT: I'm sorry. And I am not a
17 bond lawyer --

18 MR. MIZELL: I understand.

19 THE COURT: -- or a certificate of
20 obligation lawyer. And my board certification is
21 personal injury trial law, too. There you go.

22 MR. MIZELL: As is Mr. McKinney's.

23 THE COURT: Then you and I can talk. we
24 can reduce it to our level. But I'm not seeing the
25 inconsistency with subsection F because that's a very

1 particularized limitation they've put on their elected
2 officials, that is, don't incur debt that's not payable
3 from then current revenues unless we approve it in an
4 election, which is not the same thing as what is in
5 271.049(c). I don't see that they're -- I don't see
6 the -- I don't see that they are irreconcilable. I
7 think they're entirely reconcilable.

8 MR. MIZELL: Because under one scheme you
9 have all debt that's subject to that clause not
10 current -- not payable out of current revenue, which is
11 all certificates of obligation. From what we're talking
12 about today, that encompasses all of it --

13 THE COURT: Why --

14 MR. MIZELL: -- because it's paid out over
15 multi years, okay? I'm just trying to get you over that
16 one hump on the clause.

17 THE COURT: Oh, you're saying they can
18 never -- you could never have a certificate of
19 obligation that's payable from then current revenues?

20 MR. MIZELL: Right.

21 THE COURT: You could still do a
22 certificate of obligation because you don't want to pay
23 it out of then current revenues. I mean, why --

24 MR. MIZELL: No, no, no. In bond law --
25 it would be easy for me to take the opposite position

1 except for my bond lawyers told me you can't take that
2 position, because I thought a plain reading was, can you

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3 pay the debt service out of current revenues?

4 THE COURT: Right.

5 MR. MIZELL: And there is a term of art in
6 bond law that I think Mr. Griess would back me up on --
7 not back me up; contradict me if I said anything
8 differently. That's not what that means. That means
9 that the principal and interest --

10 THE COURT: And you're referring to 8.05?

11 MR. MIZELL: 8.05.

12 THE COURT: Really means what?

13 MR. MIZELL: Really means that if you
14 don't -- if you can't pay it by year's end, you then
15 have to put it up for a vote. Does that make sense?

16 THE COURT: Yes.

17 MR. MIZELL: Okay.

18 THE COURT: In other words, if you're
19 borrowing more than you can pay off --

20 MR. MIZELL: In a year.

21 THE COURT: -- this year or the year in
22 which you incur the obligation, I guess, incur the debt.

23 MR. MIZELL: Right. It would be -- it
24 would be easy for me to take the opposite position,
25 which is that the debt service alone is payable out of

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1 revenues, but I am told that's not the law.

2 THE COURT: well, then you would comply
3 with 8.05.

4 MR. MIZELL: Right. And I wouldn't be --

5 THE COURT: But you concede --

6 MR. MIZELL: And I might have an alternate
7 argument that says, well, we do, in fact, comply with

8 the charter.

9 THE COURT: But just because people -- or
10 municipalities don't typically take out debt obligations
11 if they're able to pay from then current revenues, they
12 might have some strategic reason why they want to. But
13 this says -- I mean, even if you could pay the whole
14 obligation -- you say that's -- no, you can't, this city
15 can't; that's why it wants to incur the debt. And most
16 cities can't. That's why they incur these debts, so
17 they can make capital improvements.

18 MR. MIZELL: Right.

19 THE COURT: I get that. But they're
20 saying in any situation where you have to do that, you
21 have to get an election. That doesn't mean that a city
22 might not choose to incur debt even though they could
23 make that capital improvement out of current revenues.
24 Do you see what I'm saying?

25 MR. MIZELL: Yes.

□

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1 THE COURT: Ergo, there's not necessarily
2 an inconsistency, if you understand my question.

3 MR. MIZELL: I do totally understand your
4 question, and I have fought long and hard about it. And
5 it would be true -- and, in fact, it is probably true in
6 a revenue bond. It doesn't have this clear preemption
7 like the Certificate of Obligation Act. That sentence
8 was written so that charters would not -- would not
9 force elections every time the certificate of obligation
10 is raised. And it's more than a -- it's more than a
11 statement that says if it conflicts, the state

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12 legislature wins. It says that in the constitution.

13 THE COURT: So when these -- when folks
14 try to limit their local government with the charter, so
15 we really -- we want limited local government --

16 MR. MIZELL: Right.

17 THE COURT: -- limited national, state,
18 local, whatever, we want limited local government --

19 MR. MIZELL: Right.

20 THE COURT: -- we want in this charter a
21 prohibition on incurring this debt, they just can't do
22 it. The State of Texas, through its legislature, has
23 disempowered the local citizenry from limiting their
24 local government with respect to these debt obligations?
25 That's essentially --

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1 MR. MIZELL: In the narrow --

2 THE COURT: -- the law that you say is the
3 existing law in the state of Texas.

4 MR. MIZELL: In the narrow --

5 THE COURT: I think that would shock a lot
6 of people, but that's your position?

7 MR. MIZELL: In the narrow subject of
8 certificates of obligation, which are a minor subset of
9 bond finance in the state which are for strict
10 necessities of public works projects, the legislature
11 has recognized that some cities, when they have this
12 charter, may never pass upon election. And because of
13 that -- and in this case, we just lost a bond election.
14 Because of that, you may need things like a dog pound to
15 house animals because you're not in compliance with
16 state law, and you may have to do that despite the fact

17 that the charter in 1997 said you have to put it to a
18 vote. That's the important public policy --

19 THE COURT: well, no, no. They've got an
20 exception written in this charter, which is emergency of
21 urgent public necessity shall be expressed in the
22 ordinance or resolution authorizing such debt. They can
23 in an emergency situation do it, which answers your
24 question. But in a non-emergency situation -- I think
25 you stated your position clearly. State law prohibits

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1 people by local charter from limiting the powers of
2 their local government on debt obligations. It's that
3 simple.

4 MR. MIZELL: Correct.

5 THE COURT: All right.

6 MR. MIZELL: And the basis for that is --

7 THE COURT: Is not the emergency.

8 MR. MIZELL: No, no, no. No, no, no. But
9 a state pound is not an emergency. Okay? It is just a
10 public necessity.

11 THE COURT: well, it can be.

12 MR. MIZELL: well, it could be. And in
13 our circumstance it probably is because we're out of
14 compliance and we're in a floodplain and they have to
15 build it. And if they put that to a vote, it may lose.
16 It may not lose. I don't know. But we would rather
17 just fund it and issue the debt according to state law
18 which says we can choose this method of doing it over
19 the charter.

20 THE COURT: Okay.

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21 MR. MIZELL: And so that's -- I mean,

22 that's -- that is -- we have -- I mean, I think we're
23 squarely on all fours about where the rub is on this.

24 THE COURT: And let me just ask you a
25 practical matter. Why is this issue -- I mean, surely

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1 there are people somewhere in the state who have
2 objected. You said, in cross-examining your bond
3 expert, well, you don't know a case where somebody's
4 objected and the Court's decided. Obviously, if you
5 did, I'd have at least a trial court order showing me
6 that some trial court has already grappled with this.

7 MR. MIZELL: But, you know, the trial
8 court order that you have is not --

9 THE COURT: Surely you'd ask this
10 question, too. Has this ever come up where there's been
11 a dispute somewhere in the state of Texas and we've had
12 this argument about the powers of charters -- I mean,
13 the right of the people through the charter to limit
14 their local government on these debt obligations versus
15 the Certificate of Obligation Act? It's never come up
16 apparently.

17 MR. MIZELL: There's no case law. And let
18 me say that I think I know the order you're talking
19 about. And the order you're talking about was not a
20 certificate of obligation.

21 THE COURT: I don't know of any order, so
22 you're assuming I know more than you do.

23 MR. MIZELL: I am told that there was
24 another district court in Austin that ruled to the
25 contrary.

1 THE COURT: To the con --

2 MR. MIZELL: Of my position.

3 THE COURT: Really? well, I would be most
4 interested in that.

5 MR. MIZELL: And we're all open on this
6 issue. I am told that it was not that CO has a specific
7 provision in it. That was, in fact, a tax --

8 THE COURT: In other words, it wasn't --
9 this issue wasn't joined with 271.049(c) versus a city
10 charter.

11 MR. MIZELL: If you're in the lounge
12 talking to your friends and they say, you know, I
13 thought that they had to have an election, ask them if
14 it was the Certificate of Obligation Act. That's the
15 only thing.

16 THE COURT: well, the question is, do you
17 know of a case, even a local district judge, who
18 grappled with the question of whether the state local
19 government code trumps in this context, not the exact
20 kind of bonds necessarily --

21 MR. MIZELL: Right.

22 THE COURT: -- a local charter that
23 provides greater restriction? Do you see what I mean?

24 MR. MIZELL: Yes, Judge Yelenosky in the
25 City of Orange case.

1 THE COURT: Thank you.

2 MR. MIZELL: And --

3 THE COURT: My close friend.
4 MR. MIZELL: what's that?
5 THE COURT: My close friend.
6 MR. MIZELL: And he expressed almost in --
7 almost eerily similar words as you the same concern.
8 THE COURT: That may be why we get along.
9 MR. MIZELL: And at the end ultimately
10 ruled in favor of the City of Orange. And I can get
11 that order to you to show you so that we're all on the
12 same page.
13 THE COURT: If it's convenient for you,
14 that would be great. Then I can pull that case up and
15 see if it helps me.
16 MR. MIZELL: He expressed concern but was
17 ultimately satisfied --
18 THE COURT: Okay.
19 MR. MIZELL: -- that there was a state
20 scheme that trumped this.
21 THE COURT: Okay. Now let's do the harder
22 part for you. How do you get around that prohibition
23 under 3.31 that you can't buy land outside the county?
24 That seems pretty explicit. You know, they can limit
25 your powers. You know, you've just said they can expand

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1 your powers. But the State can also limit your powers.
2 You can't really have it both ways, it doesn't seem to
3 me. And in 3.31 they have clearly, it seems to me,
4 limited your powers. Maybe they shouldn't, but they
5 seem to have. And I don't know of a single case that
6 says otherwise. The case you cited, the Turtle whatever
7 case --

8

MR. MIZELL: Turtle Rock.

9

THE COURT: Doesn't really get you there.

10

MR. MIZELL: Well, Turtle Rock says -- and

11 I'm going to say this and I'm going to pass it to

12 Ms. Milner because this was her subject area and she's

13 much more eloquent on it. But Texas Supreme Court said

14 that home-rule cities do not need to look to 3.31 to

15 derive power to create parks. And it specifically

16 stands for that. In Turtle Rock -- and I'll just say

17 this and I'll pass to Carly who is --

18 THE COURT: Of course, they don't need

19 that to derive their power --

20 MR. MIZELL: Right.

21 THE COURT: -- but that doesn't mean they

22 get to run over the limitations if it's a very specific

23 limitation. In fact, in the opponent's brief they cite

24 that very language I think out of the same case. Let's

25 find it because it comes right out of their case, and I

□

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1 highlighted when I read their brief.

2 MR. MIZELL: I can do this for you.

3 THE COURT: You can do it for me. You can

4 find it faster. You know what I'm talking about.

5 MR. MCKINLEY: I have it if you want.

6 THE COURT: That's okay. I'm going to

7 pick on him.

8 MR. MIZELL: I swear I'm going to turn

9 this over to Carly in just a second.

10 THE COURT: which tab?

11 MR. MIZELL: If you will turn to 9, 9 is

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12 331.

13 THE COURT: Yes.

14 MR. MIZELL: Okay. The derivation of
15 power under 331 is this is what -- this is the law that
16 applies to general law cities and counties that provides
17 for the basis for creating parks. And that's what
18 Turtle Rock stands for. Okay? If you look at it --

19 THE COURT: Say that one more time. I'm
20 sorry. I was finding the case, which I did just find.

21 MR. MIZELL: She's really, really good and
22 really smart and is really eager to argue, but I just
23 have to say this and I'm going to shut up. 331 is a
24 thing created in the law to give general law cities and
25 counties the ability to purchase parks. General law

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1 cities and counties derive their power specifically by
2 statute, unlike home-rule cities who do not need some
3 specific grant from the legislature. They have general
4 self-government allowances. And in our case we have a
5 charter that 201 says we can do anything in our power
6 subject to the constitutional laws of the state of
7 Texas. That's --

8 THE COURT: But the State can still limit
9 your powers by the local government code if they do it
10 as in the case you cited to the Court --

11 MR. MIZELL: Right.

12 THE COURT: -- the College Station -- City
13 of College Station vs. Turtle Rock case if they limit
14 their powers. The intention of the legislature to
15 impose such limitations must appear with unmistakable
16 clarity. And I look at the local government code. It

17 defines you as a municipality, that is to say, your city
18 as a home-rule city and it is a municipality. And it
19 says municipalities may -- let's see. Land acquired by
20 a municipality which is defined as any municipality,
21 including a home-rule municipality, may be situated
22 inside or outside the municipality. So you could buy it
23 in Harris County.

24 MR. MIZELL: But Your Honor skipped the
25 most important part.

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1 THE COURT: "That must be within the
2 county in which the municipality is situated." I don't
3 know how that's not a clear and unmistakable limitation.

4 MR. MIZELL: Because the thing you
5 skipped, not intentionally --

6 THE COURT: That's okay.

7 MR. MIZELL: The thing you skipped is land
8 acquired by a municipality under Subsection B --

9 THE COURT: Yes.

10 MR. MIZELL: -- may be situated outside or
11 not outside the county. This land is not being acquired
12 pursuant to 331. We do not need this statute. And
13 that's what Turtle Rock stands for. We don't need or
14 care about this statute from the purpose of whether this
15 is the derivation of our power to buy the park. Our
16 power to buy the park is our charter which is --
17 you know, and there is a distinction in the law --

18 THE COURT: I see what you're saying.

19 MR. MIZELL: Right.

20 THE COURT: So you're saying that the

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21 city -- a home-rule city doesn't ever use 331.001 to
22 obtain the power to buy land inside or outside its
23 jurisdiction?

24 MR. MIZELL: It's not me, Pat Mizell,
25 coming up with a crafty argument. The Texas Supreme

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1 Court in Turtle Rock specifically said that in that case
2 the City of College Station did not need 331 or 608.3,
3 which was the predecessor statute, to acquire -- or
4 force the purchase of parkland when a developer did it.
5 They could do it --

6 THE COURT: So the critical language in C
7 then is "under subsection B." If that wasn't in there,
8 you lose, right?

9 MR. MIZELL: But --

10 THE COURT: No. If the words "under
11 subsection B" was not in there, you lose?

12 MR. MIZELL: No.

13 THE COURT: Why not?

14 MR. MIZELL: Because even if you took that
15 out, it's still a grant of power, and then the next
16 sentence --

17 THE COURT: It doesn't matter. They can
18 limit your power, but it has to be with unmistakable
19 clarity. Your point is, because they refer you back to
20 "under subsection B," this is not a limitation of power
21 in home-rule cities. And if they wanted it to be, they
22 would have a section that says any municipality that
23 acquires land under any powers may do so; however, they
24 may only -- you know, they may not acquire outside the
25 county in which the municipality is situated. If they

1 said that, you lose, right? The legislature has the
2 power to do that to you, right?

3 MR. MIZELL: Yes, they do.

4 THE COURT: Okay.

5 MR. MIZELL: They have the power to do it.
6 But in this circumstance -- hang on. Carly knows this
7 inside and out and is really a fine lawyer, and Carly
8 can go ahead and talk.

9 THE COURT: I finally wore you out.

10 All right. Go ahead.

11 MS. MILNER: Your Honor, I don't think
12 that the City loses even if the "under subsection B"
13 language wasn't in there. Subsection C is just defining
14 the limits of the grant of power which the City of
15 Friendswood doesn't need as a whole municipality.

16 THE COURT: Say that one more time.

17 MS. MILNER: Subsection C is simply
18 defining the limits of this grant of power. And since
19 the City of Friendswood doesn't need this grant of
20 power, Subsection C would not operate as a limitation --

21 THE COURT: Because it's inferred that C
22 is only referred to those who need the grants of power.
23 But if they put them in a separate section of the local
24 government code, land acquired by any municipality, they
25 don't reference the rest of 331 at all, it's not under

1 331, it's its own standalone provision in the code, land
2 acquired by a municipality may not -- must be within the

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3 county in which the municipality is located. The
4 legislature could do that and then you would not be able
5 to do this, right?

6 MS. MILNER: Yes, I agree that it would be
7 possible for the legislature to pass a statute that
8 would limit the City's power.

9 THE COURT: But they needed to get it
10 outside of this 331.001 because 331.001 starts with the
11 grant of power. And so by putting it underneath that,
12 one can infer, even without the language "under
13 subsection B" that's contained in C, that that's really
14 what they mean, is to limit those to whom they're
15 granting this power who otherwise wouldn't have it.

16 MS. MILNER: That's correct. And I
17 believe that that is emphasized by two other provisions
18 of the local government code.

19 THE COURT: Okay. Where is that?

20 MS. MILNER: You can find it at Tab 7.

21 THE COURT: Okay.

22 MS. MILNER: It's Section 51.072,
23 subsection B. The grant of powers to the municipality
24 by this code does not prevent, by implication or
25 otherwise, the municipality from exercising the

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1 authority incident to local self-government.

2 THE COURT: But that's a grant of powers.
3 The question is whether they're limiting powers.

4 MS. MILNER: This section is specifically
5 addressing how the local government code applies to
6 home-rule municipalities. So here the legislature is
7 saying we're setting out all the provisions of the local

8 government code, but these provisions provide grants of
9 power and they are not intended to limit the powers of
10 these home-rule municipalities.

11 THE COURT: Okay.

12 MS. MILNER: And Your Honor can also look
13 at Tab 10, which is Section 315 of the local government
14 code. And this is before Section 331 obviously, but
15 also in Title 10 of the same code. And this states that
16 the provisions of Title 10 relating to the acquisition
17 of parks outside the municipal limits are cumulative of
18 powers provided by a municipal charter. So this
19 indicates that the legislature did not intend to limit
20 the power of cities to purchase land outside the city
21 limits if the City chose to do so. And the City of
22 Friendswood has the all-encompassing power provision in
23 Section 201 of the charter.

24 THE COURT: Well, this would be fine as
25 long as they don't clearly and unmistakably limit those

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1 powers somewhere else in the code, right? Because if
2 they have a specific limitation, specific always
3 controls the general, and if they make a specific
4 limitation -- you're not saying that this would mean --
5 I think your argument would be that this means that none
6 of this applies to home-rule municipalities.

7 MS. MILNER: Section 315?

8 THE COURT: Yeah, that what 315 means, if
9 any restriction anywhere in the local government code
10 appears limiting the powers of home-rule
11 municipalities -- or limiting the powers of

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12 municipalities, it doesn't apply to home-rules.

13 MS. MILNER: No.

14 THE COURT: Even if it's clear and
15 unmistakable, as in the Turtle Rock case. Is that what
16 you're arguing?

17 MS. MILNER: My argument with respect to
18 section 315 is that this section makes clear that in
19 section 331 the legislature intended to provide grant of
20 power and --

21 THE COURT: Oh, okay. Just as title.

22 MS. MILNER: -- just expressing that
23 should a city that has additional powers wish to
24 exercise those powers, that the other provisions of
25 Title 10, which include section 331, would not limit

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1 those other powers.

2 THE COURT: Right. Okay. Does anyone
3 know if this came up, just out of curiosity -- the issue
4 of buying huge swaths of parkland, but not so much for
5 parks as to preserve the habitat west of Austin, was all
6 that in Travis County? Does anybody know?

7 MR. MIZELL: I don't know.

8 THE COURT: Or did it go beyond Travis
9 County? Because the City did that in consortium with
10 other interests, including --

11 MR. MIZELL: I do know cities all over the
12 state own property outside the county, mostly in the
13 context of water lines.

14 THE COURT: Right, right.

15 MR. MIZELL: And a unique situation we
16 have here, the City of Friendswood started in Galveston

17 County, was only within the borders of Galveston County,
18 and then annexed its way into Harris County at a later
19 time. And so whether there is this all-encompassing
20 public policy sovereign county line barrier that
21 prevents you to go across the border by a hundred feet
22 and buy a park -- and I know that sounds like jury
23 argument; I apologize -- but there is no public policy
24 embodied that is furthered by this argument.

25 THE COURT: Okay.

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1 MR. MIZELL: If I could make that any --
2 say that in the inverse, this is a thing for a clearly
3 good public purpose, a park.

4 THE COURT: That's not the question before
5 me.

6 MR. MIZELL: I know.

7 THE COURT: The law is frequently not how
8 I would write it.

9 MR. MIZELL: I know.

10 THE COURT: And, you know, sometimes I
11 think it's terrible, but I'm just up here trying to make
12 sure I'm following it. That's my job.

13 MR. MIZELL: Right. The point is, if
14 there is no -- if we don't need that as a derivation of
15 power -- if we don't need it and if the home-rule
16 city -- if the home-rule charter, which gives us broad
17 grant, is the basis to do it per the Supreme Court under
18 Turtle Rock which says you don't need 331 to build
19 parks, once that artificial -- once that artificial
20 obstacle is eliminated as an obstacle, then there isn't

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21 anything public policy-wise that's satisfied by this
22 argument. It's not an issue of we're spending too much
23 money, don't buy this park, we have other important
24 things to spend money on. That's not their issue
25 because you clearly have the right as a city to buy

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1 parkland. It is don't go across a hundred feet this
2 border to build this park. And if the City of Alvin was
3 here saying, None of those snooty Friendswood people in
4 our city, that would be one thing, but that's not what's
5 occurring here. If it was Brazoria County saying --

6 THE COURT: Why would that be one thing?
7 They couldn't stop it either, according to your
8 argument.

9 MR. MIZELL: Well, I think it would be a
10 different -- I think it would be a different --

11 THE COURT: It would be a different jury
12 argument, but the law is still the law, and it wouldn't
13 change anything based on the arguments you've made here.

14 MR. MIZELL: Right. But let me say this.
15 There's no question -- and this is an important point to
16 know. There's no doubt that through a land swap we
17 could annex this property if Alvin agreed to it and did
18 the property. So you could bypass this whole thing by
19 doing a formal land swap with Alvin and no one could
20 contest that issue. This is a much less drastic measure
21 of doing it, which is to just buy the private land for a
22 cheap price for Little League parks and football
23 fields -- we haven't talked about the football fields,
24 but they also include youth football fields -- than
25 doing the more drastic measure of a land swap or an

1 annex.

2 And so, I'm sorry, Carly, I'll step down.

3 MS. MILNER: One other point. Because
4 this is not an annexation, the purchase of this land
5 does not raise any sort of sovereignty issues.

6 THE COURT: I'm not really so concerned
7 about that. And that's not really the thrust of the
8 Friendswood 5's position on this. They didn't really --
9 I mean, I know the amicus did, but I don't really think
10 that's -- that's not the problem here in front of me.
11 That could become the problem. I don't know what the --
12 you know, the City can't on its own exercise sovereignty
13 and police powers. And I think you pretty much conceded
14 that in your briefing that you've got to do that somehow
15 in cooperation with the authorities who do have
16 governmental jurisdiction over that land. That is the
17 County of Brazoria and, to the extent it's in Alvin's
18 jurisdiction, them too, right?

19 MS. MILNER: That's correct.

20 THE COURT: And you conceded that in the
21 brief.

22 MS. MILNER: Yes.

23 THE COURT: I don't see that that's the
24 issue before me today because I don't see a clash of
25 sovereign jurisdictions that's in front of me that's

1 properly joined. I'm really focused on the 331 and the
2 extent to which -- you know, the questions we've been

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3 going back and forth on, very interesting.

4 MR. MIZELL: And all I can leave you with
5 is, if you read the last four paragraphs of Turtle
6 Rock --

7 THE COURT: I've read it.

8 MR. MIZELL: -- which is -- I mean, it is
9 clear to me that the Supreme Court has said -- and we
10 wouldn't be here today if those four paragraphs didn't
11 exist. The home-rule city does not need this charter
12 provision -- I'm sorry, this 331 to buy the parkland.
13 And in that case it said that the City of College
14 Station could go outside then 331, which was 608.3, and
15 use its police powers under its general home-rule
16 charter provisions to do what it wanted to do in that
17 case, which was require that a developer set aside
18 parkland when it makes a large development. And it
19 expressly says that 331 is applicable to general law
20 cities and it is the reason it exists, because if it
21 didn't exist, they couldn't do it under state law.

22 THE COURT: No, I understand that. It
23 still comes back to whether this statute is an intention
24 by the legislature to limit the power of home-rule
25 cities. You argue it's not because 331 doesn't even

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1 apply to home-rule cities because they're not using that
2 grant of power to buy the land to begin with.

3 MR. MIZELL: Exactly.

4 THE COURT: I understand. I understand
5 your position. Between the two of you, it's sort of a
6 one-two punch. You got it through. Thank you.

7 All right. Well, the briefing didn't

8 really -- and it was fine briefing. I don't mean that,
9 but it didn't really make it as clear to me as this oral
10 argument has made it. You understand their position
11 now. And you might just look at their tabbed -- did
12 they give you a set of exhibits?

13 MR. MCKINLEY: I have it, Your Honor.

14 THE COURT: I know you know these things
15 back and forward anyway. Those are the ones I'm looking
16 at because they're just easy to pull up and bigger print
17 than what I've been reading.

18 MR. MCKINLEY: Yes.

19 THE COURT: They argue that they're not
20 using 331.001. Why is that -- why are they wrong about
21 that?

22 MR. MCKINLEY: Our point, Your Honor, is
23 that as a home-rule city, they are, in fact, a
24 municipality and they therefore are doing something that
25 331 subsection C prohibits because it --

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1 THE COURT: But what they -- and that's
2 why I think it is important. I don't know if they both
3 agree with this. One kind of argued with me about it.
4 One of the counsel for plaintiffs argued with me about
5 it. But I think the language "under Subsection B" is
6 important, and if it wasn't there, your argument would
7 be stronger. But under C, the language, which when I
8 first read it, I thought it seems like a slam dunk for
9 you; I think you're right. Now I'm rethinking it, which
10 is -- that's why we have oral argument, to make sure
11 I've thought it through carefully enough, even after

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12 reading the brief.

13 "Land acquired by a municipality under
14 Subsection B," if that language wasn't there -- and, in
15 fact, I think I finally got them to concede this. They
16 didn't like it. But if they put this in a separate
17 section of the code, if they took C, took the C off and
18 put it in a separate section of the code and just said
19 land acquired by a municipality must be within the
20 county in which the municipality is situated, you win.
21 And I think they conceded that.

22 MR. MCKINLEY: They wouldn't even have an
23 argument then.

24 THE COURT: Exactly. But they argue, no,
25 this C section is only referring to the municipalities

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1 who are acquiring land under Subsection B, and they are
2 not. They are not. They are a home-rule municipality
3 that is not acquiring land under Subsection -- under
4 331.001. If they're right about that, if they're right
5 that a home-rule municipality may acquire land by virtue
6 of powers that home-rule municipalities have separate
7 and apart from 331.001, then this is not a limitation on
8 them, is it, if they're not using 331?

9 MR. MCKINLEY: If they are, in fact, not
10 using 331, then the issue would be, are they subject --
11 do they have the power at all.

12 THE COURT: Right.

13 MR. MCKINLEY: They're a home-rule
14 municipality and they are subject to their charter
15 provisions. Otherwise, that's a separate issue --

16 THE COURT: I'm going to go back to the
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17 charter.

18 MR. MCKINLEY: -- that encompasses the
19 land issues.

20 THE COURT: I'm still concerned about this
21 other problem they have. Even if everybody in the state
22 is doing this, I'm kind of mystified by the fact that
23 you can't limit your local government by charter. It
24 seems to me that you ought to be able to do that, and
25 I'm surprised the law doesn't allow it. I'd sure like

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1 to see some law on that. Apparently there is none, so
2 maybe, you know, I'll get famous on this case. I don't
3 know. But --

4 MR. MCKINLEY: To limit it to the
5 out-of-county issue --

6 THE COURT: But let's get back to this. I
7 want to get 331 first, then I'll go back to city
8 charter, okay, because it's a two-prong attack you make
9 on that. If they are right that they are not using 331
10 to acquire this land, then you do not prevail on your
11 331 argument because they're not using 331 --

12 MR. MCKINLEY: In answer, I would say that
13 they're being inconsistent. They're saying on the one
14 hand that we're a home-rule city and we don't need 331,
15 yet on the other hand they're pointing to the
16 legislature, which under the constitution the
17 legislature doesn't give them their power at all, none.
18 The legislature can prohibit them from things, but the
19 legislature doesn't give them a grant of power. Only
20 the constitution does. Yet here they're pulling out the

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21 Certificate of Obligation Act and saying we have all
22 these powers because the legislature gave them to us.
23 The legislature only creates special law cities and
24 general law cities and counties. It doesn't even create
25 them. So they're being inconsistent. They're saying

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1 we'll use the CO act and we won't use this.

2 THE COURT: Forget about debt for a moment
3 because B is -- let's look at -- where's the rest of
4 331? I'm going to get my Black's statutes.

5 MR. MCKINLEY: I have a copy.

6 THE COURT: That's all right. I've got
7 mine and I already have it marked up. That's what I
8 want. So 331.001 is not about debt, right?

9 MR. MCKINLEY: That is true.

10 THE COURT: It's not about acquiring debt.
11 It's all about just acquiring, by gift or by purchase or
12 eminent domain, property.

13 MR. MCKINLEY: Right.

14 THE COURT: Okay. They say -- and I'm not
15 sure you're disagreeing with this -- that they don't
16 need 331.001 to have the power to acquire property.

17 MR. MCKINLEY: I do disagree with that.

18 THE COURT: Tell me why.

19 MR. MCKINLEY: Because the word
20 "municipality" is used. This entire -- this is the
21 local government code. It could, as the legislature has
22 done in many places --

23 THE COURT: But it's a grant of power
24 which they do not need because they already have it.
25 Let's assume 331.001 did not exist, they never wrote it,

1 the legislature.

2 MR. MCKINLEY: Right.

3 THE COURT: Would they have the power to
4 acquire land as a home-rule municipality?

5 MR. MCKINLEY: Clearly.

6 THE COURT: They clearly would, right?

7 MR. MCKINLEY: Right. The issue -- the
8 out-of-county issue is the 331 issue.

9 THE COURT: Exactly. So you concede, as I
10 think you must, that if 331 did not exist, this
11 home-rule municipality would have the power to acquire
12 land?

13 MR. MCKINLEY: True.

14 THE COURT: Okay. And they clearly would
15 have the power to acquire it in their city limits,
16 right?

17 MR. MCKINLEY: Yes.

18 THE COURT: And they would clearly have
19 it -- have the power to acquire it outside their city
20 limits, wouldn't they?

21 MR. MCKINLEY: There's no question they
22 have a separate power, as counsel pointed out, a
23 separate statute that gives them the authority to
24 acquire land outside their city limits.

25 THE COURT: No, no, no. But a home-rule

1 municipality would have the power to acquire land
2 anywhere unless the legislature says that they cannot,

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3 right?

4 MR. MCKINLEY: Yes, I agree.

5 THE COURT: Including this land in
6 Brazoria County, correct?

7 MR. MCKINLEY: Unless their charter
8 prohibited it, yes.

9 THE COURT: I'll go back to the charter in
10 a minute. I know you like that argument, and I
11 understand why. But forget about the charter. Let's
12 assume the charter doesn't exist. 8.05 doesn't exist,
13 okay? 331.001 does not exist.

14 MR. MCKINLEY: Right.

15 THE COURT: That's the world we just
16 created in our hypothetical. That's how we got through
17 law school, with these hypotheticals, and that's how I'm
18 analyzing this. So if they don't exist, you concede
19 that this city, this home-rule city, has the power to
20 acquire this land?

21 MR. MCKINLEY: And could do what the
22 legislature could do, so yes.

23 THE COURT: Exactly. So the only way you
24 win, if 8.05 doesn't exist in the city charter, is if
25 331.001(c) somehow applies to this city?

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1 MR. MCKINLEY: Right.

2 THE COURT: Okay. And the problem I have
3 with that which I didn't have before I came out here is
4 the language in C which says land acquired by a
5 municipality under Subsection B must be within the
6 limits of the county. But you just conceded, as I think
7 you must -- and I didn't catch on to the significance of

8 it either -- that they don't need to acquire the land
9 under 331 and indeed they are not acquiring it under
10 331(b) or the powers there. That didn't add to their
11 powers; they already had those powers. You and I just
12 walked through that analysis.

13 MR. MCKINLEY: Except, Your Honor, that
14 the way I read 331.001, it is an enabling statute and
15 thus it can be an implied limitation. The legislature
16 can limit power. And 331.001 as an enabling statute
17 does cover the same territory that is addressed in their
18 constitutional grant. It is --

19 THE COURT: But it doesn't add to it.

20 MR. MCKINLEY: It's a successor to 60.81.
21 It may not add to it, but as an enabling statute, even
22 if it merely restates it -- note, Your Honor, that
23 section 1175 is a lengthy description of powers that
24 don't add to what the constitution says, but it
25 enumerates them anyway.

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1 THE COURT: That would be an excellent
2 argument if they didn't have the "under Subsection B"
3 language in C. Let's say they didn't put that in there.
4 Then maybe -- then maybe they would be wrong. That is
5 to say, that the limitation in C applies regardless of
6 the grant under B. Yeah, home-rule municipalities don't
7 need the grant under B. But C doesn't limit it to
8 cities acquiring it under B. But here they did.

9 MR. MCKINLEY: I'm saying --

10 THE COURT: The legislature said those
11 cities who acquired it under Subsection B.

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12 MR. MCKINLEY: I'm saying that because
13 331.001 was passed by the legislature, it's a successor
14 to 60.81(e), it is an enabling statute; thus, the
15 legislature has chosen to say here is what you can do,
16 and they've addressed all municipalities. So as a
17 practical matter, they are dependent on B because it is
18 the legislature's enabling statute. They do, in fact,
19 depend on it because it's an enabling statute. And it's
20 been on the books for a very long time as a successor to
21 a prior enabling statute. They are, in fact, using
22 this. The constitution is not self-executed. The
23 legislature chose to do this as an enablement of a
24 constitutional granted power.

25 THE COURT: If this is not clear and

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1 unambiguous and I can't tell exactly from the statute --
2 if I could construe it the way you construe it, am I
3 going to need to look at legislative history to see what
4 they meant by putting "under subsection B" and if they
5 somehow meant this doesn't apply -- this limitation
6 doesn't apply to home-rule municipalities or it does?

7 MR. MCKINLEY: Perhaps a post-trial brief
8 on what legislative intent would be appropriate if there
9 is any. But clearly, I don't think it's disputed that
10 this is an enabling statute. It's a successor to an
11 enabling statute that was on the books a long time.

12 THE COURT: They don't dispute that.

13 MR. MCKINLEY: It therefore becomes their
14 grant of authority. Therefore, it implements the
15 constitution and it limits what the constitution has
16 stated as the legislature is authorized to do. And then

17 subsection C in referring to subsection B does apply
18 here because it says municipality. The legislature --
19 the Supreme Court has repeatedly said we're going to
20 give them credit for using -- here they've defined
21 municipality to include --

22 THE COURT: No doubt about that. I walked
23 back through the introductory language in the statute.
24 I get that. Any time they use the word municipality,
25 they mean home-rule municipality too, except if the

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1 grant of authority is not intended and does not have the
2 effect in law of somehow subsuming, capturing,
3 incorporating and therefore from that point forward
4 being the only source of the authority for a home-rule
5 municipality, then you lose on this issue, not on the
6 charter.

7 MR. MCKINLEY: With respect to those
8 parts, yes.

9 THE COURT: Yes.

10 MR. MCKINLEY: I agree with Your Honor.
11 If this isn't the enabling statute that becomes their
12 source of authority, then we would lose.

13 THE COURT: Right.

14 MR. MCKINLEY: But it is, because it is an
15 enabling statute and it does apply to municipalities.

16 THE COURT: What briefing have you done on
17 that issue, whether subsequent enabling statutes somehow
18 subsume and become the only conduit through which
19 home-rule municipalities have their authority?

20 MR. MCKINLEY: I confess I didn't want to

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21 suggest arguments for them. And they haven't briefed
22 that, and it wasn't apparent to me that they were going
23 to argue it, so I didn't brief it either.

24 THE COURT: That's okay. But, you know,
25 that's the crux of the difference between you now --

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1 MR. MCKINLEY: It is.

2 THE COURT: -- because if 331 does apply
3 to this city and that -- and they must use the power of
4 331, they lose. And I think they've conceded that.
5 They lose. Because the limitation under C is just as
6 clear as it can be. The way they get out of C is by
7 saying we don't use 331. So all paths lead back to
8 whether that grant of authority under 331 is essential
9 to the purchase of this land.

10 MR. MCKINLEY: Well, Your Honor, I would
11 just say this: That the constitution is not in itself a
12 self-executing document. All throughout our state's
13 history, there either have been enabling statutes passed
14 by the legislature and/or charters such as their
15 charter.

16 THE COURT: Okay. I'd like to read a
17 brief on this issue. And I'm sorry to burden you with
18 that, but I would like to have this briefed a little bit
19 more.

20 Counsel, I'll give you a chance -- and
21 you've got more rebuttal time. When it's your time to
22 argue, I'll let you explain what else you want to
23 explain to me, but right now we're going to stay with
24 one counsel.

25 MR. MIZELL: I'm sorry.

1 MR. MCKINLEY: Your Honor, I'd also ask
2 the Court to take judicial notice of the City of
3 Friendswood's charter. We've put that in our brief.
4 And, of course, the law allows the Court to take
5 judicial notice of a charter. But there's a specific
6 provision in Chapter 58 which refers --

7 THE COURT: Oh, wait, wait. Chapter 58 of
8 the charter?

9 MR. MCKINLEY: Yes.

10 THE COURT: Okay. Hang on.

11 MR. MCKINLEY: I'm sorry. City charter.
12 City charter. I have a --

13 THE COURT: Yeah, that's Exhibit F of the
14 plaintiff's brief, as a matter of fact, is the --

15 MR. MCKINLEY: But they omitted something.

16 THE COURT: Oh, they did? Okay.

17 MR. MCKINLEY: There is a state law
18 reference.

19 THE COURT: Where is it in what you
20 submitted because I'll find it?

21 MR. MCKINLEY: It's not in there.

22 THE COURT: Okay.

23 MR. MCKINLEY: It's a state law reference.

24 THE COURT: May I have it?

25 MR. MCKINLEY: Yes, sir, Your Honor.

1 That's a certified copy which we would like to file.
2 It's specifically -- the city ordinances specifically

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3 incorporate 331.001 as a limitation. There's no
4 question that the City intended that limitation. That
5 is their enabling legislation and there they are
6 invoking it.

7 THE COURT: Where do they reference other
8 than this little thing at the bottom state law reference
9 331.001?

10 MR. MCKINLEY: That is it.

11 THE COURT: In the body of this charter
12 they don't reference it?

13 MR. MCKINLEY: No. That is how they
14 reference it.

15 THE COURT: Okay. Nowhere else --

16 MR. MCKINLEY: And goes on to state their
17 authority to acquire parkland. The point is they're
18 taking that authority from 331.001.

19 THE COURT: Now, is this, what you just
20 handed me, in the record before me on an evidentiary
21 basis or --

22 MR. MCKINLEY: No.

23 THE COURT: If not, you --

24 MR. MCKINLEY: That is something the Court
25 is entitled to take judicial notice of and we give that

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1 to the Court for your convenience.

2 THE COURT: Is this the entire Chapter 58
3 of the city charter?

4 MR. MCKINLEY: I believe it is,
5 Your Honor, yes.

6 THE COURT: Okay. Do you mind if we mark
7 that as an exhibit?

8 MR. MIZELL: I do not mind if it's marked.
9 I don't mind if it's admitted. And I don't mind if the
10 Court takes judicial notice. I don't object to you
11 taking judicial notice.

12 THE COURT: I knew you'd say that, and I
13 appreciate it.

14 MR. MIZELL: Okay.

15 THE COURT: Do you want to go ahead and
16 mark this as your exhibit, just so out of an abundance
17 of caution we've got that as a part of the record? I
18 guess that's Respondent's -- what is that?

19 MR. MIZELL: Your Honor, I need to conform
20 it to my copy.

21 MR. MCKINLEY: This is just the table of
22 contents followed by the sections.

23 So we offer Exhibit 1, Your Honor.

24 THE COURT: Okay. To which there's no
25 objection, I understand.

□

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1 MR. MIZELL: Yes. Correct, no objection.

2 THE COURT: Thank you. Respondent's 1 is
3 admitted.

4 (Respondent's Exhibit 1 admitted.)

5 MR. MCKINLEY: Is that enough for the
6 Court on 331 out-of-county issue or should I address
7 anything else?

8 THE COURT: I think that's everything you
9 can say.

10 MR. MCKINLEY: I believe so. Yes, it is,
11 Your Honor. With respect to the certificates of

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12 obligation in Section 8.05, our position, Your Honor, is
13 that, again, they can't have it both ways. As a
14 home-rule municipality, even the mere minute that they
15 derive their power from their charter, the
16 constitution --

17 THE COURT: Let's start with this
18 principal, okay, because I think we can get to where we
19 were on the last argument, too, where we got a meeting
20 of the minds about where the crucible is here. You
21 agree that if 8.05 and the code are inconsistent, then
22 the code prevails, right, local government code, right?

23 MR. MCKINLEY: No.

24 THE COURT: You don't agree?

25 MR. MCKINLEY: No.

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1 THE COURT: Okay.

2 MR. MCKINLEY: Because this is a matter of
3 constitutional authority. The City's authority to
4 exist, literally to exist and to have any laws at all,
5 is of constitutional scope. And the Texas Supreme Court
6 has repeatedly declared -- and I saw that I had -- the
7 last cited case I had was 1934, and I'd like to give the
8 Court the benefit of some more recent vintage law, which
9 is City of Galveston vs. State of Texas from 2007, if I
10 might give that to the Court, where the Court repeats,
11 as it has said before, that the authority of a city, a
12 home-rule city, is limited by its charter. It says --

13 THE COURT: The constitution says no
14 charter shall contain any provision inconsistent with
15 the constitution or of the general laws enacted by the
16 legislature of this state.

17 MR. MCKINLEY: That is true.

18 THE COURT: So if the charter is
19 inconsistent with the Certificate of Obligation Act --
20 you say it's not.

21 MR. MCKINLEY: Right.

22 THE COURT: But if it were, it would be
23 invalid?

24 MR. MCKINLEY: But only if the Certificate
25 of Obligation Act is a self-executing provision that

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1 gives any city, without regard to its existence or its
2 origin or its powers, the ability to issue debt. In
3 fact, that ability to issue debt depends on them having
4 the status of a home-rule city. And that brings them
5 within the ambit of the Supreme Court precedent that
6 says you are subject to the limitations of your charter.
7 So, if anything, we have a conflict not between state
8 law and the city ordinance or the city charter, but we
9 also have a conflict with the Texas Supreme Court
10 precedent which I would argue must be followed.

11 THE COURT: Did you cite this in your
12 brief, Counsel?

13 MR. MCKINLEY: No, I did not, Your Honor.

14 THE COURT: You did not?

15 MR. MCKINLEY: No, I did not. It says the
16 same thing as cases that I did cite, but I notice that
17 it's much more recent.

18 THE COURT: But they were old.

19 MR. MCKINLEY: Yes. And this is new.

20 THE COURT: Yes.

21 MR. MCKINLEY: This is fresh law. The old
22 is like old wine that's really, really good. This is
23 Beaujolais. They're all Supreme Court precedent. They
24 all trump whatever argument the City is making. The
25 Court said the home-rule city has all the powers of the

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1 state, not inconsistent with the city's charter. Well,
2 fine, they're citing powers of the state. Our Supreme
3 Court has said they have those powers only if they're
4 not inconsistent with the city's charter, and they are.

5 THE COURT: Okay. See, I'm not sure they
6 are inconsistent. And that's why I was picking on them.

7 MR. MCKINLEY: Their interpretation.

8 THE COURT: I'm not so sure that they are
9 inconsistent.

10 MR. MCKINLEY: Well, I agree with you.

11 THE COURT: I think they can be
12 reconciled. They say they can be, and I'm not sure --
13 I'm going to go back and think some more about that.

14 MR. MCKINLEY: I agree with you,
15 Your Honor. And my approach to reconciling it is the
16 meaning -- if I might find my copy. The Certificate of
17 Obligation Act refers to taking the benefit of this
18 act -- I read the Certificate of Obligation Act to mean
19 that as a city you can't just say, we don't do debt,
20 we're cash people, we just flat don't do debt, no one
21 can ever issue debt in our city. Clearly, the
22 Certificate of Obligation Act says you can't take that
23 position. It doesn't say, though, that consistent with
24 issuing certificates of obligation you can't validly
25 have charter provisions that limit how those COs can be

1 issued. There's nothing in that statement that
2 precludes our charter provision requiring a vote to
3 approve the debt. It doesn't say as it should if it
4 means what they say -- it should be specific and it
5 should say you can't prohibit them from issuing debt
6 without an election. It doesn't say that.

7 THE COURT: They seem to be saying if a
8 city had -- a city would never incur a debt not payable
9 from then current revenues. They just wouldn't do it as
10 a practical matter. Therefore, because they wouldn't do
11 it, this provision 8.05 essentially means you have to
12 have an election with every debt obligation which is
13 inconsistent with the five percent threshold. That's
14 their argument.

15 Now, that presupposes that nobody -- no
16 city in their right mind would ever incur debt that was,
17 in fact, payable from current revenues. I think they
18 might. I think there might be a strategic reason why
19 they might want to put capital improvements on debt
20 obligations as opposed to paying it out of current
21 revenues. But in any event, that's their position.

22 MR. MCKINLEY: I found the language I was
23 referring to. It's Section 271.004 of the local
24 government code in the CO act. Subpart B says a
25 home-rule municipality may use this subchapter

1 regardless of any provision in the municipality's
2 charter to the contrary.

3 THE COURT: Back up again. I was still --

4 MR. MCKINLEY: A home-rule municipality
5 may use this subchapter regardless of any provision in
6 the municipality's charter to the contrary. That's what
7 they say is the superior state law provision that trumps
8 our charter.

9 THE COURT: Right.

10 MR. MCKINLEY: Well, I agree with
11 Your Honor; it is inherently inconsistent, because all
12 that means is that a municipality can use debt, can use
13 certificates of obligation specifically. They can't
14 just say we forswear all such things, we do -- we don't
15 do debt, we only pay on a cash basis like individual
16 families. It doesn't say, as it should if it were to be
17 given the sweeping effect they want to give it, that
18 you, home-rule municipality, can't limit how you issue a
19 certificate.

20 THE COURT: Let's take that to its logical
21 conclusion, though. Where's the section on the five
22 percent threshold?

23 MR. MCKINLEY: That is 271.049.

24 MR. MIZELL: That's at the beginning.

25 That's No. 1.

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1 THE COURT: Let's say that -- it's 049(c),
2 okay? Let's say your city charter said we only require
3 two percent of the -- in other words, word for word but
4 said only two percent or one percent. Can they do that?
5 That seems inconsistent to me. You argue that only --
6 the inconsistency must be about whether they can incur
7 debt at all. I'm not so sure that's right. I think if

8 they write something in the charter that just clearly
9 flies in the face of 271.049(c) and you cannot
10 reconcile, then I think you lose.

11 MR. MCKINLEY: Then it would be a closer
12 issue.

13 THE COURT: Do you see what I mean?

14 MR. MCKINLEY: Yes, I do.

15 THE COURT: That's a harder case.

16 MR. MCKINLEY: It certainly would be a
17 closer issue. I stand on my contention that the Texas
18 Supreme Court has repeatedly and recently declared that
19 you cannot have the city taking and exercising powers
20 that are inconsistent with its charter. It's repeatedly
21 held that. And so I don't believe that the legislature
22 trumps that long-standing declaration of the Texas
23 Supreme Court because it is about a matter of
24 constitutional scope.

25 THE COURT: And the right of citizens to

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1 limit their local government code.

2 MR. MCKINLEY: That's correct. They have
3 constitutional powers which they trump. So do we.

4 THE COURT: That part really does bother
5 me, okay, even if that's what everybody in the state
6 does.

7 MR. MCKINLEY: Well, if everyone in the
8 state does it, that's because their citizens are too
9 busy going on about their lives to do what these
10 citizens have done, which is to put their money on the
11 line to hire a lawyer to come and protest what their

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12 government has done. And I don't believe that the
13 novelty of this case is particularly a guide to how it
14 should be decided. There's no question that the bond
15 lobby garners immense money from doing this statewide on
16 a regular basis. There's no doubt that they're in court
17 all the time. And there's no doubt that citizens rarely
18 feel that they can go to court. But here they are. And
19 the fact that the City routinely gets away with it and
20 cities get away with it is of no moment to this case.

21 THE COURT: well, I understand that. I'm
22 just surprised, like all of us, or maybe like you, that
23 the issue hasn't ever been joined before, given how long
24 this has been going on.

25 MR. MCKINLEY: In any event, Your Honor,

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1 when it says -- their limitation provision that they
2 want to cite, actually they say here is where state law
3 trumps the charter. It doesn't clearly do that. If
4 state law is going to trump a charter, it should be very
5 clear about doing it. And it doesn't say that. It's
6 permissive. It says a home-rule municipality may use --

7 THE COURT: What section are you citing?

8 MR. MCKINLEY: This is Section 271.044,
9 subchapter available to certain municipalities. And it
10 says they may use the subchapter. And indeed they may.
11 No one is denying that they can issue COs. We're simply
12 saying they face limitations of constitutional dimension
13 in our charter which is on our -- that's our enabling
14 law.

15 THE COURT: But what does it mean,
16 "regardless of any provision in the municipality's

17 charter to the contrary"? What does that mean? We know
18 it means something. What does it mean?

19 MR. MCKINLEY: Then it would mean that you
20 can't prohibit the City from taking on debt. If the
21 charter says we don't do debt, we don't do -- let's say
22 they specifically said we don't do certificates of
23 obligation.

24 THE COURT: I think it also means in my
25 hypothetical if they passed a city provision -- a city

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1 charter provision exactly like 271.049(c) that says the
2 threshold is only one percent, you couldn't do that
3 either.

4 MR. MCKINLEY: Well, Your Honor, note that
5 the one percent is the number of people who have to
6 petition to have a vote. The vote itself would still be
7 the defining outcome.

8 THE COURT: I know. But that is contrary
9 to the state statute. The city charter would then be
10 clearly contrary to the state statute.

11 MR. MCKINLEY: Oh, okay. If -- yes.

12 THE COURT: Do you see what I mean?

13 MR. MCKINLEY: I agree. If the statute
14 says five percent and the charter says one percent, yes,
15 I agree with you.

16 THE COURT: Exactly. That was the
17 hypothetical I gave you earlier.

18 MR. MCKINLEY: Yes.

19 THE COURT: So I think you would lose
20 then.

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21 MR. MCKINLEY: That would be procedural.

22 But I agree with you. What we're dealing with here is
23 the very origin of their power. They tout the origin of
24 their power in the Texas Constitution. And we agree
25 that's where it is. And the Supreme Court has

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1 repeatedly interpreted the Texas Constitution and
2 construed it as limiting home-rule cities to their
3 charters.

4 THE COURT: Okay. But if I can reconcile
5 8.05 and -- well, I keep having to pull it up here
6 again. If I can reconcile 8.05 of the charter and
7 271.049(c) of the local government code, then I think
8 they concede this basically and you win. If I can't,
9 then you lose, right?

10 MR. MCKINLEY: In essence, Your Honor.

11 THE COURT: Okay.

12 MR. MCKINLEY: I don't believe that we
13 lose depending on .049 because I don't think that
14 that's -- that's not at issue today. Even they concede
15 that five percent of the voters can call for an election
16 and block their COs. And that is a matter that would
17 occur --

18 THE COURT: They argue that 8.05 is
19 contrary to the law as set out in 271.

20 MR. MCKINLEY: They say that, and I don't
21 believe that it necessarily is.

22 THE COURT: Exactly. So if it's not
23 contrary, you win; if it is contrary, you lose.

24 MR. MCKINLEY: If it is contrary,
25 Your Honor, I don't agree that we lose.

1 THE COURT: why not?

2 MR. MCKINLEY: Because I see us as having
3 a constitutional argument and they only have a statutory
4 argument. They're trying to relegate us to the position
5 of some little municipality that must yield to the
6 legislature. No. We have -- the municipality's very
7 existence is a matter of constitutional law, the
8 constitution itself, and the Texas Supreme Court has
9 construed the constitution. And it said your powers are
10 limited by your charter.

11 THE COURT: Then that means that -- then
12 you just argued that 271.044(b) is null; it has no
13 meaning.

14 MR. MCKINLEY: No. I think that what it
15 is saying -- and my guess is the Texas Supreme Court
16 would read this to mean if you as a city want to ban
17 debt altogether, you can't do that.

18 THE COURT: Why can't they do that?

19 MR. MCKINLEY: It's inconsistent with the
20 CO act. They might -- I don't know that they would.
21 They might say that --

22 THE COURT: That seems inconsistent with
23 your argument that your powers don't flow from the
24 legislature anyway.

25 MR. MCKINLEY: They would be picking and

1 choosing.

2 THE COURT: Do you see what I mean?

3 MR. MCKINLEY: I agree that it's
4 inconsistent. If I were on the Court, I'd be saying you
5 can't do it.

6 THE COURT: No. I'm saying your argument
7 is inconsistent in that --

8 MR. MCKINLEY: I'm guessing what their
9 argument would be. That's not my argument. My argument
10 is absolutely that the constitution rules and the
11 legislature can't do what it's done in 271.004.

12 THE COURT: Yes.

13 MR. MCKINLEY: As applied to this city,
14 that is unconstitutional. It deprives us --

15 THE COURT: Even if you by charter said
16 we're never going to have any debt, we don't want any
17 stinking debt in this city --

18 MR. MCKINLEY: True, but there would be --

19 THE COURT: -- in their charter, you argue
20 they cannot do that.

21 MR. MCKINLEY: It's a greater risk the
22 Court would allow that and try to finesse it, but it's
23 inconsistent, absolutely. They wouldn't be able to do
24 it under the constitution.

25 THE COURT: Who wouldn't be able to do it?

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1 MR. MCKINLEY: The legislature couldn't do
2 what they've done in 271.044 to a city such as
3 Friendswood if it just, for example, banned that
4 altogether, which it would be able to do because as a
5 home-rule city, its powers have a constitutional
6 dimension.

7 THE COURT: Now your argument is

8 consistent.

9 MR. MCKINLEY: I was guessing what they
10 would say.

11 THE COURT: Now I understand your argument
12 to be consistent.

13 MR. MCKINLEY: Yes.

14 THE COURT: You believe that they still
15 have the power to ban debt, limit debt in any way, shape
16 or form.

17 MR. MCKINLEY: Yes.

18 THE COURT: And so whether it's contrary
19 or not doesn't matter. If it does matter, your argument
20 is this isn't contrary, it's not inconsistent, which is
21 something I was picking on them about.

22 MR. MCKINLEY: That is correct,
23 Your Honor.

24 THE COURT: Okay. I get it.

25 MR. MCKINLEY: I mean, there's nothing

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1 sacrosanct about debt. The legislature has allowed it.
2 They have not mandated it. And so if they haven't
3 mandated it, who decides whether to do it? The voters.

4 THE COURT: Right.

5 MR. MCKINLEY: It's an expression of voter
6 decision to determine.

7 THE COURT: That resonates with me. I'm
8 surprised we don't have any law on that, but that
9 resonates with me. All right.

10 MR. MCKINLEY: That's all I have,
11 Your Honor. I yield any time to counsel.

12 THE COURT: I can't imagine there's
13 anything we haven't already covered.
14 MR. MCKINLEY: Probably.
15 THE COURT: Because those are the two
16 issues I care about, the ones we've talked about.
17 MR. ROGERS: Your Honor --
18 MR. MIZELL: Can I just observe -- I don't
19 know whether it's counterproductive for me to say this.
20 Amicus don't speak in any context. In Court of
21 Appeals --
22 THE COURT: They don't typically.
23 MR. MIZELL: Right.
24 THE COURT: They can be given some time in
25 the discretion of the Court. Do you object to them

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1 being given any time?
2 MR. MIZELL: Yes.
3 THE COURT: Why?
4 MR. MIZELL: Because he has nothing to
5 add. His brief is 98 percent things not pleaded in this
6 case, things that are moot.
7 THE COURT: Then I don't want him to argue
8 those things because they are not pleaded in the case.
9 I want to stay within the pleadings. I don't want him
10 to talk about sovereignty. I don't want him to talk
11 about the other things. I want him to talk about the
12 two issues we've been arguing, which is 331 and the city
13 charter.
14 MR. MIZELL: Right.
15 THE COURT: I think we've covered it, but
16 if he has something to add that counsel has not already

17 said, I'm going to let him say it because I'm just
18 trying to be as educated as I can be. If he thinks
19 there's something he can shine a light on on the two
20 issues that we've been debating, you know, in a way that
21 only lawyers can appreciate probably, then let's go on.

22 MR. ROGERS: Your Honor, I have just two
23 small details I'd like to add. There was some
24 discussion where we were talking about 331.001 about
25 whether or not there was a public policy argument that

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1 could conceivably support the legislature saying that
2 you can't have a park outside of the county that you are
3 located in because parkland frequently requires fire,
4 police and water services. There is a public policy
5 argument to be made that those things need to be
6 provided by the city that owns the parkland.

7 THE COURT: That was not part of the pled
8 position by the defendants, was it?

9 MR. ROGERS: No. Opposing counsel said
10 there was no public policy.

11 THE COURT: I understand. But that's not
12 an issue before me now, is it? As this case is framed
13 with the pleadings before this Court, what you just said
14 about police powers and policing this jurisdiction and
15 this area is not an issue before me, Judge Scott
16 Jenkins, today, correct?

17 MR. ROGERS: Perhaps I misunderstood,
18 Your Honor. I thought you had raised that in the
19 colloquy with opposing counsel, but --

20 THE COURT: No, no. Actually, I said

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21 that's not an issue. In fact, in our colloquy we both
22 kind of conceded -- or we both agreed that's not really
23 what I need to be doing any lifting on today. That
24 might be an issue joined later if there's some
25 jurisdictional squabble between people who want to

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1 exercise police powers in a particular piece of land,
2 but that's not the issue before me now, at least I don't
3 see that in the pleadings. And counsel sitting at the
4 table with you is nodding yes, I think.

5 MR. MCKINLEY: It's not an issue.

6 THE COURT: It's not an issue.

7 MR. ROGERS: All right.

8 THE COURT: So I just want to stick to the
9 issues -- and I don't mean to be short with you at all,
10 but I want to stick to the issues that are before me now
11 and have you illuminate anything that hasn't been
12 illuminated on the issues that are before me now.

13 MR. ROGERS: One other question Your Honor
14 raised, was troubled by the idea that the citizens could
15 not limit their government. Your Honor, that question
16 was troubling to the authors of the 1876 constitution of
17 the state of Texas as well, so troubling that they put
18 it in Article 2 of Section 1, which I've got cited in
19 full on Page 14 of the amicus brief. The essence of it
20 is that the people have at all times the inalienable
21 right to alter, reform or abolish their government in
22 such manner as they think expedient, which I would
23 submit to Your Honor includes putting limitations in the
24 city charter. That's all I have for Your Honor.

25 THE COURT: Thank you. Just before we
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1 come back to you, does the Attorney General have
2 anything -- I guess you don't take any position in
3 support of Friendswood 5? You take -- to some extent, I
4 guess you're taking a position in support of the
5 plaintiff as to the applicability of 8.05 of the city
6 charter. Am I right about that?

7 MR. GRIESS: That's correct, Your Honor.

8 THE COURT: Just before it comes back to
9 you, I want to make sure I understand what everybody's
10 position is here.

11 MR. GRIESS: In our answer, we only took
12 an issue with respect to the issue of whether there is
13 an affirmative election requirement under 8.05(f) of the
14 city's charter.

15 THE COURT: Let me find your pleadings
16 really quickly.

17 MR. MIZELL: I have it here.

18 THE COURT: I've got it. If I get
19 any more up here, I'm going to drown.

20 Okay. I'm going to go at it backwards
21 then. It sounds like you take a position on the second
22 issue in paragraph Roman Numeral II of your pleadings
23 where you start your paragraph and at the bottom it says
24 the second issue -- you're taking the position that's
25 contrary to the plaintiffs in this case. That is to

1 say, unless the plaintiffs shows with proof at the
2 hearing that the city charter or other law authorizes

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3 the city to purchase park outside the boundaries of the
4 county, they don't have that power. You don't -- you
5 don't take any position on that. And based on the
6 pleadings, you're not persuaded that as a matter of law
7 they do have that power.

8 MR. GRIESS: That's correct. We thought,
9 Your Honor, that that issue was properly brought before
10 the Court.

11 THE COURT: Okay. And then on the first
12 issue, there's no law on that. You simply say it's been
13 your routine to approve these. But why does the law not
14 allow 8.05 to be effectuated? What this means is that
15 8.05 of the charter is meaningless, it's superfluous, it
16 has no effect whatsoever, right?

17 MR. GRIESS: Your Honor, we would view
18 8.05(f), which is an affirmative election requirement,
19 under any circumstance there must be an election -- we
20 view it as inconsistent with the election provisions of
21 the Certificate of Obligation Act, which is superior
22 law. It's a general law.

23 THE COURT: But it doesn't say in any. It
24 just says when they don't have the funds that they could
25 pay it now. Now, that may be something that doesn't

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1 happen very often, maybe ever. I don't know. But they
2 do have qualifying language. It just says certain kinds
3 of debt obligations. It doesn't say all.

4 MR. GRIESS: I think the charter
5 provision -- I don't have it in front of me, Your Honor,
6 but I believe the charter provision is basically
7 speaking of long-term indebtedness, in other words,

8 indebtedness that's not just going to be paid from
9 current expenses that year.

10 THE COURT: I see what you're saying. The
11 way you're reading it is it's not -- it doesn't say it's
12 prohibited from incurring debt that could not be paid
13 from then current revenues, but that they're not going
14 to pay from current revenues. And obviously, if they're
15 incurring a debt, they're not going to pay from then
16 current revenues. That's your point.

17 MR. GRIESS: Right. We're viewing that
18 provision as intended to mean that if the City of
19 Friendswood want to incur long-term indebtedness payable
20 over a period of years, which would be the case with
21 these certificates, that the charter provision on its
22 face would require an election unless the enumerated
23 exceptions, an emergency apply.

24 THE COURT: I see your point. And I have
25 not been reading it that way before, but now I see the

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1 way you're reading it.

2 MR. GRIESS: And we're viewing that
3 language, imposing again the affirmative election
4 requirement, as being inconsistent with the petition --
5 the five percent petition which then triggers the
6 requirement for an election scheme under the Certificate
7 of Obligation Act.

8 THE COURT: I see what you're saying. I
9 had been reading it, I think perhaps erroneously, shall
10 be prohibited incurring debt which could not be paid
11 from then current revenues. That's not what it says.

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12 It's not payable, which means they're not going to pay
13 from current revenues, which is kind of circular because
14 that means all debt. But then doesn't that language
15 become superfluous and meaningless? I mean, why even
16 put the language "debt not payable from current
17 revenues"? Do you see what I mean?

18 MR. GRIESS: I presume that the intent
19 there was that if the City is basically going to use its
20 credit to purchase something from a store in the town
21 and finance it over 90 days, that that's not the type of
22 debt -- that type of debt is going to be paid from
23 current revenues.

24 THE COURT: I see.

25 MR. MCKINLEY: That's not the type of debt

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1 that should trigger an election.

2 THE COURT: And clearly this debt on the
3 face of it is not going to be paid in the current
4 revenue cycle or whatever.

5 MR. GRIESS: That's correct. This would
6 be multi-year indebtedness.

7 THE COURT: Okay. Okay. Why can a
8 home-rule municipality not impose greater restrictions?
9 I mean, why is that necessarily contrary? I mean, can't
10 they impose greater restrictions?

11 MR. GRIESS: Your Honor, I -- it's
12 obviously ultimately a question of law for your
13 determination, but I think --

14 THE COURT: I'm sure --

15 MR. GRIESS: I think we have viewed it as
16 inconsistent that the Certificate of Obligation Act --

17 and if it would be of interest to you, I could get you a
18 copy of the Law Review article on indebtedness that was
19 written shortly after the original enactment of the act.
20 From the Law Review article, I think the intention of
21 the act was to provide for a more streamlined procedure
22 for issuing debt which admittedly would not have an
23 affirmative election requirement.

24 THE COURT: Let me ask you this.
25 Depending upon who wrote it and depending upon whether

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1 it dealt with this particular issue before me, I might
2 be interested in reading it. So if it deals with this
3 particular issue, yes, I would like that. I don't need
4 the whole history of it necessarily, but this
5 discrete --

6 MR. GRIESS: In all candor, Your Honor, I
7 do not believe it discusses the applicable -- the
8 construction of the act when considered with an election
9 requirement in the charter.

10 THE COURT: All right. Thank you.
11 Anything else I didn't ask you that you'd like to tell
12 me from your statement?

13 MR. GRIESS: I don't believe so,
14 Your Honor. I think from our answer, you're aware of
15 the historical construction of the act that the Attorney
16 General has given.

17 THE COURT: Thank you. Now, I just want
18 to make sure everything was on the table before you --

19 MR. MIZELL: Yeah. And I'm not going to
20 replot any ground, just four minor points. First of

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21 all, 58 -- Chapter 58 that purportedly adopts 331 is not
22 the charter. That's an ordinance outside the charter.

23 THE COURT: Slow down now. You just lost
24 me for some reason.

25 MR. MIZELL: The thing that he offered and

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1 I didn't object to is Chapter 58. That's not the
2 charter. That's not the city charter.

3 THE COURT: Oh, I thought it was.

4 MR. MIZELL: No. Those are the ordinances
5 out of the book of ordinances.

6 THE COURT: Ah, okay.

7 MR. MIZELL: And it does not adopt
8 anything. It is a state law reference which we believe
9 is a codifier when the service prints it online, but
10 it's not adopted in the body of any of the ordinances
11 either.

12 THE COURT: Okay.

13 MR. MIZELL: The next subject --

14 THE COURT: I just wanted everybody to
15 make whatever record they wanted to make here.

16 MR. MIZELL: On the --

17 THE COURT: Because if I'm wrong, I want
18 you to have the record you need to get it done right.

19 MR. MIZELL: You had an ah-ha look. I
20 just want to hopefully disabuse you.

21 THE COURT: All right. I appreciate that.
22 My looks are frequently misleading.

23 MR. MIZELL: Turtle Rock expressly
24 addresses the enabling issue as clear as it can be
25 addressed. And I won't reread it to you. But if you're

1 staring at it, do you see the headline statutory
2 challenge?

3 THE COURT: I do, right there.

4 MR. MIZELL: Statutory challenge, first
5 paragraph, the Court of Appeals also invalidated it on
6 statutory grounds and construed it as enabling statutes.
7 Do you see that? And then down below it says we
8 disagree. And that analysis squarely addresses that
9 issue, which I'm happy to brief in greater detail, but
10 that's your -- that's their argument considered by the
11 Texas Supreme Court and rejected.

12 THE COURT: Well, there really is no other
13 authority. If there were, you'd have it here.

14 MR. MIZELL: Right. But it doesn't get
15 any better than them saying we reject the enabling
16 statutes analysis.

17 THE COURT: The problem with that is that
18 was the granting of power. This is whether they had the
19 power and the granting of power. It wasn't about
20 restricting power. And that's what we have here.

21 MR. MIZELL: Right.

22 THE COURT: And that gets back full circle
23 to what we've talked about probably too long.

24 MR. MIZELL: Right. Anything I would say
25 would just be repeating myself. But it's the home-rule

1 power that allows us to do this. But that's what Turtle
2 Rock decided. Under this very thing, it said you can

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3 use your police power to make cities dedicate parkland
4 when there's a big development and call it -- and this
5 developer didn't want to do that and said that's
6 baloney; I own this land. And the derivation of power
7 statute 331, then 60.81, said you have to do this, and
8 they said, well, it doesn't say anything about that in
9 331.

10 THE COURT: Unless the legislature limits
11 their powers.

12 MR. MIZELL: Right.

13 THE COURT: That's the question. So if
14 331 is intended by the legislature to be a limitation of
15 the power -- you say it's not --

16 MR. MIZELL: Right.

17 THE COURT: -- for home-rule cities at all
18 and the home-rule cities don't even come under 331, and
19 so -- but if it were an intent of limitation, that would
20 answer your argument on this case.

21 MR. MIZELL: With unmistakable clarity.
22 And again, and this is not where -- I'm back to where we
23 started on this. That's not where the derivation of
24 power is. I may be using the wrong word when I say
25 that. We're not behind this under 331, buying it under

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1 our home-rule.

2 Now, to segue into the other argument,
3 which is there is no state constitutional granted to
4 municipal home-rule cities powered issued bonds. The
5 powered issued bonds is purely a creature of state law.
6 The whole notion that you can issue bonds and have a
7 very rigid set of protections for the underwriters that

8 fund the bonds and have, you know, absolute guarantee
9 that they're tax free, which is what makes them
10 attractive, all that is a creature of state law. And
11 the state created it, certificates of obligation -- and
12 I do think it's relevant that the Law Review article
13 says they wanted a streamlined process when they did it.
14 To say that -- and it may be that I'm not understanding
15 the argument, but to say that it is unconstitutional to
16 say that 274 can't be the basis for home-rule cities to
17 issue debt turns bond law on its head, period.

18 And so -- and let me say as a closing,
19 this notion that we're the big evil bond lobby that
20 really has an interest in trumping charters, these are
21 to build roads. And this isn't -- I mean, the big evil
22 bond lobby and the big evil cities build things that
23 they deem to be public works necessities. And in this
24 case, that --

25 THE COURT: The jury arguments are just

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1 washing over me.

2 MR. MIZELL: I know. I can't help myself.

3 THE COURT: The fact that -- you know, 31
4 years of this, they just kind of wash over me now.

5 MR. MIZELL: I know. That's why I should
6 let Carly make the argument.

7 THE COURT: I'm really just honing in on
8 the legal issue, which is fascinating because it's all
9 about powers of government and limitations on powers of
10 government. That's really fascinating.

11 MR. MIZELL: Let me -- one last thought.

12 THE COURT: And no one loves ball fields
13 more than me, I promise. But none of that really
14 matters to me. It really doesn't. It can't. It can't.
15 I can't do my job that way.

16 MR. MIZELL: You have to ask yourself,
17 did state law intend to prevent this from happening?
18 And ultimately that's what I would respectfully submit
19 to the Court that you have to decide.

20 THE COURT: Did they intend in state law
21 to say, cities, you may not buy land in other counties?
22 Did they? You're right. That's the question. Can
23 they? You bet they can.

24 MR. MIZELL: They can.

25 THE COURT: We know they can.

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1 MR. MIZELL: Did they in this when you've
2 got a home-rule authority to do it outside?

3 THE COURT: Exactly.

4 MR. MIZELL: And we're more all on the
5 same page than I would have ever imagined to be possible
6 in oral argument and I very gratefully -- it's been a
7 great back and forth. And let me just say on the last
8 point that to have a system whereby you can have a vote
9 for any reason and a system where you only have to have
10 a vote unless five percent of the electorate sign a
11 petition is inconsistent, and state law says that the
12 city can pick -- pick this CO act regardless of any city
13 charter to the contrary because there is this statewide
14 policy embodied in this legislation to allow cities to
15 do public necessity or public works projects without
16 having to do a vote unless five percent -- unless they

17 can get five percent of the people. And with that, I'll
18 sit down.

19 THE COURT: well, the question is whether
20 271.044(b) means, to the contrary, can a municipality
21 limit its powers and be more restrictive in incurring
22 debt. And you say it cannot because that would be
23 contrary to the use of this subchapter by a home-rule
24 municipality.

25 MR. MIZELL: I think that respectfully the

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1 only reading of 044(b) is you get to use the CO act
2 including the election process regardless of a charter
3 to the contrary.

4 THE COURT: Okay. Very interesting
5 argument.

6 MR. MIZELL: Thank you.

7 THE COURT: Interesting case. Oh, did you
8 bring proposed orders for me --

9 MR. MIZELL: Yes, I did.

10 THE COURT: -- one granting the relief
11 requested by the plaintiff, one denying the relief
12 requested by the plaintiff?

13 MR. MCKINLEY: I did not bring a proposed
14 order, Your Honor. I wanted to craft it -- I thought
15 you would rule orally or else it would be later.

16 THE COURT: It will be later, but I would
17 prefer that you submit -- it should be a fairly vanilla
18 order from your standpoint. It would be the relief
19 requested by the plaintiff is denied. I don't know what
20 else -- I don't know what -- and there's no evidence

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21 about attorneys' fees put on, besides which I did not
22 see any authority for attorneys' fees. They had in
23 their pleadings that they wanted attorneys' fees, but
24 there is -- there was no cite to any legal authority for
25 that. And without some legal authority, I'm without

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1 authority to grant them.

2 MR. MCKINLEY: It's because it's a
3 declaratory judgment, Your Honor. They've used the
4 declaratory judgment act, expedited declaratory judgment
5 act.

6 THE COURT: Okay. So you're arguing that
7 you're entitled to attorneys' fees.

8 MR. MCKINLEY: It's purely in the
9 discretion of the Court. And we would like to get
10 attorneys' fees, yes.

11 THE COURT: But as you know, I don't have
12 anything in the record about attorneys' fees now anyway.

13 MR. MCKINLEY: This is true.

14 THE COURT: So you'd have to ask for
15 another hearing on that because there's no evidence
16 about the amount of attorneys' fees. So I'm going to
17 move on. At this point, all I can do is grant the
18 relief requested by the plaintiffs or deny the relief
19 requested by the plaintiff, which is the order I need
20 from you.

21 MR. MCKINLEY: Yes.

22 THE COURT: And then I need you to
23 circulate it to them and get it approved as to form
24 that, you know, if I rule against you, then the language
25 in this order would be the correct language. Okay?

1 MR. MCKINLEY: I will, Your Honor.

2 THE COURT: Have you looked at their
3 proposed order yet?

4 MR. MCKINLEY: No. I just got it.

5 MR. MIZELL: Can I say one thing just real
6 quick?

7 THE COURT: Sure.

8 MR. MIZELL: This is a 1205 declaratory
9 judgment, not a Civil Practice and Remedies Code --

10 THE COURT: Ah.

11 MR. MIZELL: -- declaratory judgment. And
12 so there is a loser pays discretionary attorneys' fees
13 thing in the Civil Practice and Remedies Code. That's
14 not what this is. And there's no -- the government
15 doesn't get attorneys' fees. They don't get attorneys'
16 fees. The one thing the government can do is make them
17 pay for the costs, and we're not seeking --

18 THE COURT: It's where in the Civil
19 Practice and Remedies Code?

20 MR. MIZELL: Civil Practice and Remedies
21 Code. And I want to say it's --

22 THE COURT: 1205 is the government code.

23 MR. MIZELL: That's the government code
24 called the expedited declaratory judgment.

25 THE COURT: Right, right.

1 MR. MIZELL: That's a separate feature
2 than the Civil Practice and Remedies Code that allows

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3 for fees. But we're not asking for it.

4 THE COURT: I understand. Your argument
5 is the only authority would be the government code
6 because that's how this is brought.

7 MR. MIZELL: Right.

8 THE COURT: And so they can't -- as a
9 matter of law, there's no entitlement to fees by the
10 defendants regardless.

11 MR. MCKINLEY: That is why I did not --
12 because I saw that -- I was thinking of Chapter 37.

13 MR. MIZELL: I'm sorry.

14 THE COURT: And this is not a Chapter 37
15 dec action, so you concede that under the government
16 code that this case is under, there is no entitlement to
17 fees for anyone?

18 MR. MCKINLEY: I didn't see authority for
19 it.

20 THE COURT: You do not have any authority
21 for it?

22 MR. MCKINLEY: No, we're not seeking it.

23 THE COURT: And you're not seeking it. I
24 get it. All right.

25 MR. MIZELL: Your Honor, a couple other

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1 little -- one screwy thing about the order.

2 THE COURT: And you may be right. That
3 may be why very few people contest it.

4 MR. MIZELL: There is some statutory
5 language in the judgment about it being a permanent
6 injunction against other people bringing the same suit
7 once this has been decided that is tracked straight out

8 of the statute. When you look at it, you will go,
9 "That's really weird. What's all this?"

10 THE COURT: No, I've seen that. And
11 there's someone who's made a career of it in some bonds
12 in Houston, so I know about that.

13 MR. MIZELL: I just wanted you to know
14 the -- there's a statute for it. That's what that is.
15 One other small point. And I did not -- and we clearly
16 have thought about this.

17 THE COURT: You're about to hit the hour
18 and 15.

19 MR. MIZELL: And we want you to continue
20 to think about it. We have time pressures just that I
21 wanted to say out loud, one of which is it could
22 potentially -- it's not anything -- I'm talking about
23 like weeks --

24 THE COURT: What happens with the Court of
25 Appeals? This matter can be taken to the Court of

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1 Appeals, can it not?

2 MR. MIZELL: Yeah, but it goes in front of
3 the line of everything else except for parent
4 termination cases. And frankly, having handled a
5 couple, they go through pretty quickly. I don't know
6 about Austin.

7 THE COURT: So they do it on submission?
8 In other words, they would get this record, because
9 there is an evidentiary record, and they would do it on
10 submission? They wouldn't -- you wouldn't have oral
11 argument? Or even if you did, it would be so expedited

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12 that --

13 MR. MIZELL: The statute itself says it
14 goes in front of every one of your other cases except
15 for suits affecting parent-child relationship and all
16 the way -- I don't think that the Supreme Court is under
17 the same speed-up deal, but it is clearly under the
18 expedited rules, so that's what happens. We understand
19 it's going to take some time. And the client
20 understands that. I want to --

21 THE COURT: Trust me. The delay will not
22 be mine. That's why I tried to read as much as I could
23 before I came out here because I assumed that everyone
24 wanted a rapid decision. I'm prepared to do that.

25 MR. MCKINLEY: We appreciate that.

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1 THE COURT: You will have it hopefully
2 this week. You will have it this week. I'm confident
3 you'll have it this week.

4 MR. MCKINLEY: Did Your Honor mention the
5 post-trial brief on the need for the enabling statute?

6 THE COURT: I don't know that I need that.
7 If you want to send something in, then collaborate with
8 each other and let me know tomorrow morning what you
9 intend to submit and when you intend to submit it
10 because it's Tuesday. I'm on the bench all day tomorrow
11 and all day Thursday. You know, I mean, there's only so
12 much time I have to --

13 MR. MCKINLEY: If I were to submit
14 anything, it would be short and it would only be if I
15 could find something on point.

16 THE COURT: Okay. Good.
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17 MR. MIZELL: And I won't do it just to --
18 I mean, you know what my argument is.

19 THE COURT: I do.

20 MR. MIZELL: And the one thing I really
21 would like just, from a public policy standpoint --

22 THE COURT: No, we're not going to make
23 any more argument.

24 MR. MIZELL: No, no, no.

25 THE COURT: Oh, good.

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1 MR. MIZELL: I would like to get you the
2 Law Review article from Mr. Griess to glance at if you
3 want to, and if not --

4 THE COURT: I'm probably not going to have
5 time to deal with that. I don't think it's going to add
6 much to my understanding unless it deals with these
7 discrete issues. That's why I asked him. If he thought
8 it dealt with these discrete issues, I might be
9 interested in reading it to see why they, you know, came
10 out the way they came out on their analysis. But if
11 not, if it's just about what the purpose was, then I
12 don't know that that's going to help me that much. I
13 can read the purpose by reading the statute because they
14 tell me the purpose in the statute.

15 All right. Thank you.

16 (End of proceedings.)

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REPORTER'S CERTIFICATE

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2

3 THE STATE OF TEXAS)
4 COUNTY OF TRAVIS)

5 I, Chavela V. Crain, Official Court
6 Reporter in and for the 53rd District Court of Travis
7 County, State of Texas, do hereby certify that the above
8 and foregoing contains a true and correct transcription
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11 included in this volume of the Reporter's Record, in the
12 above-styled and numbered cause, all of which occurred
13 in open court or in chambers and were reported by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, offered in evidence by the respective
17 parties.

18 WITNESS MY OFFICIAL HAND this the 13th day of
19 August, 2009.

20

21
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Travis County, Texas
P.O. Box 1748
Austin, Texas 78767
(512) 854-9322
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