UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC., and TEXAS DISPOSAL SYSTEMS LANDFILL, INC., Plaintiffs,	§	
v.	§	Case No. A-11-CV-1070-LY
CITY OF AUSTIN, TEXAS, and BYRON JOHNSON, in his official capacity, Defendants.	§	

CITY OF AUSTIN'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE LEE YEAKEL:

Defendant, City of Austin (the "City") files its Motion to Alter or Amend Judgment, and in the Alternative, Motion for New Trial, and respectfully requests that the Court grant this motion because of manifest errors of law or fact in the Final Judgment (Doc 58) and in the Order on Cross-Motions for Summary Judgment (Doc. 57) entered March 20, 2014. Plaintiffs are referred to jointly herein as "TDS".

I. SUMMARY OF ARGUMENT

The City respectfully requests that the Court correct or modify its judgment to dismiss Plaintiffs' claims in all respects because: (1) This court lacks subject matter jurisdiction in regard to plaintiffs' requests for relief under the Texas Uniform Declaratory Judgment Act; (2) Plaintiffs have no standing to bring their claims because plaintiffs have produced no evidence of a concrete injury; (3) The court's interpretation

of the ordinance is inconsistent with the intents and purposes of the ordinance; (4) There are genuine issues of material fact that require a motion for new trial.

In addition to the order and judgment of the court, this motion addresses: Plaintiffs First Amended Complaint (Original Complaint after Removal) (Doc. 7), the City's First Amended Answer (Doc 8), and the motions for summary judgment, responses, and replies to those motions filed by the parties, as well as the exhibits to those filings. (Doc. 34, 35, 36, 46, 48, 49, 51 and 52) The City also relies on the joint exhibits and stipulations of the parties. (Doc 25, 27 and 28)

II. ARGUMENT AND AUTHORIES

Plaintiffs' suit sought declaratory judgment against the City of Austin, and challenged the constitutionality of the City's Anti-Lobbying Ordinance. Based on the following arguments and authorities, the City requests that the Court enter an order dismissing all of Plaintiffs' claims.

A. No Subject Matter Jurisdiction for Relief Sought Under TDJA

1. No Express Waiver under the TDJA or other Statute

"A defect in the district court's subject matter jurisdiction…may be raised at any time… and cannot be waived. " *Hayes v. Gulf Oil Corp.* 821 F.2d 285, 290-21. (5th Cir. 1987). *See Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n.2 (Tex. 1996)(Subject matter jurisdiction cannot be presumed and cannot be waived.) Whether a trial court has subject matter jurisdiction is a question of law. *Gandy Nursery, Inc. v. U.S.*, 318 F.3d 631, 636 (5th Cir. 2003); *Texas Parks and Wildlife Department v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

The Texas Uniform Declaratory Judgment Act (TDJA) does not establish subject-matter jurisdiction—it is merely a procedural device for deciding matters already within a court's subject-matter jurisdiction. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex.1996). It is well settled under Texas law that the TDJA "does not enlarge the trial court's jurisdiction". *Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22. (Tex. 2011). [citations omitted] Thus, relief may not be sought under the TDJA against a political subdivision of the state unless immunity has expressly been waived for the particular claims at issue. *Sefzik*, 355 S.W.3d at 620, 622. A municipality is a political subdivision of the state entitled to governmental immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex.2006).

Texas law requires that any waiver of governmental immunity be expressed in clear and unambiguous language. TEX. GOV'T CODE ANN. § 311.034; See e.g., *Tooke v. City of Mexia*, 197 S.W.3d 325, 344 and 346 (Tex.2006)(waivers of immunity must be clear and unambiguous); *Reata Const. Corp.*, 197 S.W.3d at 379 (phrases relied on do not clearly and unambiguously waive immunity to suit). Furthermore, in interpreting statutory waivers of immunity Texas courts apply a "heavy presumption in favor of immunity." *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)

The heavy presumption in favor of immunity is especially true for home-rule cities such as the City of Austin. *Id.*; See *Thompson v. City of Austin*, 979 S.W.2d 676, 683 (Tex.App.–Austin 1998, no writ)(Austin is a home-rule municipality.); *City of Austin v. Whittington*, 384 S.W.3d 766, 780 n. 12 and 784 (Tex. 2012)(referring to the City of Austin as a home-rule municipality). Home-rule municipalities "derive their powers

from the Texas Constitution, not the Legislature." *City of Galveston*, 217 S.W.3d at 469 n. 8; citing, TEX. CONST. art. XI, § 5; *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex.1998)[other citations omitted]. They have "all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter." *City of Galveston*, 217 S.W.3d at 469 [citations omitted]. Therefore, courts may only find a waiver of immunity from suits against home-rule municipalities where the waiver is expressed with "unmistakable clarity." *Id.* [citations omitted]

The TDJA only waives immunity in particular cases. *Sefzik* 355 S.W.3d at 622. Under the TDJA, a governmental entity has only been recognized as proper party to an action challenging the validity of a statute or ordinance. *Id.* 622; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n. 6 (Tex.2009); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697–98 (Tex.2003). The Texas Supreme Court recognized the waiver for challenges to the validity of a statute or ordinance because the UDJA expressly requires joinder of the governmental unit. *Sefzik*, 355 S.W.3d at 622 n. 3; *see* TEX. CIV. PRAC. & REM. CODE § 37.006(b)("In any proceeding [involving] the validity of a municipal ordinance..., the municipality must be made a party...and if the statute, ordinance,...is alleged to be unconstitutional, the attorney general of the state must also be served...."); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex.1994)("The DJA expressly provides that...governmental entities must be joined or notified.") The Texas Supreme Court reasoned that its holding is consistent with the requirement that the Legislature expressly waive immunity with "clear and unambiguous" language. *Sefzik*, 355 S.W.3d at 622 n. 3; TEX. GOV'T CODE § 311.034; *see City of McKinney v. Hank's Restaurant*

Group, L.P., 412 S.W.3d 102, 112 (Tex. App.—Dallas 2013, no pet. h.)(TDJA does not waive governmental immunity from suit for claims seeking an interpretation of an ordinance or a declaration of rights under statute).

In *Sefzik*, the plaintiff sued the Texas Department of Transportation (TxDOT) and sought relief under the TDJA by requesting a declaration that Texas' Administrative Procedure Act (APA) entitled him to a hearing. 355 S.W.3d at 620. The Texas Supreme Court upheld TxDOT's plea to the jurisdiction based on sovereign immunity because Sefzik did not challenge the validity of a statute, but instead challenged TxDOT's actions under the statute and failed to identify any TDJA provision that expressly waived immunity for his claim. *Id.* at 622; *see Boll v. Cameron Appraisal Dist.,*--- S.W.3d ----, No. 13-11-00750-CV, 2013 WL 4187756 at *2 .)(Court lacked subject matter jurisdiction where the challenge was not to the validity of a provision of the tax code, but instead, the Appraisal District's actions under it). Likewise, TDS has failed to identify any legislative enactment that expressly waives immunity for an action allowing removal of the discretionary disqualification decision by the Purchasing Officer for the City. As in *Sefzik*, TDS is not challenging the validity of a statute or ordinance; instead, like Sefzik's challenge to TxDOT's actions under a statute, TDS challenges the City's actions under and interpretations of the Anti-Lobbying Ordinance.

The Dallas Court of Appeals' holding in *EZPAWN*, in a recent, unpublished opinion, is squarely on point with respect to the City's immunity from TDS' challenge under the TDJA. *City of Dallas v. Texas EZPAWN, L.P. d/b/a EZMONEY Loan Serv.,* No. 05–12–001269–CV, 2013 WL 1320513 at *2. (Tex.App.-Dallas Apr. 1, 2013, no

pet.) In *EZPAWN*, the City of Dallas argued that the TDJA did not waive governmental immunity from suit "for the construction or interpretation of an ordinance and that EZPAWN had not challenged the validity of the ordinance." *Id.* at *1. The court of appeals held there was no subject matter jurisdiction over EZPAWN's claims because EZPAWN "sought only the interpretation of an ordinance and a declaration that the ordinance does not apply to its loan services business," which allegations "affirmatively negate the trial court's subject matter jurisdiction." *Id.* at *3; see *City of Dallas v. Turley*, 316 S.W.3d 762, 770-71 (Tex.App.—Dallas 2010, pet. denied).

In this case, just as in *EZPawn,* TDS challenges the City's interpretation of the ordinance. It does not claim that the ordinance is invalid under state law. Accordingly, the TDJA does not waive the City's immunity from suit, and the court erred by so concluding. This court has no subject matter jurisdiction over TDS' request for declaratory relief pursuant to the Texas Uniform Declaratory Judgment Act (TDJA), because the TDJA does not expressly waive immunity with unmistakable clarity for challenges to a governmental entity's interpretation of or actions under an ordinance or statute. See *Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex.2011); *EZPAWN,*2013 WL 1320513 at *2.

2. No Waiver under the Texas Tort Claims Act

The Texas Tort Claims Act (TTCA) does not waive immunity for intentional torts, and TDS' claim based on damage to its reputation by the Anti-Lobbying Ordinance

disqualification is essentially a tort claim for defamation.[1] Defamation is an intentional tort, and section 101.057 of the TTCA clearly establishes that the Legislature did not waive immunity for intentional torts. *Brantley v. Texas Youth Com'n*, 365 S.W.3d 89, 105 n. 18 (Tex. App. –Austin 2011, no pet.); TEX. CIV. PRAC. & REM. CODE § 101.057 ("This chapter does not apply to a claim arising out of any intentional tort,..."). TDS' interpretation of its past disqualification under the Anti-Lobbying Ordinance as damaging its reputation is no different than a tort claim for defamation seeking damages for injury to one's reputation. Because the TTCA does not waive immunity for defamation claims, TDS cannot attempt to use the TDJA to circumvent the City's immunity through the TDJA, as the TDJA does not enlarge the court's jurisdiction. *See* p. 3 *infra.*

3. No Waiver for Requested Relief that Controls State Action

Texas courts have also refused to find a waiver of liability under the TDJA for suits seeking to "control state action." *City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 628 (Tex.App.–Austin 2007, no pet.); *see Texas Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855-56 (Tex.2002)(imposition of contract liability against the state is a prohibited form of "controlling state action"); *Short v. W.T. Carter & Bro.*, 133 Tex. 202, 126 S.W.2d 953, 962 (1939)("A suit ... to enjoin the Land Commissioner, when acting within the scope of his authority, from...executing a lease, is a suit to control the action of the State in selling...public lands and is...a suit against the State, which cannot be maintained, the State, not having consented to be sued."); *Director of Dep't of Agric.*

[1] Damage to reputation is an element of damages recoverable in a defamation case. *Hancock v. Variyam*, 400 S.W.3d 59, 70 (Tex. 2013).

& Env't v. Printing Indus. Ass'n, 600 S.W.2d 264, 265-66 (Tex.1980)(recognizing immunity from a judgment that would effectively direct or control a government official in exercising discretionary statutory authority) ; *McLane Co. v. Strayhorn*, 148 S.W.3d 644, 649–51 & n. 6 (Tex.App.-Austin 2004, pet. denied) ("A suit that seeks to control a state official's exercise of discretion within her legal authority is a suit to control state action and cannot be maintained without legislative permission".

Thus, based on the above precedent, TDS is not entitled to relief pursuant to the TDJA, because it has failed to identify any legislative enactment that, with unmistakable clarity, expressly waives immunity for an action seeking retroactive relief, removal of the discretionary disqualification decision by the Purchasing Officer for the City.[2] Absent a constitutional violation, federal courts are bound by a state court's judicial construction of an ordinance or statute. *Hancock v. Decker*, 379 F.2d 552, 553 (5th Cir. 1967); see *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel, L.L.C.*, 620 F.3d 558, 564 (5th Cir.2010). Thus, unless TDS can establish a constitutional injury, it cannot establish waiver of immunity pursuant its request for relief under the TDJA.

B. No Concrete Injury

TDS suffered no actual harm because it was eligible for and obtained the short-term and long-term contracts for recycling services. (Doc 35 at 7) Moreover, TDS likely benefitted by its lobbying of city council members and their staff during the time that

[2] This Court properly denied TDS' request for relief under the TDJA based on the *ultra vires* exception to immunity. (Doc 58 at 1-2; Doc 57 at 15-16). Moreover, the *ultra vires* exception only allows for prospective relief, so the court has no authority to remove the disqualification at issue. *See City of El Paso v. Heinrich,* 284 S.W.3d 366, 376 (2009)(allowing only prospective relief under the *ultra vires* exception).

other competitors were abiding by the Anti-Lobbying Ordinance. *Id.* Its disqualification was, thus, of no practical effect.

TDS offered no evidence and only conclusory allegations of harm to its reputation, which cannot support a motion for summary judgment. (Doc 49 at 2-3; Doc 51 at 6-7). Neither "conclusory allegations" nor "unsubstantiated assertions" will defeat a motion for summary judgment. *Wallace v. Tex. Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996). Further, plaintiffs cannot establish that they are entitled to "private speech" with government officials who are part of the decision-making process involving contracts for public money. *See U.S. v. Harriss,* 347 U.S. 612, 625-26 (1954)("[T]he voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.") Plaintiffs are at no risk of a concrete injury unless and until they suffer two more disqualifications under the Anti-Lobbying Ordinance, at which time they will be entitled to another public hearing in regard to all prior disqualifications. (Doc 35 at 11-13) Thus, Plaintiffs' claims of injury, being subjected to the possibility of debarment related to a third disqualification, are conjectural, speculative, and not ripe for review.

C. No Constitutional Injury

Under *Asgeirsson v. Abbott,* Plaintiffs cannot establish that they are entitled to "private speech' with government officials who are part of the decision-making process involving contracts for public funds. 696 F.3d 454, 458 (5th Cir. 2012), *cert denied,* 133 S.Ct. 1634, 81 U.S.L.W. 3371 (Mar. 25, 2013). (Doc 35 at 13-16). In its rationale, the Fifth Circuit emphasized that the Texas Open Meetings Act (TOMA) makes government

more transparent by providing the public with access to government decision making—that government is not made less transparent because of the lack of messages of private speech about public policy. *Id.* at 561-62. Instead, the court pointed out that private speech makes the government less transparent regardless of its message, and that "[t]ransparency is furthered by allowing the public to have access to government decision making. *Id.* [emphasis added] TDS has made no valid counter-argument to this holding. TDS' First Amendment rights were always preserved by the exception in the Anti-Lobbying Ordinance that permits competitors to participate fully by speaking and handing out materials in open meetings of the City. City Code §2-7-104(F)(6). Thus, TDS cannot establish a constitutional injury under federal law.

D. Statutory Interpretation

With all due respect to the court, the City complains that the court's Order on Cross-Motions for Summary Judgment directly conflicts with the purposes and intent of the Ordinance, including City Council's findings in section 2-7-102:

> (A) ...persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter.
>
> (B) The Council finds that it is in the City's interest: (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and (2) to further compliance with State law procurement requirements.
>
> (C) The Council intends that: (1) each response is considered on the same basis as all the others; and (2) respondents have equal access to information regarding a solicitation and the same opportunity to present information regarding the solicitation for consideration by the City.

The Court's analysis of the definition of a "respondent" ignores the above expressed intents and purposes. Austin City Code §2-7-102. If a respondent is not a respondent because of a late response, such an interpretation allows an opt-out provision that was never intended by council. The Austin City Council, as the legislature for the City, explicitly stated its intent that each response is considered on the same basis as all others; that respondents have equal access to information and the same opportunity to present information for the City's consideration. *Id.* §2-7-102(C). This court cannot create an "opt-out" provision for those who seek to avoid compliance with the ordinance where it conflicts with express terms of the ordinance. Moreover, TDS flaunted the terms of the ordinance by its December 8th e-mail, its "alternative" response to the RFP, and its continued lobbying of council during the no-contact period. (Doc. 35 at 5-6, 10). Although Gregory's December 8th e-mail professed to only relate to Greenstar's interim contract (not the long-term recycling contract), the e-mail was highly critical of Greenstar and included accusations that Greenstar "does not always adhere to its contractual agreements with regard to determining…purchase price[s] for commodities" and that it manipulates commodity pricing. Such serious accusations were harmful to Greenstar's response to the long-term RFP, which was subject to the Ordinance--regardless of whether they were couched under the cloak of being limited to the proposed extension of Greenstar's short-term contract for recycling. The interpretation that TDS did not submit a response is an "absurd result", contrary to the intents and purposes of the ordinance and contrary to the statutory rules of construction. (Doc 57 at 14); *See SWEPI v. RR Comm'n of Tx,* 314 S.W.3d 253, 262-63 (interpretation must be consistent with the plain language

and stated purposes and cannot lead to absurd results). Courts "must...avoid a construction that would seriously impair the effectiveness of an [enactment] in coping with the problem it was designed to alleviate." *U.S. v. Harriss,* 347 U.S. at 623.

III. CONCLUSION AND PRAYER

For the foregoing reasons, the City of Austin respectfully requests that the Court grant this motion and dismiss all Plaintiffs' claims against Defendants as a matter of law. In the alternative, the City requests that the Court reconsider the City's arguments in its motion for summary judgment, response to Plaintiffs' motion for summary judgment and the City's reply to Plaintiffs' response to the City's motion for summary judgment. The City further requests any and all further relief to which the City is justly entitled.

RESPECTFULLY SUBMITTED,

KAREN M. KENNARD, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ Lynn E. Carter
LYNN E. CARTER
Assistant City Attorney
State Bar No. 03925990
P.O. Box 1546
Austin, Texas 78767-1546
(512) 974-2171
(512) 974-1311 [FAX]
lynn.carter@austintexas.gov

ATTORNEYS FOR DEFENDANT
CITY OF AUSTIN

CERTIFICATE OF SERVICE

I certify that on the 17TH day of April, 2014, I served by e-filing/e-service and by electronic mail, by agreement of counsel, a copy of the foregoing to:

James Hemphill
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 536-9907 facsimile
jhemphill@gdhm.com

/s/ Lynn E. Carter
LYNN E. CARTER

UNITED STATES DISTRICT COURT
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ORDER GRANTING CITY OF AUSTIN'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

Before the Court is the City of Austin's Motion to Amend or Alter Judgment. After considering the motion, and any response and reply by the parties, the Court determines the motion is MERITORIOUS.

THEREFORE, the Motion to Alter or Amend the Judgment is GRANTED and Plaintiffs' claims are dismissed in their entirety for lack of subject-matter jurisdiction. The court determines that it lacks subject matter jurisdiction to consider Plaintiffs' request for relief under the Texas Uniform Declaratory Judgment Act, and that Plaintiffs have failed to establish a concrete injury sufficient to establish standing for any claims under federal law.

The Court further orders that the parties bear their own court costs and attorney fees.

This order does not affect the Court's prior order, entitled "Final Judgment" in the following respects: the City of Austin and Byron Johnson are entitled to summary judgment on Plaintiffs' *ultra vires*' claim alleged against Byron Johnson.

SIGNED this the ____ day of _____, 2014.

_____
LEE YEAKEL
UNITED STATES DISTRICT JUDGE