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.	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT

TO THE HONORABLE LEE YEAKEL, JUDGE OF SAID COURT:

Come now Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. (collectively "Texas Disposal" or "Plaintiffs") and file their Response in Opposition to Defendant City of Austin's Motion to Alter or Amend Judgment, and in the Alternative, Motion for New Trial (Doc. 59, "City Motion"), and would show as follows:

INTRODUCTION AND SUMMARY

The City raises four grounds on which it claims the Court's judgment should be modified "to dismiss Plaintiffs' claims in all respects." City Motion at 1-2. The City is not entitled to relief on any of these grounds:

1. The City waived any challenge to subject matter jurisdiction on governmental immunity grounds when it removed this case to federal court.

2. As the Court has already determined, Texas Disposal has standing because it sustained an actual injury: a disqualification under the City's Anti-Lobbying Ordinance.

3. The Court's interpretation of the City's Anti-Lobbying Ordinance to apply only to "respondents" who make a prohibited "representation," and its conclusion that

Texas Disposal was not a respondent and made no representation, are clearly correct under the express, unambiguous terms of the Ordinance.

4. Although the City alleges in its Summary of Argument that "[t]here are genuine issues of material fact that require a motion for new trial," City Motion at 2, the City presents no further argument or explanation of this point, and therefore has waived it.

ARGUMENT AND AUTHORITIES

I. The City Waived Objection to the Court's Subject Matter Jurisdiction over Texas Disposal's Declaratory Judgment Claim When it Voluntarily Invoked the Court's Jurisdiction By Removing the Case from State Court.

Texas Disposal filed this case in state court, and the City removed to this Court, citing federal question jurisdiction over Texas Disposal's claims under 42 U.S.C. § 1983 and supplemental jurisdiction over the declaratory judgment claims.[1] Doc. 1 at 1-2. "[W]hatever immunity from suit [the governmental entity] may have retained in state court as a political subdivision of the State … [the governmental entity] waived that immunity by removing the instant case to federal court." *Caldera v. County of El Paso*, 520 F.Supp.2d 846, 852-53 (W.D. Tex. 2007). "[T]he federal district court has subject matter jurisdiction because Texas waived its immunity from suit by removal of this case to federal court." *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 256 (5th Cir. 2005), *cert. denied*, 550 U.S. 917 (2007).

When a governmental entity removes a case to federal court, the removal operates as an affirmative invocation of the court's subject matter jurisdiction. "[R]emoval is a form of

[1] The City argues that "[t]he Texas Uniform Declaratory Judgment Act (TDJA) does not establish subject-matter jurisdiction," City Motion at 3. The TDJA is a procedural statute not applicable in federal court. Once this case was removed by the City, Texas Disposal added claims under the Federal Declaratory Judgment Act. Plaintiffs' First Amended Complaint (Original Complaint After Removal), Doc. 7, at 18-19. It is well established that "when a declaratory judgment action filed in state court is removed to federal court, that action is in effect converted into one brought under the federal Declaratory Judgment Act." *Tyler v. Bank of Am., N.A.*, 2013 WL 1821754 (W.D. Tex. Apr. 29, 2013, internal quotations omitted). Thus, this Court's Judgment was rendered under the Federal Act, not the TDJA.

voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Lapides v. Board of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 624 (2002). The Supreme Court in *Lapides* recognized that allowing a state (or its political subdivision, such as the City here) to voluntarily invoke federal court jurisdiction, while simultaneously arguing that the federal court *lacked* jurisdiction, "would permit States to achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. As the Fifth Circuit recognized in analyzing and applying *Lapides*, permitting governmental entities to "follow their litigation interests by freely asserting both claims [*i.e.*, both invoking federal jurisdiction and claiming immunity] in the same case could generate seriously unfair results." *Myers*, 410 F.3d at 249 (quoting *Lapides*; bracketed material inserted by quoting court).

In *Myers*, the State of Texas argued that *Lapides* should be limited to instances in which there was a waiver of governmental immunity that would have applied had the case not been removed to federal court. The Fifth Circuit unequivocally rejected such a reading:

> [W]e are not persuaded by Texas's argument that *Lapides* must be read as limiting the ambit of the voluntary invocation principle to cases involving state-law claims with respect to which the state has waived immunity in its own courts.

Myers, 410 F.3d at 250. Therefore, the City's citation to Texas state cases regarding when immunity has been waived for state court declaratory judgment actions or other state court actions, *see* City Motion at 4-8, is irrelevant. While Texas Disposal does not agree with the City's position that governmental immunity would have barred Texas Disposal's declaratory judgment action had the case remained in state court, that issue is irrelevant in light of the City's voluntary invocation of federal court jurisdiction through removal. Once this case was removed,

the City forfeited any argument that it was immune from suit under its governmental immunity.[2]

Even in the unlikely event that this Court concludes it lacks subject matter jurisdiction over the declaratory judgment claims, the City's requested relief – dismissal of all Texas Disposal's claims – would be improper. Texas Disposal also pleaded claims under 42 U.S.C. § 1983, over which this Court has subject matter jurisdiction and to which the City cannot claim governmental immunity. *See, e.g., Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978). The Court appropriately decided this case on Texas Disposal's declaratory judgment claims, finding it unnecessary to reach the Section 1983 claims. If the Court chooses to alter or amend its judgment to rule for the City on the declaratory judgment claims, it should also amend the judgment to reverse the dismissal without prejudice of the Section 1983 claims and consider their merits.

II. The City's Wrongful Disqualification of Texas Disposal Caused a Concrete Injury and Confers Standing.

The Court correctly rejected the City's argument that Texas Disposal's claims were not ripe and that it lacked standing because the City's wrongful disqualification did not bar Texas Disposal from doing business with the City. Order on Cross-Motions for Summary Judgment (Doc. 57, March 20, 2014) at 12-13. The City assessed a disqualification against Texas Disposal, which would remain in place on Texas Disposal's record absent this Court's grant of declaratory judgment in Texas Disposal's favor. The disqualification *is* the harm, and the controversy is ripe because the parties disagree as to whether an actual, concrete, adverse action taken by the City against Texas Disposal – the disqualification – was assessed appropriately under the terms of the

[2] The City also argues that there has been no waiver of sovereign immunity "for intentional torts," referring to "[Texas Disposal's] claim based on damage to its reputation." City Motion at 6-7. Texas Disposal has never alleged any state law intentional tort claim in this case against the City.

City's Anti-Lobbying Ordinance. Texas Disposal established "actual present harm" by proving that the City issued a disqualification that remains on Texas Disposal's record, and thus has standing to pursue a declaratory judgment action. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008).

Under the City's theory – that Texas Disposal suffers no injury until it is debarred from doing business with the City after the requisite number of disqualifications – Texas Disposal (1) would be required to challenge multiple disqualifications in a single court proceeding, even though each disqualification is subject to a separate administrative hearing process, and (2) would be barred from doing business with the City for a period of months or years while litigation challenging the disqualifications progressed, perhaps even preventing continued performance of the existing 30-year disposal contract between the City and Texas Disposal. Such a result would be wildly inefficient and would ignore the actual harm imposed with each disqualification.

Frankly, the City's continued attack on ripeness and standing is puzzling. By providing an administrative process for challenging a disqualification under the Ordinance, the City has recognized that disqualification is an adverse action that may be disputed. The City has no basis for its contention otherwise in this case, and it has (again) failed to articulate any coherent argument as to why the Court should reconsider its well-reasoned decision.

III. The Court's Interpretation of the Ordinance Conforms to its Unambiguous Language.

Tellingly, the City's complaint about the Court's interpretation of the City's Anti-Lobbying Ordinance does not quote or rely on the Ordinance's operative language defining "respondent" and "representation." Rather, the City contends that the Court's analysis "ignores"

the Ordinance's "expressed intents and purposes." City Motion at 11. In effect, the City argues that the Ordinance should be interpreted and applied *beyond* its actual words because of its "purpose" of providing a fair and equitable bidding process. The City is wrong, for at least two reasons.

First, when an ordinance's terms are unambiguous, a court interprets the ordinance by reference to its plain language. *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App. – San Antonio 2012, pet. denied) (citing *Texas Dept. of Protective & Regulator Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004)). Here, the Anti-Lobbying Ordinance specifically defines "respondent" and "representation," the two key terms in this case; Texas Disposal contested the City's findings that Texas Disposal was a "respondent" that made a prohibited "representation" under the Ordinance, and the Court agreed with Texas Disposal. The City would have this Court go beyond the plain language of the relevant definitions and expand the scope of those definitions in a way the City claims would be consistent with the "purposes and intent of the Ordinance." City Motion at 10-11. But the City itself defined these terms in the Ordinance, and those subject to the Ordinance are entitled to rely on the plain, unambiguous language of those definitions. Further, because the Ordinance is a restriction on speech,[3] it must be interpreted narrowly to restrict as little speech as possible under its plain language. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1592-93 (2010); *Asgeirsson v. Abbott*, 696 F.3d 454, 466 n.13 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 1634 (2013).

Second, a proper interpretation of the Ordinance does nothing to harm the City's fair and

[3] This Court recognized that the Ordinance is a speech restriction, stating that it "bans speech that is a 'representation' by a class of persons who are 'respondents'…." Doc. 57 at 3.

equitable bidding process. The City errs in arguing that its legitimate interest in treating all those who respond to requests for proposals (RFPs) or similar bid invitations would be damaged by the Court's holding. The City, of course, has an interest in ensuring that all those who submit conforming responses to bid invitations are treated equally. In fact, this is not just a City interest, but a requirement of Texas law. *See, e.g., Texas Highway Commission v. Texas Ass'n of Steel Importers, Inc.*, 327 S.W.2d 525 (Tex. 1963) (all bidders have a right to be on the same "plane of equality"). But Texas Disposal did *not* submit a conforming response to the RFP at issue here; rather, it knowingly and voluntarily waived any right to be on the same "plane of equality." The City (correctly) found that Texas Disposal's alternate contract amendment proposal could not be considered as a response because it did not conform to all the requirements of the RFP, but then (wrongly) considered Texas Disposal to be a "respondent" to the very same RFP to which it did not submit a response. The City accuses the Court's interpretation of the Ordinance of being "absurd," City Motion at 11, when in fact the City's position is nonsensical.

Under the Court's interpretation, the Anti-Lobbying Ordinance will continue to apply to those who actually respond to RFPs, and will not apply to those who do not respond. This result is eminently logical and is mandated by the plain language of the Ordinance. The City's argument is without merit.

IV. The City Has Failed to Identify Any Fact Issues, and in Any Event, the Court Properly Decided this Case as a Matter of Law.

Although the Summary of Argument contends that "[t]here are genuine issues of material fact that require a motion for new trial," City Motion at 2, the Motion itself does not offer any further argument on that point (the word "fact" does not appear anywhere after the quoted mention). The City has thus waived any argument that fact issues prevented granting of

summary judgment.

Further, there simply are no fact issues. The case turns on the interpretation of an ordinance, which is a matter of law. *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App. – San Antonio 2012, pet. denied). There is no factual dispute over the communication that the City wrongly concluded was a violation of the Ordinance; it was made in writing and is in the record. There is simply no conceivable fact issue preventing this Court's grant of summary judgment in favor of Texas Disposal's declaratory judgment claim.

CONCLUSION AND PRAYER

Wherefore, premises considered, Defendant City of Austin's Motion to Alter or Amend Judgment, and in the Alternative, Motion for New Trial should be denied in whole.

Respectfully submitted,

/s/ *James A. Hemphill*
James A. Hemphill
State Bar No. 00787674
Graves Dougherty Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, TX 78701
(512) 480-5762
(512) 536-9907 (fax)
jhemphill@gdhm.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served *via* CM/ECF and *via* email on the 23rd day of April, 2014, to counsel of record for Defendants:

Lynn E. Carter
Assistant City Attorney
City of Austin Law Department
301 W. 2nd St.
P.O. Box 1546
Austin, TX 78767
lynn.carter@austintexas.gov

/s/ *James A. Hemphill*