CAUSE NO. 22-0482-C395

TEXAS DISPOSAL SYSTEMS, INC., Plaintiff,	§ § §	IN THE DISTRICT COURT
v.	§ §	WILLIAMSON COUNTY, TEXAS
CITY OF ROUND ROCK, TEXAS, and LAURIE HADLEY, IN HER OFFICIAL CAPACITY OF CITY MANAGER OF ROUND ROCK, TEXAS, Defendants.	§ § § § §	395th JUDICIAL DISTRICT

REPLY IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

TO THE HON. RYAN D. LARSON, JUDGE OF SAID COURT:

The entitlement of Plaintiff Texas Disposal Systems, Inc. ("Plaintiff," "TDS," or "Texas Disposal") to a temporary restraining order primarily involves three questions. If the answer to all three is "yes," then TDS has shown itself entitled to relief. Those three questions are:

1. Does Round Rock's City Charter prohibit the granting of exclusive franchises to utilities? ***Yes.*** *The City does not appear to argue otherwise.*

2. Has Round Rock granted an exclusive franchise to Central Texas Refuse for the collection of non-residential waste and recyclable materials within the City? ***Yes.*** *The City does not appear to argue otherwise.*

3. Is the collection of waste and recyclable material a utility? ***Yes.*** *The City argues otherwise, but case law holds that waste collection* ***is*** *a utility.*

In Defendants' Opposition to Plaintiff's Petition and Application for Temporary Restraining Order (the "City Response"), the City[1] spends a great deal of time arguing a point with which TDS has no disagreement: that a municipality has, in the abstract, broad powers to regulate the collection and disposal of waste. But those broad general powers cannot and do not allow a city to institute regulation that violates its own charter, as the City has done here.

[1] The Defendants will be referred to collectively as the "City."

I. Waste collection is a utility; the City violated its Charter by granting an exclusive franchise.

Round Rock's City Charter does not define the term "utility," either directly in connection with the prohibition on exclusive franchises or otherwise. Texas courts, in determining whether waste collection and disposal constitutes a utility, have spoken with a single voice: *Yes, waste collection is a utility.*[2]

Texas Disposal in its Original Petition cited *Sanchez v. Southampton Civic Club, Inc.*, 367 S.W.3d 429, 434 (Tex. App. – Houston [14th Dist.] 2012, no pet.), for the proposition that waste collection is a utility. A copy of this case is attached as Exhibit A. The City Response simply ignores the case. In *Sanchez*, a restrictive covenant required residents to keep a three-foot strip of land clear to be used for "the laying of gas mains, water mains, storm and sanitary sewer laterals and connections, and electric light poles, telephone poles and ***other proper or necessary public utility***." *Id.* at 431-32 (emphasis added). Sanchez built a fence on the three-foot strip, which interfered with the collection of waste. *Id.* at 432. The subdivision sued Sanchez for violating the covenant, and Sanchez responded by arguing that waste collection was not a "public utility." The court disagreed: "Relying on longstanding precedent, we hold that ***garbage collection is a public utility*** falling within the boundaries of the restrictive covenant at issue." *Id.* at 434 (emphasis added). The court further observed that "[t]he fact that a private contractor – as opposed to a government agency – is collecting the garbage has no bearing on whether the activity is a public utility." *Id.*

Texas Disposal also cited *City of Wichita Falls v. Kemp Hotel Operating Co.,* 162 S.W.2d 150, 153 (Tex. Civ. App. – Fort Worth 1942), *aff'd,* 141 Tex. 90, 170 S.W.2d 217 (Tex. 1943).

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[2] "City charters are construed according to general rules of statutory interpretation. When a statute does not define a term, we look to its common, ordinary meaning unless a contrary meaning is apparent from a statute's language." *Powell v. City of Houston*, 628 S.W.3d 838, 843 (Tex. 2021).

The City Response discusses this case but misapprehends its significance. A copy is attached as Exhibit B. There, Wichita Falls' charter required all "public utility franchises and renewals, extensions and amendments thereof" to be granted only by ordinance, and only after the ordinance had been published and a written recommendation report had been made by the Mayor or City Manager. 162 S.W.2d at 152. The city had adopted an ordinance, without following those procedures, broadly governing the collection of waste, received bids, awarded a contract to one L.B. Green, and prohibited any other parties from gathering and hauling waste. *Id.* Litigation ensued after several parties were arrested and prosecuted for hauling their own waste in violation of the ordinance; those parties challenged the validity of the city's contract with Green because the city charter's provision regarding "public utility franchises" was not complied with. *Id.* The court framed two questions: "(1) Do the gathering and disposition of garbage constitute a public utility? And (2) Do the ordinance and contract with Green amount to a franchise?" *Id.* The court answered "yes" to the first question: "We have concluded ... that the performance of the ordinance and contract constitutes a public utility." *Id.* at 153. However, it answered the second question "no": "We conclude therefore that neither the ordinance nor the contract, nor the two combined, constituted a franchise to Green." *Id.* at 154. The city therefore had not violated its charter.

The City Response claims the *Kemp Hotel* case "did not find it relevant as to whether the gathering and disposition of garbage constituted a 'public utility' or a 'franchise.'" City Response at 6. This is not correct. The court keyed in on exactly those two questions and followed precedent establishing that waste collection is a public utility. In fact, the *Sanchez* case discussed above relies on *Kemp Hotel* as part of "longstanding precedent" holding waste collection to be a public utility. *Sanchez*, 367 S.W.3d at 434.

The City does not cite a single case holding that waste collection is not a public utility.

The City cites a case holding that ambulance service is not a public utility[3] – an issue that simply is irrelevant here. Similarly irrelevant are the cases cited by the City regarding the broad general power to regulate waste, none of which address whether waste collection is a public utility.[4] In fact, one of those cases discusses a provision of the County Solid Waste Control Act, which allowed certain public entities to "offer solid waste disposal service to persons within its boundaries" and to "establish said service ***as a utility***." *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 165 (Tex. Civ. App. – Eastland 1972, writ ref'd n.r.e.) (emphasis added).

Cities regularly refer to waste collection as a utility. The City of Austin calls its Austin Resource Recovery department "the City's waste management utility." Ex. C. Round Rock itself places waste under its "Utilities and Environmental Services" department. Ex. D.

Texas Disposal has carried its burden to show that it has a cause of action under the Uniform Declaratory Judgment Act for a declaration regarding its rights, status, or other legal relations under the City Charter, the referenced ordinance and resolutions, and the exclusive franchise granted to CTR.[5]

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[3] *Ayala v. Corpus Christi,* 507 S.W.2d 324 (Tex. Civ. App. – Corpus Christi 1974, no writ).

[4] *Grothues v. City of Helotes,* 928 S.W.2d 725 (Tex. App.—San Antonio 1996, no writ); *City of Breckenridge v. McMullen,* 258 S.W. 1099 (Tex. Civ. App.--Fort Worth, 1923, no writ).

[5] The City has not raised immunity as a defense. In any event, its immunity is waived under the Uniform Declaratory Judgment Act (UDJA) regarding the claims made by Texas Disposal. Under Section 37.004(a) of the UDJA, a party "whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Under Section 37.006(b), a municipality "must be made a party" to "any proceeding that involves the validity of a municipal ordinance or franchise." In adopting these provisions of the UDJA, the Legislature waived municipalities' immunity for such claims. *See, e.g., Turner v. Robinson*, 534 S.W.3d 115, 127 (Tex. App. – Houston [14th Dist.] 2017, pet. denied).

II. The City violated the posting requirements of the Open Meetings Act in granting authority for the negotiation of an exclusive single-source franchise contract; because the authority to negotiate is void, all subsequent actions relying on that void authority are also void.

The Texas Open Meetings Act requires notice of the "subject" of each meeting. Tex. Gov't Code § 551.041. The subject must be described with "reasonable specificity" to alert the public of the nature of the proposed action; the greater the public interest, the more specific the description must be. *Cox Enterprises v. Board of Trustees*, 706 S.W.2d 956 (Tex. 1986) (finding "personnel" to be inadequate description of hiring of superintendent). Actions taken in violation of the Open Meetings Act are voidable, Tex. Gov't Code § 551.141, and suit for mandamus or injunction may be brought to reverse a violation, *id.* § 551.142.

The notice for the July 16, 2021 Council Retreat – which said simply that the Council would "Consider discussion and possible action regarding the collection and disposal of commercial refuse" – did not provide adequate notice that the Council would actually authorize the negotiation of a sole-source exclusive franchise contract (and thus terminating Texas Disposal's existing franchise). The City makes no real argument otherwise. Rather, it appears to maintain that proper notice was given to subsequent Council actions, such as approval of the exclusive franchise contract, so no Open Meetings posting violations occurred.

However, without the initial authorization for negotiation of the contract – which is void due to the inadequate notice of the subject to be considered at the Council Retreat – then the negotiation of the contract that was purportedly later approved by the Council was not authorized, so the Council could not properly approve that contract, rendering the contract – including the grant of an exclusive franchise – void itself. This is a sufficient and independent ground for the grant of a TRO in Texas Disposal's favor.

III. Texas Disposal has established all elements for issuance of a TRO.

The City correctly sets forth the three elements required for issuance of a temporary restraining order, City Response at 9, but is incorrect in arguing that the elements have not been satisfied. They have been, easily.

First, Texas Disposal has established multiple causes of action: a declaratory judgment claim for violation of the City Charter in granting an exclusive utility franchise, a mandamus and injunction claim for violation of the Open Meetings Act, and an *ultra vires* claim against the City Manager in her official capacity for acting outside her authority in carrying out acts to effectuate and enforce an exclusive franchise for CTR in violation of the City Charter.

Second, Texas Disposal has established a probable right to the relief sought. As described herein, the City has in fact granted an exclusive franchise in violation of its Charter and has violated the notice provisions of the Open Meetings Act.

Third, Texas Disposal has shown that it will incur probable, imminent, and irreparable injury if the City's grant of an exclusive franchise is not restrained. Texas Disposal will be forced to abandon its commercial waste accounts, many of which it has held for years, the removal of equipment from the premises of current customers would involve substantial costs, and current customers will be forced to deal with CTR – many against their will – and if Texas Disposal ultimately succeeds, those customers may choose not to incur the transaction costs of again changing providers.

The City's main argument on imminent irreparable injury is that Texas Disposal allegedly waited too long to seek injunctive relief. City Response at 9. This is incorrect. The City does not contest that implementation of the exclusive franchise would deprive Texas Disposal of its current

customers within the City, a deprivation that is not amenable to an eventual award of money damages.

The City argues that Texas Disposal was aware of the City's plans in November 2021. Correct (though had the City not violated the Open Meetings Act, TDS would have been aware in July 2021). But the grant of this exclusive franchise has at least two aspects: one is political, and the other is legal. Texas Disposal, once it learned of the City's plans, invoked the political process and attempted to convince the elected representatives of the City that granting an exclusive franchise without a competitive bidding process was unwise. This effort was ultimately unsuccessful, resulting in Texas Disposal receiving notice on March 23, 2022 that its franchise would be terminated, making its legal claim ripe. Texas Disposal filed for injunctive relief just 26 days later, on April 18, 2022.

Texas Disposal does not ask this Court to pass on the wisdom of the City's decision to grant an exclusive franchise. That is a political question. However, the City cannot properly grant the franchise without legal authorization, which is a question squarely within the Court's jurisdiction. Texas Disposal thus prays that the Court grant its application for a temporary restraining order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon counsel for Defendants *via* electronic service if available, and also *via* electronic mail as follows, on the 26th day of April, 2022:

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