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.	§	

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS TEXAS DISPOSAL SYSTEMS, INC. and TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

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

June 14, 2013

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY 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 this Reply in Support of their Motion for Summary Judgment, and in reply to Defendants' Response to Plaintiff's Motion for Summary Judgment ("City Response," Doc. 49), and would show as follows:

I. Texas Disposal Did Not Violate the Anti-Lobbying Ordinance and Is Entitled to Summary Judgment.

Texas Disposal demonstrated in its summary judgment motion that it did not violate the City's Anti-Lobbying Ordinance (the "Ordinance") because (1) Bob Gregory's December 8, 2009 email was not a "representation" as defined in the Ordinance, for multiple reasons; and (2) Texas Disposal was not a "respondent" to a City RFP as defined in the Ordinance. TDS MSJ (Doc. 34) at 15-18. The City Response has no substantive counter-argument. Texas Disposal is thus entitled to summary judgment on its declaratory judgment causes of action.

A. Interpretation of the Ordinance, and application to Texas Disposal's speech, is an issue of law; the City presents no legal analysis as to the proper interpretation of the Ordinance.

Rather than present a substantive analysis of how it contends the Ordinance's terms should be applied to Gregory's December 8, 2009 email, the City makes a conclusory allegation that there is a genuine issue of material fact as to whether Texas Disposal violated the Ordinance – because City representatives (and the City-chosen and -hired hearing officer, Stephen Webb) concluded that there had been a violation. City Response at 7. This is wrong in at least two respects. First, the interpretation of an ordinance is a question of law, not of fact. *See, e.g.*, *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App. – San Antonio

2012, pet. denied, mtn. rhrg. filed); *Arredondo v. City of Dallas*, 79 S.W.3d 657, 667 (Tex. App. – Dallas 2002, pet. denied). Second, a party cannot raise a fact issue (particularly on a legal question) simply by citing its own allegations. Texas Disposal addressed the decision of hearing officer Webb in its summary judgment motion, showing why his analysis was contrary to the Ordinance's language. TDS MSJ at 17-20. The City offers no substantive response, instead pointing merely to the existence of Webb's decision with no attempt to justify its analysis.

The City also cites to two passages in its own summary judgment motion that it claims demonstrate a genuine issue of material fact as to whether there was an Ordinance violation. City Response at 11. The first cited section of the City's summary judgment motion (pages 3-6) is simply a recitation of fact with no legal analysis, and the second cited section (pages 13-15) addresses the City's argument on First Amendment issues. Neither of the cited sections contains any substantive analysis of the Ordinance's terms or their application to Gregory's email. The City's failure to provide any such analysis reinforces Texas Disposal's entitlement to summary judgment on its declaratory judgment causes of action.

B. The City misstates Texas Disposal's position regarding interpretation of the Ordinance.

The City mistakenly asserts that Texas Disposal "ask[s] this Court to ignore" the portions of the Ordinance that define the no-contact period as beginning with the issuance of an RFP or other solicitation, and that retroactively applies the Ordinance's speech restrictions to any communication that took place during the no-contact period once a person or entity becomes a "respondent" to an RFP. City Response at 14-15. Of course, Texas Disposal asks no such thing. The Ordinance clearly applies to speech made during the no-contact period before a business becomes a respondent – but *only if* that business *actually does* become a respondent. Ordinance

§§ 2-7-101(4) (defining "respondent"), 2-7-103(A) (defining contact restrictions on "a respondent"). JEX 1 to parties' MSJ pleadings (Doc. 27-1 at 1-5). The disqualification of Texas Disposal was unsupported by the Ordinance's terms not because it was rendered before any RFP responses were received, but rather because Texas Disposal never became a respondent (and other reasons set forth in Texas Disposal's summary judgment motion). The fact that no RFP responses had been received at the time of Gregory's December 8, 2009 email *is* relevant to the fact that the email did not "discredit[] the response of any other respondent," Ordinance § 2-7-101(5)(c), because no such responses existed when the email was sent.

C. The City's Response makes additional misstatements regarding the facts and Texas Disposal's arguments.

Although they are not dispositive regarding the issues on which Texas Disposal has sought summary judgment, the City's Response includes other misstatements related to the City's application of the Ordinance to Texas Disposal that should not go unaddressed.

The City argues that rather than sending the December 8, 2009 email, Texas Disposal's Bob Gregory could have spoken at public meetings, such as City Council meetings on December 17, 2009 and thereafter. City Response at 6. This misses the point in at least two ways. First, whether it was necessary for Gregory to send the email when he did is irrelevant to whether the email violated the ordinance. Second, the email on its face is a communication to the City's Solid Waste Advisory Commission (SWAC) about a vote it was taking on December 9, 2009. JEX 3 (Doc. 27-1 at 12-32). Obviously, communicating with the City Council after December 9, 2009 would be fruitless when the entire purpose of the communication was to send a message to SWAC for a vote that was to occur on December 9.

The City criticizes Texas Disposal's discussion of how it was treated differently with

regard to the Ordinance from how a competitor, Greenstar, was treated. City Response at 6-7. The City alleges that "there is simply no valid comparison" between Gregory's email and the communication that resulted in the (ultimately overturned) disqualification of Greenstar, and that Texas Disposal has not demonstrated the absence of any fact issue regarding differences between those communications. *Id.* The communications are in the record and speak for themselves. JEX 3 (Doc. 27-1 at 12-32) (Gregory email and attachments); JEX4 (Doc. 27-1 at 33-35) (Greenstar letter). Texas Disposal discussed the content of Greenstar's letter and, more importantly, the correct interpretation of the Ordinance by hearing officer Monte Akers that resulted in the reversal of Greenstar's disqualification. TDS MSJ (Doc. 34) at 6-8, 18-20. The City has no substantive response.

Texas Disposal accurately set forth in its summary judgment motion that the City's Law Department made the decision to have a hearing officer other than Monte Akers for the second TDS disqualification protest hearing. TDS MSJ (Doc. 34) at 11, citing the deposition testimony of City Purchasing Officer Byron Johnson. The City responds by alleging that Texas Disposal "caused" the change in hearing officers by making "exparte communications" with Akers that impliedly were improper. City Response at 7-8. This is a very serious allegation, and it is absolutely wrong.

The record of events is crystal clear: after not receiving a response from the City to its inquiry as to the status of its protest for several weeks, Texas Disposal's general counsel called Akers and asked if there were any more procedural steps available, and Akers reported the contact to the City. In stark contrast to the City's implication that the contact was an improper "exparte" contact and "caused" the City to hire a different hearing officer, Akers himself stated:

I do not believe there have been any improper contacts made, ex parte

> communications, violation of the anti-lobbying ordinance, attempt to influence me, or anything else that would influence my consideration and decision if I serve in another, related protest hearing [involving TDS] next week.

PX9 attached hereto (Ex. 25 to Johnson depo). After receiving the communication from Akers that confirmed Texas Disposal did not act improperly, Purchasing Officer Johnson consulted with the Law Department, and based on its advice, the City decided to use a hearing officer other than Akers – even though Akers confirmed that it would not be improper for him to continue as hearing officer. PX1 to TDS MSJ (Johnson depo.) at 93-96. The City claimed privilege over Johnson's discussions with the Law Department, so Texas Disposal could not discover the content of the advice that led to the hiring of Stephen Webb as hearing officer; but now the City is claiming that Texas Disposal "caused" the change in hearing officers due to its "exparte communications." Texas Disposal takes strong exception to the implication of wrongdoing, which is unequivocally contrary to the evidence.

II. Texas Disposal Has Standing to Challenge the City's Actual, Wrongful Issuance of a Disqualification.

The City argues that standing does not exist due to "[t]he mere existence of a statute or ordinance 'that may or may not ever be applied to plaintiffs….'" City Response at 10. The City's position is puzzling: there is no "may not" regarding the application of the Ordinance to Texas Disposal. The Ordinance was applied, and the result was the disqualification that is the subject of this lawsuit. Texas Disposal suffered an actual injury, about which it has standing to complain. The City seems to argue that no dispute is ripe until there have been additional disqualifications and subsequent debarment from doing business with the City, City Response at 10-11, but offers no legal or logical explanation as to why that should be the case. Texas Disposal is challenging the actual application of the Ordinance to its actual speech that resulted in an actual disqualification. Texas Disposal plainly has standing to do so.

The City also argues that because the First Amendment doctrine of facial overbreadth does not apply to commercial speech, Texas Disposal lacks standing to make this claim. City Response at 8-9. Like several of the City's other arguments, this is wrong for multiple reasons. Texas Disposal has not made a facial challenge to the Ordinance; rather, its First Amendment claim is made only in the alternative to its declaratory judgment/statutory interpretation claims, and is an "as-applied" challenge, not a facial challenge.

The City also errs, badly, in characterizing Texas Disposal's speech as "commercial." Under the First Amendment, "commercial speech" means "speech that does no more than propose a commercial transaction," such as advertising. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). The City alleges that Texas Disposal's speech – made to appointed public officials regarding a matter of public concern about which the officials were set to vote – was "purely commercial in nature" because Texas Disposal admittedly has commercial interests in recycling issues. City Response at 9. But Texas Disposal was speaking to an issue of public concern, not making an advertisement, and the Supreme Court has squarely held that speech regarding public, political issues is fully protected by the First Amendment even when the speaker is a corporation that may ultimately have business interests in the matter at hand. *See, e.g., Citizens United v. Federal Election Commission*, 558 U.S. 310, 342-47 (2010) (tracing the history of First Amendment protection of corporate political speech).

The City also states that to have standing, a party alleging its speech was chilled must show that prosecution occurred, was threatened, or is likely. City Response at 10. As discussed below, Texas Disposal's First Amendment claims are not based on a contention that its speech was unconstitutionally chilled. The City did take adverse action against Texas Disposal, and this lawsuit challenges that adverse action. Plaintiffs plainly have standing to bring their claims.

III. If the Ordinance Is Interpreted to Apply to Texas Disposal's Speech, its As-Applied First Amendment Challenge Should Be Sustained.

A. Texas Disposal's First Amendment claims are not based on an allegation that its speech was unconstitutionally chilled.

The City argues that Texas Disposal has not presented sufficient evidence of "chilled speech" to support its First Amendment claims, City Response at 2-3; that Texas Disposal representatives have spoken frequently at public meetings, *id.* at 4-6; and that Texas Disposal responded to RFPs and voluntarily submitted to the Ordinance's restriction during the same time periods as it declined to respond to other RFPs due to the City's interpretation of the Ordinance, *id.* at 5-6. The City apparently makes these arguments to show that Texas Disposal has no cause of action for violation of its First Amendment rights because its speech was not "chilled."

Texas Disposal does not base its constitutional claims on a contention that its speech was chilled. It is true that Texas Disposal declined to bid on some City contracts because it feared that if it did bid and then spoke generally on recycling or waste disposal issues, it might face another wrongful disqualification. TDS MSJ at 24 (citing Bob Gregory deposition testimony). But Texas Disposal does not contend that its speech was chilled; in fact, it chose not to respond to these RFPs so its speech on those specific subjects *would not* be chilled. While Texas Disposal's decision not to respond to certain RFPs out of concerns over the City staff's interpretation of the Ordinance is evidence that the interpretation has had ill effects, Texas Disposal does not base its constitutional claims on these decisions. It rather brings an as-applied challenge, only in the event that this Court determines that Gregory's December 8, 2009 email was in fact a prohibited representation under the Ordinance.

B. The application of the Ordinance to Texas Disposal's speech is unconstitutional.

The City argues that the Ordinance is a constitutional, content-neutral time, place, and

manner restriction on speech. City Response at 11-13. As Texas Disposal has frequently stated, it does not challenge the actual terms of the Ordinance, as correctly interpreted and applied, and agrees that the purposes stated in the Ordinance are important governmental interests. *See* TDS MSJ at 23. However, if the Ordinance is interpreted in such a way that Bob Gregory's December 8, 2009 email is considered a prohibited representation under the Ordinance, then the Ordinance is unconstitutional as applied to the email. Texas Disposal makes this argument at pages 22-24 of its summary judgment motion. As demonstrated there, if interpreted to reach Texas Disposal's speech, the Ordinance is a content- and viewpoint-based speech restriction. Such restrictions are presumed unconstitutional and must pass strict constitutional scrutiny. The City does not even allege – let alone prove – that the Ordinance survives such exacting scrutiny.

C. Texas Disposal's due process claim is intertwined with its First Amendment claim.

Texas Disposal does not bring a procedural due process claim, or any due process claim that is separate and distinct from its First Amendment claim. *See* City Response at 2 (arguing that Texas Disposal has not presented evidence regarding its due process claim).

The due process issue in this case is that the Ordinance fails to provide the constitutionally required "fair notice" of what speech it does and does not prohibit, if the City's interpretation of the Ordinance and its application to TDS are accepted. This "fair notice" is required by not only constitutional due process, but also by the First Amendment; indeed, complaints regarding lack of such fair notice are frequently characterized as claims under the First Amendment rather than due process. *See, e.g.*, *Service Employees Int'l Union v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010); *see also* TDS MSJ at 20-21 (discussing the due process fair notice requirement in First Amendment cases).

The City argues that if the Ordinance does not give the required notice, there would be others "who have been unable to comply with the terms of the ordinance," City Response at 15. First, Texas Disposal *did* comply with the Ordinance; the City's allegation otherwise is legally incorrect. Second, the lack of fair notice applies only if the City staff's Ordinance interpretation is accepted; Texas Disposal does not contend that the Ordinance, as written and properly interpreted, fails to satisfy the fair notice requirements of due process and the First Amendment. If the City's interpretation is accepted, the Ordinance may be applied to restrict nearly *any* speech on the general subject of a pending RFP. Finally, Texas Disposal *has* cited another incident where a disqualification was assessed in a situation where a respondent appeared to have crafted a communication specifically to comply with the Ordinance: Greenstar's letter complaining of Gregory's email. TDS MSJ at 6-8, 18-20. Greenstar was disqualified because City staff interpreted the Ordinance beyond its actual language; the disqualification was correctly overturned after Hearing Officer Monte Akers' analysis and recommendation. The same result should have applied to Texas Disposal.

D. The City mischaracterizes Texas Disposal's constitutional arguments.

The City alleges that Texas Disposal "incorrectly argue[s] that the Anti-Lobbying Ordinance constitutes a total ban on speech," City Response at 14. Texas Disposal does not make, and never has made, such an argument. The Ordinance does prohibit any direct communication with elected officials about a pending RFP, other than brief comments at public meetings. *See* TDS MSJ at 23. But that is not a "total ban on speech," and Texas Disposal has not claimed that it is.

The City also argues that Texas Disposal "does not possess a constitutional right to bid on city solicitations under its own terms," City Response at 13, but that is not an accurate

description of either the nature nor effect of any of Plaintiffs' arguments, by any stretch of the imagination. Texas Disposal did not even bid on the City's RFP here at issue, let alone bid "under its own terms" or argue that it had a "constitutional right" to do so. (Texas Disposal did, however, have the ability to propose an amendment of its existing 30-year contract with the City to encompass additional services. *See* TDS MSJ at 2, 8-9.) The City is legally required to properly interpret and apply its ordinances, and Texas Disposal has the right to challenge the legally incorrect application of the Ordinance to its speech.

IV. Texas Disposal's Claims Against Byron Johnson, in his Official Capacity, Are Identical to its Claims Against the City.

The City contends that Texas Disposal has presented no competent evidence to support its claims against Purchasing Officer Byron Johnson. City Response at 3. This is incorrect. Texas Disposal established that Johnson is the City official with the ultimate authority to decide whether there has been a violation of the Ordinance. TDS MSJ at 7. Johnson is a defendant because some Texas authority suggests that a party alleging misapplication of the law by a governmental entity must sue the public official charged with applying that law. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Texas Disposal does not bring any claims against Johnson that are not also brought against the City. Texas Disposal is entitled to summary judgment on its claims against Johnson in his official capacity for the same reasons it is entitled to summary judgment on its claims against the City.

CONCLUSION AND PRAYER

Plaintiffs pray that this Court grant Plaintiffs' Motion for Summary Judgment, and grant Plaintiffs all further relief to which they may show themselves entitled.

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 14th day of June, 2013, 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

From: Johnson, Byron
Sent: Thursday, May 20, 2010 5:00 PM
To: Castro, Carolyn
Subject: Fw: TDS protest

Send to Tamara and John Steiner for advice.

From: Monte Akers <makers@txcityattorney.com>
To: Castro, Carolyn; Johnson, Byron
Sent: Thu May 20 16:09:55 2010
Subject: TDS protest

Carolyn and Byron:

This message is in the interest of full disclosure and being cautious, although I do not think there is any reason it is required.

I know Gary Newton, the General Counsel for TDS, having met him years ago when I worked for the

Johnson
EXHIBIT NO. 25
4-19-13
K. KEEPER

TDS v. COA
A-11-CV-1070-LY
COA 00721

Texas Municipal League and our jobs required both of us to spend a lot of time at the Capitol building during legislative sessions. He was also involved in various solid waste matters at TCEQ that TML was interested in, and we each represented our respective clients on TCEQ committees regarding solid waste issues and Subtitle D in the early 1990s. Similarly I know Bob Gregory from the same type of business matters and his service on a state solid waste advisory committee. We've never socialized or had connections outside of those business encounters.

Gary telephoned me once during the last month, at some time prior to May 12, to ask me a question about City of Austin procedures. He stated that TDS had sent a letter to the Austin City Attorney's office several weeks earlier, had not had a response, and asked me if I knew of any ordinance or other procedural mechanism whereby TDS could appeal a decision made by the City whereby it was disqualified from participating in an RFP. After hearing his explanation, I told him that I really did not have any new or different suggestions than what TDS had already done, i.e. that contacting the City Attorney's office and perhaps following that with another letter after a suitable period of time if no response was received, perhaps requesting an opportunity for a hearing, was all that I would know to do if I was in a similar situation. He thanked me and I did not hear any more about the matter until Carolyn called yesterday to ask me if I could serve as hearing examiner on a protest matter.

She then sent me the TDS letter of May 18, 2010, with the attached letter from the City Attorney's office dated May 12, the letter from TDS's attorney, James Hempill, dated February 26, and the memo to the mayor and council from Robert Goode dated February 24, which I reviewed today. Apparently the letter of February 26 is the one that Gary told me about in the phone call and thereafter TDS received the letter dated May 12, which Gary had not received as of the date of the phone call.

The TDS letter of May 18 appears to be prompted by and in response to the letter from the City Attorney's office of May 12 rather than anything discussed in my pre-May 12 phone conversation with Gary. Additionally, the request by TDS that a hearing be set before me is apparently based on my serving as hearing examiner in the TDS matter heard on February 5. I do not believe there have been any improper contacts made, ex parte communications, violation of the anti-lobbying ordinance, attempt to influence me, or anything else that would influence my consideration and decision if I serve in another, related, protest hearing next week.

Nevertheless, if any of the foregoing causes concern on behalf of you, the City, City Attorney's office, or if you simply want to avoid any question, I will understand completely if you decide to ask someone else to serve as the hearings officer on the matter currently scheduled for May 26.--Monte Akers

5/24/2010

TDS v. COA
A-11-CV-1070-LY
COA 00722