

CAUSE NO. D-1-GN-18-002394

TIFFANY MCMILLAN	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	419th JUDICIAL DISTRICT
	§	
LAKEWAY CITY COUNCIL and	§	
SANDY COX,	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

**NON-PARTY CITY OF LAKEWAY’S AMICUS BRIEF RESPECTING PLAINTIFF’S
APPLICATION FOR TEMPORARY RESTRAINING ORDER**

TO THE HONORABLE JUDGE OF SAID COURT: City of Lakeway, a non-party home-rule Texas municipal corporation (“City”) submits the following brief at the invitation of the Court respecting Plaintiff’s Application for Temporary Restraining Order (“TRO Application”):

I. FACTS

Although the City has some disagreements with the facts alleged in the Original Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctions (“Petition”), courts do not consider evidence at TRO hearings. Therefore, for the purposes of the TRO Application, the City treats the properly verified allegations in the Petition as the operative facts without admitting their truth.

The Petition does not name the City as a party and the TRO Application seeks no relief against the City. The only entity named by the Petition as a defendant is the “Lakeway City Council.” The only named co-defendant is Ms. Sandy Cox, whom the Petition alleges to

have won a plurality of votes at a recent Lakeway mayoral election.¹

The TRO Application is contained in a single subparagraph of the Petition’s prayer for relief, the only pleading on file in this cause. The TRO Application in the Petition states in its entirety:

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

* * *

b. Issue a temporary restraining order and temporary injunction restraining Sandy Cox from taking the oath of office or assuming the duties of Mayor of the City of Lakeway pending the results of the runoff election for the office of Mayor of the City of Lakeway.”

Plaintiff’s Original Petition V(b) at 9-10.

The Petition contains no allegation that there is an emergency or risk of immediate irreparable harm or words of like import – the words “emergency” and “risk” appear nowhere in the body of the Petition. Therefore, the general verification appended to the Petition verifies no facts establishing an emergency or immediate risk.

II. TEMPORARY RESTRAINING ORDER

A. Capacity to Sue and Be Sued

The Lakeway City Council is not a jural entity and lacks the capacity to sue or be sued. *Darby v. Pasadena Police Dep’t*, 939 F.2d 311, 313 (5th Cir.1991); *Skyway Towers v. City of San Antonio*, Cv. No. 5:14–CA–410–DAE, 2014 WL 3512837 (W. D. Tex. July 14,

¹ The undersigned attorneys do not represent Ms. Cox or the individual members of the Lakeway City Council in this cause.

2014). It is the legislative arm of the City, not an independent governmental entity. *Id.* “As a rule, a governmental entity without the power to sue and be sued cannot be a party in litigation.” *Tooke v. City of Mexia*, 197 S.W.3d 325, 334 (Tex. 2006)(footnote omitted). Thus, even if the TRO Application were supported by adequate verified facts (it is not), and even if the TRO Application sought relief against the City Council (it does not), the Court would be abusing its discretion and exceeding its subject-matter jurisdiction if it granted such relief.

City of El Paso v. Heinrich, 284 S.W.3d 366 (2009), teaches that the only permissible methods for seeking future equitable relief when city officials or a city allegedly violate the Texas constitution or a state statute are, when the facts so justify, to sue each governing body member individually for mandamus relief to compel future adherence to the constitution or law in performing ministerial duties, or to sue the city for a declaration of rights and ancillary injunctive relief under the Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ch. 37.

Plaintiff did not sue the City. Plaintiff does not seek relief under the Declaratory Judgment Act. Plaintiff has no valid claim in the nature of a TRO against the Lakeway City Council and does not purport to state one.

B. Plaintiff Lacks Standing and thus Court Lacks Jurisdiction Under Election Code § 273.081

Plaintiff’s only jurisdictional assertion in her Original Petition is section 273.081 of the Texas Election Code stating: “A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive

relief to prevent the violation from continuing or occurring.” Tex. Elec. Code § 273.081²

Plaintiff cites elections results in paragraph 6 of her pleading that allege that she was the runner up in the May 5, 2018 election. Plaintiff’s Original Pet. ¶ 6. However, the Petition admits that the vote has not yet been canvassed – indeed a purpose of the petition is to prevent the canvass. (Pet. at 10.) Therefore the Petition admits that there is no factual basis for the assertion of election results and defeats the efficacy of the verification as it relates to election results. As the Petition admits, the election has yet to be canvassed and the official results of the May 5, 2018, general election are at the time of this filing unknown. Until the election is canvassed it is unclear whether any candidate would have standing to demand a runoff. Therefore, Plaintiff has not and cannot allege facts demonstrating that she is in danger of being deprived of any of her own Election Code rights. She therefore lacks standing and thus the Court lacks subject-matter jurisdiction to grant the TRO she requests against Ms. Cox.

C. Plaintiff Fails to Allege Violations of the Election Code - Ripeness and Standing

Nowhere does Plaintiff properly allege any violations of the Election Code. To sustain jurisdiction under the section 273.081 the Plaintiff must allege harm by violations of the Election Code. Plaintiff’s only Election Code claim includes an assumption that a

² Although only tangentially relevant at this TRO stage where Plaintiff seeks no relief against a government entity, it should be noted that Election Code section 273.081, unlike the Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code sections 37.004(a) and 37.006(b), contains no unmistakably clear waiver of the City’s governmental immunity as required by the Texas Supreme Court for waiver of a city’s immunity from suit. “The question thus is not whether any statute grants home-rule cities immunity from suit, but whether any statute limits their immunity from suit. Such limits exist only when a statute speaks with ‘unmistakable clarity.’” *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)(footnotes omitted).

runoff election is required and an assumption that the City intends not to hold one. However, as Plaintiff notes: “When a runoff is required, ‘[n]ot later than the fifth day *after the date the final canvass of the main election is completed*, the authority responsible for ordering the main election shall order the runoff election.” Plaintiff’s Original Pet. ¶ 33 (citing Tex. Elec. Code § 2.024). The City has not yet canvassed the election and the deadline to order the runoff election has not passed. Accordingly, as of the date of this filing there has been no violation of the Elections Code and no concrete danger of such violation to any right of Plaintiff under the Election Code, and therefore there are no ripe issues for review and thus Plaintiff lacks standing.

D. TRO Is Not Appropriate to Halt Ministerial Duties Mandated by the Election Code

Equity should not mandate illegal acts – particularly those that violate a statute. Assuming, the Plaintiff does have standing to bring this suit, the sole purpose of a TRO is to preserve the status quo, pending a ruling on the motion for a temporary injunction. *In re Newton*, 146 S.W.3d 648 (Tex. 2004); *Cannan v. Green Oaks Apts., Ltd.*, 758 S.W.2d 753 (Tex. 1988); *Fernandez v. Pimentel*, 360 S.W.3d 643 (Tex. App. El Paso 2012). The TRO Application asks the court to “issue a temporary restraining order and temporary injunction restraining Sandy Cox from taking the oath of office or assuming the duties of Mayor of the City of Lakeway pending the results of the runoff election for the office of Mayor of the City of Lakeway.”

The Application does not articulate any action by the City it is trying to enjoin, but Plaintiff cites the City’s May 16, 2018 Agenda to support the assertion that the City is planning to declare Sandy Cox Mayor today. But, the agenda is only posted to canvass the election as required by law. (Tex. Govt. Code Chapter 551) It is unclear what action on the

May 16, 2018 Agenda the Plaintiff is trying to immediately enjoin or why a TRO is necessary at this time.

Plaintiff claims it is her aim to preserve the status quo and she will be harmed if that is not done. However any TRO issued that would enjoin the actions posted on the May 16, 2018 City Council Agenda, would require the City of Lakeway to violate multiple provisions of the Election Code.

- Section 67.003(b) of the Texas Election Code states: “[E]ach local canvassing authority shall convene to conduct the local canvass at the time set by the canvassing authority's presiding officer not later than the 11th day after election day.”
- Section 67.016(a) of the Texas Election Code states: “After the completion of a canvass, the presiding officer of the local canvassing authority shall prepare a certificate of election for each candidate who is elected to an office for which the official result is determined by that authority's canvass.”
- Section 67.016(e) of the Texas Election Code states: “The authority preparing a certificate of election shall promptly deliver it to the person for whom it is prepared, subject to Section 212.0331.”

If the City fails to comply with any of these ministerial duties, the City believes its Council members would be vulnerable to a mandamus action on a theory of *ultra vires*. See *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

E. Proceeding with May 16, 2018 Agenda Items Will Not Harm Plaintiff

Plaintiff argues that a TRO must be issued because if Ms. Cox is sworn in as the new mayor and the City refuses to hold the runoff election, Plaintiff will be “irreparably

harmed.” This is not the case. The City’s continued compliance with the election code at its May 16, 2018 meeting will not affect Plaintiff’s ability to demand a run-off election. Issuing the certificate of election, as required by law, will make Ms. Cox eligible to be sworn into office, but even if she is sworn in, it that will not impede the court from ruling that a run-off is required if it is so inclined after full briefing on the merits. *See Estrada v. Adame*, 951 S.W.2d 165 (issuing a writ ordering a that the council seat in dispute vacated after the apparent winner was sworn-in and ordering they mayor to hold a runoff election for the seat).

III. CONCLUSION AND PRAYER

Wherefore, the City as amicus urges the Court to dismiss, or in the alternative to deny, the TRO Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Non-Party City of Lakeway's Amicus Brief Respecting Plaintiff's Application for Temporary Restraining Order (CAUSE NO. D-1-GN-18-002394) was served on the parties listed below by electronic mail on the 16th day of May, 2018.

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