

NO. _____

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT OF TEXAS
AT CORPUS CHRISTI

In re Timothy Ryan,

Relator.

PETITION FOR WRIT OF MANDAMUS

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 52.3(a), the following is a complete list of all parties, and the names and addresses of all counsel, involved in this case:

Relator:

Timothy Ryan

Counsel for Relator:

Jason M. Ryan
Karlene Dunn Poll
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Real Parties in Interest:

In an abundance of caution and to provide all candidates for city council notice of this proceeding, Relator is including as real parties in interest the following non-Respondent candidates for city council in the May 10 election:

Jimmy Roppolo
Otha Edison
Henry Dornak
Richard Young

Respondents:

Phillip Spenrath
Ed Erwin
Kenny Martin
Robert Boone
Anthony Collins
Gloria Harris
Cindy Cerny
City of El Campo, Texas

Counsel for Respondents:

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STATEMENT OF THE CASE

Nature of underlying proceedings: This is an original mandamus proceeding. Although there is currently pending in this Court, in Cause No. 13-08-00105-CV, an appeal from an order dismissing for lack of standing relator's prior suit to enforce section 7.03 of respondent City of El Campo's charter, for reasons discussed herein, that appeal is not an adequate remedy for the matters raised in this suit.

Respondents: Phillip Spenrath
Ed Erwin
Kenny Martin
Robert Boone
Anthony Collins
Gloria Harris
Cindy Cerny
City of El Campo, Texas

Action from which relator seeks relief: Respondents' failure to comply with section 7.03 of El Campo's city charter prior to May 10, 2008 election.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus pursuant to Article V, Section 6 of the Texas Constitution and section 273.061 of the Texas Election Code.

ISSUE PRESENTED

On May 10, 2008, respondent City of El Campo, Texas (the City) will hold an election to fill three at-large city council seats. Among the seven candidates for the three positions are relator Timothy Ryan and non-party Jimmy Roppolo (Roppolo). Roppolo was not a citizen of the City until his neighborhood and others were annexed by ordinances of the City in December 2007. Because the requisite number of registered voters in the City presented petitions in January 2008 challenging the annexation ordinances, section 7.03 of the charter of the City required its city council to either revoke the annexation ordinances or submit them to a city-wide vote. If the City chooses the vote option, section 7.03 requires the ordinances to be suspended. Here, Respondents failed to follow section 7.03 of the charter, the result being that Roppolo will be wrongly included on the ballot for the May 10 election and all citizens brought into the City through the now-void annexation ordinances can vote in the May 10 election. Must the respondents follow section 7.03 of the charter to avoid an invalid election?

STATEMENT OF FACTS

On May 10, 2008, respondent City of El Campo, Texas (the City) will hold an election to, among other things, fill three at-large seats on its city council. (R. Tab A at ¶ 3.) The seven candidates for those three seats are respondents Phillip Spennath and Kenneth Martin, relator Timothy Ryan (Ryan), and non-parties Jimmy Roppolo, Otha Edison, Henry Dornak Jr., and Richard Young. (*Id.*) As provided in section 5.05 of the charter of the City, “the candidates for the ‘at large’ positions shall be elected by plurality of the votes cast for such position”, where the “three (3) persons receiving the most of such votes cast in such election shall be declared elected.” (R. Tab B at § 5.05.) In other words, the seven candidates are not running for distinct at-large positions; rather, they are all running against each other and the top three vote-getters will be seated on council.

Relevant here, only residents of the City may run for a city council seat (R. Tab B at § 3.02), and only residents of the City may vote in the election of its city council, TEX. ELEC. CODE § 11.001. But because Respondents have failed to perform ministerial duties mandated by section 7.03 of the City’s charter, those limitations will not be enforced for the City’s May 10 election. Instead, Roppolo, a citizen of an area not validly annexed by the City, is running for city council. (R. Tab A at ¶ 4.) And voters in invalidly annexed areas will be permitted to vote in the May 10 election. (R. Tab A at ¶ 5.)

Section 7.03 of the City’s charter expressly gives its citizens the right to petition for a public vote on any ordinance, including annexation ordinances.

Qualified voters of the City of El Campo may require that any

ordinance or resolution passed by the City Council be submitted to the voters of the city for approval or disapproval, by submitting a petition for this purpose within thirty (30) days after final passage of said ordinance or resolution. . . .

(R. Tab B at § 7.03 (emphasis added).) Such a petition must be signed by qualified voters of the City equal in number to 20% of the number of votes cast in the last election of the City. (R. Tab B at §§ 7.02-.03.) Upon receipt of a valid petition, the City *must* either repeal the subject ordinance or call for a public vote on the ordinance.

Immediately upon the filing of such petition, the person performing the duties of City Secretary shall present said petition to the City Council. Thereupon the City Council shall immediately reconsider such ordinance or resolution and; if it does not entirely repeal the same, shall submit it to popular vote. . . .

(R. Tab B at § 7.03.) And if the City chooses to hold an election rather than repeal the subject ordinance, that ordinance “shall be suspended from taking effect and shall not later take effect unless a majority of the qualified voters voting thereon at such election shall vote in favor thereof.” (*Id.*)

The City, through its city council, passed three annexation ordinances on December 11, 2007: Ordinance No. 2007–16; Ordinance No. 2007–17; Ordinance No. 2007–18 (collectively, the Annexation Ordinances). (R. Tab C at 2.) In accordance with the provisions of section 7.03 of the charter, on January 10, 2008, citizens of the City filed three valid petitions, one each concerning the three Annexation Ordinances. The three petitions demanded that the city council reconsider the Annexation Ordinances and, if the council did not repeal the ordinances, to submit the Annexation Ordinances to a

popular vote. Respondents have conceded that the petitions complied with all the procedural requirements set forth in section 7.03. (R. Tab C at 2-3.)

Though council was required to act “immediately,” the council did nothing from January 10 to January 13. Then, at a council meeting on January 14, 2008, the council affirmatively decided to neither reconsider the Annexation Ordinances nor submit the Annexation Ordinances to a city-wide vote. (R. Tab D at 7-8.) Simply put, the city council refused to follow the only two options it had—doing nothing was not an option. Then the City proceeded to enter into agreements for services to implement the annexation (R. Tab E), spending taxpayer dollars that can never be paid back to taxpayers if the annexation is, indeed, void.

In the face of respondents’ unlawful inaction, Ryan filed suit in the 329th Judicial District Court of Wharton County, Texas seeking declarations that section 7.03 of the charter is valid under Texas law, that the petitions at issue complied with section 7.03, and that the Annexation Ordinances were suspended in accordance with section 7.03. Ryan further sought an injunction requiring Respondents here to follow the nondiscretionary procedures set forth in section 7.03 of the charter and to take certain other related actions. Seeking to avoid resolution on the merits, Respondents filed a plea to the jurisdiction of the district court arguing that Ryan lacked standing to enforce section 7.03 of the charter. Without reaching the merits of Ryan’s claim, the trial court granted the respondents’ plea. (R. Tab C. at 70-71.) Because Ryan respectfully disagrees with the trial court’s standing analysis, he filed a direct appeal of that standing decision to this Court, which is pending as Cause No. 13-08-00105-CV.

While many of the same facts are relevant to both that direct appeal and this original proceeding, the trial court's standing analysis in that case does not apply here. First, the issue in that direct appeal is limited to whether Ryan had standing to seek disannexation by referendum. In contrast, this original mandamus action seeks to prevent an invalid upcoming election by compelling Respondents to follow the requirements of section 7.03 of the City's own charter. As discussed further below, Ryan's status as a candidate in this upcoming election (a status he acquired subsequent to the trial court's dismissal in the direct proceeding (R. Tab A at ¶ 6)) provides an independent basis for standing to prevent inclusion of an unqualified candidate on the ballot.

Given that the election at issue is just over one month away, Ryan has no adequate remedy by appeal. And because time is of the essence, Ryan has filed concurrently with this petition a motion for expedited consideration and, in the alternative, emergency temporary relief.

ARGUMENT

Respondents have blatantly refused to comply with a mandatory, non-discretionary provision of their own city charter. Although there is currently pending an appeal in this Court relating to the respondents' failure to comply with section 7.03 of the charter, because the May 10 election is affected by that failure, Ryan has no adequate remedy by appeal and thus respectfully request that this Court grant this petition and direct Respondents to follow the section 7.03 of the charter.

I. Ryan has standing to bring this action.

Ryan, as a candidate for one of the at-large city council positions in the May 10, 2008 election, has an interest in not being opposed for office by an ineligible candidate. Because the City failed to properly follow section 7.03 of its charter, Roppolo is not a qualified candidate for the at-large position. Ryan has standing to maintain an action to ensure only qualified candidates run against him in the May 10 election. *In re Jones*, 978 S.W.2d 648, 651 (Tex. App.—Amarillo 1998, orig. proceeding) (holding that a legal candidate for an office has standing to prosecute an action to ensure his opponent is an eligible candidate).

II. Mandamus is proper because Respondents have refused to perform ministerial duties.

A writ of mandamus will issue to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy by appeal. *E.g.*, *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). There are two requirements to a mandamus. The relator must show, first, a clear abuse of discretion and, second, that he has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). The “[t]raditional[.]” way in which to establish a clear abuse of discretion is by showing that an entity failed to perform a ministerial law or duty. *See Walker*, 827 S.W.2d at 839; *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (1939). A duty or law is ministerial if it “is mandatory and allows for no discretion.” *Duffy v. Branch*, 828 S.W.2d 211, 213 (Tex. App.—Dallas 1992, orig. proceeding).

A. Respondents had a non-discretionary duty to recall the annexation ordinances or submit the issue to a vote under the City’s charter mandatory.

Here, the three citizen petitions filed with the City on January 10, 2008 demanded that the city council reconsider the Annexation Ordinances and, if the council did not repeal the ordinances, submit the Annexation Ordinances to a popular vote. When presented with the valid petitions, however, Respondents decided to ignore them. By refusing to follow the only two options they had, Respondents refused to perform their non-discriminatory or ministerial duties. *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (mandamus relief appropriate because mayor’s refusal to order an election when presented with a complying petition amounted to a failure to perform a ministerial act); *Duffy*, 828 S.W.2d at 212–14 (mandamus relief appropriate to compel city council member to hold recall election when all necessary requirements for holding such an election were met); *Burns v. Kelly*, 658 S.W.2d 731, 732 (Tex. App.—Fort Worth 1983, orig. proceeding) (mandamus relief appropriate to compel city council to hold election to recall member of city council when required under the law).

B. Respondents were misguided by the City attorney’s reliance on bad law.

Instead of considering the petitions, Respondents did not discuss the petitions, “take any action[,] or consider anything” because the unelected City attorney advised them that doing so would somehow be “break[ing] the law.” (R. Tab D at 7.) The City attorney relied on *City of Hitchcock v. Longmire*, 527 S.W.2d 122 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref’d n.r.e.) as the basis for that position. (*Id.*) The

City attorney was misguided by *Longmire* and therefore Respondents were similarly misguided.

Longmire was incorrectly decided and should not be embraced by this Court. More importantly, however, *Lonmire* is irrelevant now because in 1987 the legislature recodified the Municipal Annexation Act and other provisions related to municipal boundaries into the local government code, which expressly states that “[a] home-rule municipality may disannex an area according to rules as may be provided by the charter of the municipality and not inconsistent with the procedural rules prescribed by this chapter.” TEX. LOC. GOV’T CODE § 43.142. Application of *Longmire* now would render this entire section of the local government code, which did not exist in its current form at the time of the *Longmire* decision, superfluous. The code of today must mean that section 7.03 of the City’s charter is a valid mechanism to challenge the Annexation Ordinances. And if that section is valid, the petitions on the Annexation Ordinances should have caused the City to act in compliance with the charter.

III. Mandamus is proper because Ryan does not have an adequate remedy by appeal.

The requirement that Ryan have no adequate remedy by appeal has no comprehensive definition. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136. Instead this requirement is “simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings.” *Id.* Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment. *Id.*

Simply put, “whether an appellate remedy is ‘adequate’ so as to preclude mandamus review depends heavily on the circumstances presented.” *Id.* at 137.

For several reasons, this is the exceptional case for which no adequate appellate remedy exists. First, an appeal is not an adequate remedy because the City plans to hold an election on May 10, 2008. An original mandamus proceeding is the only remedy that can force Respondents to follow section 7.03 and ensure only qualified candidates run for office against Ryan and only qualified voters vote in the election. Second, if unqualified candidates run in the May 10 election and unqualified voters vote in the May 10 election, Ryan and the other candidates will unquestionably have standing to bring an election challenge that Respondents failed to follow the laws governing the election. *See, e.g., Alvarez v. Espinoza*, 844 S.W.2d 238, 241 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.). Third and finally, the City is taking actions to proceed with annexation using taxpayers’ money that simply cannot be undone if the City’s annexations are defeated in a later-held election on the citizens’ petitions.

The election code specifically confers upon this Court the jurisdiction to “issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election.” TEX. ELEC. CODE § 273.061. Respondents have simply refused to follow the law only mandamus by this Court can remedy that failure and avoid election irregularities.

PRAYER

The City’s May 10, 2008 election should be free from the taint of Respondents’ failure to properly implement section 7.03 of the City’s charter. That is,

only qualified citizens should be on the ballot for the at-large city council positions and only qualified voters should be permitted to vote. If Ryan is correct that the Annexation Ordinances are suspended and void, the election results can be challenged. Because the City has failed to take action and the Wharton County district court could not provide the appropriate remedy, this Court should act here to protect the election process and the rights of the citizens of El Campo. Ryan thus respectfully requests this Court grant this petition and require Respondents to follow the provisions contained in section 7.03 of the City's charter before the May 10, 2008 election.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: _____

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COUNSEL FOR RELATOR TIMOTHY RYAN

CERTIFICATE OF SERVICE

I hereby certify that on this, the 4th day of April, 2008, a true and correct copy of the foregoing Petition for Writ of Mandamus and Record in Support of Petition for Writ of Mandamus was sent by the means noted to the following counsel of record:

Counsel for Respondents Phillip Spenrath, Ed Erwin, Kenny Martin, Robert Boone, Anthony Collins, Gloria Harris, Cindy Cerny, and City of El Campo, Texas:

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Jason M. Ryan

AFFIDAVIT AND VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared Jason M. Ryan who, being duly sworn, deposed and said the following:

1. My name is Jason M. Ryan. I am over the age of eighteen (18), have never been convicted of a crime, and am fully competent and able to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an attorney of record for Relator Timothy Ryan.

3. The factual statements in Timothy Ryan’s petition for writ of mandamus are true and correct, based on my personal knowledge.

Jason M. Ryan

SUBSCRIBED AND SWORN TO BEFORE ME on this 4th day of April, 2008 to certify which witness my hand and official seal.

Notary Public in and for the State of Texas

My Commission Expires:
