

CAUSE NO. _____

ROBERT NEAL HEAD	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
VS.	§	
	§	
MARK A. BRICKER, MAYOR	§	MATAGORDA COUNTY, TEXAS
JULIE ESTLINBAUM,	§	
COUNCILWOMAN, POSITION 1,	§	
BILL CORNMAN,	§	
COUNCILMAN, POSITION 2,	§	
AND THE CITY OF BAY CITY,	§	
TEXAS	§	
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S EMERGENCY ORIGINAL PETITION FOR WRIT OF
MANDAMUS AGAINST ULTRA VIRES DEFENDANTS AND
ORIGINAL PETITION SEEKING DECLARATORY AND
INJUNCTIVE RELIEF AGAINST THE CITY OF BAY CITY, TEXAS**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff, Robert Neal Head, hereby files this suit for Emergency Original Petition for Writ of Mandamus and Original Petition seeking Declaratory and Injunctive Relief against Defendants Mark A. Bricker, Mayor (hereinafter “Bricker”), Julie Estlinbaum, Councilwoman, Position 1 (hereinafter “Estlinbaum”), Bill Cornman, Councilman, Position 2 (hereinafter “Cornman”), [Defendants Bricker, Estlinbaum and Cornman will be collectively referred to herein as the “Ultra Vires Defendants,” and are sued solely in their respective official capacities], and the City of Bay City, Texas (hereinafter the “City” or “Bay City”) and in support

hereof, would show as follows:

I.
SUMMARY OF THE CONTROVERSY

1. Plaintiff files this suit for three reasons. First, Plaintiff seeks a writ of mandamus and/or declaratory and injunctive relief to prevent Mayor Bricker from continuing to violate both the Texas Constitution and the Bay City Charter by casting his vote at City Council meetings in the absence of a tie vote amongst the other members of the City Council. As will demonstrated herein, Section 4.01 of Bay City's Charter has been unconstitutionally and illegally "amended" in a very significant and material fashion without the City ever calling, much less holding, an election for such changes. For example, without any constitutional or legal authority whatsoever to do so, Section 4.01 of Bay City's Charter has purportedly been "changed" to allow the Mayor of Bay City to cast votes in the same manner and substance as every other member of the City Council. However, Article XI, § 5 of the Texas Constitution only permits the amendment of a city's charter by majority vote of the qualified voters of that city at an election held for that purpose, which did not happen here. Thus, all purported changes not voted upon by the voters of Bay City are void ab initio. Accordingly, any and all votes cast by Mayor Bricker at City Council meetings, both before and after the filing of this lawsuit, constitute ultra vires and unconstitutional actions which must be set aside. Furthermore, any and all ordinances enacted by the City Council, as well as any and all proposed actions

and/or ordinances which failed to be enacted by the City Council, both before and after the filing of this lawsuit, constitute ultra vires and unconstitutional actions which must be set aside, to the extent that Plaintiff can show that the outcome of the vote depended upon the vote of the Mayor, and such vote was not made in the context of breaking a tie vote.

2. Second, Plaintiff seeks a writ of mandamus and/or declaratory and injunctive relief to prevent Mayor Bricker from continuing to violate Section 3.07 of Bay City's current City Charter, which prohibits the Mayor from voting on matters coming before City Council unless it is for the purpose of breaking a tie. As will be demonstrated herein, Mayor Bricker has repeatedly violated this City Charter provision by casting votes where no tie was present. Thus, any and all ordinances enacted by the City Council, as well as any and all proposed actions and/or ordinances which failed to be enacted by the City Council, both before and after the filing of this lawsuit, constitute ultra vires and unconstitutional actions which must be set aside, to the extent that Plaintiff can show that the outcome of the vote depended upon the vote of the Mayor, and such vote was not made in the context of breaking a tie vote.

3. Third, Plaintiff seeks a writ of mandamus and/or declaratory and injunctive relief to prevent Defendants Estlinbaum and Cornman from casting any votes after May 31, 2018, which marks the last day of the completion of their third

consecutive term in office. As will be shown below, the voters of Bay City imposed term limits on all members of Bay City's City Council at a duly called election in November of 2013. By majority vote of its qualified electors, Section 4.01 of the Bay City Charter was amended to impose term limits such that no Councilmember shall be elected to serve for more than three consecutive two-year terms. As will be shown herein, Defendants Estlinbaum and Cornman will have completed six years of consecutive service on May 31, 2018. Plaintiff also specifically seeks a judicial declaration that Section 4.01 applies to Defendants Estlinbaum and Cornman.

4. Accordingly, because the City acts by and through its Mayor and City Council, and because each of the named Ultra Vires Defendants is allowing the City to engage in unauthorized, illegal and unconstitutional conduct, each Defendant is engaging in ultra vires acts which are not legally permitted or authorized, and is hereby sued in his official capacity for that reason.

5. In order to bind all necessary parties to the declaratory relief sought herein, Plaintiff also sues the City.

II.

THE PARTIES

6. Plaintiff is a Bay City resident and registered voter within the city limits of Bay City. Plaintiff also intends to run for City Council, once the City enters an order calling for the election for Positions 1 and 2 and/or once this Court rules that

neither incumbent is exempt from the term limits of Section 4.01.

7. The Defendants herein are Mark A. Bricker, Mayor, Julie Estlinbaum, Councilwoman, Position 1, Bill Cornman, Councilman, Position 2, and Bay City, Texas. Mayor Bricker may be served with service of process at the physical offices of the Bay City, 1901 5th St., Bay City, Texas 77414. Councilwoman Julie Estlinbaum and Councilman Bill Cornman, may also be served with service of process at the physical offices of the Bay City, 1901 5th St., Bay City, Texas 77414. Alternatively, Councilwoman Julie Estlinbaum may be served at 2412 Oak Dr., Bay City, Texas 77414 and Councilman Bill Cornman may be served at 2617 Encino Ave., Bay City, Texas 77414. In accordance with CIVIL PRACTICE AND REMEDIES CODE § 17.024(b), the City of Bay City, Texas may also be served by serving the Mayor, who may be served as referenced above.

III.
VENUE

8. Venue in this action is proper and maintainable in Matagorda County, Texas under Civil Practice and Remedies Code § 15.002(a) because the events or omissions giving rise to the claim occurred in Matagorda County, Texas.

IV.
STANDING

9. Plaintiff has standing to assert the claims and causes of action in this case.

V.
WAIVER OF GOVERNMENTAL IMMUNITY

10. Plaintiff asserts that no governmental immunity exists for a claim brought under the “ultra vires” exception to sovereign and/or governmental immunity. As explained in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-76 (Tex. 2009), the ultra vires exception allows a plaintiff to sue a municipal governmental official in his official capacity, thereby binding the municipality through its agent, for prospective injunctive and/or declaratory relief to restrain the official from violating statutory or constitutional provisions. Sovereign and/or governmental immunity does not bar such a suit because, in concept, acts of municipal officials that are not lawfully authorized are not considered to be acts of the municipality. Thus, the remedy of compelling such officials to comply with the law, while binding on the City, does not attempt to exert control over the City, but instead attempts to reassert the control of the municipality. It is for this reason that Plaintiff has sued each of the Ultra Vires Defendants in their respective official capacities.

11. In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit. Plaintiff asserts claims under this Act against each of the Defendants. With respect to Defendant the City of Bay City, Texas, this entity is a necessary party to Plaintiff’s claim for declaratory relief that none of the Ultra Vires

Defendants have any statutory authority or constitutional authority to ignore Article XI, § 5 of the Texas Constitution and/or Sections 3.07 and 4.01 of the City Charter of Bay City, Texas. Accordingly, governmental immunity does not preclude prospective equitable remedies in official-capacity suits against government actors who have violated statutory and constitutional provisions, by acting without legal authority, and by failing to perform a purely ministerial act. Heinrich, 284 S.W.3d at 372-73. Thus, to the extent this Court rules that neither the City of Bay City, Texas nor its officials have the constitutional or legal authority to continue to act in the manner asserted herein, no governmental immunity exists to bar such relief.

VI.
JURISDICTION AND VENUE AND DISCOVERY

12. Jurisdiction in this action is proper and maintainable in Matagorda County, Texas. Discovery in this matter is intended to be conducted under Level 3 in accordance with T.R.C.P. 190.3. Venue is proper in Matagorda County, Texas, as all of the events which form the basis of this suit occurred in that County. Pursuant to Tex. R. Civ. P. 47(c)(2), Plaintiffs seek damages in an amount within the jurisdiction of this Court, including non-monetary declaratory relief and injunctive relief and monetary relief of less than \$100,000.

VII.
FACTS

13. Bay City, Texas is a home-rule municipality. On May 7, 1988, fifteen

(15) registered voters were duly elected to serve as the Charter Commission of Bay City, Texas. After several months of diligent work, the Charter Commission submitted a proposed City Charter on October 27, 1988 for the electorate to consider. In the month of November, 1989, the voters of Bay City, Texas passed the proposed City Charter by a majority of the qualified voters at a Special Election.

14. Since that time, Bay City voters have elected to amend the City Charter on several occasions, with the most recent election occurring on November 5, 2013. When the City Council passed its Election Ordinance on February 28, 2013 calling for an election to determine whether to pass any amendments to the current version of City Charter, the proposed ordinance to be enacted should the voters pass Measure No. 6 read as follows:

Measure No. 6

AN AMENDMENT TO SECTION 4.01 OF THE CITY CHARTER
IMPOSING TERM LIMITS AS FOLLOWS:

The Council shall be composed of five Councilmembers, each serving a two year term. Councilmembers Nos. 3, 4, and 5 shall be elected in May of odd years. Councilmembers No. 1 and 2 shall be elected in May of even years. No Councilmember shall be elected to serve for more than three consecutive three-year terms.

15. As shown above, the portion of the proposed Measure No. 6 that was not underlined was the actual text of the entire Section 4.01 prior to the November 5, 2013 election. Furthermore, as shown by the underlined portion of Measure No.

6, that was the proposed amendment that the voters were asked to approve or reject. The voters of Bay City, Texas passed Measure No. 6 on November 5, 2013 by a majority vote. Subsequently, Bay City canvassed the results of the November 5th election and entered a Canvassing Order on November 6, 2013. Accordingly, the entirety of the above-quoted passage of 4.01, including both the non-underlined and the underlined portions, constitute the current text of Bay City’s Charter. Of significance, Section 4.01 does not include the Mayor in the definition and/or description of “Councilmembers.”

16. Without any constitutional or legal authority to do so, and after the election results had been tallied and canvassed and deemed valid, the text of Section 4.01 was substantively changed in 2013 to read as follows:

The Council shall be composed of five Councilmembers *and the Mayor*. All Councilmembers to be selected at large. Councilmembers No. 1 and 2 shall be elected one year and Councilmembers No. 3, 4, and 5 elected the following year. No Councilmember shall be elected to serve for more than three consecutive two-year terms (emphasis added).

17. The wrongful insertion of the phrase, “and the Mayor” is both significant and stunning. As explained previously, Section 3.07 of Bay City’s Charter only permits the Mayor to cast a tie-breaking vote. And, because there are—by design—an odd number of five (5) City Councilmembers, it is exceedingly rare that a tie-breaker would ever be needed.

18. This framework was not created by accident, but was the careful result of an abundance of forethought and wisdom on the part of the Charter Commission and the electorate itself. Unlike the City Manager form of city government, Bay City has intentionally chosen to be governed by a Mayoral form of government. That being the case, a Mayor acts as a CEO of the City, much like the Governor of the State or the President of the United States, performing the functions of the Executive Branch of city government. Conversely, when a City Manager form of government is chosen, the Mayor is considered to be a full-fledged voting member of the City Council, which acts as the Legislative Branch of city government. By inserting “the Mayor” into the definition and/or description of City Councilmembers, the separation of powers between the Executive Branch and the Legislative Branch of Bay City’s municipal form of governance was literally destroyed by one tyrannical stroke of a pen. Indeed, this substantive change is not simply an intellectual or academic topic of debate. To the contrary, Mayor Bricker has, on multiple occasions from 2013 to 2018, wrongfully exercised a vote on City Council matters without the presence of a tie, in a flagrant and despicable violation of the Texas Constitution and the City Charter of Bay City, Texas¹. This must be stopped.

¹ One such example occurred in January of this year, 2018, when Mayor Bricker voted to keep a proposition calling for a change in municipal government from a Mayoral form to a City Manager form of government off the ballot in May of this year. By exercising his “right” to vote on matters

19. In addition, the above-quoted and underlined voter-approved amendment to Section 4.01 of Bay City's Charter imposed term limits in 2013. At the present time, there are two incumbents, Defendants Estlinbaum and Cornman, who will have exhausted their right to hold office on May 31, 2018, which marks the last day of the completion of their three consecutive and respective terms in office. There is no debate that the voters of Bay City imposed term limits on all members of Bay City's City Council at a duly called election in November of 2013. By majority vote of its qualified electors, Section 4.01 of the Bay City Charter was amended to impose term limits such that no Councilmember shall be elected to serve for more than three consecutive two-year terms. Plaintiff specifically seeks a judicial declaration that Section 4.01 applies to Defendants Estlinbaum and Cornman also asks the Court to order the City to order and conduct an election this coming November of 2018 for these two seats.

20. Lest there be any confusion, Plaintiff is not seeking the remedy of quo warranto herein. Quo warranto is an ancient prerogative writ through which the State acts to protect itself and the good of the public generally through its chosen agents as provided by its constitution and laws, though sometimes it is brought at the instance of and for the benefit of a private individual who may have a special

not resulting in a tie, Mayor Bricker singlehandedly disenfranchised the entire electorate of Bay City, Texas.

interest. *Staples v. State*, 112 Tex. 61, 245 S.W. 639, 640-41 (1922); *State v. City of Colleyville*, 519 S.W.2d 698, 700 (Tex.Civ.App. --Fort Worth 1975, writ ref'd n.r.e.). That writ may only be brought by the Texas Attorney General, as well as the Matagorda County and/or District Attorney. Accordingly, Plaintiff does not have standing to seek the ouster of any of the Ultra Vires Defendants, no matter how clear cut their illegal usurpation of constitutional and statutory authority may be. However, Plaintiff implores these governmental actors to seriously consider doing so. Irrespective of whether that happens, Plaintiff is entitled to a declaration that the term limits indeed apply to Defendants Estlinbaum and Cornman.

21. Plaintiff anticipates that the Ultra Vires Defendants will argue that they are grandfathered in whole or in part from the aforementioned term limits amendment to Section 4.01. Based upon a legal memo recently prepared by the Bay City Attorney, Plaintiff believes that the Ultra Vires Defendants will likely contend that the voter-approved amendment should be prospective only, citing Article I, Section 16 of the Texas Constitution.

22. Plaintiff contends that this argument is dead wrong. Indeed, Article I, Section 16 of the Texas Constitution provides that “[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” See TEX. CONST. art. I, § 16. This provision applies to charter provisions and ordinances adopted by cities. See *Coffee v. Castleberry*, 258 S.W. 889, 892

(Tex. Civ. App.-Amarillo 1924), *judgment reformed on other grounds and aff'd*, 272 SW. 767 (Tex. Comm. App. 1925). It prohibits retroactive laws only to the extent they “destroy or impair rights which had become vested.” See *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002); *Corpus Christi People’s Baptist Church, Inc. v. Nueces County Appraisal Dist.*, 904 S.W.2d 621,626 (Tex. 1995); *Merchant’s Fast Motor Lines, Inc. v. R.R. Comm’n*, 573 S.W.2d 502,504 (Tex. 1978); *Deacon v. City of Euless*, 405 S.W.2d 59, 62 (Tex. 1966); *McCain v. Yost*, 284 S.W.2d 898, 900 (Tex. 1955). Thus, a law is not invalid even though retroactive in operation unless vested rights are destroyed or impaired. *Corpus Christi People’s Baptist Church*, 904 S.W.2d at 626; Tex. Att’y Gen. Op. No. GA-0149 (2004) at 5-6.

23. The legislature may enact a statute shortening an incumbent officer’s term and apply it to persons in office when the act becomes effective, as long as the Texas Constitution does not fix the term of office. See *Popham v. Patterson*, 51 S.W.2d 680,683 (Tex. 1932). See also TEX. CONST. art. IV, §4 (establishing four-year term of office for governor); *id.* art. V, §18 (establishing four-year term for justices of the peace and constable; providing that each justice and constable in office when precinct boundaries are changed shall serve out term).

24. The Bay City Charter sets the terms of office for City Councilmembers. See BAY CITY, TEX., CITY CHARTER art. IV, §4.01. A public officer has no

vested right in the office he holds, and the legislature may reduce his term of service or abolish the office entirely. See *Tarrant County v. Ashmore*, 635 S.W.2d 417, 422 (Tex. 1982) (public officer's qualified interest in office is neither property nor a vested right); Tex. Att'y Gen. Op. Nos. JM-1233 (1990) at 3 (member of State Board of Pharmacy has no vested right to his position); JM-23 5 (1984) at 3 (school board may establish single-member trustee districts pursuant to statute, even though terms of some incumbent trustees will be shortened); H-955 (1977) at 4 (absent legislative direction, state agency board that established chair's term of office by resolution may reduce term and apply change to present chair). In Attorney General Opinion JM- 1233, the Attorney General construed a term limit provision applicable to members of the Texas State Board of Pharmacy, determining that the term limit provision applied to service performed before the statute's effective date. See Tex. Att'y Gen. Op. No. JM-1233 (1990) at 2-3. It found that the statute was not retroactive, noting that "the legislature could have even reduced. . . [the board member's] present term of service or abolished the office entirely." *Id.* at 3 (citing Attorney General Opinions JM-235 (1984) and H-955 (1977)). See *also* Tex. Att'y Gen. Op. No. DM-493 (1998) at 3-4 (statute shortening term of incumbent does not violate constitutional provision against retroactive laws). Accordingly, if a city charter term limit provision applies to service as a city officer prior to its adoption,

it does not impair a vested right and therefore is not a “retroactive law” prohibited by Article I, Section 16 of the Texas Constitution.

VIII.
CONCLUSION

25. For all of the foregoing reasons, Plaintiff seeks the following relief:
- (a) an emergency writ of mandamus and/or declaratory and injunctive relief to prevent Mayor Bricker from continuing to violate both the Texas Constitution and the Bay City Charter by casting his vote at City Council meetings in the absence of a tie vote amongst the other members of the City Council;
 - (b) an emergency writ of mandamus and/or declaratory and injunctive relief to prevent Mayor Bricker from continuing to violate Section 3.07 of Bay City’s current City Charter, which prohibits the Mayor from voting on matters coming before City Council unless it is for the purpose of breaking a tie;
 - (c) a writ of mandamus and/or declaratory and injunctive relief to prevent Defendants Estlinbaum and Cornman from casting any votes after May 31, 2018, which marks the last day of the completion of their third consecutive term in office, as well as a Court Order mandating the City to hold an election in November of 2018 for these two seats;
 - (d) a judicial declaration that Section 4.01 of the City Charter of Bay City, Texas does not include the phrase “and the Mayor”;
 - (e) a judicial declaration that Section 4.01 of the City Charter of Bay, City, Texas applies to Defendants Estlinbaum and Cornman and does not impair a vested right and therefore is not a “retroactive law” prohibited by Article I, Section 16 of the Texas Constitution;
 - (f) any and all votes cast by Mayor Bricker at City Council meetings, both before and after the filing of this lawsuit, constitute ultra vires and unconstitutional actions which must be set aside, to the extent that Plaintiff can show that the outcome of the vote depended upon the vote

of the Mayor, and such vote was not made in the context of breaking a tie vote;

(g) any and all ordinances enacted by the City Council, as well as any and all proposed actions and/or ordinances which failed to be enacted by the City Council, both before and after the filing of this lawsuit, constitute ultra vires and unconstitutional actions which must be set aside, to the extent that Plaintiff can show that the outcome of the vote depended upon the vote of the Mayor, and such vote was not made in the context of breaking a tie vote;

(h) injunctive relief as plead above;

(i) reasonable and necessary attorneys' fees;

(j) all costs of suit; and

(k) all other and further relief to which Plaintiff may show himself to be justly entitled.

Respectfully Submitted,

ANDY TAYLOR & ASSOCIATES, P.C.

BY: /s/Andy Taylor

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