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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

HONORABLE BERNARD KINCAID, Mayor of the City of Birmingham; **THE CITY OF BIRMINGHAM, ALABAMA,**

Plaintiffs,

v.

THE COUNCIL OF THE CITY OF BIRMINGHAM, ALABAMA; THE WATER AND SEWER BOARD OF THE CITY OF BIRMINGHAM, ALABAMA; WILLIAM A. BELL, SR., in his official capacity as President of the Council for the City of Birmingham; **PAULA SMITH**, acting in her official capacity as the City Clerk of the City of Birmingham, Alabama.

Defendants.

FILED IN OFFICE
FEB 28 2002
ANNE-MARIE ADAMS
Clerk

CIVIL ACTION NO.

CV-01-02218

ORDER

INTRODUCTION

This case is the latest in a series of related cases to come before this Court concerning the attempts of the Mayor of the City of Birmingham to reverse the Council of the City of Birmingham's decision on July 25, 2000, to transfer the City of Birmingham's water and sewer systems (the "Systems") to The Water Works and Sewer Board of the City of Birmingham.[1] After the Council overrode his veto of the transfer of the Systems on August 8, 2000, the Mayor initially filed a lawsuit in this Court styled *The Honorable Bernard Kincaid v. The Council of the City of Birmingham, Alabama, et al.*, bearing Civil Action No. CV-00-4779 (hereinafter referred to as "*Kincaid I*"). In *Kincaid I,* the Mayor alleged, among other things, that the Council had

fraudulently adopted Ordinance 00-123 transferring the Systems to the Water Works Board, and that the Water Works Board had been abolished by operation of law. This Court dismissed *Kincaid I* on February 23, 2001, and the Water Works Board and the Council subsequently executed the documents called for under Ordinance 00-123 to effectuate the transfer. The Mayor appealed this Court's dismissal of *Kincaid I* to the Alabama Supreme Court. On November 2, 2001, the Supreme Court affirmed this Court's ruling in *Kincaid I.*

After the Water Works Board and the Council executed the transaction documents under Ordinance 00-123, the Mayor directed the City Attorney to file the present declaratory judgment action against the Water Works Board, the City Council, the City Clerk and himself in his official capacity as Mayor. This Court subsequently re-aligned the Mayor as a Plaintiff.[2] This present action raises numerous challenges to the actual transfer documents executed on February 23, 2001. Despite the procedural shortcomings, if not disingenuousness, of the Mayor suing himself, the parties agree the issues presented here are of such public importance that a judicial determination is necessary even though they cannot agree what that determination should be. The court and the parties set an expedited schedule for all discovery, including depositions, which has been completed. This case is before the Court on Cross Motions for Summary Judgment.

PROCEDURAL HISTORY AND FACTS

In filing the present action, the Plaintiffs request this Court to declare that: (1) the documents executed by the Council President on February 23, 2001 were not the documents which were authorized by the Council because they contained substantial changes, and thus were void; (2) any amendments or changes to the documents which were before the Council when it

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[1] These parties shall be referred to herein as the Mayor, the Council, the City and the Water Works Board.
[2] The Water Works Board and the City Clerk also filed motions to realign the Clerk as a Plaintiff.

adopted Ordinance 00-123 on July 25, 2000 were not approved by the Council or the City Attorney and, therefore, the documents executed by the Council President are void; (3) the documents which transfer interests in real property should have been executed by the Mayor, and those that were executed by the Council President are void; (4) the documents executed by Council President Bell were not attested by the City Clerk and are therefore void; (5) the enactment of Ordinance 00-123 on July 25, 2000 was a valid and binding contract[3]; and (6) the Management Agreement dated as of December 30, 1998, between the Water Works Board and the City is still in effect.

Prior to his re-alignment as a Plaintiff, the Mayor filed an Answer, Counterclaim and Cross-claim in which he asserted that because of the alleged changes to the transaction documents, his veto was not properly overridden by the Council. The Council and the Water Works Board filed their Answers alleging, among other things, that the Mayor was barred from denying the validity of the transaction documents based upon the doctrines of estoppel and unclean hands. The Water Works Board also filed a counterclaim requesting the Court to enter a writ of mandamus directing the Mayor or the Clerk to execute and attest the documents in the event the Court determined such signatures were necessary under the law.

Subsequent to the close of discovery in this case and deadline for dispositive motions, a municipal election for members of the Council resulted in the replacement of those members of the former Council who voted in favor of the transfer of the Systems to the Water Works Board. This Court subsequently received a letter from the Council's counsel informing it that the

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[3] The Complaint in this action alleged that a different set of transfer documents was presented to the Council between July 18, 2000 (the first vote on Ordinance 00-123) and July 25, 2000 (the second vote on Ordinance 00-123). The Plaintiffs asked this Court to declare that the alleged different draft of documents presented to the Council on July

Council had resolved to repudiate the actions of the former Council President. That action does not affect the validity vel non of the documents previously executed and at issue here, however. At the hearing in this case on December 19, 2001, this Court received a Motion to Withdraw from the Council's previous attorneys, and the City Attorney's Notice of Appearance on behalf of the Council, along with Motions to Realign the Defendant Council as a Plaintiff, and to join in the Mayor's Motion for Summary Judgment. Given the origin of this action, the alignment of the parties is not as important as the fact that all the necessary parties are present, the essential issues are presented for declaratory relief and those issues have been well briefed and argued.

Based upon the pleadings, documents submitted to this Court and the deposition testimony, this Court finds the following to be the relevant facts:

The Proposal to Re-acquire the Systems

On July 10, 2000, the Water Works Board adopted Resolution No. 3995, authorizing its Chairman and General Manager to make an offer to acquire the Systems from the City. On the same day, the Water Works Board presented its proposal to reacquire the Systems to the Council's Finance and Administration Committee. Concurrently with this presentation, drafts of the transfer documents were hand delivered to all members of the Council or their assistants as well as to the Mayor or his representatives. The draft transfer documents included an Acquisition Agreement (the "Acquisition Agreement") setting forth the consideration and conditions for the transfer of the Systems to the Water Works Board. (The July 10, 2000 presentation and draft transfer documents are collectively referred to as the "July 10, 2000 Documents.") As outlined in the presentation, the Water Works Board's proposal included, among other things, (a) the payment of $206 million to the City, (b) the assumption of $264,860,000 principal amount of

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25, 2000 was a valid binding contract. As set out herein, this Court finds that only one set of documents was

water and sewer debt of the City (including Series 1998-B General Obligation Capital Improvement Warrants originally issued in the principal amount of $31 million, as well as $57 million principal amount of general obligation warrants proposed to be issued in 2000), and (c) the Water Works Board's continuing obligation to pay the City a yearly franchise fee of approximately $1 million. The total amount of consideration to be paid to the City was approximately $471 million.[4] The July 10, 2000 Documents also contained provisions to place the watershed lands around Lake Purdy under a conservation easement or trust, and contained provisions providing for the Water Works Board's employees to vote on joining a union.

On July 14, 2000, a revised draft of the Acquisition Agreement, marked to show changes in relation to the initial draft, was hand delivered from counsel for the Water Works Board to the Council President with copies thereof being concurrently provided to the Mayor, members of the Council, and the City Attorney. This marked copy provided for a "Covenant Against Private Management" in response to questions and concerns raised by a Council Member at the July 10 meeting.

The Presentations to the Council

On July 18, 2000, the Council voted for the first time on an ordinance (subsequently designated "Ordinance 00-123") to authorize the transfer and conveyance of the Systems from the City to the Water Works Board in consideration of the cash payment and assumption by the Water Works Board of indebtedness of the City identified in the July 10, 2000 Documents, as modified by the above referenced change to the Acquisition Agreement on July 14, 2000. The

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presented to the Council.

[4] The Series 1998-B General Obligation Warrants were not referenced by name in the draft of the Acquisition Agreement that was included in the July 10, 2000 Documents, but they were substantively included because the $206 million in cash was based on the commitment that $264,860,000 in debt would be assumed by the Water Works Board.

proposed ordinance did not receive the required unanimous consent and was continued until the next regular Council meeting. On July 25, 2000, the Council met at 6:00 p.m., in a regular meeting held at the Sixth Avenue Baptist Church where it considered at length, for the second time, the previously considered ordinance for the transfer and conveyance of the Systems by the City to the Water Works Board. This ordinance, as considered for a second reading and final passage at that meeting, was identical to the ordinance that had been initially considered on July 18, 2000. As finally enacted on July 25, 2000, this ordinance was designated Ordinance 00-123. On August 8, 2000, the Council overrode the Mayor's veto of Ordinance 00-123. On August 10, 2000, the Mayor filed the suit denominated above as *Kincaid I.* On August 11, 2000, Ordinance No. 00-123 was published in both *The Birmingham News* and *The Birmingham Post Herald.*

Section 2.1, Article II, Ordinance No. 00-123, provides in part that "[t]he transfer and conveyance of the Systems by the City to the Board, and in connection therewith, the assumption by the Board of the indebtedness of the City evidenced by the Series 1998 Warrants and the Junior Lien Warrants are hereby authorized and approved."[5]

Section 3.1, Article III, Ord. No. 00-123, provides:

> "Section 3.1 **Authorization of Agreements.** In order to retransfer and re-convey the Systems to the Board, and to provide for the assumption by the Board of the Series 1998 Warrants, the Junior Lien Warrants, and other obligations and liabilities, the City is hereby authorized to enter into the following Agreements with the Board (copies of which are on file at the office of the City Clerk): Acquisition Agreement; an Assignment and Assumption Agreement; Bill of Sale; Quitclaim Deed, Bill of Sale and Assignment; Assignment of Easement and Right-of-Way Agreement; Promissory Note secured by a Purchase Money Mortgage; and Assignment and Assumption of Leases. *The Mayor and /or the Council President* is hereby authorized and directed to execute and deliver the above agreements *in forms substantially similar to those attached hereto, with such changes as such officers, acting with*

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[5] "Series 1998 Warrants" were defined in Section 1.1(g) as the Water and Sewer Revenue Warrants, Series 1998-A and Taxable Water and Sewer Revenue Refunding Warrants, Series 998-B. "Junior Lien Warrants" were defined in Section 1.1(g) as the 1998-B General Obligation Warrants and all warrants so issued on a parity therewith.

the advice of counsel to the City, shall determine to be necessary or desirable. The City Clerk is hereby authorized and directed to affix the official seal of the City to the above agreements and to attest the same." (Emphasis added).

The Executed Documents

On August 3, 2000, the Mayor vetoed Ordinance 00-123. In his written veto message, the Mayor emphasized that his view of applicable municipal law required him to "execute all deeds and contracts" on behalf of the City, thereby signaling the inability of the Council to consummate the transaction authorized by Ordinance 00-123 without his cooperation.

On February 23, 2001, after this Court dismissed the Mayor's Complaint in *Kincaid I*, the Water Works Board and the Council President, on behalf of the City, both with the advice and assistance of their separate legal counsel, completed the execution of a set of documents to effect the transfer authorized by Ordinance 00-123. (The transfer documents executed by the Water Works Board and the Council President are collectively referred to hereinafter as the "Executed Documents"). The Water Works Board's legal counsel notified the City Attorney and legal counsel for the Mayor that the documents had been signed by the Council President on behalf of the City and that said documents had been recorded in the Probate Court of Jefferson County.

Between the dates of February 23, 2001 and March 9, 2001 (10 business days), the Executed Documents were recorded in the counties of Jefferson, Shelby, St. Clair, Blount, Walker and Cullman. On March 9, 2001, the Office of the City Clerk was provided a copy of the Executed Documents.

DISCUSSION

Resolution of the issues in this case centers around the various documents generated in conjunction with the transfer of the water systems from the City to the Water Works Board. Numerous copies of the relevant documents have been filed with the Court.

Standard of Review

A party against whom a claim is asserted or a declaratory judgment is sought may, at any time, move for summary judgment. Ala. R. Civ. P. 56(b). Summary judgment is proper when the evidence presented shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ala. R. Civ. P. 56(c)(3). All reasonable doubts concerning the existence of a genuine issue of material fact must be resolved against the moving party. *McClendon v. Mountain Top Indoor Flea Market*, 601 So. 2d 957 (Ala. 1992). The applicable standard of proof is the "substantial evidence rule." Ala. Code § 12-21-12 (1975). Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). The trial court is required to view all evidentiary material offered by the defendant in support of its motion in the light most favorable to the non-moving party. *Houston v. McClure*, 425 So. 2d. 1114 (Ala. 1983). The defendant can satisfy Rule 56 either by submitting affirmative evidence that negates an essential element of the plaintiff's claim or, assuming discovery has been completed, by demonstrating to the trial court that the plaintiff's evidence is insufficient to establish an essential element of the plaintiff's claim. *Ex parte General Motors Corp.*, 769 So. 2d. 903, 909 (Ala. 1999). If the plaintiff cannot produce substantial evidence to prove each

element of its claim, the defendant is entitled to summary judgment, for a trial would be useless. *Ex parte General Motors,* 768 So. 2d at 909.

The Delegation of Authority to the Council President.

The Plaintiffs have asserted that the Council President acted beyond the scope of his authority in approving changes to and executing the transfer documents. Pursuant to Ala. Act No. 452 (Sept. 9, 1955) commonly referred to as the Mayor-Council Act of 1955, "*all* powers of the city shall be vested in the council...." *See* § 2.02, Mayor-Council Act. Likewise, section 3.07 of the Mayor-Council Act provides that "[a]ll powers of the city, including all powers vested in it by this act, by the laws, general and local, of the state, and the determination of all matters of policy, shall be vested in the council." S*ee also, Federation of City Employees v. Arrington*, 432 So. 2d 1285 (Ala. 1983). Thus, the powers of the Council include all express powers granted to municipalities under the constitution and state law together with all implied powers necessary to execute its express powers. *See* §2.03 Mayor-Council Act. S*ee also City of Birmingham v. Graffeo*, 551 So. 2d 357, 360 (Ala. 1989).

The Mayor's powers are also contained in the Mayor-Council Act and are limited to the powers expressly set out under the Act. *See* § 4.06 Mayor-Council Act. This section provides that "[t]he mayor shall be the head of the administrative branch of the city's government. He shall not sit with the council nor shall he have a vote in its proceedings and he shall have the powers and duties herein conferred." *Id.* Thus, the powers of the Mayor are limited and administrative in nature.

The power to make contracts on behalf of a municipality rests in the council or governing body, and the mayor is not authorized to make municipal contracts so as to bind the city unless authorized by the council or the charter. *Coleman v. Town of Hartford*, 157 Ala. 550, 47 So. 594

(1908). Although a municipal council may not delegate its legislative powers, it may delegate to an officer, (either the mayor or someone else) the discretion to carry out and execute an ordinance which calls for making contracts, so long as the delegation of authority sets out a standard or guide by which, and within which, the limits of the discretionary power may be exercised. *See,* Eugene McQuillin, *The Law of Municipal* Corporations § 10.40.10. Thus, an agreement executed by an officer is valid if the power to contract has been validly delegated. McQuillin at § 29.15.

In the present case, Ordinance 00-123 set out the purposes and intent of the Ordinance to transfer the Systems to the Water Works Board, and delegated the authority to the Mayor or Council President to review, modify and execute the transaction documents to effectuate such intent. The record reflects that the Mayor stated that he would not execute the transfer documents, and that he was adamantly opposed to the transfer and nothing would change his mind.[6] Because of the Mayor's refusal to effectuate the transaction, the Council President did so. The Ordinance did contain a standard within which the Council President could exercise his authority; the Council President did not have the complete discretion to change the terms of the documents so as to change the intent of the Ordinance. Instead, the Council President was authorized to make any changes, with the advice of legal counsel, which may be necessary to effectuate the transfer so long as the changes were not "substantial."

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[6] Q. Mr. Mayor, in that letter the water board members offered to meet with you. Did you ever request a meeting with them?
A. No.
Q. Why not?
A. Just quite simply, I am adamantly opposed to the issue and speaking with me would have had no effect on my position. And so—
Q. And so you were opposed to it as of July 19, as of the date that those letters were written?
A. I was opposed to it from the first day it was proposed. I don't know what that date is.

(Kincaid Depo., pp. 48-52)

Based upon the facts and law set out herein, this Court finds that the Council properly authorized the Council President to carry out the intent of the Ordinance, and the Council President was properly operating within the discretion and authority delegated to him by the Council.

The Changes to the Documents

The Plaintiffs have alleged that because of the various modifications and changes made to the Executed Documents, such documents and the transaction are void. The Plaintiffs have also alleged that there were drafts of the transfer documents before the Council on July 25, 2000 that were different from the documents presented to the Council at the first reading of the Ordinance on July 18, 2000.

In the depositions of Councilors Little, Bandy, MacDermott, Gunn, Alexander, and Bell, the Plaintiffs failed to elicit any evidence that a different set of documents was distributed to the Council between the first and second readings of the Ordinance. The record reflects that the July 10, 2000 Documents were before the Council at both the first and second readings of Ordinance 00-123. Moreover, the Mayor testified in his deposition that he had no evidence that different drafts of the transfer documents were presented to the Council between the first and second readings of the Ordinance.[7]

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[7] Q. Okay. Do you have any evidence that what was presented to the finance and administration committee on July 10 and what was presented to the council and perhaps you on July 18 was any different?
A. No. I don't have any evidence.

* * * *

Q. Do you have any evidence that the drafts considered by the F&A committee on July 10 and the council on July 18 differ from what was presented on July 25?
A. No.
Q. You don't have any evidence?
A. No.

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The $10 million Issue

One of the changes made to the documents which the Plaintiffs assert to be "substantial" is a change in the amount of cash consideration to be received by the City from $206 million to $196 million. The documents before the Council when Ordinance 00-123 was enacted on July 25, 2000, called for the City to receive $206 million and to be relieved of $264,860,000 in debt, for the total consideration of approximately $471 million. The Executed Documents call for the City to receive $196 million and to be relieved of $274,860,000 in debt, for the same total consideration of approximately $471 million. The record reflects that this change was initiated by the City's Finance Director and the City's bond counsel in connection with a pending $57,000,000 general obligation warrant issue for school financing purposes. This change called for the Water Works Board to fund not only the $31 million principal amount of Series 1998-B General Obligation Warrants, and the pending $57 million issue of warrants, Series 2000 (the "Series 2000 Warrants"), which were to be assumed according to the original proposal of the Water Works Board, but, in addition, to fund the Series 1998-A General Obligation Warrants in the principal amount of $10 million. These warrants were not included in the $264,860,000 principal amount of debt proposed to be assumed by the Water Works Board in the transaction reflected in the July 10, 2000 Documents. The inclusion of $10 million principal amount of Series 1998-A General Obligation Warrants in the proposed funding agreement, if not offset by an equivalent reduction in the proposed $206 million cash portion of the purchase price, would have had the effect of increasing the total purchase obligation of the Water Works Board by $10

Q. What evidence do you have that the City Council had documents on July 25 that had been changed?
A. Again, the doctrine of *res ipsa loquitur* speaks for itself. If there was a document on the 21 and it said this and there is a document on the 25 and it said that, it speaks for

million. The record reflects that the Council's primary goal in the transaction was to receive the total consideration of approximately $471 million in exchange for transferring the Systems. Accordingly, this Court finds that the reduction in the cash consideration by $10 million with a concomitant increase in the amount of debt assumed or funded, so that the total amount of consideration to be received by the City did not change, was not a substantial change in the documents.

The Note/Bond Change.

Another change to the documents which the Plaintiffs allege to be "substantial" was that the cash portion of the purchase price was originally to be evidenced by a short-term note that was expected to be promptly liquidated by the issuance of long-term bonds payable from the revenues of the Systems. The Executed Documents changed the note to provide for the cash portion of the purchase price to be evidenced by an interest-bearing note/bond with a maturity that can be extended by calendar quarters for up to ten years until the litigation surrounding the transfer of the Systems is resolved, at which time the principal of the note/bond must be promptly paid to the City in cash. The record reflects that this change was made because of the Mayor's institution of litigation challenging the transfer, which prevented the Water Works Board from issuing revenue bonds to pay the consideration. It was contemplated by Ordinance 00-123 that the Water Works Board would obtain the cash portion of the consideration by issuing bonds payable from and secured by the revenues of the Systems. Revenue bonds cannot be issued by a municipal utility if there is pending or threatened litigation challenging the ownership of the utility's property or its right to issue such bonds. The note/bond given to the City to evidence the

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itself. But I don't have a conscious recollection of how it got changed or who changed it or anything like that. (Kincaid Depo. pp. 30-32; 34-35; 41-42; 81-83).

cash price will become due within three months after the cessation or final disposition of the Mayor's litigation. Accordingly, this Court finds that such change is not substantial.

The Arbitrage Rebate Change

The Plaintiffs argue that including an obligation in the Executed Documents that the City will be responsible for paying any arbitrage rebate that may occur as a result of the Water Works Board issuing revenue bonds to satisfy the note/bond was also a substantial change. A federal arbitrage rebate is the amount of profit that a state or local government must repay to the United States government when it invests the proceeds of a tax-exempt bond issue at a yield higher than its attributed interest cost for that bond issue. The City will have a rebate problem only if it and the Water Works Board are deemed "related parties" under the federal arbitrage regulations. *See* I.R.S. Reg. § 1.150-1(c)(1). If they are not "related parties", then the payment of the proceeds of the bonds in cash to the City will be deemed an expenditure of the proceeds by the Water Works Board, whereupon the City's use of such cash will be free of arbitrage concerns. Assuming that the revenue bonds to be issued by the Water Works Board will be treated as the City's bonds, the City will still incur no rebate obligation if there is no profit from the investment of the City's cash payment at a yield higher than the Water Works Board's revenue bonds, or if it spends the cash payment within a reasonable construction period as if the bonds were directly issued by the City to finance capital costs of its school system. Only if the City refuses or fails to spend the cash payment on the allowable schedule would there be any risk of rebate liability. In other words, it is solely within the power of the City to avoid any rebate liability by spending the cash payment in accordance with its announced intention. For these reasons, this Court finds that the inclusion

of the obligation for the City to be responsible for any arbitrage rebate that may occur as a result of the Water Works Board's issuance of revenue bonds to pay the note/bond was not a substantial change.

The Funding Agreement

Next, the Plaintiffs argue that including a "Funding Agreement" as one of the transaction documents is a substantial change. According to the Plaintiffs, by substituting the form of the Water Works Board's obligation to pay for the City's Series 1998-A, 1998-B and 2000-A General Obligation Warrants from an "assumption" agreement to the Funding Agreement, "[t]he City remains contingently liable on the debt – that is , the debt remains an obligation of the City." The record reflects that the inclusion of the Funding Agreement was suggested and drafted by the City's bond counsel, who stated that the proposed warrants should not be assumed by the Water Works Board because they were general obligations of the City, but rather that the payment obligation therefor should be covered by a funding agreement of the Water Works Board to be included in the Acquisition Agreement. Under Alabama law, when a party assumes the debt or obligation of another, then such party becomes primarily liable and the original obligor becomes liable as a surety. *First National Bank of Birmingham v. Hendrix*, 4 So. 2d 407 (Ala. 1941); *see also,* Restatement (First) of Security § 83 (1941) (providing that a suretyship relation is created "when the surety having been a principal obligor, his obligation, without a novation, has been assumed by another."). Thus, an assumption of an obligation does not relieve the original debtor of his obligation but rather he remains liable. Accordingly, whether the Water Works Board "assumed" the City's obligations on these various G.O.'s or simply agreed to "fund" their debt service through the Funding Agreement, the City would still have remained contingently liable for their payment. Moreover, it is apparent from a plain reading of Ordinance 00-123 that

documents could be revised, substituted or added since it explicitly authorized changes in Section 3.1, and Section 5.1 of the Ordinance provided for the execution of any other documents which may become necessary to carry out the transfer of the Systems. Thus, this Court finds that adding a Funding Agreement document was not a substantial change.

No Substantial Changes

The Plaintiffs have not presented any other evidence that any of the alleged changes to the documents were substantial.[8] Ordinance 00-123 provides that the Council delegated its authority to the Council President to execute the transfer documents in a form substantially similar to those attached to the Ordinance or on file with the City Clerk, and further authorized the Council President to approve any changes which were necessary to such documents, with the advice of counsel. The record reflects that any changes made to the documents were authorized by the Council President with the advice of counsel. The purpose and objective of Ordinance No. 00-123 was to transfer the Systems from the City back to the Water Works Board. Ordinance 00-123 authorized specific transfer documents that were to effectuate the transfer of the Systems back to the Water Works Board in addition to any other documents that may be necessary. The changes made by the Council President did not change the purpose or the objective of Ordinance No. 00-123. This Court therefore finds that there are no material, substantial differences between the July 10, 2000 Documents and the Executed Documents.

The Council President's Execution of the Documents Conveying Real Property

The Plaintiffs have alleged that only the Mayor has the authority to execute deeds or conveyances of real property of the City.

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[8] The Plaintiffs filed an Affidavit of Dr. Robert Brooks, Ph.d., CFA, to state an "expert" opinion on the "damages" to the City as a result of the changes to the transfer documents. The Court notes that damages are not an issue in this action. Furthermore, the Defendants filed a Motion to Strike the affidavit of Dr. Brooks.

Generally, the authority to make a conveyance of municipal property is vested in the council as the governing legislative body. *See* McQuillin Mun Corp § 28.44.10 (3rd ed.). The authority to execute a conveyance is generally based on an ordinance of the municipal council. *Id.* Further the council may authorize the execution of deeds and other instruments by someone other than the mayor. *Id.*

Section 11-43-43 of the Code of Alabama contains the legal basis for the Council President to execute such documents. This section provides that "[a]ll legislative powers and other powers granted to the cities and towns shall be exercised by the council, except those powers conferred on some officers by law or ordinance." Ala. Code § 11-43-43 (1989). Likewise, § 3.07 of the Mayor- Council Act of 1955 provides that "[a]ll powers of the city, including all powers vested in it by this act, by the laws, general and local, of the state, and the determination of all matters of policy, shall be vested in the council." Mayor-Council Act 1955, § 3.07.

The Plaintiffs have asserted that Ala. Code § 11-47-20 and § 11-43-83 provide that the Mayor is the "sole" official with the power to execute deeds on behalf of the City. Ala. Code § 11-47-20 sets out the procedure for the City to transfer or convey property that is no longer needed for public purposes, and is inapplicable to the facts of this case. Section 11-43-83 of the Code of Alabama provides: "The mayor shall see that all contracts with the town or city are faithfully kept or performed. He shall execute all deeds and contracts and bonds required in judicial proceedings for and on behalf of the city or town…." Ala. Code § 11-43-83 (1989).

However, the Plaintiffs have failed to recognize that § 11-47-5 of the Code of Alabama provides:

> Contracts entered into by a municipality shall be in writing, signed and executed in the name of the City or town by the officers authorized to make the same and by the party contracting. *In cases*

> *not otherwise directed by law or ordinance,* such contracts shall be entered into by the mayor in the name of the city or town....

Ala. Code § 11-47-5 (1992) (emphasis added). Generally, courts should construe statutes covering the same subject matter to be read together if possible. *See generally James v. McKinney*, 729 So. 2d 264 (Ala. 1998). Because § 11-43-83 does not state that the mayor shall be the only officer allowed to execute contracts and deeds on behalf of the city, and because § 11-47-5 provides that an ordinance may direct someone other than the mayor to execute a contract on behalf of the city, the two statutes can be read together to provide that a city ordinance may direct someone other than the mayor to execute deeds and contracts on behalf of the city. *See also, Edwards v. First Nat'l Bank*, 377 So. 2d 966 (Ala. 1979)(holding that a city council may by ordinance prohibit the mayor from signing checks and designate another to do so).

Moreover, the City's own municipal statute provides that someone other than the mayor may be directed to execute deeds on behalf of the City. Section 2-1-3 of the Birmingham City Code provides: "[t]he mayor shall sign, upon behalf of the city, all proclamations, deeds, notes, leases, contracts and bonds authorized by ordinance or resolution, *except in cases otherwise provided for by statute, ordinance or resolution.*" Birmingham City Code § 2-1-3 (emphasis added).

Therefore, this Court finds that because Ordinance No. 00-123 authorized the Council President to execute the transfer documents, and the Council President did in fact execute the documents, the lack of the Mayor's signature thereon does not render such documents invalid.

The City Clerk's Attestation

The Plaintiffs have alleged that the transfer documents are invalid because they were not attested by the City Clerk, as called for in the Ordinance. As set forth below, the Defendants complied with all statutory requirements applicable to the Ordinance and under the facts of the present case, the absence of the City Clerk's attestation does not invalidate the documents. Requiring the City Clerk's attestation under the facts of this case, would vest authority to approve or disapprove contracts and deeds in administrative officials, and would in essence, give the Clerk a "super veto." *See* McQuillin Mun Corp § 16.73 (3rd ed.).

Birmingham City Code § 2-3-11 provides that the Clerk shall "attest as to the correctness of all City documents executed by the Mayor and the Council." Section 3.11 of the Mayor-Council Act provides that the City Clerk "shall perform such other duties as shall be required by this act or by ordinance...." Mayor-Council Act of 1955, § 3.11. Under Alabama law, where an attestation provision does not also provide that the failure to comply with it shall prevent the documents from being valid, such provision is merely directory. *See Clark v. Uniontown*, 58 So. 725 (Ala. Ct. App. 1912) (*rev'd on other grounds*); *Bell v. Jonesboro*, 57 So. 138 (Ala. Ct. App. 1911). A directory provision is "one which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard." Blacks Law Dictionary (Abridged 5th ed.).

Ordinance 00-123 directed the Clerk to attest the documents. The record reflects that when requested to do so, the Clerk refused. The record also reflects that one of the reasons the Clerk refused to attest the Executed Documents was because the Mayor instructed her not to do so.

Because Birmingham City Code § 2-3-11 does not state that the failure of the clerk to attest City documents renders such documents invalid, and because such law should not be construed to give the Clerk a "super veto", this Court finds that the failure of the Clerk to attest the transfer documents, under the facts of the present case, does not render them invalid.

The Attachment or Filing of the Documents

The Plaintiffs have also alleged that the Executed Documents are invalid because they were not attached to the Ordinance or on file with the Clerk's office. The City Code does not require that supporting documents must be attached to an ordinance or filed with the clerk prior to their execution, nor does the law require that every revision of such documents must be filed with the Clerk. Instead, Birmingham City Code § 2-2-15(c)(1) simply provides that copies of a *proposed ordinance* must be filed with the Clerk prior to or at the beginning of a meeting in which the ordinance is introduced. The record reflects that copies of proposed Ordinance 00-123 were filed with the Clerk and it was placed on the agenda for the July 18, 2000 Council meeting (the first meeting in which it was introduced). Copies of the proposed ordinance were also distributed to the Mayor and Councilors at such meeting.

Birmingham City Code § 2-3-12(a) requires the Clerk, as the official custodian of City records, to maintain a file copy of ordinances and requires that the Clerk must maintain a file copy of all contracts and other documents *entered into* by the City. The record reflects that the Clerk did receive executed copies of the transfer documents to be filed in the office of the City Clerk after such documents had been *entered into* by the parties.

The Clerk testified that she did not receive a copy of the transfer documents prior to the July 18, 2000 Council meeting. The Clerk testified that it is the custom and practice of the City Clerk's office to review Council agenda items prior to Council meetings, and to check whether

the agenda items have the proper attachments, if required. The Clerk also testified that it is the custom and practice of her office to contact the parties involved with an agenda item if any attachments are missing. The Clerk stated that upon determining that no attachments were provided with Ordinance 00-123, she *did not* contact anyone involved with Ordinance 00-123 to request copies of the transfer documents, nor did she instruct anyone in her office to do so. The Clerk further stated that she did not know if anyone from her office followed the usual procedure to request missing attachments. The record also reflects that copies of the July 10, 2000 Documents and proposed ordinance were transmitted on a computer disk to the Council Administrator for filing. Therefore, under the facts of this case, considering the above law and the Clerk's failure to follow her own procedures, the fact that the documents were not filed with the Clerk does not invalidate the transfer.[9]

City Attorney Review

The Plaintiffs have also alleged that the transfer documents are invalid because the City Attorney did not review the documents. Birmingham City Code § 2-2-15(a) only requires that the City Attorney must review *ordinances* which are not prepared by City Attorneys. Likewise, Birmingham City Code § 2-3-24 provides that "[t]he city attorney shall *draft* deeds, contracts and other instruments of writing *when requested to do so* by the mayor...." (Emphasis added). These sections do not require that the City Attorney must review or pass upon the sufficiency of contracts, deeds or other documents prior to their execution, as asserted by the City.

[9] The evidence in this case shows that both the Mayor and the City Attorney had copies of the drafts of the transfer documents at the filing of this action.

Nevertheless, the record reflects that the City Attorney did receive drafts of the transfer documents in a meeting on July 10, 2000, prior to the Finance and Administration Committee meeting. The City Attorney also received a copy of the proposed ordinance prior to the Council voting on it.

The City Attorneys are not the *only* attorneys who may review and advise the Council concerning City documents. Birmingham City Code § 2-3-22 provides that "[t]he city attorney shall advise the council and all officers of the city with reference to all official acts, *on request*, and he shall give written opinions when required to do so by the mayor." (Emphasis added). This section clearly does not prohibit execution of City documents without review by the City Attorney. A municipal council, acting on behalf of a city, has the authority to retain outside counsel to advise them on matters when such retention is determined to be necessary to protect the city or its officers. *See Ex parte City of Birmingham,* 624 So. 2d 1018 (Ala. 1993)(citing *City of Birmingham v. Wilkinson,* 194 So. 548 (Ala. 1940); *City of Montgomery v. Collins,* 355 So. 2d 1111 (Ala. 1978)); McQuillin, at § 12.52.05. Moreover, the Council did not request the city attorneys to advise them on this transaction. Instead, the Council properly requested its outside legal counsel to review the transfer documents and advise the Council as to such documents. Thus, this Court finds that the City Attorney was not required to review or approve the transfer documents in this case.

Estoppel

The Water Works Board has pled estoppel.

The record reflects that the Water Works Board provided the Mayor and City Attorney with copies of all documents and made numerous requests to meet with the Mayor and his staff prior to and during the Council's consideration of the transfer of the Systems. The record also

reflects that the Mayor never intended to meet with the Water Works Board and prevented his staff and department heads from doing so. The very changes which the Mayor and City Attorney allege to be "substantial" could have been discussed and clarified had they participated in meetings with the Water Works Board or permitted their staff to do so. However, neither the Mayor nor the City Attorney responded to the Water Works Board's requests nor participated in the drafting and re-drafting of the transfer documents. The Mayor has resorted to multiple lawsuits, rather than negotiation and the orderly processes of representative government, to accomplish his ends. The difficulties of the present case and the uncertainties it has visited upon the City of Birmingham , The Water Works Board, and the credit and the operation of each are in part a result of the Mayor's obduracy. The issues are of such public importance, however, that to decide it here on other than the merits would fail the end all parties express a desire for, and that is closure.

The estoppel defense is therefore applied only to the question of whether the City Clerk must actually perform other acts to validate the transactions here. In addition to the other reasons stated, the answer to that question is no. By his attempts to cause the clerk through inaction to be able to thwart actions otherwise lawful, the mayor is estopped from claiming the clerk's ministerial duties are not complete. Neither the Clerk nor the City Attorney, whether acting independently or on order of the Mayor, has the power to override the vote of the Council and the lawful actions taken pursuant to it. Therefore, the Water Works Board alternative petition for mandamus to the City Clerk is denied.

The Mayor's Counterclaim

In addition to asserting the same claims as the City, the Mayor asserted in his Counterclaim and Cross-Claim that "[b]ecause of the changes made to the transfer documentation between July 25, 2000 and August 8, 2000, there is a dispute as to whether the Council validly overrode the veto of the Mayor." However, neither the City's Complaint nor the Mayor's Counterclaim and Cross-Claim contain any allegations that Ordinance No. 00-123 was modified or changed during the course of proceedings at issue in this case.

Section 3.15 (a) of the Mayor-Council Act of 1955 is entitled "Meetings, Passage of Ordinances by Council" and sets out the proper procedure for the Council to validly override a veto of the Mayor. This section provides:

> If the mayor shall disapprove of any *ordinance or resolution* transmitted to him as aforesaid, he shall within 10 days of the time of its passage by the council, return the same to the clerk with his objections in writing, and the clerk shall make report thereof to the next regular meeting of the city council; and if two-thirds of the members elected to said council shall at said meeting adhere to said *ordinance or resolution*, notwithstanding said objections, said vote being taken by yeas and nays and spread upon the minutes, then, and not otherwise, said *ordinance or resolution* shall after publication thereof, if publication is required, have the force of law. (Emphasis added).

The Council followed this procedure in overriding the Mayor's veto of Ordinance No. 00-123 on August 8, 2000. It is clear that based upon the above quoted law, a mayor's veto only pertains to the ordinance and not any related documents intended to effectuate the ordinance. Therefore, any changes which may have been made to the transfer documents have no relation to the procedure for overriding a mayoral veto of an ordinance, and the Mayor's allegation that the veto of Ordinance No. 00-123 was improper is without merit and is hereby dismissed.

CONCLUSION

Upon consideration of the issues presented, this Court concludes that the pleadings, testimony and documents filed with the Court show that no substantial or material changes were made to the Executed Documents which were beyond the purpose or intent of Ordinance 00-123, or which differed substantially from the July 10, 2000 Documents, and the Plaintiffs have failed to present any evidence in support of their claims. The Executed Documents were properly executed and are valid. Therefore, no material, factual issues exist and the Water Works Board is entitled to an Order granting its Motion for Summary Judgment based upon the law set forth above.

For the reasons discussed, the Motion for Summary Judgment submitted by the Water Works Board is due to be granted, and the Motion for Summary Judgment submitted by the Mayor is due to be denied. The Mayor's counterclaim is due to be dismissed, with prejudice.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1.The transfer documents, Executed Draft, along with all other documents including, but not limited to Quit Claim Deed, Assignment Easements and Rights-of-Way executed by the President of the Council of the City of Birmingham, Alabama pursuant to Ordinance 00-123 and brought into question or issue by this action are declared to be lawful, valid and binding documents of The City of Birmingham, Alabama.

2. Consistent with the findings herein, final order has been entered this date in *The Water Works Board v. Regions Bank, et. al.*, CV 01-1367 pending in this court.

3. This order resolving all issues in this action, costs are taxed to the Plaintiff, The City of Birmingham, Alabama.

Done this the 28 day of February, 2002.

Arthur J. Hanes, Jr., Circuit Judge

COPIES TO:
K. Mark Parnell, Esq.
Mary H. Thompson, Esq.
Lynneice Olive Powell, Esq.
Emory Anthony, Esq.
Richard Jaffe, Esq.
Henry I. Frohsin, Esq.
James H. White, IV, Esq.
Tamara H. Johnson, Esq.
Michael Melton, Esq.
Rowena Teague, Esq.

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STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT

OCTOBER TERM, 2001-2002

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The City of Birmingham et al. v. Water Works and Sewer Board of the City of Birmingham (Appeal from Jefferson Circuit Court: CV-01-2218).

HOUSTON, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P.

Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Moore, C.J., dissents.