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24<sup>TH</sup> JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 806-019

DIVISION "A"

SAM CAPITANO

VERSUS

CITY OF KENNER

FILED  
MAY 18 2020  
*Levy Peralta*  
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came on for a hearing on affidavits on May 11, 2020 via Zoom teleconference on the request for a Preliminary Injunction contained in the *Supplemental and Amended Verified Taxpayer Petition To Enjoin Ultra Vires Acts Taken by City of Kenner Mayor Ben Zahn and Declaratory Judgment Relief* ("Verified Amended Petition") filed by Sam Capitano ("Mr. Capitano") and Melissa Peralta ("Ms. Peralta")(collectively, "Plaintiffs") on April 27, 2020. In view of the COVID-19 emergency, all parties agreed to file documents into the Court's record which were admitted in support of or in contravention to the Preliminary Injunction request, rather than admission during the Zoom hearing itself, and no objections were lodged as to this procedure.

Factual Background and History of the Case

Plaintiffs are taxpayers and citizens of Defendant, the City of Kenner.<sup>1</sup>

Plaintiffs filed suit to enjoin the performance of a contract executed by Kenner Mayor, E. "Ben" Zahn, III ("Mayor Zahn") with Intervenor herein, IV Waste, LLC ("IV Waste"),<sup>2</sup> and to contest the validity of Kenner Ordinance No. 11,718 which approved that contract. Plaintiffs contended Ordinance No. 11,718 and the contract between the City of Kenner and Mayor Zahn are null and void.<sup>3</sup>

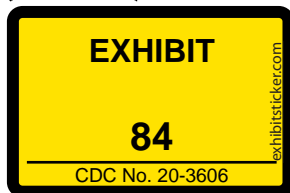
By way of history, in February, 2016, the City of Kenner entered into a ten-year non-exclusive contract with Ramelli Janitorial Service, Inc. ("Ramelli") for the collection of garbage and recyclable materials (the "Ramelli Contract").<sup>4</sup> The Ramelli Contract conferred on Ramelli the right to collect garbage and recyclable materials for twenty-two thousand (22,000) "Service

<sup>1</sup> *Verified Taxpayer Petition To Enjoin Ultra Vires Acts Taken by City of Kenner Mayor Ben Zahn and Declaratory Judgment Relief* ("Verified Petition"), ¶¶3, 6, 64 and Plaintiff's Exhibit #E (Affidavit of Sam Capitano), ¶¶1-4; *Verified Amended Petition*, ¶81 and Plaintiffs' Exhibit G (Affidavit of Melissa Peralta), ¶¶1-4.

<sup>2</sup> *Verified Petition*, ¶3.

<sup>3</sup> *Verified Amended Petition*, ¶88.

<sup>4</sup> *Verified Petition*, ¶¶9-10; Plaintiff's Exhibits ##A (Affidavit of Robert C. Ramelli, ¶2) and A-1 (Ramelli Contract, pp. 1, 2, 7, 40, 45, 56; §§ 2, 6-8, 11).



Units” in the City of Kenner.<sup>5</sup> The Ramelli Contract further provided that the City of Kenner was to pay Ramelli \$10.98 per Service Unit per month for garbage collection plus \$1.00 per Service Unit per month for recycling collection fees.<sup>6</sup> The Ramelli Contract also allowed the monthly, per-Service-Unit price to be increased annually in reference to the Consumer Price Index (“CPI”).<sup>7</sup>

As part of the concessions to negotiate the Ramelli Contract, Ramelli agreed to forego the 2016 CPI increase.<sup>8</sup> Ramelli also averred that it did not bill for and did not receive the 2017 CPI increase.<sup>9</sup> Finally, Ramelli alleged it agreed not to charge the 2019 CPI increase because it was informed the City of Kenner could not afford the increased charge.<sup>10</sup> The City of Kenner disputed this, presenting the Affidavits of Mayor Zahn, Kenner Chief Administrative Officer, Deborah Foshee, and Kenner Deputy Chief Administrative Officer, Leigh Roussel, to establish that those three Affiants did not tell anyone that the City of Kenner could not afford the 2019 CPI increase.

Ramelli did charge for and did receive a CPI increase in 2018, so that by 2020, Ramelli alleged it was receiving \$11.28 per Service Unit per month for garbage collection.<sup>11</sup> The fact that Ramelli was receiving \$11.28 per Service Unit per month for garbage collection appears undisputed,<sup>12</sup> but the City of Kenner did dispute the correctness of Ramelli’s CPI calculations to derive the \$11.28 per Service Unit monthly charge.<sup>13</sup> The City of Kenner presented the Affidavit of Kenner Finance Director, Michael Wetzel who, like Mayor Zahn, Ms. Foshee, and Ms. Roussel, asserted he had told no one the City of Kenner could not afford the 2019 CPI increase. Attached to Mr. Wetzel’s Affidavit were two spreadsheets which calculated the per-Service-Unit charge with the allowed annual CPI increase and secondly with a waiver of the 2016 CPI increase, both of which exceeded \$11.28 per Service Unit per month. According to Plaintiffs, the City Attorney later contended that Ramelli was under-charging the City of Kenner by billing at a rate of \$11.28 per Service Unit per month.<sup>14</sup>

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<sup>5</sup> A “Service Unit” is defined as each residence or business for which Ramelli provided collection services. Verified Petition, ¶10 and footnote 1; Plaintiff’s Exhibit # A-1 (Ramelli Contract, pp.6).

<sup>6</sup> Verified Petition, ¶10 and footnote 2; Plaintiff’s Exhibit # A-1, pp. 35-37.

<sup>7</sup> *Id.*

<sup>8</sup> Plaintiffs’ Exhibit M (*Supplemental Affidavit of Robert C. Ramelli*), ¶¶5-7.

<sup>9</sup> Plaintiff’s Exhibit #A-1 (Ramelli Contract), p.8.

<sup>10</sup> Plaintiff’s Exhibit M (*Supplemental Affidavit of Robert C. Ramelli*), ¶9.

<sup>11</sup> Verified Petition, ¶10 and footnote 2; Plaintiff’s Exhibit #A, ¶4.

<sup>12</sup> *See*, Affidavit of Kenner Finance Director, Michael Wetzel, p. 2.

<sup>13</sup> *Id.*

<sup>14</sup> *See*, Verified Amended Petition, ¶97.

Per the Ramelli Contract, Ramelli was also obligated to supply all 22,000 Service Units with “Roll-out Carts” at Ramelli’s sole expense<sup>15</sup> and to supply replacement Roll-out Carts free-of-charge, upon the provision of a police report documenting that a particular cart was stolen or vandalized.<sup>16</sup>

At the March 5, 2020 Kenner City Council meeting, an Ordinance was proposed to approve a ten-year garbage and recycling collection contract with IV Waste (the “proposed IV Waste contract”).<sup>17</sup> The proposed IV Waste contract provided for garbage collection at \$12.32 per Service Unit per month,<sup>18</sup> and it provided that replacement carts would be provided at a charge of \$65 per cart.<sup>19</sup>

Plaintiffs contended IV Waste and Mayor Zahn misrepresented that IV Waste was to charge the same price Ramelli was charging, whereas the IV Waste contract was actually for an increased price.<sup>20</sup> Defendant, the City of Kenner, and Intervenor, IV Waste, disputed this.

The proposed Ordinance was amended at the March 5, 2020 Kenner City Council meeting to provide that any Roll-out carts which were purchased by a resident remained the property of that resident and to further provide that the first replacement Roll-out cart would be provided free of charge to residents whose carts were stolen or vandalized, with the provision of a police report.<sup>21</sup> The Ordinance, designated as No. 11,718, was passed as amended.<sup>22</sup>

On March 23, 2020, Mayor Zahn executed a contract with IV Waste (“the IV Waste Contract”), as contemplated by Ordinance No. 11,718.<sup>23</sup> Plaintiffs contended that despite the amendment to Ordinance No. 11,718 which required the first replacement cart to be free of charge with a police report, the IV Waste Contract nevertheless required Kenner residents to pay \$65 for each replacement cart.<sup>24</sup> Plaintiffs also claimed the IV Waste Contract allowed IV Waste to charge \$11.96 per Service Unit per month.<sup>25</sup> While the \$11.96 rate was \$0.36 cheaper than the \$12.32 charge in the proposed IV Waste contract,<sup>26</sup> Plaintiffs alleged that the IV Waste

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<sup>15</sup> Plaintiff’s Exhibit #A-1 (Ramelli Contract), p.8.

<sup>16</sup> Verified Petition, ¶11; Plaintiff’s Exhibit #A-1 (Ramelli Contract), p.9.

<sup>17</sup> Verified Petition, ¶20 and Plaintiff’s Exhibit #B-2.

<sup>18</sup> Verified Petition, ¶15 and Plaintiff’s Exhibit #B-3, p. 31.

<sup>19</sup> Verified Petition, ¶18 and Plaintiff’s Exhibit #B-3, p. 8.

<sup>20</sup> Verified Petition, ¶¶24-26, 30-31, 53-54.

<sup>21</sup> Verified Petition, ¶38 and Plaintiff’s Exhibit #C.

<sup>22</sup> Verified Petition, ¶39 and Plaintiff’s Exhibit #C.

<sup>23</sup> Verified Petition, ¶¶41-42 and Plaintiff’s Exhibit #D.

<sup>24</sup> Verified Petition, ¶43 and Plaintiff’s Exhibit #D, p. 8, §3.A.2.

<sup>25</sup> Verified Petition, ¶43 and Plaintiff’s Exhibit #D, p. 31.

<sup>26</sup> Plaintiff’s Exhibit #B-3.

Contract's rate was still higher than Ramelli's actual current charge.<sup>27</sup> Defendants disputed these contentions.

Plaintiffs argued that Mayor Zahn was prohibited from entering a contract with a value of \$100,000 or more unless the contract was approved by Ordinance,<sup>28</sup> but the IV Waste Contract was contrary to Ordinance No. 11,718 which required the first replacement cart to be provided free-of-charge.<sup>29</sup> As a result, Plaintiffs claimed the IV Waste Contract was null and void.<sup>30</sup>

According to Plaintiff, IV Waste's promotional materials disclosed that it planned to distribute Roll-out carts beginning on April 23, 2020, and it planned to begin garbage and recycling collection on May 1, 2020.<sup>31</sup> Mr. Capitano's Verified Petition was filed on April 23, 2020. It requested a Temporary Restraining Order ("TRO") be issued prohibiting Defendant, the City of Kenner, from performing under the IV Waste Contract.<sup>32</sup>

At a Zoom teleconference hearing held on April 24, 2020 on Mr. Capitano's TRO request, the City of Kenner averred that \$65 replacement cart charge in the IV Waste Contract was a mere typographical error by the City Attorney's office which would be remedied by "substituting a page" in the IV Waste Contract for the page which contained the clerical error.<sup>33</sup> Moreover, and more importantly, the City of Kenner asserted that Ordinance No. 11,718 took precedence over the IV Waste Contract, and to the extent the IV Waste Contract deviated from the Ordinance, the Ordinance controlled.

On the basis of Defendant's representations that Mr. Capitano's key argument was premised on a mere unintentional, typographical error in the IV Waste Contract which would in fact be immediately remedied and which was, in any event, vitiated by the controlling Ordinance No. 11,718, Mr. Capitano's request for a TRO was denied at the Zoom hearing held the morning of April 24, 2020.<sup>34</sup> The Court set the Preliminary Injunction hearing for May 11, 2020.

Mr. Capitano and Ms. Peralta then filed a Verified Amended Petition on Monday, April 27, 2020. It detailed the events of a Special Session of the Kenner City Council held the evening of Friday, April 24, 2020, just hours after the hearing on Mr. Capitano's requested TRO.<sup>35</sup>

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<sup>27</sup> Verified Petition, ¶45 and Plaintiff's Exhibits ##A and D.

<sup>28</sup> Verified Petition, ¶70 and Plaintiff's Exhibit F, p. 3, §2.09.

<sup>29</sup> Verified Petition, ¶¶74-75 and Plaintiff's Exhibit C, §2.

<sup>30</sup> Verified Petition, ¶¶75-76.

<sup>31</sup> Verified Petition, ¶63.

<sup>32</sup> Verified Petition, ¶77.

<sup>33</sup> Verified Amended Petition, ¶91.

<sup>34</sup> Minute Entry of April 24, 2020.

<sup>35</sup> Verified Amended Petition, ¶¶85-88, 90, 94-95.

The Verified Amended Petition alleged the Kenner City Council had adopted a Resolution to affirm its prior approval of the IV Waste Contract<sup>36</sup> but had announced the Resolution did not carry the force of law because a mere Resolution cannot cure defects in a prior Ordinance.<sup>37</sup> The Verified Amended Petition also alleged the Kenner City Attorney announced IV Waste would charge \$11.87 per Service Unit for the months of May and June, 2020. The newly-announced \$11.87 charge was different than the \$11.96 rate in the executed IV Waste Contract<sup>38</sup> and the \$12.32 charge in the proposed IV Waste contract.<sup>39</sup> The Verified Amended Petition further alleged that Defendant had explained Ramelli was actually entitled to charge \$11.87 per Service Unit if the Ramelli Contract's CPI adjustments were appropriately calculated. The City averred Ramelli was undercharging the City of Kenner, so the new IV Waste Contract did not represent an increased rate from the rate which Ramelli was actually entitled to charge.<sup>40</sup>

Since Kenner Ordinance 9½-5(a) requires citizens to pay the "actual cost" of garbage collection services<sup>41</sup> and since the Kenner Home Rule Charter §2.13 requires any Ordinance which increases a service charge to be laid over 28 days before adoption,<sup>42</sup> the Verified Amended Petition averred that Ordinance No. 11,718 should have been laid over the required 28 days, but it was not.<sup>43</sup> Plaintiffs contended that, as a result, the Ordinance authorizing the IV Waste Contract was itself null and void. Plaintiffs requested a TRO on the additional grounds in the Verified Amended Petition. A hearing on the Verified Amended Petition's TRO request was set for April 30, 2020.

The City of Kenner claimed there was no requirement that the actual IV Waste Contract be attached to Ordinance No. 11,718, and in fact it could not have been attached to Ordinance No. 11,718 because certain contractual provisions were amended and adopted at the March 5, 2020 Kenner City Council meeting.<sup>44</sup> Defendant further averred that Mayor Zahn was authorized to execute any documents necessary to give effect to Ordinance No. 11,718, with the

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<sup>36</sup> Verified Amended Petition, ¶85.

<sup>37</sup> Verified Amended Petition, ¶86.

<sup>38</sup> Verified Amended Petition, ¶96 and Plaintiff's Exhibit #D.

<sup>39</sup> Plaintiff's Exhibit #B-3.

<sup>40</sup> Verified Amended Petition, ¶97.

<sup>41</sup> Plaintiff's Exhibit #J.

<sup>42</sup> Plaintiff's Exhibit #K.

<sup>43</sup> Verified Amended Petition, ¶¶100-102 and Plaintiff's Exhibit K.

<sup>44</sup> *Memorandum in Opposition* filed by Defendant, the City of Kenner, p. 2.

proviso that a resident would own carts for which the resident had paid and with the further requirement that the first cart be replaced free-of-charge with a police report.<sup>45</sup>

Although Defendant acknowledged that certain Ordinances must lay over 28 days, Defendant argued that ordinances approving or authorizing contracts were not among those with such a layover. Defendant averred that Kenner Ordinance 9½-5.A, which addresses what Kenner residents pay for garbage collection (i.e., “actual cost”), did in fact lay over 28 days.<sup>46</sup> However, Defendant averred it was charged with devising a formula to calculate the amount charged to residents for garbage collection considering millage revenue, and thus, the IV Waste fee charged to the City of Kenner did not equate directly to the fee charged to residents for garbage collection and disposal. Although IV Waste’s charge was a portion of the fee charged to residents, Defendant averred it was not a direct charge as contemplated by §2.13 of Kenner’s Home Rule Charter.<sup>47</sup>

The parties entered into a Consent Order on April 30, 2020, signed on May 5, 2020, as to Plaintiffs’ requested TRO. The parties agreed Plaintiffs’ requested TRO would be denied, but until such time as a Judgment was rendered on Plaintiffs’ requested Preliminary Injunction or IV Waste and the City of Kenner entered into a contract approved by an Ordinance that was adopted in compliance with §2.13 of Kenner’s Home Rule Charter, IV Waste would perform the garbage collection and disposal services required under its March 23, 2020 contract for \$11.28 per Service Unit per month. Plaintiffs’ request for a Preliminary Injunction was again set for May 11, 2020.

### **Statutory Law and Jurisprudence**

#### **Preliminary Injunction and Plaintiffs’ Standing to Maintain this Suit**

A preliminary injunction is an interlocutory procedural device designed to preserve the status quo between the parties pending a trial on the merits.<sup>48</sup>

Our jurisprudence recognizes the right of taxpayers to enjoin unlawful action by a public body.<sup>49</sup> Under Louisiana law, taxpayers may seek to restrain public servants from transcending

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<sup>45</sup> *Memorandum in Opposition* filed by Defendant, the City of Kenner, p. 2.

<sup>46</sup> *Memorandum in Opposition* filed by Defendant, the City of Kenner, p. 3.

<sup>47</sup> *Memorandum in Opposition* filed by Defendant, the City of Kenner, pp. 3-4.

<sup>48</sup> *Zachary Mitigation Area, LLC v. Tangipahoa Parish Council*, 2016-1675 (La. App. 1 Cir. 9/21/17), 231 So. 3d 687, 690–91, citing *Acadian Ambulance Service, Inc. v. Parish of East Baton Rouge*, 97-2119 (La. App. 1 Cir. 11/6/98), 722 So.2d 317, 322, writ denied, 98-2995 (La. 12/9/98), 729 So.2d 583; *Willis-Knighton Health Sys., Inc. v. NW. Louisiana Council of Governments*, 48,141 (La. App. 2 Cir. 4/10/13), 116 So. 3d 55, 62–63, writ denied sub nom. *Willis-Knighton Health Sys. v. Nw. Louisiana Council of Governments*, 2013-1325 (La. 11/15/13), 125 So. 3d 1103.

their lawful powers or violating their legal duties in any unauthorized mode that would increase the burden of taxation or otherwise unjustly affect the taxpayers or their property.<sup>50</sup> And, it is well-settled that taxpayers are entitled to maintain a proceeding where the object of the suit is to enjoin the execution, enforcement, or award of an unauthorized or illegal act or contract.<sup>51</sup>

In *League of Women Voters v. City of New Orleans*,<sup>52</sup> the Louisiana Supreme Court held that, unlike a citizen attempting to *compel* the performance of a public duty, if a public official is charged with unlawful performance or refusal to perform a legal duty that discriminates against a taxpayer by increasing his tax burden or otherwise injuring the taxpayer's person or property, the taxpayer need not show such a particular, specialized or individual interest distinct from that of the public at large in order to sustain a right of action.<sup>53</sup> The magnitude of Plaintiffs' right is of no consequence. Notwithstanding that Plaintiff's right might be slight or difficult of measurement, it does not deprive a plaintiff of his right of action.<sup>54</sup>

The Court notes that although arguments were made by Plaintiffs to justify their standing to pursue this action, neither Defendant nor Intervenor filed an Exception of No Right of Action or other objection to Plaintiffs' standing. The Court therefore finds that Plaintiffs have standing to request preliminary injunctive relief herein.

And generally, a party seeking a preliminary injunction must show he will suffer irreparable injury, loss, or damage if the injunction does not issue and must show entitlement to the relief sought; this must be done by a *prima facie* showing that the party will prevail on the merits of the case.<sup>55</sup> However, a showing of irreparable injury is not necessary when the act sought to be enjoined is unlawful, or a deprivation of a constitutional right is involved.<sup>56</sup> Taxpayers have the right "to seek judicial review, including the annulment of a contract, of acts

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<sup>49</sup> *Louisiana Associated General Contractors, Inc. v. Calcasieu Parish School Board*, 91-0106 (La. 6/21/91), 586 So. 2d 1354, 1357-58.

<sup>50</sup> *Id.*

<sup>51</sup> *Hudson v. City of Bossier*, 36,213 (La. App. 2 Cir. 8/14/02), 823 So. 2d 1085, 1087, *writ denied*, 2002-2383 (La. 11/27/02), 831 So. 2d 279, *citing Donaldson v. Police Jury of Tangipahoa Parish*, 161 La. 471, 109 So. 34 (1926).

<sup>52</sup> *League of Women Voters of New Orleans v. City of New Orleans*, 66,024 (La. 3/3/80), 381 So.2d 441, 447.

<sup>53</sup> *Id.*

<sup>54</sup> *Bussie v. Long*, 9,519 (La. App. 1 Cir. 10/26/73), 286 So. 2d 689, 696.

<sup>55</sup> *Zachary Mitigation Area, LLC v. Tangipahoa Parish Council*, 2016-1675 (La.App. 1 Cir. 9/21/17), 231 So. 3d 687, 690-1, *citing Adler v. Williams*, 2016-0103 (La. App. 1 Cir. 9/16/16), 203 So.3d 504, 512-13; LSA-C.C.P. art. 3601.

<sup>56</sup> *Zachary Mitigation Area, LLC v. Tangipahoa Parish Council*, 2016-1675 (La.App. 1 Cir. 9/21/17), 231 So. 3d 687, 690-1, *citing Dale v. Louisiana Secretary of State*, 2007-2020 (La. App. 1 Cir. 10/11/07), 971 So.2d 1136, 1141.

of public servants which are alleged to have been contrary to law, unconstitutional or illegally confected.”<sup>57</sup>

In this case, Plaintiffs aver that the IV Waste Contract and Ordinance No. 11,718 which authorized it are unlawful and contrary to the City of Kenner’s Home Rule Charter.

The City of Kenner’s Home Rule Charter and Ordinances

The City of Kenner’s Home Rule Charter, §2.09, Plaintiff’s Exhibit F, provides:

All actions having the force and effect of law...or contracts with a value of \$100,000.00 or more...shall be by ordinance.

Plaintiffs, as taxpayers and citizens of Kenner, filed suit to challenge the authority of the City of Kenner to perform the IV Waste Contract because the IV Waste Contract was not approved by Ordinance as required by §2.09 of the Kenner Home Rule Charter.<sup>58</sup> Plaintiffs averred that the IV Waste Contract’s terms regarding cart replacement did not comply with the terms of Ordinance No. 11,718.

The Court agrees. And, although a Temporary Agreement was executed by IV Waste and the City of Kenner through Mayor Zahn and filed into the Court’s record,<sup>59</sup> neither the IV Waste Contract itself nor the Temporary Agreement comply with Ordinance No. 11,718 because neither document provides for IV Waste to replace carts free-of-charge the first time a cart is stolen or vandalized.

Although defense counsel spoke of “substituting a page” in the executed IV Waste Contract to correct the “typographical error” inadvertently made by his office, and without commenting on the propriety of such a substitution, Defendant did not introduce into evidence a revised contract between the City of Kenner and IV Waste which complied with Ordinance No. 11,718. Furthermore, the Temporary Agreement by its own terms was only effective for sixty (60) days or until the City of Kenner ratified a contract with IV Waste, whichever first occurred, whereas the provision for free first-time cart replacement in Ordinance No. 11,718 was without date.

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<sup>57</sup> *Hudson v. City of Bossier, supra, citing Roussel v. Noe*, 274 So.2d 205, (La.App. 1 Cir.1973), *writ refused* 281 So.2d 743 (La.1973), and *Donaldson, supra*.

<sup>58</sup> *Memorandum in Support of Temporary Restraining Order*, p. 1.

<sup>59</sup> *See*, Temporary Agreement dated 4/30/20, signed by Mayor Zahn and Sydney D. Torres, IV (“Mr. Torres”), attached as Exhibit #A to the Affidavit of Mr. Torres who is the sole member and manager of Intervenor, IV Waste. Although the Temporary Agreement was not admitted into evidence during the Preliminary Injunction Zoom hearing, via email correspondence forwarded to the Court, all counsel indicated no objection to IV Waste’s introduction of the Temporary Agreement by filing it into the Court’s record post-hearing, and in fact, no objection was filed into the Court’s record after the Temporary Agreement was filed.



Finally, since the Temporary Agreement itself exceeded a value of \$100,000.00, the Court finds that pursuant to the Kenner Home Rule Charter §2.09, the Temporary Agreement itself of necessity had to be approved by an Ordinance in order to be valid. The Court finds it was not.

As to the validity of Ordinance No. 11,718 which approved the IV Waste Contract, Kenner's Home Rule Charter, §2.13, Plaintiff's Exhibit K, provides:

Proposed ordinances on any of the following specified subjects shall be introduced and adopted only at regular meetings of the Council and shall not be adopted until at least twenty-eight (28) days after being introduced, nor until the proposed ordinance shall have been published by caption in the Official Journal at least twice...:

(A) Levying any tax or excise, or increasing the rate of any tax or excise...

Plaintiffs further averred that not only did the IV Waste Contract fail to comply with Ordinance No. 11,718, but Ordinance No. 11,718 itself, which approved the IV Waste Contract, violated the City of Kenner's Home Rule Charter §2.13 because it did not lay over at least twenty-eight (28) days after it was introduced and before it was adopted. Again, the Court agrees. Although residents may receive a credit for the millage revenue which the City of Kenner receives, there can be no doubt that Ordinance No. 11,718 levies an excise or service charge on residents for the amount of garbage collection and disposal, and the amount of the IV Waste Contract, even at \$11.96 per Service Unit per month, represented an increase from the Ramelli service charge of \$11.28 per Service Unit per month.

Defendant asserts Ramelli was undercharging the City of Kenner by invoicing its services at \$11.28 per Service Unit per month. The Affidavit of Kenner Finance Director, Michael T. Wetzel, and its spreadsheet attachments establish that Ramelli should have charged \$11.80 per Service Unit per month as of July, 2019 if all CPI increases were appropriately calculated. Mr. Wetzel's spreadsheet attachments to his Affidavit further establish that Ramelli should have charged \$11.71 as of July, 2019 if Ramelli waived the 2016 CPI increase, as Plaintiffs claim.

Therefore, even if Ramelli was not undercharging the City of Kenner, Ramelli would have charged either \$11.80 (no waiver of the CPI increase in 2016) or \$11.71 (with the 2016 waiver of the CPI increase), according to Defendant's Affidavit of Mr. Wetzel. The IV Waste Contract, on the other hand, provided for garbage collection services at \$11.96 per Service Unit per month. Therefore, the IV Waste Contract represented an increased charge to the citizens of Kenner even if Ramelli's alleged undercharging (at \$11.28 per Service Unit) is not considered.

Furthermore, Kenner Ordinance No. 9½-5(a)<sup>60</sup> provides:

The fees charged to Residential Units and Small Business Units for collection and disposal of refuse which is placed between the sidewalk and the curb shall be equal to the *actual cost of collection* that the City of Kenner incurs for the collection and disposal of the refuse. This charge shall be a monthly charge. The Administration is authorized to devise the formula used to calculate the monthly charge to each Residential Unit and Small Business Unit. Once the Administration calculates any change to the garbage collection fee, that change shall be published in the Official Journal and presented to the Council at the last Council meeting in October. (Emphasis supplied.)

Thus, Kenner residents were to be charged the actual cost of collection which the City of Kenner incurred, namely the fees charged by the respective vendors for collection of refuse, albeit subject to a credit for millage revenue. The cost incurred by the City of Kenner under the IV Waste Contract, namely \$11.96, represented an increase from Ramelli's charge whether Ramelli's alleged under-charging is considered (\$11.28) or whether it is not considered (\$11.71 or \$11.80 per the Affidavit of Michael Wetzal and its attachments). The fact that the IV Waste charge or the Ramelli charge would then be reduced by, presumably, the same millage revenue amount is of no moment to the determination that there was an increase in the service charge to residents with the IV Waste Contract. Pursuant to Kenner's Home Rule Charter §2.13, Ordinance No. 11,718 which authorized the IV Waste Contract with its increased excise to be levied on residents, had to lay over for twenty-eight (28) days before its adoption. Since Ordinance No. 11,718 did not lay over twenty-eight (28) days, it is null and void.

The Court therefore grants the Preliminary Injunction requested by Plaintiffs, enjoining the City of Kenner from performing under the contract with IV Waste, LLC dated March 23, 2020 until the trial on the merits of the permanent injunction or until further Orders of this Court, whichever first occurs, upon Plaintiffs furnishing of security as discussed below.

#### Security

Pursuant to LSA-C.C.P. art. 3610, a preliminary injunction shall not issue unless the applicant furnishes security in the amount fixed by the Court, except where security is dispensed with by law.<sup>61</sup> The security shall indemnify the person wrongfully enjoined for the payment of costs incurred and damages sustained.<sup>62</sup> Although Plaintiffs are not required to make a showing

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<sup>60</sup> See, Plaintiff's Exhibit #J.

<sup>61</sup> Pursuant to LSA-C.C.P. art. 3610, no security is required when the applicant for a preliminary or permanent injunction seeks protection from domestic abuse, dating violence, stalking, or sexual assault.

<sup>62</sup> LSA-C.C.P. art. 3610.

of irreparable harm to obtain the Preliminary Injunction they seek, Plaintiffs are required to post security.<sup>63</sup>

The Court finds that a bond in the amount of \$75,000.00 is sufficient security for the payment of costs incurred and damages sustained by the City of Kenner should it be determined that the Preliminary Injunction was wrongfully issued.

**Findings of the Court**

For the foregoing reasons, the Court renders Judgment in favor of Plaintiffs, Sam Capitano and Melissa Peralta, and against Defendant, the City of Kenner, and against Intervenor, IV Waste, LLC. The Court grants the Preliminary Injunction requested by Plaintiffs, Sam Capitano and Melissa Peralta, and enjoins Defendant, the City of Kenner, from performing under the contract with Intervenor, IV Waste, LLC, dated March 23, 2020 until the trial on the merits of the permanent injunction or until further Orders of this Court, whichever first occurs, upon Plaintiffs posting of a bond as security in the amount of SEVENTY-FIVE THOUSAND AND 00/100 (\$75,000.00) into the Registry of this Court.

Signed this 18 day of May, 2020, in Gretna, Louisiana.

  
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JUDGE RAYMOND S. STEIB, JR.

**PLEASE MAIL NOTICE OF SIGNING TO:**

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<sup>63</sup> See, e.g., *Deshotels Plantation, LLC v. Torrent Gulf Coast, LLC*, 2019-750 at p. 8 (La. App. 3 Cir. 4/22/20), 2020 WL 1934805; *Ard v. Grllspot, LLC*, 2019-0312 (La. App. 4 Cir. 10/23/19), 2019 WL 5432098; and see generally, *Holley v. Holley*, 17-325 (La. App. 5 Cir. 11/20/17), 232 So. 3d 717, 728, fn. 13; LSA-C.C.P. art. 3610.