

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

2015 APR 15 PM 4:17

H. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

GREGORY D. COUNTRYMAN, SR.,)
individually and as Elected Marshal of)
Muscogee County, Georgia and,)
VIVIAN BISHOP, individually and as)
Elected Clerk of the Municipal Court of)
Columbus, Georgia,)

Plaintiffs,)

v.)

COLUMBUS, GEORGIA, TERESA P.)
TOMLINSON, individually and as Mayor,)
JERRY "POPS" BARNES, individually)
and as District 1 Councilor, GLENN)
DAVIS, individually and as District 2)
Councilor, BRUCE HUFF, individually)
and as District 3 Councilor, EVELYN)
TURNER PUGH, individually and as)
District 4 Councilor, MIKE BAKER,)
individually and as District 5 Councilor,)
GARY ALLEN, individually and as)
District 6 Councilor, EVELYN "MIMI")
WOODSON, individually and as)
District 7 Councilor, JUDY THOMAS,)
individually and as District 9 Councilor,)
and BERRY "SKIP" HENDERSON,)
individually and as District 10 Councilor,)
ISAAH HUGLEY, individually and as)
City Manager, PAMELA HODGE,)
individually and as Finance Director, and)
CLIFTON C. FAY, individually and as)
City Attorney,)

Defendants.)

CIVIL ACTION FILE NO. SU14CV3468-94

**DEFENDANTS' BRIEF AND CITATION TO AUTHORITY IN SUPPORT OF
THEIR RENEWED MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

COME NOW, Defendants and file this their Renewed Motion to Dismiss. Defendants adopt and incorporate herein by reference all affirmative defenses and grounds for dismissal established in Defendants' Motion to Dismiss, originally filed on December 8, 2014. Defendants renew all arguments made in their prior Motion to Dismiss, as well as their Response to Plaintiffs' Motion for Mandamus Relief, filed contemporaneously herewith and request that Plaintiffs' Second Amended Complaint be dismissed in its entirety pursuant to O.C.G.A. §9-11-12(b)(6), as it is legally insufficient and fails as a matter of law.

INTRODUCTION

The Second Amended Complaint filed by Plaintiffs does not warrant the extraordinary relief requested of this Court. Plaintiffs have adopted in full their prior claims from the First Amended Complaint. Therefore, Defendants fully incorporate, as if restated herein, each of their prior filings and arguments made in their Motion to Dismiss, which is still pending, as Defendants contend dismissal is warranted of all claims now found under Counts I-IV of the Second Amended Complaint. Plaintiffs have added a new mandamus claim in Count VI of their Second Amended Complaint, as well as a Motion for Mandamus Relief. Defendants have filed a corresponding Response to Motion for Mandamus Relief, requesting the extraordinary and unwarranted mandamus claims be denied and dismissed. Defendants hereby adopt and incorporate all arguments made in their Response to the Motion for Mandamus Relief, as if restated herein, and request dismissal on the basis of the arguments made in their Response to the Motion for Mandamus Relief.

Plaintiffs have filed a Second Amended Complaint, which included a Motion for Mandamus Relief, to request the Court force the withdrawal of the FY16 Recommended Budget and to require the Columbus Council to consider, and grant, each and every one of their budget

requests. *See* Motion for Mandamus Relief, Prayer for Relief. Contrary to these incorrect assertions, the Columbus Charter requires that the Mayor, with the assistance of the City Manager, prepare the initial FY16 Recommended Budget for presentation to the Columbus Council. (Charter §7-401(2)(outlines budget process, including Mayor's fiscal policy recommendations); Charter §4-307(3)(requires City Manager to propose and present to the Mayor the annual recommended budget); Charter §4-201(10)(requires the Mayor to submit an executive-recommended budget to Council annually); and 7-401(4)(c)(Mayor is to propose expenditures for each department, elected office, board and agency of jurisdiction). Both Marshal Countryman and Municipal Court Clerk Bishop have the opportunity to appear before the Columbus Council to present their own budget requests if a hearing is requested. Instead of continuing to participate in the ongoing FY16 budget process, Plaintiffs have filed a mandamus action to request this Court enter into the budget negotiations and demand certain appropriations for their offices, without any legal support or authority from the Charter or Georgia law.

As noted in their Response to the Motion for Mandamus Relief, which is adopted in full as if restated herein, Defendants have provided this summary as the basis of the request for dismissal:

- (1) Neither the Marshal, nor the Municipal Court Clerk, may ignore the authority of the Charter in requiring the Mayor (executive branch) to provide Columbus Council with an annual recommended budget for their offices, such that the requested withdrawal of the Mayor's Budget would be in violation of the express Charter provisions requiring this submission.**
- (2) The budget requests of the Plaintiffs have already been submitted to the Columbus Council, since the elected officials may request a hearing on those requests, so this portion of their mandamus claim is moot and unnecessary.**
- (3) Neither Plaintiff has a right to demand a specific budget.**
- (4) A mandamus is not a proper vehicle to force the Columbus Council to exercise its discretion in a particular way.**

(5) The Plaintiffs' requests to order specific payment of CCG funds for FY16 would be outside the jurisdiction of a mandamus and this Court.

Each of these defenses is supported with citations to Georgia law and the Charter in the Response to Plaintiffs' Motion for Mandamus Relief. Essentially, the Charter provides only that all CCG elected officials and outside agencies may have their budget requests submitted and heard. No evidence suggests the Defendants, in following the Charter-mandated FY16 budget process, have excluded any elected official or outside agency from this process. The contrary is shown here. Plaintiffs can show no legal right to mandamus relief, as the law states the opposite of what they pose. Plaintiffs have failed to plead a proper mandamus case, and their Second Amended Complaint continues to ask for extraordinary and overreaching forms of relief, to which they have no legal right to seek.

Marshal Countryman and Clerk Bishop are not simply asking this Court to allow them to be heard in the budget process, because their budget requests were already received and considered by the Executive Branch in the formulation of the Mayor's Recommended Budget. In addition, their initial budget requests have also been copied and sent to Council for consideration and may be deliberated further through a hearing, if requested. Instead, the Plaintiffs want this Court to disregard the discretion and authority provided to both the Mayor (executive branch) and the Council (legislative branch) in the Charter, namely: (1) the Mayor's consideration and determination of all financial data and budget requests incorporated and balanced into her presentation to Council of the FY16 Recommended Budget; and (2) the discretion of the Council to deliberate and approve or disapprove of the various items in the Mayor's FY16 Recommended Budget and hear any of the budget requests made by the elected officials and agencies not under Council's control. These budgetary roles and functions are mandated in several Charter

provisions and demonstrate the full consideration and deliberation consistent with the local budgetary powers provided by Georgia law.¹

The only provision cited by the Plaintiffs which they contend supports their vast expansion of their budgetary authority is Charter §8-105, which notes that all elected officials, constitutional officers and outside agencies not under the direct control and jurisdiction of the Council will have their budget requests “incorporated into the overall consolidated government budget for submission by the Mayor to the Council.” The interpretation of the Plaintiffs in this citation, without further analysis, ignores Section 7-401(4)(c), which mandates that the Mayor’s Recommended Budget shall contain propose expenditures for the Marshal’s Office, to-wit:

Proposed expenditures detailed by each department, board, commission, *office*, agency, and activity in accordance with an established classification of accounts,...;

See Charter, Section 7-401(4)(c)(emphasis added). Further, the Mayor’s “initial budgetary policy-making function” in proposing such budget expenditures is required by the Charter, to wit:

A proposed annual operating and capital budget for the ensuing fiscal year shall be prepared by the city manager to be submitted by the mayor to the Council on or before a date fixed by ordinance, but not less than 60 days prior to the beginning of the fiscal year. Such budgets shall be accompanied by a budget message from the mayor containing explanations of general fiscal policies, explanations of major changes recommended for the next fiscal year, a general summary of the budgets, and other information deemed appropriate.

See Charter §7-401(2),(emphasis supplied), the provisions of which are also recognized in Georgia law in OCGA §36-81-4(c).

¹ Georgia law provides the executive branch of a local government may provide initial budget-making policy functions as allowed by local law, O.C.G.A. §36-81-4. Under the provisions of the Charter in Charter §4-201(10), §4-307(3), §7-401, §7-402, and §8-105 the executive branch’s role in the mandated and discretionary proposal of the FY16 recommended budget uses its discretion to provide fiscal policy recommendations and the proposed budget to Council. Council then must review, deliberate, and hear from elected officials on their submissions before approving a final FY16 budget. Charter §7-401 and §7-402.

Nothing in this language, or anywhere else in the Charter, suggests that the Executive Branch has lost all of its discretion to formulate a balanced budget for the Mayor to provide to Council. In fact, the Charter requires that the Mayor do precisely as she has done. Plaintiffs' interpretation of Section 8-105 contradicts the Charter provisions quoted above and conflicts with Georgia law, as it wrongfully eliminates the discretion of the Executive Branch and the Council outlined in the various budget provisions of the Charter. *See* Charter §7-401, §7-402, and §8-105. All parts of a statute should be harmonized and given sensible and intelligent effect, because it is not presumed that the legislature intended to enact meaningless language. English v. State, 282 Ga. App. 552, 555 (2006). The practical difficulties of this interpretation are obvious, as the City Manager would only be able to provide the Mayor a proposed budget on the remaining funds, if any were left after the other elected officials and boards submitted their budget requests. Any mandamus issued to expand the authority of these officials in this manner, without legal or other justification, would be in error. As such, Plaintiff's Motion, as well as their Second Amended Complaint, is due to be denied, and their claims dismissed.

ARGUMENT AND CITATION OF SUPPORTING AUTHORITY

1. Defendants note the legal insufficiencies of Plaintiffs' claims continue. Sovereign immunity bars Plaintiffs' claims against Defendant CCG and all other Defendants in their official capacities. *See* Defendants' December 8, 2014 Motion to Dismiss pg. 6. All of Plaintiffs' claims against Defendants in their individual capacities are barred by official or legislative immunity. *See* Defendants' December 8, 2014 Motion to Dismiss beginning at page 8. Plaintiffs' requests for injunctive relief fail on additional, separate grounds based upon the legal insufficiency of Plaintiffs' allegations and pleadings. *See* Defendants' December 8, 2014 Motion to Dismiss beginning at page 11. Likewise, Plaintiffs have failed to demonstrate a need for declaratory relief under the law. *See* Defendants' December 8, 2014 Motion to Dismiss beginning at page 19. Plaintiffs' request for mandamus relief should also be denied, as discussed herein. Finally, Plaintiffs are not entitled to attorney's fees and such requests are, moreover, premature. *See* Defendants' December 8, 2014 Motion to Dismiss at pages 10-11 and 14-16. **As a jurisdictional matter, this mandamus action should be barred by sovereign immunity.**

The Georgia Supreme Court recently overruled prior authority regarding sovereign immunity and held that "sovereign immunity bars injunctive relief against the State at common law." Georgia Dep't of Natural Resources v. Center for a Sustainable Coast, Inc., 294 Ga. 593, 597-602 (2014) (because sovereign immunity is now a product of constitutional law as opposed to common law, only the General Assembly, and no court at common law, can grant a waiver); See also Id. at 602 ("[n]ot only does sovereign immunity bar the [plaintiff's] claim for injunctive relief against the State at common law, but it also bars the [plaintiff's] injunctive relief pursuant to [statutory law]"). In so doing, the Georgia Supreme Court stated that relief would have to be "against such officers in their individual capacities" and even that could be limited by qualified official immunity. Sustainable Coast, *supra.* at 603. Therefore, the application of the constitutional doctrine of sovereign immunity should warrant dismissal of the Plaintiffs' Complaint, insofar as it seeks equitable relief against Defendant CCG and all other Defendants named in their official capacities as an "extension" of the State. The Supreme Court of Georgia has not distinguished between the types of relief and the implications of the sovereign immunity decision rendered in the Sustainable Coast opinion, such that it may be entirely plausible that a mandamus action is likewise barred. Thus, sovereign immunity poses a bar to mandamus against Defendant CCG and Defendants in their official capacities. Official immunity will bar mandamus against Defendants in their individual capacities.

2. Mandamus cannot compel an act already completed – Plaintiffs' mandamus requests are subject to dismissal as moot because they all ask this Court to utilize mandamus to compel an act that has already occurred.

Plaintiffs request a writ of mandamus to require the budget requests they have submitted for their offices be transmitted to the Council . . ." (Second Amended Complaint, ¶134). Plaintiffs should have known this action has already occurred. *See* Exhibit C to Defendants' Response to

Motion for Mandamus Relief. Regardless, Plaintiffs' Second Amended Complaint fails to show any entitlement to this particular form of mandamus relief... Where a mandamus petition seeks to compel the performance of a duty that has already been performed, the mandamus petition must fail, as the relief sought is moot. Once performance of a public duty has occurred, the "prayer that mandamus be issued compelling [a public officer] to perform that public duty is moot." R.A.F. v Robinson, 286 Ga. 644, 646 (2010)(upholding dismissal of petition seeking to compel filing of certain reports as moot where the reports had been filed, even though petitioners alleged the reports were filed inappropriately and in contravention of certain regulations, *citing* Merry v. Williams, 281 Ga. 571, 571(2) (2007)(upholding dismissal of petition for mandamus; petition sought to require holding of a new election, but was moot because the mayor had already been elected).

3. Mandamus cannot compel a discretionary act, a particular result, or a course of action.

Plaintiffs' Second Amended Complaint would require mandamus relief compelling a specific act or specific course of action in a situation where public officials are expressly vested with discretion about whether and how to act. Mandamus cannot compel a discretionary act, a particular result, or a course of action, so these requests are subject to dismissal as a matter of law. It is only when no element of discretion is involved that mandamus may compel an act. Georgia law is settled, consistent, and clear: a writ of mandamus cannot be sought to compel an action that involves the exercise of discretion on the part of the relevant public officer. Mandamus is only available where "no element of discretion is involved in performance [of official duties]." Hartsfield v. Salem, 213 Ga. 760, 760 (1958)(mandamus could not lie to compel revocation of license where city officials had discretion related to whether revocation was in best interest of the city).

Georgia law speaks clearly to the “original and exclusive” jurisdiction of the legislative body of a county government. *See* O.C.G.A. § 36-5-22.1(a) (The Council has “original and exclusive jurisdiction over the directing and controlling of all property of the county” and ... “[t]he examining and auditing of the accounts of all officers...and the settlement of the same.” O.C.G.A. § 36-5-22.1(a)). No court can interfere with the budgetary or financial decisions of a legislative local government:

By article 1, section 1, paragraph 23, of the Constitution of 1945 (Code, Ann. Supp., § 2-123), providing for a division of governmental powers, the judiciary cannot modify, amend, or repeal legislative action, nor concern itself with the wisdom of it; that is a field in which only the Legislative Department may work. Barnes v. Carter, 120 Ga. 895, 897 (48 S. E. 387).

See Sirota v. Kay Holmes, 208 Ga. 113, 115 (1951); *See also Lovett v. Bussell*, 242 Ga. 405, 405 (1978)(“In the administration of county affairs county commissioners are vested by law with a broad discretion, and the reviewing power of a judge of the superior court should be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law”). Plaintiffs’ Second Amended Complaint recognizes that it is the province of the Council to create its budget, in admitting also that the Council has already engaged in a deliberative budgeting process. (Second Amended Complaint ¶ 57)

Mandamus cannot be granted unless the law requires the performance of some specific and absolute ministerial duty. Even “authorization to act is insufficient unless the law requires performance of the duty.” *Id.* *See also Bland Farms, LLC v. Georgia Department of Agriculture*, 281 Ga. 192 (2006)(mandamus was not an available remedy to require public official to find a violation of certain regulations where public official has discretion as to violations), *and Persons v. Mashburn*, 211 Ga. 477, 480 (1955) (“Mandamus is not an available

remedy to control the official action taken in the exercise of discretion vested by law in a public officer”) and Henderson v. McVay, 269 Ga. 7, 7 (1998)(“we have held that mandamus will lie when the act is purely ministerial, but not when it is discretionary.”) The petitioner seeking mandamus bears the burden to show on the face of the petition that the official action demanded was a ministerial act required to be performed without discretion, and was not performed. Guhl, *supra*, 237 Ga. at 568 (1976). Moreover, mandamus is “not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act.” Schrenko v. DeKalb County Sch. Dist., 276 Ga. 786, 794 (2003) (citations omitted).

CONCLUSION

Plaintiffs’ Second Amended Complaint should be dismissed because, as set forth above and in Defendants’ December 8, 2014 Motion to Dismiss, it is wholly deficient to state a claim under the law under the arguments made herein, as well as in the Defendants’ Response to Motion for Mandamus Relief. Nothing in the CCG Charter or Georgia law allows Plaintiffs to avoid the discretion afforded in the presentation of the Executive Recommended Budget, nor is there any authority to provide them with the ultimate entitlements in the budget process. Instead, the Charter is replete with provisions requiring the Executive Branch to use its discretion - in weighing the various budget requests and providing Council with a balanced, recommended budget after those deliberations are made. The recommended budget has no legal force or effect and must reviewed, deliberated and adopted or changed by Council, who must use its discretion and bear the fiscal responsibility for the CCG in its appropriations. The Charter provides only that all CCG elected officials and outside agencies may have their budget requests heard, and there is nothing to suggest the FY16 budget process has excluded any elected official or outside agency from this process. Plaintiffs’ request for extraordinary relief in the form of a mandamus

is simply unavailable, as they have no legal rights to the relief requested. For all of the foregoing reasons, the Defendants request denial of the Motion for Mandamus Relief and request dismissal of Marshal Greg Countryman and Municipal Court Clerk Vivian Bishop's Second Amended Complaint in its entirety, with prejudice.

Respectfully submitted this 15th day of April, 2015.

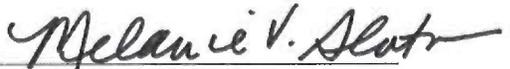
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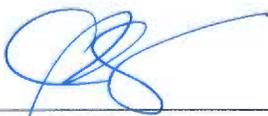
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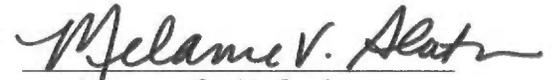
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **DEFENDANTS'**
RENEWED MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED
COMPLAINT via electronic mail, per agreement of counsel and the Court, addressed as follows:

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This 15th day of April, 2015.


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