



## AlaFile E-Notice

01-CV-2007-003613.00

To: RALPH COOK  
ralph@hwnn.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

PATRICK COOPER VS LARRY LANGFORD  
01-CV-2007-003613.00

The following ORDER2 was FILED on 10/29/2007 2:52:32 PM

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**ANNE-MARIE ADAMS**  
**CIRCUIT COURT CLERK**  
JEFFERSON COUNTY, ALABAMA  
JEFFERSON COUNTY, ALABAMA  
BIRMINGHAM, AL 35203

205-325-5355  
anne-marie.adams@alacourt.gov



IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

PATRICK COOPER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO: CV-2007-3613
	)	
LARRY LANGFORD,	)	
	)	
Defendant.	)	

**DEFENDANT LANGFORD’S BRIEF IN SUPPORT OF HIS  
MOTION TO DISMISS FOR LACK OF JURISDICTION**

This action must be dismissed because this Court lacks subject matter jurisdiction. An election contest can only be brought pursuant to an applicable statute. There simply is no statute authorizing any kind of post-election judicial challenge to an election for the office of Mayor of the City of Birmingham. This Court has no choice but to dismiss this action for lack of subject matter jurisdiction.

Defendant Langford’s position can be outlined, thusly:

- (1) Election contests are purely creatures of statute;
- (2) Election contests can be brought only pursuant to an applicable statute, and by strictly abiding by the requirements of such statute;
- (3) There is no statute authorizing any kind of post-election judicial challenge to an election for the office of Mayor of the City of Birmingham;
- (4) Birmingham is a Class 1 municipality;
- (5) The general statutes in the Code of Alabama pertaining to challenges to municipal elections [see Title 11, Chapter 46, e.g., Article 2; Plaintiff Cooper purports to rely upon Ala. Code § 11-

46-69]<sup>1</sup> do not apply to Class 1 municipalities;

(6) There is no other Code provision providing for election challenges in Class 1 municipalities;

(7) The Alabama Legislature's "Mayor-Council Act of 1955," which applies to the City of Birmingham, does not make any provision for post-election challenges;

(8) No other uncodified local or special act makes any such provision for any such election challenge;

(9) Thus, this Court has no jurisdiction to hear or conduct any form of challenge to the mayoral election of October 9, 2007.

### ARGUMENT

Judicial election contests may be brought only if an applicable statute provides for such a remedy. As noted in Defendant Langford's Motion to Dismiss, Ala. Code § 17-16-44 emphatically states that: "No jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute. . . ." (emphasis added).

"An election contest is strictly statutory, and the statute must be strictly observed and construed. *Watters v. Lyons*, 188 Ala. 525, 66 So. 436 (1914)." *Washington v. Hill*, 960 So.2d 643, 646 (Ala. 2006). The cited case, *Watters v. Lyons*, 188 Ala. 525, 66 So. 436 (1914), is instructive. Watters filed an election contest, claiming that Lyons was not eligible for the office

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<sup>1</sup> See footnotes 6 and 7 at page 6 of "Patrick Cooper's Verified Statement of Grounds for Mayoral Election Contest."

of commissioner for the city of Mobile to which he had been elected. The Alabama Supreme Court affirmed the dismissal of the action on the ground that no statute provided for an election contest.

The two grounds of disqualification cited by Watters, if true, would have violated provisions of the Act of April 8, 1911. At 66 So. 436-37, the Supreme Court explained (emphasis added):

It is true that the act of April 8, 1911 (page 330 et seq.), makes a great number of acts, as to conduct in the election, unlawful, and as a part of the penalty provides that such offenses shall be grounds for removal of the commissioner from office, and shall disqualify him to hold the office, and some of these offenses, it is provided in terms, shall render him ineligible to the office sought; but there is no provision in such statute, nor in any other known to us, which makes any of these wrongful acts grounds of contest of the election of the officer guilty thereof, on the charge of ineligibility at the time of the election. There are similar statutes to the one under consideration [citations omitted] which provide that violations of the provisions of such sections, by a candidate, shall be grounds of contest if such candidate, so offending, is successful. . . . The omission of this provision from the act in question is significant. The Legislature evidently thought the insertion of this provision in the other acts was necessary to authorize a contest of the election, in the event the candidate violating was successful; and the omission of such provision from the statute in question leads us to the conclusion that it was not intended by the Legislature that elections held under the provisions of the act in question could be contested on the ground that the candidate, on the day of the election, violated the provisions of the act, as was alleged or sought to be alleged in the statement or petition of contestants in this case. . . .

The act in question nowhere provides for a contest of the elections . . . . We feel sure that there are no Code provisions which authorize a contest on any facts stated . . . which will authorize a contest of the election in question. This being true, it necessarily follows that no injury was done contestants in striking their contest. . . . If these paragraphs had been amended as proposed by contestants, or if they had originally contained all the facts offered to be added by the amendment, they would still, considered jointly or severally, have stated no valid ground of contest; and the court could have granted no relief if the facts alleged had been proven.

This principle was more recently applied in *Etheridge v. State ex rel. Olson*, 730 So.2d 1179 (Ala. 1999). In that case, the Supreme Court held that the certificate of election to a municipal office is not subject to revocation for failure of the successful candidate to comply with the Fair Campaign Practices Act (FCPA). At 1182, the Court emphatically stated: “We note again, as we have done on previous occasions, that a court does not have jurisdiction to interfere in an election result unless a statute authorizes it to do so. The Legislature has made this abundantly clear.” (emphasis added). This principle is generally the law everywhere. See 26 Am. Jur. 2d Elections § 398 (online edition, database updated July 2007) (emphasis added): “Courts do not have inherent authority to hear election cases or to pass on the validity of elections. The determination of an election contest is a judicial function only to the extent that the determination by a court is authorized by statute. In other words, election contests are creatures of statute, and the power or jurisdiction of a trial court to consider such contests exists only to the extent authorized by statute. . . . In other words, a court does not have jurisdiction to interfere in an election result unless a statute authorizes it to do so. Because any right to contest an election is acquired by statute, contestants must strictly comply with the statutory provisions necessary to confer jurisdiction.”

Plaintiff Cooper purports to rely upon Ala. Code § 11-46-69.<sup>2</sup> But, that statute does not apply and cannot be deemed to give this Court jurisdiction. Section 11-46-69 does provide for election challenges, but § 11-46-69 does NOT apply to elections conducted in Class 1 municipalities. Section 11-46-20(a) provides that (emphasis added): “General and special

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<sup>2</sup> See footnotes 6 and 7 at page 6 of “Patrick Cooper’s Verified Statement of Grounds for Mayoral Election Contest.”

elections in cities and towns of this state, in all municipalities except Class 1 municipalities and except cities and towns organized under a commission form of government, shall be held and conducted at the times and in the manner prescribed in this article [meaning Article 2 of Chapter 46 of Title 11]. . . .” Therefore, § 11-46-69 does NOT apply to Class 1 municipalities.

It is without dispute that the City of Birmingham is a Class 1 municipality. Ala. Code § 11-40-12 (“Classification of municipalities”) states (emphasis added): “(a) There are hereby established eight classes of municipalities based on the population as certified by the 1970 federal decennial census, as authorized by amendment No. 375, Constitution of Alabama, 1901, as follows: Class 1: All cities with a population of 300,000 inhabitants or more; . . . .” In the official 1970 census, Birmingham had a population of over 300,000. See [www.census.gov/population/documentation/twps0027/tab20.txt](http://www.census.gov/population/documentation/twps0027/tab20.txt)

It is valid and constitutional for the Legislature to lock in a population classification statute to a specific census year, even though there is only one municipality (Birmingham) that was and is within the Class 1 classification. See *Phalen v. Birmingham Racing Commission*, 481 So.2d 1108 (Ala. 1985). West headnote 1 accurately summarizes the *Phalen* holding, thusly: “Statutes . . . which permit horse racing and pari-mutual wagering only in class 1 municipalities defined, Code 1975, § 11-40-12, as those with population of 300,000 or more according to 1970 census, are general laws rather than unconstitutional local laws, even though only one city existed in class and even if amendments of State Constitution which validate statutes applicable to single-city class are inconsistent with other provisions in State Constitution.” At 1114-16, the *Phalen* Court explained, in historical detail (emphases added):

Section 11-40-12 defines Class I municipalities as those having

populations of 300,000 or more inhabitants, based on the population as certified by the 1970 federal decennial census. All parties in this case agree that, without further legislative action, Birmingham is the only Alabama city classified as a Class I municipality under this definition, and, thus, under the provisions of Act No. 84-131, is the only Alabama city allowed to authorize horse racing. There is no doubt that prior to the ratification of Amendments 375 and 397 to Section 110 of the 1901 Constitution of Alabama, this legislation would be void as a local act. . . .

Shortly after the adoption of the 1901 Constitution, however, this Court, by judicial interpretation, construed the language of Section 110 to permit legislation based on population distinctions. . . .

In *Peddycoart v. City of Birmingham*, 354 So.2d 808, 814 (1978), this Court reviewed the history of its decisions on the “general” versus “local” law dichotomy, and issued an opinion which, in effect, required the legislature, on pain of having its acts declared unconstitutional, to follow the literal language of Section 110. . . .

The legislature, almost immediately upon learning that it would be bound under *Peddycoart* to a literal interpretation of Section 110, proposed an amendment to Section 110, and this proposed amendment became Amendment 375 when it was ratified by the people. . . .

Thereafter, the legislature passed Act No. 79-263, codified as Code 1975, § 11-40-12, establishing eight classes of municipalities as authorized by Amendment 375. The classifications were based on the 1970 federal decennial census, which was then the most recent federal decennial census. Amendment 397 also addressed the problem of general laws with local application, and [further amended Section 110]. . . .

The express language of Amendment 397 authorizes general laws applicable to a class containing only one municipality. . . . Clearly, the amendment authorizes legislation not authorized under Section 110 as interpreted by *Peddycoart*. Moreover, Amendment 397 ratified any action of the legislature regarding the eight classes of municipalities established by Act No. 79-263. In effect, the amendment ratified all laws enacted pursuant to this Act as general acts, even though those laws may apply to only one municipality.

As amended by Amendments 375 and 397, Section 110 of the Constitution now reads, as follows:

Sec. 110. "General law," "local law" and "special law" defined.

A general law is a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class. A general law applicable to such a class of municipalities shall define the class on the basis of criteria reasonably related to the purpose of the law, provided that the legislature may also enact and change from time to time a general schedule of not more than eight classes of municipalities based on population according to any designated federal decennial census, and general laws for any purpose may thereafter be enacted for any such class. Any law heretofore enacted which complies with the provisions of this section shall be considered a general law.

No general law which at the time of its enactment applies to only one municipality of the state shall be enacted, unless notice of the intention to apply therefor shall have been given and shown as provided in Section 106 of this Constitution for special, private or local laws; provided, that such notice shall not be deemed to constitute such law a local law.

A special or private law is one which applies to an individual, association or corporation. A local law is a law which is not a general law or a special or private law.

Act No. 79-263 (House Bill No. 68)<sup>3</sup> entitled "An Act to establish eight classes of municipalities, by population, based on the 1970 Federal decennial census" approved June 28, 1979, and each and every Act of the legislature thereafter enacted referred or relating to a class of municipalities as established in said Act No. 79-263 are hereby in all things ratified, approved, validated and confirmed as of the date of their enactment, any provision or provisions of the Constitution of Alabama, as amended, to the contrary notwithstanding.

See also this explanation in Howard P. Walthall, Sr., A Doubtful Mind: Understanding Alabama's State Constitution, 35 Cumberland Law Review 7, 78-79 (2005):

This left some wiggle room for the adoption of local laws, but not as much as desired. Thus, for a number of decades, until restrained by the Alabama Supreme Court's 1978 decision in *Peddycoart v. City of Birmingham*, the legislature responded by adopting "general laws of local application"--that is, bills cast as general laws but whose applicability was limited to political subdivisions within specific population brackets. The result has been aptly called "legislation by census." In *Peddycoart*, the Alabama Supreme Court held that population

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<sup>3</sup> Codified as Ala. Code § 11-40-12.

bracket acts, though cast as general laws, were nevertheless local laws subject to the section 104 and section 105 proscriptions on enactment and the section 106 publication requirements. With respect to municipalities, the impact of *Peddycoart* has been largely nullified by an amendment allowing municipalities to be classified according to population, with legislation as to any class being deemed a general law, even though not applicable to the whole state. Thus, what is in effect a "bracket act" can be adopted as to a particular class of municipalities when its application is phrased in terms of one of the classes of municipalities.

So, it is without dispute that Birmingham is a Class 1 municipality, and that no statute in the Code of Alabama provides for any kind of election contest in a Class 1 municipality.

The statute that presently governs the form of government in the City of Birmingham is an act of the Alabama Legislature entitled, "The Mayor-Council Act of 1955." This Act applies to any city "which has a population of more than 300,000, according to the last federal census . . . ." Section 1.01. In 1950 [[www.census.gov/population/documentation/twps0027/tab18.txt](http://www.census.gov/population/documentation/twps0027/tab18.txt)], and in 1970 [see citation, *supra*], Birmingham's population exceeded 300,000. The Mayor-Council Act of 1955 still applies to Birmingham even though its population has dipped below 300,000 as of today.

Amendment 389 added what is now Section 106.01 to the Alabama Constitution (emphasis added):

Sec. 106.01. Validation of certain population based acts and method for amendment thereof.

Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.

**All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on**

**January 13, 1978, and no other, despite changes in population.**<sup>4</sup>

The population based acts referred to above shall only be amended by acts which are properly advertised and passed by the legislature in accordance with the provisions of this Constitution.

*Freeman v. Purvis*, 400 So.2d 389, 391 (Ala. 1981), recognized that “[t]he effect of this Amendment [No. 389] was to validate all ‘bracket bills’ enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional.”

Prior to the *Peddycoart* decision in 1978, the 1955 population classification act applied to Birmingham because Birmingham’s population exceeded 300,000 in 1970. Section 106.01 forever locks in the population of a county or city as it existed under the statute as the statute existed in 1978. The Mayor-Council Act of 1955 applies to any city “which has a population of more than 300,000, according to the last federal census.” The “last federal census,” as of 1978, was the 1970 census. Thus, until specifically changed by the Legislature (or, unless the voters of Birmingham pass a petition to voluntarily change the City’s form of government), the Mayor-Council Act of 1955 will forever apply to the City of Birmingham, no matter what the present population of the City might be.

A copy of the Mayor-Council Act of 1955 has been supplied to the Court. No provision of that Act permits a post-election challenge. Plaintiff Cooper’s action must be dismissed for

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<sup>4</sup> Near the end of the Mayor-Council Act of 1955 is Article IX, entitled, “Abandonment of Mayor-Council Form of Government.” The City of Birmingham can voluntarily change its form of government if such a petition is approved by a majority of the voters. But, until and unless such a petition passes, the Mayor-Council Act of 1955 will continue to apply to the City of Birmingham, no matter what the City’s population may be. That is the effect of Amendment 389 (Section 106.01 to the Alabama Constitution).

lack of jurisdiction, because Cooper can cite no statute that permits him to challenge the election of October 9, 2007.

### CONCLUSION

Defendant Langford seeks an order dismissing this action for lack of subject matter jurisdiction.

Respectfully submitted,

/s/ Bruce J. McKee

Bruce J. McKee

One of the Attorneys for Defendant

Larry Langford

#### OF COUNSEL:

John W. Haley, Esq.  
Ralph D. Cook, Esq.  
HARE, WYNN, NEWELL & NEWTON  
2025 Third Avenue North  
800 The Massey Building  
Birmingham, AL 35203  
(205) 328-5330

Brandy Murphy Lee, Esq.  
Andrew P. Campbell, Esq.  
CAMPBELL, GIDIERE, LEE  
SINCLAIR & WILLIAMS  
2100-A Southbridge Parkway, Suite 450  
Birmingham, AL 35209

Russell Jackson Drake, Esq.  
WHATLEY, DRAKE & KALLAS, LLC  
P. O. Box 10647  
Birmingham, AL 35203

Giles G. Perkins, Esq.  
Edward Miller, Esq.  
MILLER, HAMILTON, SNIDER & ODOM, LLC  
500 Financial Center  
505 20<sup>th</sup> Street North  
Birmingham, AL 35203

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon all counsel of record by electronic filing via Alacourt, or facsimile transmission on this 29<sup>th</sup> day of October, 2007

Donald E. Blankenship, Esq.  
Blankenship & Company  
1820 7<sup>th</sup> Avenue North, Suite 108  
Birmingham, AL 35203

James S. Ward, Esq.  
Ward and Wilson, LLC  
2100-A Southbridge Parkway, Suite 580  
Birmingham, AL 35209

/s/ Bruce J. McKee  
Of Counsel