

CAUSE NO. 2019CCV-61513-3

PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY, TEXAS	§	IN COUNTY COURT AT LAW
Plaintiff,	§	
	§	
	§	
v.	§	COUNTY COURT AT LAW NO. 3
	§	
CITY OF PORT ARANSAS, TEXAS	§	
Defendant.	§	NUECES COUNTY, TEXAS

**PORT OF CORPUS CHRISTI AUTHORITY’S HEARING BRIEF IN SUPPORT OF
ITS REQUEST FOR A TEMPORARY INJUNCTION**

On September 3, 2019, Plaintiff Port of Corpus Christi Authority of Nueces County, Texas (the “Port Authority”) filed its Original Petition for Declaratory Judgment and Request for Injunctive Relief against Defendant City of Port Aransas, Texas (the “City”).¹ On November 26, 2019, the Port Authority set its Request for a Temporary Injunction for Hearing on December 3, 2019 at 1:30 p.m. The Port Authority now files this Hearing Brief in Support of its Request for a Temporary Injunction.

**I.
Introduction**

This case is about the Port Authority’s property on Harbor Island and the City’s efforts in violation of Texas law to restrict the Port Authority’s re-development of Harbor Island for oil and gas operations. Specifically, the City enacted an ordinance restricting the Port Authority’s ability to develop Harbor Island that is expressly preempted by Texas law set forth in Texas Natural Resources Code § 81.0523. In addition, the City’s elected officials have made clear in their statements in the ordinance, by adopting resolutions, and in other public statements that the City

¹ In its Original Petition, the Port Authority requested that this Court issue against the City a temporary restraining order, a temporary injunction after an evidentiary hearing, and a permanent injunction after a trial enjoining the City from enforcing its Ordinances regarding the Port Authority’s actions at Harbor Island.

is committed to preventing development of Harbor Island notwithstanding Texas law preventing it from doing so. The Port Authority has filed this suit to avoid suffering irreparable harm and to obtain a ruling from this Court enjoining the City from violating Texas law.

In April 2018, the Port Authority and the City agreed to a lease in which the City obtained the right to lease Port Authority owned property for use as the City's marina (the "Marina Lease"). In that agreement, the City stated that it "acknowledges the importance of Harbor Island to the operation and development of the Port of Corpus Christi; and recognizes that any changes in the zoning of Harbor Island further restricting the uses to which property within the Harbor Island District may be put will have a significant adverse impact on the" Port Authority. As part of the Marina Lease, the City recognized that Harbor Island was zoned for industrial use and that any effort to change that zoning or making additional restrictions on the uses to which Harbor Island could be put would "immediately terminate" the Marina Lease.

In February 2019, the City passed a resolution that instructed its employees to obstruct the Port Authority's development of Harbor Island as a marine terminal for oil and gas operations (the "Resolution"). It then passed an Emergency Ordinance on August 29, 2019, for the first time claiming that an emergency existed with regard to Harbor Island that required the City to study rezoning Harbor Island and to issue "no development permits or approvals for development of Harbor Island property" (the "Ordinance").² The City made the following statements in passing the Ordinance:

- Because the City contended that its fire department could not provide fire protection services to Harbor Island, "a public emergency exists which adversely affects the life, health, property, and public peace of those properties located on Harbor Island. To ensure that these life safety concerns are protected, a temporary moratorium on further heavy industrial development on Harbor Island is warranted until adequate fire protection services and emergency response are available." The City claimed

² Together, the Resolution and the Ordinance will be referred to as the "Ordinances."

that this emergency was caused by Hurricane Harvey in August 2017, but it did not pass the emergency ordinance until two years later.

- The City also determined that it needed to pass the Emergency Ordinance “[i]n order to prevent the development of Harbor Island in a way which would adversely affect, damage or destroy the aesthetics or environment of the City, and to recognize the historical uses of Harbor Island . . .” As is discussed below, Harbor Island has been used for heavy industrial purposes for over 100 years without destroying the aesthetics of the City.

The Port Authority does not agree that development on Harbor Island poses a risk to persons or the environment or that it would affect the historic character of Harbor Island, but these statements establish that the City is fully committed to preventing development on Harbor Island. The Ordinance is unlawful—both facially and as applied—because it violates Texas Natural Resources Code § 81.0523 and is, therefore, preempted.

Even though the August 29, 2019 Ordinance has expired by its own terms, the Port Authority is still entitled to injunctive relief because the City may simply pass another ordinance in violation of Texas law, irrevocably prejudicing the Port Authority’s interest. The City’s statements in the Resolution and August 29, 2019 Ordinance make it clear that the City intends to enact a new ordinance similar to the one passed in August to impede the Port Authority’s development of Harbor Island. The City’s words and action establish that the Port Authority is facing an imminent harm warranting this Court’s injunctive relief.

The Port Authority’s claims should also be reviewed by this Court for the separate reason that they fall under the “capable of repetition, yet evading review” exception to the mootness doctrine. This is true because the Port Authority’s claims meet both requirements of that doctrine: (1) the City’s August 29, 2019 Ordinance was too short in duration to be litigated fully before it expired on its own terms; and (2) a reasonable expectation exists that the Port Authority will be subjected to additional ordinances to be passed by the City prohibiting and impeding the Port

Authority's development of Harbor Island, in violation of Texas Natural Resources Code § 81.0523.³

The Port Authority and the City have attempted to resolve their differences but have been unsuccessful. The City and the Port Authority entered into five Rule 11 Agreements dated September 6, 2019, October 10, 2019, October 24, 2019, November 4, 2019, and November 25, 2019, wherein the parties agreed that during the time the Rule 11 Agreements were in effect: (1) the City would not interfere with the Port Authority's work at Harbor Island, and in exchange, the Port Authority would not seek injunctive relief; and (2) the Port Authority would not interfere with the City's possession or operation under the Marina Lease, and in exchange, the City would not seek injunctive relief.⁴ On November 25, 2019, the City agreed to extend the Rule 11 Agreements until a hearing on the Port Authority's "TRO hearing." The Port Authority is now seeking a temporary injunction to prevent the City from further violations of Texas law.

II. Factual Background

A. Port Authority

The Port Authority is a political subdivision of the State of Texas that was established in 1922. The Port Authority's boundaries encompass all of Nueces and San Patricio Counties, Texas. By law, the Port Authority is required to develop and maintain infrastructure and its real properties

³ *Tex. A&M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290-291 (Tex. 2011) ("Capable of repetition yet evading review' is a rare exception to the mootness doctrine. It applies only when 'the challenged act is of such duration that the appellant cannot obtain review before the issue becomes moot.' There must also be a reasonable expectation that the same action will occur again if the issue is not considered. 'The capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will be subjected to the alleged illegality again.'") (internal citations omitted); *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) ("To invoke the [evading review] exception to the mootness doctrine, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again.").

⁴ On November 25, 2019, the Port Authority filed with this Court a Notice of Filing Rule 11 Agreements attaching to the Notice the five Rule 11 Agreements entered into between the Port Authority and the City. *See* Exhibit 1.

for port purposes within its boundaries. The Port Authority is required to develop port-related industries that best advance the Port Authority's interests and the economies of Nueces and San Patricio Counties. The Port Authority's efforts to provide deep channels, adequate docks, cargo-handling facilities, and other infrastructure components have attracted billions of dollars in private capital, built the tax base of all local taxing authorities—including the City of Port Aransas—and created employment opportunities for thousands of South Texans over several generations.

B. History of Harbor Island.

Harbor Island enjoys a distinguished history that has been enriched by decades of service to the City of Port Aransas, City of Aransas Pass, City of Ingleside, City of Portland, City of Corpus Christi, San Patricio County, Nueces County, and the Port Authority. For more than a century, these and other area communities have been served by Harbor Island—a service made possible only because of the federally-funded Corpus Christi Ship Channel that stretches for more than twenty miles from the Gulf of Mexico to the inner harbor of the Port of Corpus Christi. Harbor Island and the Corpus Christi Ship Channel also serve the City's marina.

Harbor Island lies to the west of the northeast tip of Mustang Island. Various historical uses of Harbor Island date back to the 1800s, and significant industrial uses began around 1912. Specifically, crude oil storage and transport of crude oil from Harbor Island began in 1912. The Corpus Christi Ship Channel opened in 1927. For the 1930s, 1940s, 1950s, and 1960s, Harbor Island was used primarily for industrial uses best described as crude oil storage and transport. During the 1970s and 1980s, Harbor Island was mostly used for the fabrication of deep-water drilling rigs. In 1995, the Port Authority purchased part of Harbor Island.

C. The City Decided to Annex Harbor Island.

The City incorporated in 1911, and the City's boundaries originally included a small piece of Harbor Island. In 1970, the City annexed additional parts of Harbor Island. Although partially annexed by the City, Harbor Island is separated from the residential and commercial areas of the City by 1,500 feet of navigable waterway that has been deep-dredged to create the Corpus Christi Ship Channel. The Corpus Christi Ship Channel is officially approved for large vessels to a depth of forty-seven feet, and some of the waters near Harbor Island presently sound to a depth of approximately ninety feet. As of 1985, the portion of Harbor Island within the City's limits was zoned for industrial uses:

1. 1985 Ordinance 85-22: Harbor Island's approved uses included storage of petroleum and petroleum products, crewboat docking facilities and petroleum related uses, and fabrication and manufacturing of oil-rig jackets and structures.
2. 1997 Ordinance 97-8: Harbor Island zoned for "I-2 Heavy Industry," any lawful, non-dwelling, non-residential use.
3. 2010, Section 25-121 Port Aransas Code of Ordinances: Harbor Island approved for industrial and other non-residential uses (listed below).

Currently, the use for Harbor Island is governed by section 25-121 of the Port Aransas Code of Ordinances, which lists the following approved uses for Harbor Island:

- Marine terminals;
- Storage facilities for oil and/or gas;
- Ship yards;
- Fabrication yards;
- Offshore oil/gas support services;
- Dredge material placement areas; and
- Other non-residential uses.

Simply put, since 1912 Harbor Island has been used for industrial uses, primarily the storage and transportation of crude oil and other petroleum products. Harbor Island was first zoned in 1985, and it was then zoned for industrial uses—thus allowing for the storage and transportation of crude oil and other petroleum products. Today, Harbor Island is still zoned to allow for the storage and transportation of crude oil and other petroleum products. In 2015, the federal ban on the export of crude oil was lifted, and today’s international economy makes clear that the highest and best use of Harbor Island is its re-development for crude oil storage and transport (via a marine terminal).

The Port Authority is in the process of completing certain work at Harbor Island to fulfill its mission to the community. The Port Authority has been engaged in on-going demolition and site preparations in support of contracted for construction projects. The Port Authority is presently in the process of preparing additional construction and other development contracts for public bidding pursuant to the applicable Texas laws governing such contracts. The Port Authority has been, is currently, and is obligated to continue making significant expenditures for the re-development of Harbor Island, and to investing its employees’ time and efforts in support of same.

D. The City Breaks its Promise.

In April 2018, the City confirmed its support for the re-development of Harbor Island as a marine terminal for the storage and transportation of oil and gas products. To obtain the benefit of operating the City’s marina, the City signed the Marina Lease, in which it recognized that Harbor Island was—and should be—zoned as an industrial property:

Harbor Island is currently zoned by Section 25-121 of the Port Aransas City Code (the “Code”). City acknowledges the importance of Harbor Island to the operation and development of the Port of Corpus Christi; and recognizes that any changes in the zoning of Harbor Island further restricting the uses to which property within the Harbor Island District may be put will have a significant adverse impact on the [Port Authority] and on [the Port Authority’s] development of the Port of Corpus Christi.

In the Marina Lease, the City acknowledged the importance of the re-development of Harbor Island.⁵ It also expressly agreed to Harbor Island's re-development as a marine terminal for the storage and transport of oil and gas products.⁶

In contradiction to the City's expression of support for the Port Authority's re-development of Harbor Island in 2018, the City has since passed the August 29, 2019 Ordinance, which have radically and comprehensively changed and modified the Harbor Island District Regulations set forth in section 25-121 of the Port Aransas City Code. The Ordinance passed by the City are incredibly restrictive, and represent a full affront to the Port Authority's planned re-development of Harbor Island.

The City's Resolution passed in February 2019 acknowledges that federal and state agencies pre-emptively govern the development of Harbor Island. Specifically, the Resolution confirms that "industrial development permits are reviewed by the public and reviewing agencies such as U.S. Fish and Wildlife, EPA, USACE, Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife, and others"⁷ Nonetheless, the City—by the Resolution—directed its staff to delay regulatory permitting processes by requesting extensions (whether needed or not), by hiring legal counsel to challenge the data supporting Harbor Island's development (without regard for the data's validity), and by causing further delays by requesting updated environmental studies (irrespective of the dates of the studies relied upon). Then on August 29, 2019, the City passed the Ordinance, a law refusing to issue permits for any

⁵ See Lease Agreement between the Port Authority and the City.

⁶ See Lease Agreement between the Port Authority and the City; see also Harbor Island District Regulations set forth in City Code, section 25-121.

⁷ See Exhibit 2.

development of Harbor Island: “no development permits or approvals shall be issued for development of Harbor Island property.”⁸

For the reasons more fully set forth below, the City’s Ordinances are unlawful. Texas law is clear that an “oil and gas operation is subject to the exclusive jurisdiction of” the State of Texas, and that the “authority of a municipality . . . to regulate an oil and gas operation is expressly preempted”⁹ Therefore, the City’s Resolution directing its employees to obstruct the re-development of an oil and gas operation is unenforceable and should be enjoined. Given the City’s manifest hostility to the Port Authority’s development of Harbor Island and its recent issuance of an Ordinance declaring that “no development permits or approvals shall be issued for the development of Harbor Island property,” this Court should issue an injunction to preclude the City from passing additional or enforcing existing Ordinances in violation of Texas law. The Port Authority has standing to challenge the Ordinance and Resolution because the City’s threatened enforcement against the Port Authority makes this case and controversy ripe for consideration.

E Texas Natural Resources Code § 81.0523.

The State of Texas has had a prosperous history with its exploration, production, transportation, and sale of oil and gas products (including crude oil transportation across Harbor Island since 1912, as discussed above). In support of this rich history, the State of Texas in 2015 enacted Texas Natural Resources Code § 81.0523. This law states:

⁸ See Exhibit 3.

⁹ There are exceptions to the law, but none apply here (as explained more fully below).

Texas Natural Resources Code § 81.0523
Exclusive Jurisdiction and Express Preemption

- (a) In this section:
 - (1) “Commercially reasonable” means a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas, as determined based on the objective standard of a reasonably prudent operator and not on an individualized assessment of an actual operator’s capacity to act.
 - (2) “Oil and gas operation” means an activity associated with the exploration, development, production, processing, and transportation of oil and gas, including drilling, hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities.
- (b) An oil and gas operation is subject to the exclusive jurisdiction of this state. Except as provided by Subsection (c), a municipality or other political subdivision may not enact or enforce an ordinance or other measure, or an amendment or revision of an ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation within the boundaries or extraterritorial jurisdiction of the municipality or political subdivision.
- (c) The authority of a municipality or other political subdivision to regulate an oil and gas operation is expressly preempted, except that a municipality may enact, amend, or enforce an ordinance or other measure that:
 - (1) regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground, including a regulation governing fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements;
 - (2) is commercially reasonable;
 - (3) does not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and

(4) is not otherwise preempted by state or federal law.

- (d) An ordinance or other measure is considered prima facie to be commercially reasonable if the ordinance or other measure has been in effect for at least five years and has allowed the oil and gas operations at issue to continue during that period.

The purpose of this statute passed by the Texas Legislature is plain on its face. The State of Texas understands the importance of its oil and gas operations. The State of Texas understands its reliance upon oil and gas operations to support the fundamentals of Texas' economy. The State of Texas understands how our oil and gas operations support high paying jobs in our communities. The State of Texas knows that oil and gas operations—as properly regulated by the state and federal agencies—can co-exist with sound, scientifically supported environmental concerns. The purpose of this Texas law is to allow state and federal regulations to govern—and to expressly preempt interference from more local concerns. It is the public policy of the State of Texas to not only allow for the development of oil and gas operations (such as Harbor Island), but to actively promote and protect the development of oil and gas operations (such as Harbor Island).

F. The Port Authority of Corpus Christi is Entitled to Court Intervention to Protect the Status Quo.

At this moment, the Port Authority is re-developing Harbor Island. The Port Authority has already spent millions of dollars towards re-developing Harbor Island as “an oil and gas operation.” The re-development of Harbor Island is a positive re-development for many reasons—but, more importantly, it is a re-development *promoted and protected* by Texas Natural Resources Code § 81.0523. The Port Authority continues to rely upon § 81.0523 in support of its Harbor Island re-development—yet the Port Authority must also now bring to this Court's attention the overzealous actions of the City. The City has known about the Port Authority's plans for several years. To allow for a clear path forward, the Port Authority now seeks a temporary injunction.

III. Request for Injunctive Relief

The Port Authority requests that this Court issue a temporary injunction against the City to enjoin it from enacting or enforcing any ordinance, resolution, code, or other measure, or an amendment or revision to an ordinance, resolution, code, or other measure, relating to the Port Authority's development of Harbor Island in violation of Texas Natural Resources Code § 81.0523.

The Port Authority is entitled to a temporary injunction because it has:

- (a) A cause of action against the City;
- (b) A probable right to the relief it is seeking; and
- (c) A probable, imminent, and irreparable injury in the interim.¹⁰

For all of the reasons sets forth herein, the Port Authority would show it is entitled to the injunctive relief it is requesting at the hearing on December 3, 2019.

The Port Authority has a cause of action against the City regarding the validity of the Ordinances and any additional Ordinances the City will pass prohibiting development on Harbor Island. The Texas Declaratory Judgment Act expressly allows any person “whose rights, status, or other legal relations are affected by” a “municipal ordinance” to bring a declaratory-judgment action to determine “any question of construction or validity arising under” the “ordinance” and to “obtain a declaration of rights, status, or other legal relations thereunder.”¹¹

It is probable that, after a trial on the merits, the Port Authority will prevail on its declaratory-judgment action against the City. Texas Natural Resources Code § 81.0523 provides that any city ordinance or other measure “to regulate an oil and gas operation is expressly preempted.”¹² As

¹⁰ *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

¹¹ TEX. CIV. PRAC. & REM. CODE § 37.004(a).

¹² TEX. NAT. RES. CODE § 81.0523(c).

explained below, the Ordinances and any additional Ordinances the City will pass prohibiting development on Harbor Island seek to regulate oil and gas operations, and none of the statute's exceptions to preemption are met. Therefore, the Port Authority has established that it is probable that it will prevail on its claim that the Ordinances and any additional Ordinances the City will pass prohibiting development on Harbor Island are preempted by Texas Natural Resources Code § 81.0523.

Finally, the Port Authority is entitled to injunctive relief because it will suffer immediate and irreparable injury if the City's Ordinances and any additional Ordinances are enforced, enacted, or amended – thereby impeding the Port Authority's development of Harbor Island in violation of Texas Natural Resources Code § 81.0523. Even though the City's August 21, 2019 Ordinance has expired by its own terms, this case and the Port Authority's claims are ripe for consideration because: (1) the City's Resolution is still in full force and effect; and (2) any additional Ordinances prohibiting development on Harbor Island can be passed with little or no notice.¹³ The City has made it clear through word and deed that it intends to pass another ordinance in violation of §81.0523 at its convenience in the near future.

Moreover, the Port Authority's claims are subject to the “capable of repetition, yet evading review” exception to the mootness doctrine because: (1) the City's August 21, 2019 Ordinance was too short in duration to be litigated fully before it expired on its own terms; and (2) a reasonable expectation exists that the Port Authority will be subjected to additional Ordinances to be passed by

¹³ See TEX. GOV'T CODE §551.043(a) requiring the notice of a meeting of a governmental body to be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting.

the City prohibiting and impeding the Port Authority's development of Harbor Island in violation of Texas Natural Resources Code § 81.0523.¹⁴

The damages, harm, and injury that the Port Authority has suffered and will continue to suffer as a result of the City's Ordinances and any additional Ordinances prohibiting development on Harbor Island that the City will pass cannot be accurately measured by any certain pecuniary standard, although certain damages could be quantified as a result of a delay in developing Harbor Island.¹⁵ As a result, the Port Authority has no adequate remedy at law.¹⁶ The City has recognized the harm that the Port Authority will suffer by the City's agreements set forth in the Marina Lease (executed just last year); to wit: the City stated that it "acknowledges the importance of Harbor Island to the operation and development of the Port of Corpus Christi; and recognizes that any changes in the zoning of Harbor Island further restricting the uses to which property within the Harbor Island District may be put will have a significant adverse impact on the" Port Authority. The City should be estopped from contending that the Port Authority will not suffer a significant adverse impact from the City's efforts to restrict development on Harbor Island.

The Port Authority asks this Court to promptly consider this request for entry of a temporary injunction, issue a temporary injunction against the City as requested herein, set this matter for the court's

¹⁴ In *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001), the Texas Supreme Court held that to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine, a plaintiff must prove that: "(1) the challenged action was too short in duration to be *fully litigated* before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again." (italics added). In holding that it had jurisdiction of the case before it under the "capable of repetition yet evading review" exception to the mootness doctrine, the court in *Labrado v. County of El Paso*, 132 S.W.3d 581 (Tex. App.—El Paso 2004, no pet.), stated: (1) at a temporary injunction hearing, the merits of an underlying controversy are not presented; (2) such a hearing is not a substitute for, nor does it serve the same purpose as a hearing on the merits; and (3) concomitantly, the merits of the underlying controversy are also not presented in the appeal of an order granting or denying a temporary injunction. Citing to the Texas Supreme Court's opinion in *Williams v. Lara*, the *Labrado* court "conclude[d] that whether the appellants obtained a hearing on their request for a temporary injunction is irrelevant to determining whether this case could have been 'fully litigated' before the contracts expired." *Labrado*, 132 S.W.3d at 591.

¹⁵ *Butnaru*, 84 S.W.3d at 204.

¹⁶ *Id.*

consideration of a permanent injunction, and for such other and further relief in favor of the Port Authority as is just and right. The Port Authority is willing to post an appropriate bond as ordered by the Court in connection with the requests for injunctive relief.

IV.
Texas Natural Resources Code § 81.0523 Preempts
Local Ordinances to Regulate Oil and Gas Operations

Texas Natural Resources Code § 81.0523 is the law in the State of Texas. The Texas Legislature passed it to prevent cities from interfering with oil and gas operations. The City’s local ordinances are the law in the City. Absent the filing of this declaratory judgment action, the Port Authority (as a political subdivision of the State of Texas, relying on the laws of the State of Texas) and the City are on a collision course. The court system is the appropriate place for an orderly resolution of the parties’ differences.

By the express language of Texas Natural Resources Code § 81.0523, “the authority of a municipality . . . to regulate an oil and gas operation is expressly preempted,” except in very limited circumstances. When an issue of preemption is raised (as here), the Texas courts have made clear that preemption questions are “pure questions of law.”¹⁷ Given the present circumstances, this Court must decide whether Texas Natural Resources Code § 81.0523 precludes the City from taking any action to slow and stop the development of Harbor Island.

As with all preemption challenges, the Port Authority’s action seeking declaratory relief turns on matters of statutory interpretation—and such matters must be decided by the Court.¹⁸ The

¹⁷ *Austin Police Assoc. v. City of Austin*, 71 S.W.3d 885, 888 (Tex. App.—Austin 2002, no pet.) (preemption questions are “pure questions of law”); *Secured Envtl. Management, Inc. v. Tex. Natural Res. Conservation. Comm’n*, 97 S.W.3d 246, 251 (Tex. App.—Austin 2002, pet. denied).

¹⁸ See *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 91 (Tex. App.—Fort Worth 2000, pet. denied) (preemption questions are “proper matters for summary judgment”); see also *In re Scott*, No. 13-17-00148-CV, 2017 WL 1173829, at *5 (Tex. App.—Corpus Christi Mar. 29, 2017) (orig. proceeding) (“[S]tatutory construction is a question of law for the court to decide”); *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 6 (Tex. 2016) (addressing preemption declaratory-judgment claim, which was decided by trial court on summary judgment); *City of*

Port Authority has properly brought this preemption challenge as a declaratory-judgment action regarding the validity of the City’s Ordinances.¹⁹ This Court should hold that the City’s Ordinances are unenforceable as a matter of law—and issue appropriate declaratory and injunctive relief.²⁰ This court’s review of the State of Texas’ Texas Natural Resources Code § 81.0523 and the City’s Ordinances will demonstrate that the Ordinances are inconsistent with the state statute. This Court, therefore, should declare that the Ordinances are unenforceable and enjoin the City from enforcing them.²¹

A. Local Ordinances are Unenforceable if Inconsistent with State Law.

“The Texas Constitution mandates that no city ordinance ‘shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.’”²² The Texas Legislature has the power to place “limitations” on a home-rule city’s authority, and a “home-rule city’s ordinance is unenforceable to the extent that it is inconsistent with [a] state statute preempting [a] particular subject matter.”²³ Statutes enacted by the Legislature preempt a city’s ordinances if the Legislature expressed its preemptive intent through

San Antonio v. Greater San Antonio Builders Assoc., 419 S.W.3d 597, 600 (Tex. App.— San Antonio 2013, pet. denied).

¹⁹ See *City of Corpus Christi v. City of Ingleside*, No. 13-13-00088-CV, 2016 WL 8919856, at *3 (Tex. App.—Corpus Christi Dec. 21, 2016, no pet.) (“parties may have any question regarding construction of a city ordinance determined by a declaratory-judgment action”); see also *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633-634 (Tex. 2010) (“the Declaratory Judgments Act expressly provided that persons may challenge ordinances ... and that governmental entities must be joined or notified”) (additional citations omitted); TEX. CIV. PRAC. & REM. CODE § 37.004(a).

²⁰ See *BCCA Appeal Group*, 496 S.W.3d at 24.

²¹ *Id.*

²² *Id.* at 7 (quoting TEX. CONST., art. XI, § 5(a)).

²³ *Id.*; see also *Dallas Merchant’s & Concessionaire’s Assoc. v. City of Dallas*, 852 S.W.2d 489, 490-491 (Tex. 1993); *Deacon v. City of Euless*, 405 S.W.2d 59, 62 (Tex. 1966).

clear and unmistakable language.²⁴ When deciding whether an ordinance is preempted, a court cannot “rewrite” a local ordinance to avoid preemption.²⁵ Also, any construction of a city’s ordinance “that relies upon a city to opt out of the enforcement authority granted it under the ordinance . . . is hardly reasonable.”²⁶ The remedy pursuant to the Texas Constitution and Texas law is: if the state law preempts any part of the ordinance, then the court must declare the ordinance unenforceable as a matter of law.²⁷

B. Texas Natural Resources Code § 81.0523 Preempts Local Ordinances Aimed to Regulate Oil and Gas Operations.

In passing Texas Natural Resources Code § 81.0523, the Texas Legislature “unmistakably” expressed its intent to preempt local ordinances that attempt to regulate “oil and gas operations.”²⁸ Section 81.0523 expressly provides that an “oil and gas operation is subject to the exclusive jurisdiction of this state.”²⁹ Section 81.0523 states that the “authority of a municipality . . . to regulate an oil and gas operation is expressly preempted”³⁰ The Texas Legislature’s intent is clearly expressed the first time that § 81.0523 states that an “oil and gas operation” is “subject to the exclusive jurisdiction of this state,” yet the Texas Legislature left no room for any mistake

²⁴ See *BCCA Appeal Group*, 496 S.W.3d at 24; see also *City of Houston v. Bates*, 406 S.W.3d 539, 546 (Tex. 2013) (“The Legislature may limit a home-rule city’s broad powers when it expresses its intent to do so with ‘unmistakable clarity.’”) (additional citations omitted).

²⁵ See *BCCA Appeal Group*, 496 S.W.3d at 17-18.

²⁶ See *id.* (courts cannot “alter[] an ordinance’s applicability or reconstruct[] a city’s authority under an ordinance to eliminate patent inconsistency [with state law]”); see also *Bates*, 406 S.W.3d at 547-548 (invalidating ordinance using plain meaning of statutory term, instead of adapting a meaning that would have saved the ordinance).

²⁷ See *BCCA Appeal Group*, 496 S.W.3d at 16 (invalidating ordinance that gave city authority to enforce local regulations inconsistent with state statute); see also *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 679 (Tex. 2013) (holding city ordinance invalid because it conflicted with statutory provision); *Dallas Merchant’s & Concessionaire’s Assoc.*, 852 S.W.2d at 494 (concluding that “the express language of [the statute] compels this court to give effect to the Legislature’s clear intent—the Ordinance is preempted”).

²⁸ TEX. NAT. RES. CODE § 81.0523; see also *Bates*, 406 S.W.3d at 547.

²⁹ TEX. NAT. RES. CODE § 81.0523(b).

³⁰ TEX. NAT. RES. CODE § 81.0523(c).

about its intent by stating, again and expressly, that the “authority of a municipality . . . to regulate an oil and gas operation is expressly preempted”³¹ By the Legislature’s reservation of its exclusive jurisdiction to regulate “oil and gas operation[s],” the Legislature has “unmistakably” demonstrated its “intent that ‘uniformity [concerning oil and gas operations] shall prevail throughout the state’”—rather than allowing different cities to impose varying regulations (ordinances, resolutions) of their own local choosing.³² Section 81.0523’s clear and unmistakable intent limits the City’s authority to pass or enforce any ordinance/resolution that “bans, limits, or otherwise regulates an oil and gas operation”—unless the ordinance is within the limits of the narrow exception carved out of § 81.0523 (discussed below).

C. Texas Natural Resources Code § 81.0523 Preempts the Ordinances.

As stated above, the Port Authority has already spent millions of dollars to develop a marine terminal³³ on Harbor Island. By definition, the development of a marine terminal is an “activity associated with the . . . transportation of oil and gas”—and thus an “oil and gas operation” as defined by § 81.0523. The Port Authority’s investments and work efforts to develop Harbor Island’s “oil and gas operation” involve (now, in the past, and/or in the future) demolition, excavation, use of heavy equipment, earth moving, remediation processes, fabrication/construction of storage tanks, docks, and other related equipment. Because the Port Authority’s efforts are an “activity associated with the . . . transportation of oil and gas,” they are “subject to the exclusive jurisdiction of this state” and a “municipality” like the City “may not

³¹ *Id.*

³² See *BCCA Appeal Group*, 496 S.W.3d at 14 (quoting *City of Weslaco v. Melton*, 308 S.W.2d 18, 19-20 (Tex. 1957)).

³³ The marine terminal being developed by the Port on Harbor Island has—at a minimum—the following constituent parts: crude oil storage tanks, pipelines into the facility (to storage tanks), pipelines to the liquid cargo dock (from storage tanks), a liquid cargo dock, and all of the related infrastructure and equipment.

enact or enforce an ordinance or other measure . . . that bans, limits, or otherwise regulates [the] oil and gas operation”

Texas law is absolute, and a municipality’s “ordinance or other measure, that bans, limits, or otherwise regulates an oil and gas operation” is preempted, unless the “ordinance or other measure” meets the narrow exception defined by § 81.0523. In this case, the City’s Ordinances are not narrow in scope, but rather on their face substantially intrude upon the Port Authority’s “oil and gas operation.” As such, the City’s Ordinances are unenforceable, and this Court should grant injunctive relief to allow the Port Authority’s re-development of Harbor Island.

The City is not entitled to avoid injunctive relief because it has not yet reissued its Ordinance preventing the granting of any additional permits on Harbor Island. The public statements from City officials and the remaining Ordinances, which have not expired, make clear that the City intends to interfere with the Port Authority’s development of Harbor Island in violation of Texas Natural Resources Code § 81.0523.

D. The Narrow Exception in Texas Natural Resources Code § 81.0523 Does Not Apply to the Ordinances.

Texas Natural Resources Code § 81.0523 includes a narrow exception to the general rule that a Texas municipality’s authority to regulate an oil and gas operation is preempted by state and federal authorities. Specifically, § 81.0523 allows a municipality to enact, amend, or enforce an “ordinance or other measure” that:

1. “regulates only aboveground activity related to an oil and gas operation that occurs at or above the surface of the ground;” **and**
2. “is commercially reasonable” (*i.e.*, ordinance must allow “operator [the Port Authority or other] to fully, effectively, and economically exploit, develop, . . . and transport oil and gas...;” **and**
3. “does not effectively prohibit an oil and gas operation...;” **and**
4. “is not otherwise preempted by state or federal law.”

This is an incredibly narrow exception to the general (and absolute) rule that a municipality is preempted by the state or federal regulations applicable to oil and gas operations. If a municipality’s “ordinance or other measure” does not meet any one of these four requirements, then the “ordinance or other measure” is unenforceable.

By specifically creating a narrow exception to the state’s and federal government’s exclusive authority to regulate oil and gas operations, § 81.0523 preempts all local power/authority to regulate beyond the limits of the narrow exception.³⁴ As such, the City’s Ordinances must be written in a manner that limits their scope to comply *with all four tenets* of § 81.0523—or else the “ordinance or other measure” is unenforceable as a matter of law. The Ordinances fail to meet any of the four requirements to meet the exception codified in § 81.0523.

1. The Ordinances do not Regulate “Only Aboveground Activity.”

The Ordinances do not regulate only aboveground activity as required by Texas Natural Resources Code § 81.0523(c)(1). The re-development of Harbor Island to allow for the storage and transfer of oil and gas products by use of a marine terminal requires below-ground piping systems, below-ground foundational work, below-ground structures in support of the docks, upland and submerged land excavations (including dredging), and extensive additional infrastructure development for the entire oil and gas operation (much of it below-ground). Therefore, the Ordinance—which states that “no development permits or approvals shall be issued for the development of Harbor Island property”—unquestionably “bans, limits, or otherwise regulates [the Port Authority’s] oil and gas operation.”

³⁴ See *Dallas Merchant’s & Concessionaire’s Assoc.*, 852 S.W.2d at 493, n.7 (“[B]y expressly stating under what circumstances a governmental entity may regulate the location of an alcohol related business, it follows that there are no other instances when a governmental unit may regulate the location of an alcohol related business”) (holding that the statute allowed ordinances “to prohibit the sale of alcoholic beverages only under limited circumstances”); see also *Foster v. City of Waco*, 255 S.W. 1104, 1105 (Tex. 1923) (“[W]here a power is granted, and the method of its exercise prescribed, the prescribed method excludes all others, and must be followed.”).

Moreover, the City’s Resolution requiring City staff to request time-extensions for public comment on state and federal regulatory processes, to hire counsel to challenge data relied upon by the state and federal regulatory agencies, and to request updated studies “for any ship channel dredging projects” is an effort that further “bans, limits, or otherwise regulates [the Port Authority’s] oil and gas operation.” By its express language, the City’s Resolution expressly acknowledges that it is aimed at “industrial development permits” subject to the jurisdiction of “U.S. Fish and Wildlife, EPA, USACE, Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife, and others.” Texas Natural Resources Code § 81.0523 overrides every City ordinance and resolution that “bans, limits, or otherwise regulates an oil and gas operation.” The City’s Ordinances are designed to delay, ban, limit, halt, or otherwise regulate the Port Authority’s on-going Harbor Island belowground “activities associated with the . . . transportation of oil and gas” are preempted, and—therefore—are not enforceable. These City Ordinances are too broadly crafted and are inconsistent with those state and federal procedures that already regulate the Port Authority’s activities on Harbor Island. For this reason alone (as well as for the additional reasons), the City’s Ordinances are preempted and unenforceable.

2. The City’s Ordinances are not “Commercially Reasonable.”

The Port Authority would also show that the City’s Ordinances are not “commercially reasonable,” as the term is defined in Texas Natural Resources Code § 81.0523(a)(1). To be “commercially reasonable,” the Ordinances must allow the Port Authority to “fully, effectively, and economically . . . develop [Harbor Island as] an oil and gas operation.”³⁵ The City’s delay tactics and data challenges (by its Resolution) obstruct the Port Authority’s “full, effective, and economic” efforts to comply with the state and federal regulatory processes. The City’s August

³⁵ TEX. NAT. RES. CODE § 81.0523(a)(1).

2019 Ordinance stating that “no development permits or approvals shall be issued for the development of Harbor Island property” is an attempted stop-work order from the City. Again, the City has made it clear through its previous conduct and public statements that it intends to enact additional Ordinances to interfere with development of Harbor Island in violation of Texas Natural Resources Code § 81.0523. The City’s Ordinances are designed to delay and completely halt Port Authority “activities associated with the . . . transportation of oil and gas”—thus, delaying and stopping the Port Authority’s “oil and gas operation” on Harbor Island.

Texas law expressly preempts a municipality’s “ordinance or other measure” that is not “commercially reasonable,” and it cannot be seriously argued that refusing to issue permits or approvals—without even considering the content of the requests—is reasonable.³⁶ Stated differently, it is never “commercially reasonable” to refuse approval of a permit that has not yet even been reviewed by the City. The City Ordinances, therefore, are too broadly crafted, are inconsistent with those state and federal procedures that already regulate the Port Authority’s activities for development of Harbor Island, and are thus preempted. For this reason alone (and the other reasons set forth herein), the City’s Ordinances are unenforceable as would be any additional Ordinances that run afoul of Texas Natural Resources Code § 81.0523. The Port Authority is challenging the Ordinances both facially and as applied.

3. The City’s Ordinances do “Effectively Prohibit” an “Oil and Gas Operation.”

The City’s Ordinances also fail to meet the narrow exception carved out in Texas Natural Resources Code § 81.0523(c)(3), because the City’s Ordinances effectively prohibit the Port Authority’s “activities associated with the . . . transportation of oil and gas.” The purpose of the

³⁶ TEX. NAT. RES. CODE § 81.0523(c)(2).

City's Ordinances is to delay or stop the State of Texas or United States from issuing required regulatory permits. As such, the City's Ordinances are a direct attack designed to "effectively prohibit" the Port Authority's "oil and gas operation." The purpose of the City's Ordinances is to stop all Port Authority "activities associated with the . . . transportation of oil and gas." Specifically, the Ordinance states that "no development permits or approvals shall be issued for development of Harbor Island." It would be hard to imagine how the City could be more direct about its intent to ban or otherwise regulate the Port Authority's activities on Harbor Island now and in the future. Section 81.0523(c)(3) is quite clear in its language that a municipality's "ordinance or other measure" is preempted if it "effectively prohibit[s] an oil and gas operation"—and the City's Ordinances do. For this reason alone (and the other reasons set forth herein), the City's Ordinances are preempted and unenforceable.

4. The City's Ordinances are "Otherwise Preempted by State or Federal Law."

Finally, the fourth and final tenet requires that a municipality's "ordinance or other measure" be held unenforceable if it is "preempted by state or federal law." The City's Resolution is a directive to City staff to inject the City into the state and federal regulatory procedures. The Resolution directs the City staff to "request public comment extensions on any and all regulatory permits for industrial development"—irrespective of whether there is a legitimate need for an extension of time. The Resolution directs the City staff to authorize hiring of legal counsel to "challenge" the "age, accuracy, and soundness" of the "scientific and socio-economic data" relied upon by state and federal agencies to issue "regulatory permits"—irrespective of whether there is a legitimate basis for attacking the data. The Resolution directs City staff to request an "updated [] Environmental Impact Study for any ship channel dredging projects"—a delay tactic to be employed without regard to whether there is any indication that the current study is outdated. The

Resolution acknowledges that “U.S. Fish and Wildlife, EPA, USACE, Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife, and others” are the proper reviewing state and federal agencies to consider “industrial development permits,” yet the City’s Resolution (without consideration of the merits) directs its staff to delay and obstruct the state and federal processes.

The Ordinance states that “no development permits or approvals shall be issued for development of Harbor Island.” Whether the Corpus Christi Ship Channel (which is a federal ship channel) gets dredged to a deeper depth is the prerogative of the United States (specifically, the United States Army Corps of Engineers) not the City. Whether the State of Texas (specifically, the TCEQ) issues an air quality permit is the prerogative of the State of Texas, not the City. It is not the prerogative of the City to pass ordinances to delay or stop the Port Authority’s “oil and gas operation” activities on Harbor Island; instead, the laws of the State of Texas and federal laws govern.³⁷ Therefore, the City’s Ordinances are too broadly crafted, inconsistent with those state and federal processes that already regulate the Port Authority’s activities on Harbor Island, so they are preempted. The Ordinances are also part of the City’s efforts to use its zoning powers to require permitting for certain construction activities to prevent the Port Authority’s activities, despite the fact that these powers are preempted.³⁸ For this reason alone (and the other reasons set forth herein), the City’s Ordinances are preempted and unenforceable.

³⁷ TEX. NAT. RES. CODE § 81.0523(c)(4).

³⁸ *Austin Indep. Sch. Dist. v. Sunset Valley*, 502 S.W.2d 670, 673 (Tex. 1973); *Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771, 772-73 (Tex. App.—Dallas 1982, writ ref’d n.r.e.).

5. The City's Ordinances Do Not Stay within the Exception, and are thus Unenforceable.

If a municipality wants to pass an ordinance, resolution, or other measure to regulate an oil and gas operation that is being pursued by a private company in the State of Texas, then the municipality's ordinance, resolution, or other measure must: (1) regulate only aboveground activity; and (2) be commercially reasonable; and (3) not effectively prohibit the oil and gas operation; and (4) limit its ordinance, resolution, or other measure to not otherwise be preempted by state or federal law. The municipality's ordinance, resolution, or other measure must comply with all four requirements of Texas Natural Resources Code § 81.0523(c). Otherwise, the municipality's ordinance, resolution, or other measure is preempted and unenforceable.

The City's Ordinances are too broad. They are not carefully crafted so as to limit their application to only *aboveground* activities as required by Texas Natural Resources Code § 81.0523(c)(1). It is not *commercially reasonable* for the City to delay for the sake of delay (without regard for merit), and it is not commercially reasonable to proclaim that "no development permits or approvals shall be issued for development of Harbor Island."³⁹ The City's Ordinances *effectively prohibit* the development of Harbor Island for its approved industrial uses, which violates the limitation set forth in Section 81.0523(c)(3). The City's Ordinances also interfere directly with the jurisdiction of USACE, TCEQ, and other state and federal agencies.⁴⁰ The City's Ordinances completely fail to stay within those limits prescribed by the Texas Legislature and federal law, and thus they are preempted and unenforceable.

³⁹ See TEX. NAT. RES. CODE § 81.0523(c)(2).

⁴⁰ See TEX. NAT. RES. CODE § 81.0523(c)(4).

V.
**The Texas Legislature has Waived the City’s
Governmental Immunity for the City’s Claims**

As a Texas political subdivision, the City has governmental immunity in some circumstances.⁴¹ But its governmental immunity can be waived by the Texas Legislature.⁴² The Legislature has done that here, so the City does not have governmental immunity regarding the Port Authority’s claims in this lawsuit or its request for injunctive relief.

The Texas Supreme Court has held that the Legislature has waived cities’ governmental immunity to declaratory-judgment actions brought to challenge the cities’ ordinances.⁴³ The Texas Declaratory Judgment Act allows any person “whose rights, status, or other legal relations are affected by” a “municipal ordinance” to bring a declaratory-judgment action to determine “any question of construction or validity arising under” the “ordinance” and to “obtain a declaration of rights, status, or other legal relations thereunder.”⁴⁴ Texas Civil Practice and Remedies Code § 37.006(b) provides that in “any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard”⁴⁵ The Supreme Court has held that for “claims challenging the validity of ordinances or statutes,” the “Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity.”⁴⁶ The Supreme Court has held that because the Declaratory Judgment Act “contemplates that governmental entities may be—indeed, must be—joined in suits to construe

⁴¹ *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 324 (Tex. 2006).

⁴² *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

⁴³ *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

⁴⁴ TEX. CIV. PRAC. & REM. CODE § 37.004(a).

⁴⁵ TEX. CIV. PRAC. & REM. CODE § 37.006(b).

⁴⁶ *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

their legislative pronouncements,” the Legislature has waived a city’s governmental immunity as to declaratory-action lawsuits brought to challenge one of the city’s ordinances.⁴⁷

VI.
Prayer for Relief

Plaintiff Port of Corpus Christi Authority of Nueces County, Texas respectfully requests that the Court issue a temporary injunction enjoining the City, its officers, agents, servants, employees, and other persons who are in active concert or participation with any of them from enacting any ordinance, resolutions, code, re-zoning, or other measure that bans, limits, or otherwise regulates the Port Authority’s development of Harbor Island; amending or revising any ordinance, resolution, code, zoning, or other measure that bans, limits, or otherwise regulates the Port Authority’s development of Harbor Island; and enforcing any ordinance, resolution, code, zoning, or other measure that bans, limits, or otherwise regulates the Port Authority’s development of Harbor Island – unless such ordinance, resolution, code, or zoning is agreed to by the parties or otherwise ordered by this court or approved in writing by this court’s appointed master. The Port Authority requests all other relief at law or in equity to which the Port Authority may be entitled.

⁴⁷ *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

Respectfully submitted,

/s/ Doug Allison

Doug Allison
State Bar No. 01083500
403 N. Tanchua St.
Corpus Christi, Texas 78401
(361) 888-6002
(361) 888-6651 (Fax)
doug@dallisonlaw.com

/s/ Earnest W. Wotring

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Earnest W. Wotring
Texas Bar No. 22012400
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Tel: (713) 980-1700
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ewotring@bakerwotring.com
jmuir@bakerwotring.com
dgeorge@bakerwotring.com

**ATTORNEYS FOR PORT OF CORPUS
CHRISTI AUTHORITY OF
NUECES COUNTY, TEXAS**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing was served on the following counsel of record on November 27, 2019.

Robert F. Brown
Brown & Hofmeister, L.L.P.
740 East Campbell Road
Suite 800
Richardson, Texas 75081
rbrown@bhlaw.com

Fred D. Dreiling
Michael G. Morris
Ostarch, Hilmy & McCauley
Wells Fargo Tower
615 North Upper Broadway
Suite 800
P.O. Box 2888
Corpus Christi, Texas 78403
Fdreiling@ohmlegal.net
Mgmorris@ohmlegal.net

/s/ Earnest W. Wotring _____
Earnest W. Wotring

EXHIBIT 1

CAUSE NO. 2019CCV-61513-3

PORT OF CORPUS CHRISTI
AUTHORITY OF NUECES COUNTY,
TEXAS

Plaintiff,

v.

CITY OF PORT ARANSAS, TEXAS

Defendant.

§ IN COUNTY COURT AT LAW

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COUNTY COURT AT LAW NO. 3

NUECES COUNTY, TEXAS

PORT OF CORPUS CHRISTI AUTHORITY'S
NOTICE OF FILING RULE 11 AGREEMENTS

Plaintiff Port of Corpus Christi Authority of Nueces County, Texas (the "Port Authority") files this Notice of Filing of Rule 11 Agreements and attaches pursuant to Rule 11 of the Texas Rules of Civil Procedure the following documents: 1) September 6, 2019 Rule 11 Agreement; 2) October 10, 2019 Rule 11 Agreement; 3) October 24, 2019 Rule 11 Agreement; 4) November 4, 2019 Rule 11 Agreement; and 5) November 25, 2019, Rule 11 Agreement.

Respectfully submitted,

/s/ Doug Allison

Doug Allison
State Bar No. 01083500
403 N. Tanchua St.
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(361) 888-6002
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/s/ Earnest W. Wotring

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ewotring@bakerwotring.com
jmuir@bakerwotring.com
dgeorge@bakerwotring.com

**ATTORNEYS FOR PORT OF CORPUS
CHRISTI AUTHORITY OF
NUECES COUNTY, TEXAS**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on all attorneys of record in accordance with Rule 21a, Texas Rules of Civil Procedure on this 26th day of November 2019.

/s/ Earnest W. Wotring
Earnest W. Wotring



EARNEST W. WOTRING
PARTNER

DIRECT DIAL: (713) 980-1713
ewotring@bakerwotring.com

September 6, 2019

Via Electronic Mail @ rbrown@bhlaw.net

Mr. Robert F. Brown
Brown & Hofmeister LLP
740 E. Campbell Road, Suite 800
Richardson, Texas 75081

Re: *Port of Corpus Christi Authority of Nueces County, Texas v. City of Port Aransas, Texas*, Cause No. 2019CCV-61513-3, In the County Court of Law Number 3, Nueces County, Texas.

Dear Mr. Brown:

Doug and I appreciate speaking with you yesterday and today. Here are the terms of the agreement regarding this matter that we discussed on the telephone:

1. The City of Port Aransas has agreed that it will not interfere with the Port Authority's work at Harbor Island, and in exchange the Port Authority will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
2. The Port Authority will not interfere with the City's possession or operation under the Marina Lease identified in the Port Authority's letter to the City of September 4, 2019, and in exchange the City will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
3. The Parties agree that the Parties, including their elected and appointed officials and their employees, will refrain from making statements to the media, the press, or other public officials, regarding this dispute other than to state that "the Parties are in discussions in an attempt to resolve their differences and will not be commenting further while those discussions are on-going."
4. The Parties agree that this Rule 11 Agreement will be effective upon signing and through October 11, 2019.

The Parties will use their best efforts to schedule a meeting the week of October 4, 2019.

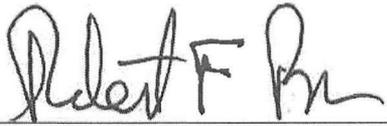
Please sign in the space indicated below to confirm your client's agreement with the terms of this letter.

Sincerely,



Earnest W. Wotring

AGREED:



Robert F. Brown
Attorney for City of Port Aransas

Date: 9-6-19



EARNEST W. WOTRING
PARTNER

DIRECT DIAL: (713) 980-1713
ewotring@bakerwotring.com

October 10, 2019

Via Electronic Mail @ rbrown@bhlaw.net

Mr. Robert F. Brown
Brown & Hofmeister LLP
740 E. Campbell Road, Suite 800
Richardson, Texas 75081

Re: *Port of Corpus Christi Authority of Nueces County, Texas v. City of Port Aransas, Texas*, Cause No. 2019CCV-61513-3, In the County Court of Law Number 3, Nueces County, Texas.

Dear Mr. Brown:

This letter will confirm that we are extending the Rule 11 Agreement that we previously entered into on September 6, 2019 as follows:

1. The City of Port Aransas has agreed that it will not interfere with the Port Authority's work at Harbor Island, and in exchange the Port Authority will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
2. The Port Authority will not interfere with the City's possession or operation under the Marina Lease identified in the Port Authority's letter to the City of September 4, 2019, and in exchange the City will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
3. The Parties agree that the Parties, including their elected and appointed officials and their employees, will refrain from making statements to the media, the press, or other public officials, regarding this dispute other than to state that "the Parties are in discussions in an attempt to resolve their differences and will not be commenting further while those discussions are on-going."
4. The Parties agree that this Rule 11 Agreement will be effective upon signing and through October 25, 2019.

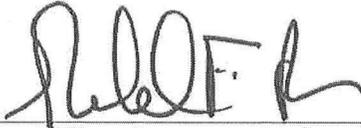
Please sign in the space indicated below to confirm your client's agreement with the terms of this letter.

Sincerely,



Earnest W. Wotring

AGREED:



Robert F. Brown
Attorney for City of Port Aransas

Date: 10-10-19



EARNEST W. WOTRING
PARTNER

DIRECT DIAL: (713) 980-1713
ewotring@bakerwotring.com

October 24, 2019

Via Electronic Mail @ rbrown@bhlaw.net
Mr. Robert F. Brown
Brown & Hofmeister LLP
740 E. Campbell Road, Suite 800
Richardson, Texas 75081

Re: *Port of Corpus Christi Authority of Nueces County, Texas v. City of Port Aransas, Texas*, Cause No. 2019CCV-61513-3, In the County Court of Law Number 3, Nueces County, Texas.

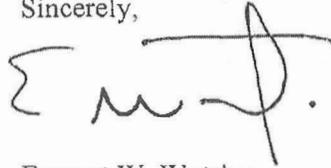
Dear Mr. Brown:

This letter will confirm that we are extending the Rule 11 Agreement that we previously entered into on October 10, 2019 as follows:

1. The City of Port Aransas has agreed that it will not interfere with the Port Authority's work at Harbor Island, and in exchange the Port Authority will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
2. The Port Authority will not interfere with the City's possession or operation under the Marina Lease identified in the Port Authority's letter to the City of September 4, 2019, and in exchange the City will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
3. The Parties agree that the Parties, including their elected and appointed officials and their employees, will refrain from making statements to the media, the press, or other public officials, regarding this dispute other than to state that "the Parties are in discussions in an attempt to resolve their differences and will not be commenting further while those discussions are on-going."
4. The Parties agree that this Rule 11 Agreement will be effective upon signing and through November 4, 2019.

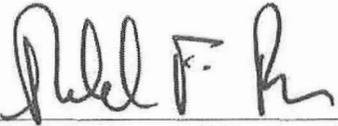
Please sign in the space indicated below to confirm your client's agreement with the terms of this letter.

Sincerely,



Earnest W. Wotring

AGREED:



Robert F. Brown
Attorney for City of Port Aransas

Date: 10-24-19



EARNEST W. WOTRING
PARTNER

DIRECT DIAL: (713) 980-1713
ewotring@bakerwotring.com

November 4, 2019

Via Electronic Mail @ rbrown@bhlaw.net

Mr. Robert F. Brown
Brown & Hofmeister LLP
740 E. Campbell Road, Suite 800
Richardson, Texas 75081

Re: *Port of Corpus Christi Authority of Nueces County, Texas v. City of Port Aransas, Texas*, Cause No. 2019CCV-61513-3, In the County Court of Law Number 3, Nueces County, Texas.

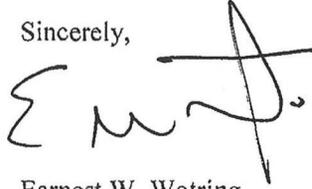
Dear Mr. Brown:

This letter will confirm that we are extending the Rule 11 Agreement that we previously entered into on October 24, 2019 as follows:

1. The City of Port Aransas has agreed that it will not interfere with the Port Authority's work at Harbor Island, and in exchange the Port Authority will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
2. The Port Authority will not interfere with the City's possession or operation under the Marina Lease identified in the Port Authority's letter to the City of September 4, 2019, and in exchange the City will not seek injunctive relief while the terms of this Rule 11 Agreement are in effect.
3. The Parties agree that the Parties, including their elected and appointed officials and their employees, will refrain from making statements to the media, the press, or other public officials, regarding this dispute other than to state that "the Parties are in discussions in an attempt to resolve their differences and will not be commenting further while those discussions are on-going."
4. The Parties agree that this Rule 11 Agreement will be effective upon signing and through November 22, 2019.

Please sign in the space indicated below to confirm your client's agreement with the terms of this letter.

Sincerely,



Ernest W. Wotring

AGREED:



Robert F. Brown
Attorney for City of Port Aransas

Date: 11-4-19

Earnest Wotring

From: Robert Brown <rbrown@bhlaw.net>
Sent: Monday, November 25, 2019 3:56 PM
To: Doug Allison; Fred D. Dreiling; Fred Dreiling; Michael G. Morris
Cc: Earnest Wotring; Jackie DiFiore
Subject: RE: Port of CC / Port Aransas (TRO) - Port of Corpus Christi v City of Port Aransas, Texas; Cause No 2019-CCV-61513-3- County Court At Law Three

Doug,

We agree to extend the Rule 11 agreement until your TRO hearing.

From: Doug Allison <doug@dallisonlaw.com>
Sent: Monday, November 25, 2019 3:52 PM
To: Fred D. Dreiling <fdreiling@ohmlegal.net>; Robert Brown <rbrown@bhlaw.net>; Fred Dreiling <dreilingfd@aol.com>; Michael G. Morris <mgmorris@ohmlegal.net>
Cc: Earnest Wotring <EWotring@BakerWotring.com>; Jackie DiFiore <jdifiore@ohmlegal.net>
Subject: Re: Port of CC / Port Aransas (TRO) - Port of Corpus Christi v City of Port Aransas, Texas; Cause No 2019-CCV-61513-3- County Court At Law Three

Fred-

Of course, we had no idea (and I'm sure there is "nothing there" too – but let's allow you to be absolutely smart about it).

Let's set the TRO hearing for Monday, December 2, 2019 (subject to the court's availability).

In the meantime, please confirm that Port A expressly agrees to extend the TRCP 11 Agreement that we've all been abiding by.

Thank you.
(and keep us posted).

Doug

From: "Fred D. Dreiling" <fdreiling@ohmlegal.net>
Date: Monday, November 25, 2019 at 3:41 PM
To: Doug Allison <doug@dallisonlaw.com>, Robert Brown <rbrown@bhlaw.net>, Fred Dreiling <dreilingfd@aol.com>, "Michael G. Morris" <mgmorris@ohmlegal.net>
Cc: Earnest Wotring <EWotring@BakerWotring.com>, Jackie DiFiore <jdifiore@ohmlegal.net>
Subject: RE: Port of CC / Port Aransas (TRO) - Port of Corpus Christi v City of Port Aransas, Texas; Cause No 2019-CCV-61513-3- County Court At Law Three

Doug

Although I appreciate the aggressive approach the POCC has seen fit to take in this matter, I don't understand why it has to run into CC 3 tomorrow pm; especially since the moratorium your client has been complaining about has expired.

Anyway, I have to be at Doctor's Regional tomorrow morning, and undergo a bone marrow biopsy procedure late tomorrow morning ordered by my hematologist/oncologist – although I'm confident there is nothing there I'm not inclined to postpone a procedure scheduled and paid for (my part anyway).

But, I'm sure the Court has time early next week to hear your TRO; I'd like to be there to oppose it; so why don't we agree to postpone the TRO until next week. I can make myself clear every day next week except Friday.

Jackie – please fax this e-mail to County Court Three – I want Judge Galvan to know why I can't be present at 1:30 tomorrow, but that I'm free Monday through Thursday next week.

Regards,

Fred D. Dreiling
Attorney at Law
Ostarch | Hilmy | McCauley
Wells Fargo Tower
615 North Upper Broadway, Suite 800
Post Office Box 2888
Corpus Christi, Texas 78403-2888
Telephone: (361) 884-1961 Ext. 802
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From: Doug Allison [<mailto:doug@dallisonlaw.com>]
Sent: Monday, November 25, 2019 3:17 PM
To: Robert Brown; Fred Dreiling; Michael G. Morris; Fred D. Dreiling
Cc: Earnest Wotring
Subject: Port of CC / Port Aransas (TRO)

Robert-
Fred-
Michael-

I am still hopeful that Port A and the Port of Corpus Christi can resolve their remaining differences. I make this statement in spite of Port A's step backwards from settlement talks (per the City's recent letter).

In the meantime, the Port of Corpus Christi requires certainty – so that operations are not interrupted.

We will move for a TRO (as discussed). The court is available tomorrow – 1:30pm; unless we can agree to entry of the Order.

Quite frankly, I do think the parties are sufficiently like-minded so that we might do it by agreement.

I say this based upon settlement talks, and based upon the fact that both parties share the common goal of a safe/environmentally sound development of Harbor Island. I'll have a draft Order for you by end of day (and perhaps we can tweak it to reach agreements).

Let me know what you guys are thinking.

Thanks

Doug

Douglas Allison
Law Office of Douglas Allison
403 N. Tanchua Street
Corpus Christi, Texas 78401
doug@dallisonlaw.com

EXHIBIT 2

RESOLUTION NO 2019-18

A RESOLUTION OF THE PORT ARANSAS CITY COUNCIL SUPPORTING THE POSITION THAT ALL REGULATORY PERMITTING FOR OIL AND GAS INDUSTRIAL DEVELOPMENTS HAVE EXTENDED DEADLINES FOR PUBLIC COMMENT PERIODS TO ACCOMMODATE THE TIME NEEDED FOR THE CITY OF PORT ARANSAS TO PROPERLY RESEARCH, EVALUATE, AND COMMENT ON SAID PERMITS, AND ASK FOR AN UP-TO-DATE ENVIRONMENTAL IMPACT STUDY FOR ANY PROJECT THAT COULD POTENTIALLY IMPACT THE CRITICAL NATURAL HABITAT, BEAUTIFUL BEACHES, TOURISM INDUSTRY, AND THE PLACE WHERE WE RAISE OUR FAMILIES.

WHEREAS, there is currently in the state of Texas a crude oil export boom creating a competitive environment on the Texas Gulf Coast to build one or more VLCC (Very Large Crude Carrier) terminals, with several proposed sites located within the city limits of Port Aransas; and

WHEREAS, the City is still in the midst of the critical rebuilding process as a result of being directly impacted by Hurricane Harvey on August 25, 2017, placing a huge work load on our citizens and municipal staff, re-enforcing the need for extended review periods; and

WHEREAS, industrial development permits are reviewed by the public and reviewing agencies such as the US Fish and Wildlife, EPA, USACE, Texas Commission on Environmental Quality (TCEQ), Texas Parks and Wildlife, and others, and such information contained within these permits should be the most updated and accurate scientific data available.

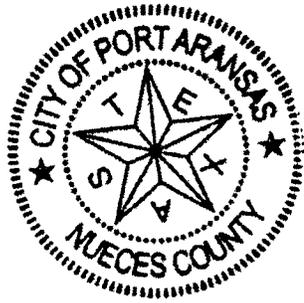
NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF PORT ARANSAS, NUECES COUNTY, TEXAS, AGREES THAT:

Section 1. City staff is hereby directed to immediately requests public comment extensions on any and all regulatory permits for industrial development in the immediate region that may impact the city's welfare.

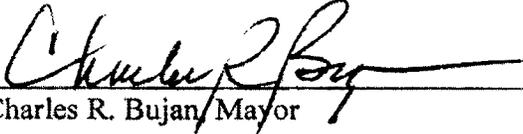
Section 2. City staff is hereby authorized to hire legal counsel to assist in challenging the scientific and socio-economic data's age, accuracy, and soundness contained in any and all regulatory permits.

Section 3. City staff is hereby directed to request updated an Environmental Impact Study for any ship channel dredging projects beyond the currently authorized 54' depth.

PASSED and **APPROVED** by the Port Aransas City Council, County of Nueces, State of Texas, on this 21st day of FEBRUARY, 2019.

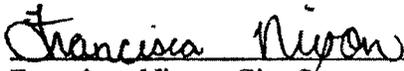


CITY OF PORT ARANSAS, TEXAS



Charles R. Bujan, Mayor

ATTEST:



Francisca Nixon, City Secretary

EXHIBIT 3

ORDINANCE NO. 2019-09

EMERGENCY

**AN EMERGENCY ORDINANCE PROVIDING FOR A MORATORIUM
PRECLUDING THE ISSUANCE OF PROPERTY DEVELOPMENT
PERMITS OR APPROVALS FOR DEVELOPMENT OF ANY HARBOR
ISLAND PROPERTIES FOR HEAVY INDUSTRIAL USES, PROVIDING
FOR EFFECTIVE DATE, READING, PUBLICATION, AND SEVERANCE**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PORT
ARANSAS, COUNTY OF NUECES, STATE OF TEXAS:**

Section 1. This is an emergency ordinance passed in accordance with Sections 3.12 and 3.13 of the Charter of the City of Port Aransas. Because this moratorium impacts only heavy industrial property uses, it is not subject to the procedures and limitations set forth in Subchapter E of Texas Local Government Code Chapter 212.

Section 2. In August, 2017, Hurricane Harvey devastated the middle Texas Coast and inflicted significant infrastructure and property damage to the City of Port Aransas. Among the many City services impacted by the Category 4 hurricane was the City's fire department, which was effectively destroyed as every single piece of firefighting equipment was lost. While the City is currently in the process of rebuilding its fire department, the City does not have the capability to provide fire protection services and emergency response to heavy industrial uses on Harbor Island and, in particular, oil and gas related operations. As a result, a public emergency exists which adversely affects the life, health, property, and public peace of those properties located on Harbor

Island. To ensure that these life safety concerns are protected, a temporary moratorium on further heavy industrial development on Harbor Island is warranted until adequate fire protection services and emergency response are available.

Section 3. The City of Port Aransas developed as a fishing village. It is a non-industrial town and relatively clean and free of the pollutants which normally accompany some industrial developments. Its commercial structures historically were small and primarily wooden with peaked roofs. The City in its commercial area had and still has the flavor and ambiance of a small fishing village which imbues it with a distinctive charm and character. The City has in the past few years, experienced extremely rapid growth and is in danger of losing the charm which makes it an attractive, unique venue. In recognition of this situation the City Council is considering re-zoning some of Harbor Island, and/or the imposition of additional controls upon new development on Harbor Island. In order to prevent the development of Harbor Island in a way which would adversely affect, damage or destroy the aesthetics or environment of the City, and to recognize the historical uses of Harbor Island, the Council considers it necessary to pass this temporary moratorium on an emergency basis to allow the City to study and, if determined to be appropriate, institute additional zoning and other development controls on Harbor Island.

Section 4. From and after the passage of this ordinance and for a period of 60 days thereafter, unless sooner repealed by the Council, no development permits or approvals shall be issued for development of Harbor Island property. Under Section 3.13 of the City Charter, unless extended

by further Council action, this emergency ordinance will automatically expire on the sixty-first (61st) day after its enactment.

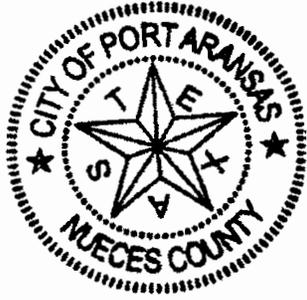
Section 5. Effective Date. As provided by Sections 3.12 and 3.13 of the Charter of the City of Port Aransas, this ordinance shall be effective upon adoption.

Section 6. Reading. As provided by Sections 3.12 and 3.13 of the Charter of the City of Port Aransas, this ordinance or the caption of it shall be read at one city council meeting.

Section 7. Severance. If any part of this ordinance is invalid or void or is declared to be so, then said part shall be severed from the balance of this ordinance and said invalidity shall not affect the balance of this ordinance, the balance of the ordinance to be read as if said invalid or void portion thereof were not included.

Section 8. Publication. As provided by Sections 3.12 and 3.13 City Charter of the City of Port Aransas this ordinance shall be published one time in the official newspaper of the City of Port Aransas, Nueces County, Texas, which publication shall contain the caption of this ordinance stating in substance the purposes of same.

PASSED, ORDAINED, APPROVED AND ADOPTED on one reading on this 29th day of August, 2019.



CITY OF PORT ARANSAS

BY: *Charles R. Bujan*
Charles R. Bujan, Mayor

ATTEST:

Francisca Nivan
City Secretary