

CAUSE NO. _____

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

Plaintiff,

v.

CITY OF PORT ARANSAS, TEXAS

Defendant.

§ IN COUNTY COURT AT LAW

§

§

§

§

§

§

§

§

COUNTY COURT AT LAW NO. __

NUECES COUNTY, TEXAS

**PORT OF CORPUS CHRISTI AUTHORITY'S ORIGINAL PETITION FOR
DECLARATORY JUDGMENT AND REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff Port of Corpus Christi Authority of Nueces County, Texas (the "Port Authority") files this Petition for Declaratory Judgment and Injunctive Relief complaining of Defendant City of Port Aransas, Texas (the "City"), and in support of same would show:

**I.
Introduction**

1. The City has violated Texas law in its attempt to stop the Port Authority from developing the Port Authority's facilities on Harbor Island. Because the City acted unlawfully and is obstructing the Port Authority from carrying out its mission, the Port Authority has had no choice but to file this petition and requests this Court to restrain the City and declare its unlawful acts void.

2. This case is about Port Authority's property on Harbor Island and the City's efforts to restrict re-development of it for oil and gas operations. The relevant events start in April 2018, when the Port Authority and the City agreed to a lease in which the City obtained the right to the lease of 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 would “immediately terminate” the Marina Lease. Within months of obtaining the Marina Lease, the City violated its agreement with the Port Authority by passing an ordinance to prohibit any industrial development on Harbor Island. The City’s actions not only violated the Marina Lease, but they also violated the Texas law that prohibits local governments from interfering with oil and gas operations.

3. 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 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”).¹ The Ordinance is unlawful—both facially and as applied—because it violates Texas Natural Resources Code § 81.0523 and is, therefore, preempted.

4. The Port Authority brings this suit to prevent the City from enforcing its unlawful Ordinances and to stop the City from preventing the Port Authority from fulfilling its lawful mission to enhance the navigation of the Corpus Christi Ship Channel and the surrounding area for the benefit of the entire community.

¹ Together, the Resolution and the Ordinance will be referred to as the “Ordinances.”

II.
Discovery Control Plan

5. The Port Authority requests that this case be conducted under a Level 3 plan under Texas Rules of Civil Procedure 190.4.

III.
Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this matter under Texas Government Code §§ 25.0003 and 25.1802. Additionally, this Court has subject matter jurisdiction under Texas Civil Practice and Remedies Code §§ 65.011(3) and 65.021(a), as well as the common law of the State of Texas, because the Port Authority seeks injunctive relief in this matter. This Court has personal jurisdiction over the City because it is a political subdivision of the State of Texas.

7. Venue is proper in Nueces County, Texas because the City's principal office in this state is in Nueces County, and it is domiciled in Nueces County.² In addition, venue is proper in Nueces County because all or a substantial part of the events and omissions giving rise to the Port Authority's claims occurred in Nueces County, Texas.³

IV.
Parties

8. The Port Authority was established in 1922 as the Nueces County Navigation District and was renamed in 1981 by the Texas Legislature as the Port of Corpus Christi Authority of Nueces County, Texas. It is a political subdivision of the State of Texas. It was created under article III, § 52 of the Texas Constitution. On April 23, 1931, the Port Authority

² TEX. CIV. PRAC. & REM. CODE § 15.002(a)(2); TEX. CIV. PRAC. & REM. CODE § 65.023(a).

³ TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).

was converted to a navigation district operating under article XVI, § 59 of the Texas Constitution.⁴

9. The Port Authority's boundaries encompassed all of the territory in Nueces County, Texas from the date of its creation until October 13, 2003. On October 14, 2003, the Port Authority annexed San Patricio County, and since that date the boundaries have been coextensive with those of Nueces and San Patricio Counties, Texas.

10. The Port Authority's principal office is located in Nueces County, Texas.

11. The Port Authority is involved with the creation, operation, and orderly development and use of deepwater ports within its boundaries. The Port Authority is also involved with the development of port-related industries and with the application of its land to uses 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.

12. The City is a Texas political subdivision located in Nueces County. It is domiciled in Nueces County, and its principal office is located in Nueces County. Pursuant to Texas Civil Practice and Remedies Code § 17.024(b), the City can be served with process by serving its mayor or secretary at the following addresses, or wherever they may be found:

⁴ The Port Authority is governed by its Commissioners, Charles W. Zahn Jr., Wayne Squires, Richard Ralph Valls Jr., David P. Engel, Richard Bowers, Wes Hoskins, and Catherine Tobin Hilliard.

Mayor Charles R. Bujan
Mayor of the City of Port Aransas
Port Aransas City Hall
710 W. Avenue A
Port Aransas, Texas 78373

Francisca Nixon
City Secretary of the City of Port Aransas
Port Aransas City Hall
710 W. Avenue A
Port Aransas, Texas 78373

V.

The City is the Proper Defendant

13. The City is the proper defendant because this is a declaratory-judgment action seeking a declaration that the Ordinances are preempted and not enforceable. The Supreme Court has held that in “suits challenging the validity of ordinances,” the “relevant governmental entities” must be parties.⁵ The City, therefore, is the proper defendant in this lawsuit.

VI.

The Legislature has Waived the City’s Governmental Immunity

14. As a Texas political subdivision, the City has governmental immunity in some circumstances.⁶ But its governmental immunity can be waived by the Texas Legislature.⁷ The Legislature has done that here, so the City does not have governmental immunity regarding the Port Authority’s claims in this lawsuit.

15. The Texas Supreme Court has held that the Legislature has waived cities’ governmental immunity to declaratory-judgment actions brought to challenge the cities’

⁵ *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633-34 (Tex. 2010); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (“For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties....”); TEX. CIV. PRAC. & REM. CODE § 37.006(b) (“In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party....”).

⁶ *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).

⁷ *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006).

ordinances.⁸ 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.”⁹ 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....”¹⁰ 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.”¹¹ 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 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.¹²

VII. Damages

16. The Port Authority is not seeking damages. Instead, the Port Authority is seeking a declaratory judgment, injunctive relief, and attorneys’ fees and costs.

VIII. Factual Background

A. History of Harbor Island.

17. 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

⁸ *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

⁹ TEX. CIV. PRAC. & REM. CODE § 37.004(a).

¹⁰ TEX. CIV. PRAC. & REM. CODE § 37.006(b).

¹¹ *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

¹² *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

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.

18. 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.

B. The City Decided to Annex Harbor Island.

19. 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 tanker service 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.

20. 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 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).

21. The Port Authority is in the process of completing certain work at Harbor Island to continue fulfilling its mission to the community, including preparing Harbor Island for additional construction activities, preparing to submit additional construction and other development contracts for public bidding pursuant to the applicable Texas laws governing such

contracts, and expending significant employee resources in support of Harbor Island’s re-development.

C. The City Breaks its Promise.

22. The Port Authority and the City had been attempting to schedule a meeting to discuss any issues regarding the re-development of Harbor Island. Unfortunately, the City—without notice or warning—did a complete ‘about-face’ with regards to its support for the Port Authority’s industrial use of Harbor Island, and it passed Ordinances that violate Texas law and breach the City’s promise to the Port Authority.

23. 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.¹³ It also expressly agreed to Harbor Island’s re-development as a marine terminal for the storage and transport of oil and gas products.¹⁴

24. 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 Ordinances, which have

¹³ See Lease Agreement between the Port Authority and the City.

¹⁴ See Lease Agreement between the Port Authority and the City; see also Harbor Island District Regulations set forth in City Code, section 25-121.

radically and comprehensively changed and modified the Harbor Island District Regulations set forth in section 25-121 of the Port Aransas City Code. The Ordinances passed by the City are incredibly restrictive, and represent a full affront to the Port Authority's planned re-development of Harbor Island.

25. 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...."¹⁵ 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 development of Harbor Island: "no development permits or approvals shall be issued for development of Harbor Island property."¹⁶

26. For the reasons more fully set forth below, the City's Resolution and Ordinance 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"¹⁷ Therefore, the City's Resolution directing its employees to obstruct the re-development of an oil and gas operation, and its Ordinance that

¹⁵ See Exhibit 1.

¹⁶ See Exhibit 2.

¹⁷ There are exceptions to the law, but none apply here (as explained more fully below).

prohibits any permitting for re-development of Harbor Island, are unenforceable and should be enjoined. While the Port Authority’s current re-development of Harbor Island is outside the scope of the City’s permitting power or ability to zone, the Port Authority has standing to challenge the Ordinance and Resolution because the City’s threatened enforcement against Port Authority makes this case and controversy ripe for consideration.

D. Texas Natural Resources Code § 81.0523.

27. 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:

**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.

28. 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 pre-empt 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).

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

29. At this moment, the Port Authority is midstream with its re-development of Harbor Island. The Port Authority has already spent millions of dollars towards re-developing Harbor Island as “an oil and gas operation,” and the Port Authority is contractually obligated to continue its re-development of 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’s plans for months, if not well over a year. To allow for a clear path forward, the Port Authority now files this Petition for Declaratory Judgement and Injunctive Relief.

**IX.
The Port Authority’s Request for Declaratory Judgment¹⁸**

A. The Port Authority is Seeking a Declaratory Judgment.

30. The Texas Declaratory Judgment Act, codified in Chapter 37 of the Texas Civil Practice and Remedies Code, permits the Port Authority to file this action and to obtain a judgment declaring that the City’s Ordinances violate Texas Law and are void. It provides this Court with the power “to declare rights, status, and other legal relations,”¹⁹ and specifically identifies a “municipal ordinance” as being the appropriate subject of an action seeking

¹⁸ The Port Authority is not bringing any claims under federal law. Instead, it is asserting only Texas state law claims in this lawsuit. This lawsuit does not support federal jurisdiction and is not removable to federal court.

¹⁹ TEX. CIV. PRAC. & REM. CODE § 37.003.

declaratory judgment.²⁰ The Port Authority seeks a declaratory judgment stating that the City's Ordinances are preempted by Texas Natural Resources Code § 81.0523 and, therefore, void and unenforceable;

31. The Port Authority seeks its costs and its reasonable attorney's fees as are equitable and just.²¹

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

32. 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 (relying on its Ordinances) are on a collision course. The court system is the appropriate place for an orderly resolution of the parties' differences.

33. 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."²² Given the present circumstances, this Court must decide whether Texas Natural Resources Code § 81.0523 preempts the City's Ordinances that are designed to slow and stop the development of Harbor Island.

²⁰ TEX. CIV. PRAC. & REM. CODE §§ 37.003 & 37.006(b).

²¹ TEX. CIV. PRAC. & REM. CODE § 37.009.

²² *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).

34. 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.²³ The Port Authority has properly brought this preemption challenge as a declaratory-judgment action regarding the validity of the City’s Ordinances.²⁴ This Court should hold that the City’s Ordinances are unenforceable as a matter of law—and issue appropriate declaratory and injunctive relief.²⁵ 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.²⁶

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

35. “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.’”²⁷ 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.”²⁸ Statutes

²³ 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 San Antonio v. Greater San Antonio Builders Assoc.*, 419 S.W.3d 597, 600 (Tex. App.— San Antonio 2013, pet. denied).

²⁴ 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).

²⁵ See *BCCA Appeal Group*, 496 S.W.3d at 24.

²⁶ *Id.*

²⁷ *Id.* at 7 (quoting TEX. CONST., art. XI, § 5(a)).

²⁸ *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).

enacted by the Legislature preempt a city's ordinances if the Legislature expressed its preemptive intent through clear and unmistakable language.²⁹ When deciding whether an ordinance is preempted, a court cannot "rewrite" a local ordinance to avoid preemption.³⁰ 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."³¹ 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.³²

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

36. 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."³³ Section 81.0523 expressly provides that an "oil and gas operation is subject to the exclusive jurisdiction of this state."³⁴ Section 81.0523 states that the "authority of a municipality ... to regulate an oil and gas operation is expressly preempted...."³⁵ 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 about its intent by stating, again and expressly, that the "authority of a

²⁹ 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).

³⁰ See *BCCA Appeal Group*, 496 S.W.3d at 17-18.

³¹ 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).

³² 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").

³³ TEX. NAT. RES. CODE § 81.0523; see also *Bates*, 406 S.W.3d at 547.

³⁴ TEX. NAT. RES. CODE § 81.0523(b).

³⁵ TEX. NAT. RES. CODE § 81.0523(c).

municipality ... to regulate an oil and gas operation is expressly preempted.”³⁶ 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.³⁷ 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 herein below).

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

37. As stated above, the Port Authority has already spent millions of dollars to develop a marine terminal³⁸ 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

³⁶ *Id.*

³⁷ 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)).

³⁸ 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....”

38. 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 activities on Harbor Island.

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

39. 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.”

40. 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.

41. 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.³⁹ 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.”*

42. 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.”

43. 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

³⁹ 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.”).

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.”*

44. 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.”⁴⁰ 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 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. The City’s Ordinances are designed to delay and completely halt those 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.

⁴⁰ TEX. NAT. RES. CODE § 81.0523(a)(1).

45. 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.⁴¹ 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. 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.”*

46. 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 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. 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

⁴¹ TEX. NAT. RES. CODE § 81.0523(c)(2).

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."*

47. 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.

48. The Ordinance states that "no development permits or approvals shall be issued for development of Harbor Island." Whether the United States' ship channel (known as the Corpus Christi 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.⁴² 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's activities, despite the fact that these powers are preempted.⁴³ For this reason alone (and the other reasons set forth herein), the City's Ordinances are preempted and unenforceable.

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

49. 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.

50. 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 §

⁴² TEX. NAT. RES. CODE § 81.0523(c)(4).

⁴³ Texas Water Code, Ch. 60; *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.).

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.”⁴⁴ 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.⁴⁵ 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.

**X.
Attorneys’ Fees**

51. The Port Authority incorporates by reference all allegations raised in prior paragraphs.

52. The Port Authority is entitled to recover its costs and reasonable attorneys’ fees for the prosecution of this declaratory-judgment action.⁴⁶

**XI.
Request for Injunctive Relief**

53. The Port Authority incorporates by reference all allegations raised in prior paragraphs.

54. The Port Authority requests that this Court issue a temporary restraining order, a temporary injunction, and a permanent injunction against the City to enjoin it from enforcing the Ordinances regarding the Port Authority’s actions at Harbor Island.

55. The Port Authority is entitled to a temporary restraining order and temporary injunction because it has:

- (a) A cause of action against the City;

⁴⁴ See TEX. NAT. RES. CODE § 81.0523(c)(2).

⁴⁵ See TEX. NAT. RES. CODE § 81.0523(c)(4).

⁴⁶ TEX. CIV. PRAC. & REM. CODE §37.009; *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

- (b) A probable right to the relief it is seeking; and
- (c) A probable, imminent, and irreparable injury in the interim.⁴⁷

56. The Port Authority has a cause of action against the City regarding the validity of the Ordinances because 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.”⁴⁸

57. 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 “to regulate an oil and gas operation is expressly preempted.”⁴⁹ As explained above, the Ordinances seek to regulate oil and gas operations, and none of the statute’s exceptions to preemption are met here.⁵⁰ Therefore, the Port Authority has established that it is probable that it will prevail on its claim that the Ordinances are preempted by Texas Natural Resources Code § 81.0523.

58. The damages, harm, and injury that the Port Authority has suffered and will continue to suffer as a result of the City’s Ordinances cannot be accurately measured by any certain pecuniary standard.⁵¹ As a result, the Port Authority has no adequate remedy at law.⁵²

59. The Port Authority asks this Court to set its application for temporary restraining order for hearing and, after the hearing, issue a temporary restraining order against the City as requested herein.

⁴⁷ *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (“To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.”).

⁴⁸ TEX. CIV. PRAC. & REM. CODE § 37.004(a).

⁴⁹ TEX. NAT. RES. CODE § 81.0523(c).

⁵⁰ See § IX, above.

⁵¹ *Butnaru*, 84 S.W.3d at 204.

⁵² *Id.*

60. The Port Authority asks this Court to set its application for temporary injunction for hearing and, after the hearing, issue a temporary injunction against the City as requested herein.

61. The Port Authority asks this Court to set its request for a permanent injunction for a full trial on the merits and, after the trial, issue a permanent injunction against the City as requested herein.

62. The Port Authority is willing to post an appropriate bond as ordered by the Court in connection with the requests for injunctive relief.

XII.
Prayer for Relief

63. Plaintiff Port of Corpus Christi Authority of Nueces County, Texas respectively requests that Defendant City of Port Aransas, Texas be cited to appear and answer and that the Port Authority be awarded the following relief:

- (a) A declaration that the City's Ordinances are preempted by Texas Natural Resources Code § 81.0523 and, therefore, void and unenforceable;
- (b) That the Court issue a temporary restraining order enjoining the City, its officers, agents, servants, employees, and other persons who are in active concert or participation with any of them from enforcing the Ordinances or interfering with the Port Authority's development of Harbor Island in any way;
- (c) That, after an evidentiary hearing, the Court issue a temporary injunction, pending final disposition of this case on the merits, enjoining the City, its officers, agents, servants, employees, and other persons who are in active concert or participation with any of them from enforcing the Ordinances or interfering with the Port Authority's development of Harbor Island in any way;
- (d) That upon final hearing, the Court enter a permanent injunction perpetuating the terms of the temporary injunction;
- (e) That the Port Authority recover its reasonable attorneys' fees as authorized by law and court costs; and
- (f) All other relief at law or in equity to which the Port Authority may be entitled.

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

Debra Tsuchiyama Baker
Texas Bar No. 15089600
Earnest W. Wotring
Texas Bar No. 22012400
John Muir
Texas Bar No. 134630477
David George
Texas Bar No. 00793212
BAKER • WOTRING LLP
700 JPMorgan Chase Tower
600 Travis St.
Houston, Texas 77002
Tel: (713) 980-1700
Fax: (713) 980-1701
dbaker@bakerwotring.com
ewotring@bakerwotring.com
jmuir@bakerwotring.com
dgeorge@bakerwotring.com

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