ORAL ARGUMENT REQUESTED

No. 05-17-00879-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

HINGA MBOGO, HINGA'S AUTOMOTIVE CO., and 3516 ROSS AVENUE, DALLAS, TEXAS,
Appellants,

v.

CITY OF DALLAS et al.,
Appellees.

Appeal from the 68th Judicial District Court of Dallas County, Texas
Cause No. DC-16-07983-C

APPELLEES' BRIEF

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.2(a), counsel for Appellees the City of Dallas et al. hereby adopts Appellants' Identity of Parties and Counsel with the following supplement to Appellees' counsel:

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STATEMENT OF THE CASE

Nature of the Case:	This interlocutory appeal involves the constitutionality of the City of Dallas's zoning ordinances for Planned Development District 298 as applied to Hinga. The City sought a permanent injunction to stop Hinga from operating a vehicle or engine repair or maintenance facility in violation of the Dallas Development Code. (CR 15-52.) In response, Hinga filed an answer, counterclaims against the City, and a third-party complaint against the Mayor and City Councilmembers alleging the zoning ordinances violated article I, sections 16, 17, and 19 of the Texas Constitution and requesting relief under the Uniform Declaratory Judgments Act. (CR 53-72.)
Course of Proceedings:	On April 17, 2017, the City, the Mayor, and the City Councilmembers filed a plea to the jurisdiction, with evidence, challenging each of Hinga's causes of action. (CR 510-687.) The trial court held a hearing on the jurisdictional challenges on July 6, 2017.
Trial Court's Disposition**:**	On July 6, 2017, the trial court granted the plea to the jurisdiction for the City, the Mayor, and the City Councilmembers, and on July 21, 2017, the trial court issued a nunc pro tunc order for the City, the Mayor, and the City Councilmembers. (CR 1416-19.) Hinga timely filed his notice of appeal. (CR 1420.)

RESPONSE TO ISSUES PRESENTED

1. The trial court correctly held that there is no subject-matter jurisdiction over Hinga's assertion that the City's zoning and enforcement violates article I, section 16 of the Texas Constitution because Hinga does not and cannot allege a viable claim that the zoning is a retroactive law.

2. The trial court correctly held that there is no subject-matter jurisdiction over Hinga's assertion that the City's zoning and enforcement violates article I, section 19 of the Texas Constitution because Hinga does not and cannot allege a viable claim that he has been denied due course of law.

3. The trial court correctly held that there is no subject-matter jurisdiction over Hinga's assertion that the City's zoning and enforcement violates article I, section 17 of the Texas Constitution because Hinga does not and cannot allege a viable taking claim.

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HINGA MBOGO, HINGA'S AUTOMOTIVE CO.,
and 3516 ROSS AVENUE, DALLAS, TEXAS,
Appellants,

v.

CITY OF DALLAS *et al.*,
Appellees.

APPELLEES' BRIEF

TO THE HONORABLE COURT OF APPEALS:

The City of Dallas, the Mayor, and the City Councilmembers (the "City") respectfully file this Appellees' Brief in response to the opening brief of Appellants, Hinga Mbogo, Hinga's Automotive Co., and 3516 Ross Avenue, Dallas, Texas (collectively, "Hinga"), to show that the trial court properly granted the City's plea to the jurisdiction because the trial court does not have subject-matter jurisdiction over Hinga's constitutional claims, so a declaratory judgment is not available.

STATEMENT OF FACTS

In 1986, Hinga opened Hinga's Automotive, a general automotive repair shop at 3516 Ross Avenue, Dallas, Texas 75204 ("the Property"). (CR 102 ¶¶ 2, 5; CR 753 ¶ 5.) When Hinga first opened Hinga's Automotive repair, he leased the Property; and "after years of hard work and saving," he bought the Property. (CR 103 ¶ 6.)

In 1988, the City issued the Bryan Area Study. This study proposed that the City "organize and enhance" development in the part of East Dallas that included Ross Avenue. (CR 1143-50.) The Bryan Area Study stated:

> At present, a large number of automotive related uses exist along the corridor. These uses are not conducive to having professional offices located next door due to noise and odors associated with many of them. Also, fencing material used to protect the contents of these establishments creates the look of a maximum security facility along the corridor.

(CR 1144.) Subsequently, on August 22, 1988, the Dallas City Council passed Ordinance No. 20049, which created Planned Development District No. 298 ("PD298"), known as the Bryan Area Special Purpose District, and regulated and established development standards for this planned development district. (CR 1151.) With the passage of PD298, vehicle or engine repair or maintenance was prohibited. (CR 1151-52.)

The chart attached to the ordinance indicates the uses allowed.

	SUB DISTRICTS	8 BAY PLACE	7 BAY PLANNG	2,10 COMM COR HI	4,13 COMM COR MED	5,12 MIX HI	8,11 MIX MED	3 VILLAGE CTR	1 LOWER ROSS
4.202	COMMERCIAL AND BUSINESS SERVICE USES								
1	Building repair and maintenance shop				R		R		
2	Bus or rail transit vehicle maintenance or storage facility								
3	Catering service		L	●	●	●	●	●	●
4	Commercial cleaning or laundry plant			●	●				
5	Custom business services		L	●	●	●	●	●	●
6	Custom woodworking, furniture construction, or repair			●	●				
7	Electronics service center		L	●	●	●	●	●	●
8	Job or lithographic printing			●	●	●	●		●
9	Machine or welding shop								
10	Machinery, heavy equipment, or truck sales and services								
11	Medical or scientific laboratory			●	●	●	●	●	●
12	Technical school			R	R	R	R		R
13	Tool or equipment rental				●				
14	Vehicle or engine repair or maintenance			R	R				

(CR 1152.) The Property is in subdistrict 1 (CR 756), the far-right column of the chart (CR 1152). Hinga's automotive use is in row 14. (CR 1152.) The box for row 14, subdistrict 1 is blank. (CR 1152.) And a blank box on the use chart above indicates the use is prohibited. Dallas, Tex., Code div. 51A-4.200 Use Charts cover page [City's App'x Tab 1]. Hinga was aware of the passage of PD298 and admits that "automotive uses on Ross Avenue, including my own, became nonconforming uses." (Hinga Br. 6-7, CR 756 ¶ 16.)

To purchase the Property, Hinga joined with three business partners. (CR 754-55 ¶ 9.) Hinga and the three partners purchased the Property in 1991, despite being aware the auto repair business was a nonconforming use. (CR 754-56 ¶¶ 9, 16; Br. of Appellant, *Ahmed v. Hinga*, No. 17-00457, 2017 WL 3580004, at *15-16 (Tex. App.—Dallas Aug. 14, 2017). Hinga made improvements to the Property while it was a nonconforming use. (CR 754-55 ¶¶ 7, 9.) The Dallas Development Code, in section 51A-4.704, addresses compliance regulations for nonconforming uses. Dallas, Tex., Code § 51A-4.704. This ordinance allows a request for a compliance date, which states in part, that "any person who resides or owns real property in the city may request that the board consider establishing a compliance date for a nonconforming use." Dallas, Tex., Code § 51A-4.704(a)(1)(A). After the Property became a nonconforming use in 1988, the use could have been terminated upon request. *Id.*

After Hinga's Automotive operated as a prohibited use for approximately seventeen years, on April 27, 2005, the City enacted a change affecting the Property by Ordinance No. 25960. (CR 549-80.) These changes were codified (now including subsequent amendments) as Dallas Development Code section 51P-298. Dallas, Tex., Code § 51P-298. Upon the enactment of the 2005 amendment to PD298, Hinga's use of the Property as a vehicle or engine repair or maintenance facility continued to be a nonconforming use. Ordinance No. 25960 established specific deadlines for nonconforming uses in PD298 to be brought into conformance. (CR 558.) The City Council made specific provisions related to nonconforming uses with its passage of Ordinance No. 25960. (CR 551.) PD298 is codified in relevant part in Dallas Development Code section 51P-298.108(b), which provides as follows regarding nonconforming uses:

> In Subarea 1, all nonconforming uses must be brought to conformance no later than April 26, 2008, except that those uses that became nonconforming as a result of city council action on April 27, 2005 must be brought to conformance no later than April 26, 2010. The owner of a nonconforming use in Subarea 1 may appeal to the board of adjustment for a later compliance date at any time up to the conformance date set forth in this subsection if the owner will not be able to recover his investment in the use (up to the date of nonconformance) by the conformance date set forth in this subsection.

(CR 558.) Hinga was allowed until April 26, 2010, to bring the use of the Property into conformance with PD298's zoning requirements. (CR. 549-80.) In April 2010, Hinga requested a later compliance date of April 13, 2013, with the City's

Board of Adjustment. (CR 105.) The Board of Adjustment recommended approval allowing Hinga to continue operating Hinga's Automotive on Ross Avenue. (CR 105 ¶ 18, CR 127.) Prior to Hinga's 2013 compliance date, Hinga filed a zoning change application with the City to (1) create a subarea, encompassing the Property within PD298, in which a vehicle or engine repair or maintenance use would be permitted by a Specific Use Permit, and (2) obtain a Specific Use Permit for vehicle or engine repair or maintenance use at the Property for a ten-year period. (CR 105 ¶ 19, CR 781.) In response to Hinga's zoning change application, on or about August 14, 2013, the Council enacted (1) Ordinance No. 29099, which created Subarea 1B within PD298, allowing a vehicle or engine repair or maintenance use by Specific Use Permit (CR 647-73), and (2) Ordinance No. 29101, which granted to Hinga Specific Use Permit No. 2043, allowing a vehicle or engine repair or maintenance use at the Property for a two-year period ending August 14, 2015. (CR 129, 674-81.) Because the Property was rezoned to be a conforming use, the Property lost its nonconforming use status. Dallas, Tex., Code § 51A-4.704(a)(4).

On August 14, 2015, Hinga's Specific Use Permit expired. (CR 129.) On November 10, 2015, Hinga submitted an application for a new Specific Use Permit to operate a vehicle or engine repair or maintenance use at the Property for a five-year period. (CR 107, 166-95.) On February 4, 2016, the City Plan Commission

held a public hearing, considered, and recommended denial of Hinga's new Specific Use Permit application. (CR 245-329.) During the City Plan Commission hearing, Hinga testified that he has never listed the Property for sale. (CR 942-43.) Hinga also admitted to the City Plan Commission that two years earlier, he had told the Commission he only needed two years to sell the Property, so he could move to another location, or simply retire. (CR 939-40.) Because the City Plan Commission recommended denial of Hinga's Specific Use Permit, on February 12, 2016, Hinga appealed the denial recommendation to the City Council for further consideration. (CR 112 ¶ 39, 330, 332-34.) On April 13, 2016, the City Council held a public hearing, considered, and denied Hinga's appeal. (CR 336-421.)

After August 15, 2015, Hinga has continued using the Property as a vehicle or engine repair or maintenance facility without a Specific Use Permit, in violation of PD298, specifically, Dallas Development Code section 51P-298.107(a). (CR 19 ¶¶ 25, 26.) The City sued Hinga on July 5, 2016, for a temporary and permanent injunction to stop Hinga from operating a vehicle or engine repair or maintenance facility in violation of PD298 and for related civil penalties. (CR 15-52.) On July 25, 2016, Hinga answered, counterclaimed against the City, and filed third-party claims against the Mayor and City Councilmembers claiming that the efforts to enforce any ordinance, statute, or rule that prevents Hinga from operating a vehicle

or engine repair or maintenance facility on the Property are in violation of article I, sections 16, 17, and 19 of the Texas Constitution.

On April 17, 2016, the City, the Mayor, and City Councilmembers filed their plea to the jurisdiction requesting dismissal of all Hinga's counterclaims and third-party claims. (CR 510-687.) On July 6, 2017, the trial court held a hearing on the plea to the jurisdiction. On July 6, 2017, the court granted the plea to the jurisdiction, and on July 21, 2017, the trial court signed a judgment an order nunc pro tunc on the plea to the jurisdiction. (CR 1416-17, 1418-19.) On July 25, 2017, Hinga filed his notice of appeal. (CR 1420.)

SUMMARY OF ARGUMENT

This is a case about a property owner who operated an auto repair business for 25 years as a nonconforming use, and during that time frame was provided an eight-year amortization period. Hinga knew the Ross Avenue auto repair business was a prohibited use when he purchased the Property in 1991 and continued to operate the business as a nonconforming use until 2013. Hinga's Specific Use Permit made the Property a conforming use in 2013 for a two-year period until August 14, 2015. In August 2015, when the Specific Use Permit expired, Hinga's use became illegal. Hinga has not pleaded a constitutional claim and does not have facts to support his constitutional claims.

The trial court correctly granted the City's plea to the jurisdiction and there is no subject-matter jurisdiction over Hinga's claims that the City's zoning and enforcement violates article I, sections 16, 17, and 19 of the Texas Constitution because Hinga does not and cannot allege a viable claim the zoning is a retroactive law, that he was denied due course of law, or that there was a regulatory taking. The City's zoning is a governmental function, and Hinga has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. Hinga has not and cannot plead facts within any constitutional waiver.

Accordingly, the trial court does not have subject-matter jurisdiction over Hinga's claims against the City. The Court should affirm the trial court's grant of the City's plea to the jurisdiction.

ARGUMENT

I. Hinga waived any issue on appeal challenging the trial court's dismissal of his claims against the Mayor and City Councilmembers.

Rule 38 requires a party to provide the Court with sufficient discussion of the facts and authorities relied upon to present the issue. *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.). The Texas Rules of Appellate Procedure have specific requirements for the appellant's briefing. Tex. R. App. P. 38.1; *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 893, 896 (Tex. App.—Dallas 2010, no pet.); *Lynd v. State Fair of Tex.*, No. 05-10-00831-CV, 2012 WL 92980, at *1 (Tex. App.—Dallas Jan. 11, 2012, pet.

denied) (mem. op.). The district court granted the plea to the jurisdiction by the Third-Party Defendants, the Mayor and City Councilmembers. (CR 1418.) Hinga's brief is not sufficient to appeal the order dismissing the claims against the Third-Party Defendants.

To comply with rule 38.1(f), an appellant must articulate the issue that the court will be asked to decide. *Bolling*, 315 S.W.3d at 896. The court must be able to discern what question of law it will be answering. *Id.* If an appellant does not articulate the question to be answered, then his brief fails at that point. *Id.* Hinga has not presented an issue challenging the order dismissing the claims against the Third-Party Defendants. (Hinga Br. 2-3.)

Additionally, rule 38.1(i) requires appellate briefs to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). If an appellate court is not provided with existing legal authority that can be applied to the facts of the case, "the brief fails." *Bolling*, 315 S.W.3d at 896. The failure to cite to applicable authority or provide substantive analysis waives an issue on appeal. *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.). Here, Hinga has not presented argument or authority concerning his claims against the Third-Party Defendants. (*See* Hinga Br. at 20-45.)

Accordingly, Hinga has waived any issues concerning the dismissal of his claims against the Third-Party Defendants. The Court should affirm the dismissal of the claims against the Third-Party Defendants.

II. The Court reviews the plea to the jurisdiction de novo.

A plea to the jurisdiction contests a trial court's subject-matter jurisdiction. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). A plea to the jurisdiction is a dilatory plea that challenges the trial court's jurisdiction over the subject of the controversy. *Am. Pawn & Jewelry, Inc. v. Kayal*, 923 S.W.2d 670, 672 (Tex. App.—Corpus Christi 1996, writ denied). The purpose of the plea "is not to force the plaintiffs to preview their case on the merits, but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). In *Texas Department of Parks & Wildlife v. Miranda*, the supreme court identified the proper analysis for deciding whether a plea to the jurisdiction should be granted. 133 S.W.3d 217, 226-27 (Tex. 2004). When a plea to the jurisdiction challenges the pleadings, the court determines whether the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Id.*

Subject-matter jurisdiction cannot be presumed and cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). Because of the fundamental nature of subject-matter jurisdiction, the court must

determine whether it has such jurisdiction once the issue is raised. *McClennahan v. First Gibraltar Bank*, 791 S.W.2d 607, 608 (Tex. App.—Dallas 1990, no writ). A ground challenging subject-matter jurisdiction can be presented for the first time in an interlocutory appeal. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). The party seeking judicial relief bears the burden of establishing that the court has subject-matter jurisdiction over the dispute. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

Courts construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent. *Miranda*, 133 S.W.3d at 226. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. *Id.* 226-227. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.* at 227.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court considers relevant evidence submitted by the parties to resolve the jurisdictional issues raised. *Id.* at 227. When, as in this case, the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the evidence to determine

whether a fact issue exists concerning the jurisdictional issue. *Id.* When the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

If the plaintiffs have had the opportunity to amend and their amended pleading still does not allege facts that would constitute a waiver of immunity, then the trial court should dismiss the plaintiffs' action with prejudice. *See Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). Whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Miranda*, 133 S.W.3d at 226; *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

III. Sovereign immunity protects the City when it is performing governmental functions unless a constitutional or legislative waiver is pleaded with facts that make the waiver applicable.

In Texas, sovereign immunity deprives a trial court of subject-matter jurisdiction for lawsuits against the State unless the State consents to suit. *Miranda*, 133 S.W.3d at 224; *Dallas County v. Wadley*, 168 S.W.3d 373, 376 (Tex. App.—Dallas 2005, pet. denied). The sovereign immunity of the State also applies to the benefit of a municipality so that the municipality has governmental immunity to the extent that it engages in the exercise of governmental functions. *See City of Tyler v. Likes*, 962 S.W.2d 489, 501 (Tex. 1997); *Gates v. City of*

Dallas, 704 S.W.2d 737, 739 (Tex. 1986). Here, the City is engaging in governmental functions. The Texas Legislature has determined that (1) building codes and inspections and (2) zoning, planning, and plat approval are governmental functions. Tex. Civ. Prac. & Rem. Code § 101.0215(a)(28), (29).

To waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). The party suing the governmental entity has the burden of establishing the State's consent, which may be alleged by reference to either a statute or a constitutional provision. *See Jones*, 8 S.W.3d at 638. Mere reference to a legislative waiver, however, does not establish consent to sue a governmental entity and is not enough to confer jurisdiction on the trial court. *See Tex. Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (holding that merely alleging the Tort Claims Act is not sufficient to establish jurisdiction). The plaintiff has the burden to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446. For the waiver to be effective, a plaintiff must plead a constitutional or legislative waiver with facts that make the waiver applicable. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001) (holding that the plaintiff had failed to allege facts to demonstrate a valid taking claim to invoke a waiver of immunity from suit); *Tex. Ass'n of Bus.*, 852 S.W.2d at

446 (holding that the pleader must allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause).

Here, Hinga brings constitutional claims under the procedural device of the Uniform Declaratory Judgments Act ("UDJA"). "The UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011) (per curiam) (quoting *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011)). Even when asserting the UDJA, the claimant must plead a viable constitutional claim. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015); *City of Houston v. Downstream Envtl.*, L.L.C., 444 S.W.3d 24, 38 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Hinga has not and cannot plead facts within this constitutional waiver.

IV. The trial court correctly held that there is no subject-matter jurisdiction over Hinga's assertion that the City's zoning and enforcement violates article I, section 16 of the Texas Constitution because Hinga does not and cannot allege a viable claim that the zoning is a retroactive law.

Hinga complains that any ordinance, statute, or rule that prevents Hinga from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas, violates article I, section 16 of the Texas Constitution. (CR 1404.) Article I, section 16 of the Texas Constitution prohibits creation of retroactive laws. Tex. Const. art. I, § 16. Hinga claims that "[t]he ordinances are

retroactive because they destroy Hinga's settled expectations and attach new disabilities to his business." (Hinga Br. 21.)

The Texas Supreme Court established that the "prohibition against retroactive laws, like other constitutional bars, must be governed by its purpose, for 'retroactive' simply means '[e]xtending in scope or effect to matters which have occurred in the past; retrospective,' and 'retrospective,' even more simply, means '[d]irected to, contemplative of, past time.'" *Robinson v. Crown Cork & Seal Co., Inc*., 335 S.W.3d 126, 138 (Tex. 2010). The constitutional prohibition was not intended to operate indiscriminately, and "[m]ere retroactivity is not sufficient to invalidate a statute." *Id.* at 139 (citing *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971)). The supreme court in *Robinson* sought to end the ambiguity of determining if a law was unconstitutional. *Robinson*, 335 S.W.3d at 145.

While there is no bright-line test for determining if a law is retroactive, the supreme court instituted a test that requires the courts to consider the following three factors:

(1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings,

(2) the nature of the prior right impaired by the statute, and

(3) the extent of the impairment.

Id. This test acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest. *Id.* at 146. And it appropriately encompasses the notion that "statutes are not to be set aside lightly." *Id.* Importantly, the supreme court created the *Robinson* test to determine the constitutionality of laws, without expressly overruling any of its precedents. *Id.* After amending his petition in response to the City's plea to the jurisdiction, Hinga did not plead facts to support any of these factors to establish a viable claim under article I, section 16 of the Texas Constitution. (CR 1395-1413.) Moreover, an examination of the three factors outlined in the *Robinson* case in relation to Hinga's claim demonstrates that no ordinance, statute, or rule violates article I, section 16 of the Texas Constitution.

A. The City's ordinances meet the public interest element of the *Robinson* test.

Hinga has not pleaded that no public interest is served by the City's zoning. (CR 1407-11.) Hinga had the extraordinary burden to show that no conclusive, or even controversial or issuable, facts or conditions existed which would authorize the City to exercise the discretion to make the zoning change. *See City of Waxahachie v. Watkins*, 275 S.W.2d 477, 480-81 (Tex. 1955). Zoning is a legislative function of municipal government. *City of Pharr v. Tippitt*, 616 S.W.2d 173, 175 (Tex. 1981). Courts must give deference to a city's action "[i]f reasonable minds may differ as to whether or not a particular zoning ordinance has

a substantial relationship to the public health, safety, morals, or general welfare"; and if no clear abuse of discretion is shown, the ordinance must stand as a valid exercise of police power. *Id.* at 176. The presumption of validity accorded original comprehensive zoning applies as well to an amendatory ordinance. *Watkins*, 275 S.W.2d at 481.

Here, the public interest is served by creating a livable residential and mixed-use area. The original PD298 ordinance regulated and established development standards for this planned development district, where the Property is located. (CR 1151-52.) Beginning in 1988, vehicle or engine repair or maintenance on Ross Avenue were prohibited in PD298. (CR 1151-52.) Then, seventeen years later, Ordinance No. 25960 enacted a change to update the standards in PD298, to help achieve the original objectives for the district, which were to provide a diverse number of uses throughout the area, particularly mixed-use developments that combine residential, retail, and office uses, not to benefit a single individual or entity. (CR 587-888.) The City Council found that amendment to PD298 was in the public interest. (CR 552.)

The public interest factor considers the nature and strength of the public interest served by the statute as evidenced by the legislative body's factual findings. *Robinson*, 335 S.W.3d at 145. The City's consideration of zoning for this area included a study, as well as a review of the study, both encouraging

redevelopment and commercial/retail development opportunities along the Ross Avenue corridor. (CR 1144.) The Bryan Area Study sought to "establish a vision for the area between Ross Avenue, Gaston Avenue, Central Expressway and Washington Street. One of the major components of this study was an expansion of the area for residential development." (CR 1148.) The study also stated there were a "large number of automotive related uses" existing along the corridor and these uses were not conducive to economic development. (CR 1144.) The study and the subsequent zoning served the public interest and reflected a substantial relationship to the general public welfare. However, Ordinance 20049 did not include a requirement to make all uses conforming. (CR 1151-52.)

Supporting evidence that public interest would be served includes the 1988 Bryan Area Study, the City's 2004 re-examination of the Bryan Area Study, and the proceedings at the City Plan Commission's public hearing on March 24, 2005, to determine proper zoning and address nonconforming uses in PD298. (CR 581-91, 1143-50, 1247.) Considering the nature and strength of the public interest served related to Ordinance No. 25960, there were 1248 property owners notified of the proposed change, which required: "In Subarea 1, all nonconforming uses must be brought to conformance no later than , [sic] 2008 (the compliance date)." (CR 591, 603-43.) The responses received from the 1248 notices sent to the property owners were the following: 81 replies were for the proposed change and

32 replies were against the proposed change. (CR 591.) During the March 24, 2005, City Plan Commission public hearing, there were seven speakers for the proposed change, and six speakers against the proposed change. (CR 591.) At the time this proposed change was being considered, there were 32 existing land uses on Ross Avenue which were nonconforming; the majority of these were vehicle repair or vehicle sales. (CR 592-93.) The City Plan Commission vote was 10 for to 2 against recommending approval of Ordinance No. 25960, the amendment to PD298, to be forwarded to the City Council for vote. (CR 591.)

Also supporting consideration of public interest, on April 27, 2005, the City Council held a public hearing, considered, and approved the proposed change for PD298, with specific changes related to nonconforming uses. The City Council revised Ordinance No. 25960 allowing owners an additional two years to bring into compliance those uses which became nonconforming as a result of the City Council action on April 27, 2005. The revised conformance deadline was April 26, 2010, instead of April 26, 2008. (CR 550-51.) The City Council added that an owner of a nonconforming use could appeal to the board of adjustment for a later compliance date at any time up to the conformance date, if the owner could not recover his investment in the use. (CR 550-551.) The courts have consistently recognized zoning is an exercise of a municipality's legislative powers. *Tippitt*, 616 S.W.2d at 175. The nature and strength of the public interest was served by

enacting Ordinance No. 20049 and Ordinance No. 25960, which added a conformance deadline for nonconforming uses in PD298.

Regarding the public interest prong of the test, the statute at issue in the *Robinson* case was enacted to benefit a single company by reducing its liability in asbestos litigation. *Tenant Hosps., Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014). In contrast to the facts in *Robinson*, Ordinance 20049 was enacted not to benefit a single entity, but to improve the Bryan Area District of Dallas for the public interest.

B. The zoning change in 2005 did not impair prior rights.

The *Robinson* court considered simultaneously the nature of the impaired right and the extent of the impairment of rights. *Robinson*, 335 S.W.3d at 146-48. The Texas Supreme Court has "long recognized that the impairment of . . . a [prior] right may be lessened when a statute affords . . . a grace period." *Tenant*, 445 S.W.3d at 708. Consideration of events "that occurred prior to the effective date of the statute does not compel disapproval of the enactment, provided the affected parties were afforded a reasonable time to protect their interests." *Wright*, 464 S.W.2d at 648. The termination of a nonconforming uses may not impair a landowner's rights:

> We are in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police powers; and that property owners do not acquire a constitutionally protected vested

> right in property uses once commenced or in zoning classifications once made. Otherwise, a lawful exercise of the police power by the governing body of the city would be precluded.

City of University Park v. Benners, 485 S.W.2d 773, 778 (Tex. 1972).

To support this constitutional claim, Hinga claims the City's zoning impairs his right to use his property for automotive repairs. (CR 1411-12.) Hinga acknowledges that his auto repair business became a nonconforming use in 1988. (Hinga Br. 6-7.) Hinga operated his business as a nonconforming use for 25 years. The pleading shows the use was terminated under reasonable circumstances. He was allowed an additional eight-year grace period from the passage of Ordinance No. 25960 in April 2005 until April 2013, to continue operating his auto repair business on Ross Avenue. (CR 1408-09.) The grace period included the Board of Adjustment approval of an extension of his compliance date from April 26, 2010, to April 13, 2013. (CR 1408.) At Hinga's request, the grace period also included City Council's establishment of a new subdistrict within PD298 allowing a Specific Use Permit for vehicle or engine repair or maintenance use on the Property for a two-year period, which expired on August 14, 2015. (CR 1408.) When the Specific Use Permit was granted, Hinga lost his nonconforming rights and his only expectation was to operate for two years. The Dallas City Code states "[t]he right to operate a nonconforming use ceases when the use becomes a conforming use. The issuance of an SUP [Specific Use Permit] does not confer

any nonconforming rights. No use authorized by the issuance of an SUP may operate after the SUP expires." Dallas, Tex., Code § 51A-4.704(a)(4). Thus, after Hinga's Specific Use Permit expired, Hinga's use was not nonconforming. The use was prohibited and illegal.

This Court holds "a constitutionally protected property interest is defined as an 'individual entitlement grounded in state law, which cannot be removed except for cause.'" *Dallas County v. Gonzales*, 183 S.W.3d 94, 111 (Tex. App.—Dallas 2006, pet. denied). This Court also holds that there is no constitutionally protected property interest in a particular use of property. *Consumer Serv. Alliance of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 805 (Tex. App.—Dallas 2014, no pet.). In fact, after the passage of PD298 in 1988, which designated automotive uses on Ross Avenue, including Hinga's Automotive, as a nonconforming use, his use could be terminated. Dallas, Tex., Code § 51A-4.704(a)(1)(A). (CR 756 ¶ 16, 1151-52;) Hinga never had a protected right to the continued operation of a vehicle or engine repair or maintenance facility on the Property.

Applying the *Robinson* test, the public interest articulated in the Bryan Area Special Purpose District's objectives of providing a diverse number of uses throughout the area, particularly mixed-use developments that combine residential, retail, and office uses, outweighs the rights of an individual business owner. Hinga knew the Ross Avenue auto repair business was a prohibited use when he

purchased the Property in 1991, and he operated his auto repair business as a nonconforming use on Ross Avenue for 25 years, from 1988 until 2013, after the passage of Ordinance 20049. And the conforming use ended with the expiration of his Special Use Permit.

As required by case law, the pleader must allege facts to demonstrate a viable constitutional claim. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. Hinga's pleading does not allege a viable claim that the City's ordinances violate the mandate against retroactive laws. Accordingly, the City's immunity has not been waived under article I, section 16 of the Texas Constitution, and the claim should be dismissed for want of jurisdiction.

C. The ordinances are not retroactive.

Hinga asserts that the ordinances at issue in this case are unconstitutionally retroactive. (Hinga Br. 27.) Retroactive means "[e]xtending in scope or effect to matters which have occurred in the past." *Robinson*, 335 S.W.3d at 138. Most statues operate to change existing conditions, and it is not every retroactive law that is unconstitutional. *Id.* at 139. A law is not invalid, even though it is retroactive in operation, if it does not destroy or impair vested rights. *Corpus Christi People's Baptist Church, Inc. v. Nueces Cnty. Appraisal Dist.*, 904 S.W.2d 621, 626 (Tex. 1995). Hinga's argument is conclusory and cites no authority stating that zoning ordinances like those at issue in this case are retroactive. Hinga

has not cited a single case showing either that operation of a vehicle or engine repair or maintenance facility qualifies as a "settled expectation," or that he has a constitutionally protected interest in such, or that zoning ordinances like those in question in this case even destroy any constitutionally protected settled expectation. (Hinga Br. 27.) In fact, the *Robinson* court even specifically states that the Texas Supreme Court has only invalidated statutes as prohibitively retroactive in three cases, all involving statutes of limitations, which is nothing like this case. *Robinson*, 335 S.W.3d at 146.

Additionally, Hinga conveniently cherry-picks the language of *Landgraf v. USI Film Products* and *Robinson* to support his argument that the ordinances at issue are retroactive. Hinga overlooks the following passage in *Landgraf*: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994) (citation and footnote omitted). Hinga's expectation of being able to use his property as a vehicle or engine repair or maintenance facility as based in prior law that permitted such use is not enough to find retroactivity. The court must ask whether the ordinances attach new legal consequences to events completed before their enactment, which they do not.

Hinga actually had no reasonable expectation in continued use of the Property for automotive repair after August 1988, when Ordinance No. 20049 established PD298. (CR 1151-52.) The 1988 ordinance made his use nonconforming. (CR 756 ¶ 16.) When the City amended PD 298 by Ordinance No. 25960, Hinga's property was given a deadline to bring his nonconforming use into conformance. (CR 558.) Section 18 of Ordinance No. 25960 states "[t]hat this ordinance shall take effect immediately from and after its passage and publication." (CR 564.) The next ordinance Hinga complains of impacting the Property is Ordinance No. 29099, which passed on August 14, 2013, and it specifically changed subarea 1 in PD298 to subarea 1B, excluding the Property from the prohibition of vehicle or engine repair in PD298—in effect, allowing Hinga to continue using the Property for auto repair. (CR 647-73.) Ordinance No. 29099 also contained the same language that the ordinance shall take effect immediately from and after its passage and publication. (CR 652.) The final ordinance Hinga complains of, also passed on August 14, 2013, is Ordinance No. 29101. (CR 674-81.) This ordinance sets out the Property's Specific Use Permit No. 2043, allowing a vehicle or engine repair or maintenance use until August 14, 2015, and this ordinance used the same effective date language as the other ordinances. (CR 674-78.)

None of the ordinances of which Hinga complains punish or attach other legal consequences to Hinga for having operated a vehicle or engine repair or maintenance facility on the Property in the past. Ordinance No. 25960 simply prevented him from continuing such use as nonconforming beyond expiration of the compliance period, and any additional extension granted by the City's Board of Adjustment.

Thus, altogether, Hinga's argument that the ordinances are retroactive merely because they touch upon a business he began prior to the ordinances, on land he purchased after the first ordinance was enacted, fails as a matter of law. Hinga's claim of unconstitutional retroactivity has not been and cannot be properly pleaded and the trial court correctly held there was no subject-matter jurisdiction.

V. The trial court correctly held that there is no subject-matter jurisdiction over Hinga's assertion that the City's zoning and enforcement violates article I, section 19 of the Texas Constitution because Hinga does not and cannot allege a viable claim that he has been denied due course of law.

Hinga asserted that the City's efforts to apply the City's zoning violates article I, section 19 of the Texas Constitution, denying Hinga due course of law. (CR 1404.) Texas Constitution article I, section 19 is a due process guarantee, which states: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19. Hinga argues he is making a

substantive due process claim. (Hinga Br. 35-41.) The Texas Supreme Court more than once has held that to have a viable claim under substantive due process, the claimant must have a vested property right. *See Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015); *City of Amarillo v. Hancock*, 239 S.W.2d 788, 791 (Tex. 1951). In *Klumb*, the Texas Supreme Court stated that before substantive due process rights attach, a plaintiff "must have a liberty or property interest that is entitled to constitutional protection." *Klumb*, 458 S.W.3d at 15. Further, the court in *Klumb* stated that the plaintiff's due process claims were facially invalid because they were not based on any vested property right. *Id.* The due process analysis also contemplates the premise that

> statutes are presumed to be constitutional. To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due process course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.

Patel, 469 S.W.3d at 87. The *Patel* court then clarified: "[T]he foregoing standard includes the presumption that legislative enactments are constitutional and places a high burden on parties claiming a statute is unconstitutional." *Id.* (citation omitted). The *Patel* case follows the standard of review set out in the *Mayhew v. Town of Sunnyvale* case which states that an ordinance will violate substantive due

process only if it is clearly arbitrary and unreasonable. *Id.* (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998)).

A. Hinga does not have a constitutionally protected property interest.

To analyze a substantive due process claims, the court must determine whether the plaintiff had a constitutionally protected property interest. *Dallas County v. Gonzales*, 183 S.W.3d 94, 111 (Tex. App.—Dallas 2006, pet. denied). This Court holds "a constitutionally protected property right is an 'individual entitlement grounded in state law, which cannot be removed except for cause.'" *Id.* Ultimately, a constitutionally protected property interest is a claim of entitlement grounded in state law, and cannot be a based on a "mere unilateral expectation." *Id.*; *see also City of New Braunfels v. Stop The Ordinances Please*, 520 S.W.3d 208, 214 (Tex. App.—Austin 2017, pet. filed) (discussing authorities holding that a vested property right in the inventory of a business "does not automatically translate to a 'vested property right' to use said property a particular way or in a particular location"). The Texas Supreme Court in an earlier case stated that "we are in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power . . .." *Benners*, 485 S.W.2d at 778.. Here, there is no allegation that termination of Hinga's use after allowing a eight-year accommodation with a two-year Special Use Permit is unreasonable.

Further, property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. *Id.* "Property owners do not have a constitutionally protected, vested right to use property in a certain way." *Consumer Serv. Alliance of Tex., Inc.*, 433 S.W.3d at 805 (citing *Morrow v. Truckload Fireworks, Inc*., 230 S.W.3d 232, 240 (Tex. App.—Eastland 2007, pet. dism'd). "A right is 'vested' when it 'has some definitive, rather than mere potential existence.'" *Consumer Serv. Alliance of Tex., Inc.*, 433 S.W.3d at 805 (citing *City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)). A business has a vested property right in the lawful possession of physical items of inventory that it owns, but does not have "a constitutionally protected right in a property merely because it began as a conforming use and is later rendered nonconforming." *Id.* at 807 (citing *Hang On III, Inc. v. Gregg County*, 893 S.W.2d 724, 727 (Tex. App.—Texarkana 1995, writ dism'd)).

Hinga's pleading relies on his unilateral expectation, and Hinga's pleading does not demonstrate a property right that is grounded in state law as required by this Court. *Consumer Serv. Alliance of Tex., Inc.*, 433 S.W.3d at 805; *Gonzales*, 183 S.W.3d at 111. Hinga has an unsupported unilateral expectation that he has a constitutionally protected right to use the Property as an auto repair business perpetually. Hinga does not have a constitutionally protected property right to his

desired auto repair use, and he has not alleged a viable claim that he has a constitutionally protected property interest needed for a deprivation of due process rights. Therefore, the City retains immunity from his constitutional due process claim.

B. The City ordinances were rationally related to a legitimate governmental interest and were not so burdensome as to be oppressive.

In addition to Hinga's failing to plead a constitutionally protected property right, he has not pleaded and cannot plead that (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest. *See Patel*, 469 S.W.3d at 87.

The first part of the analysis is whether the City had a legitimate governmental interest in its ordinances. In enacting Ordinance No. 20049, the original objective of PD298 was to provide a diverse number of uses throughout the area, particularly mixed-use developments that combine residential, retail, and office uses. (CR 1143-50.) That ordinance was followed by Ordinance No. 25960, which established specific deadlines for nonconforming uses in PD298 to be brought into conformance. The purpose of the changes Ordinance No. 25960 was

to update the original Planned Development District in areas where the original objectives were not being met. (CR 587.) The City's zoning plan for PD298 was

> established to capitalize on the potential for mixed-use developments, create pedestrian-friendly amenities to provide a multi-modal alternative within the area, develop dense residential uses to allow people to have short commutes to the central business district as well as excellent access to freeways, and capitalize on its proximity to a major health care facility by developing compatible uses . . . . [Proposed amendments to PD 298] are . . . meant to upgrade the aesthetic quality of the area and establish linkages to some of the key surrounding areas.

(CR 590.) The City thus has evidence showing that the establishment of PD298 in Ordinance No. 20049 and the amendments to PD298 Ordinance No. 25960 are rationally related to a legitimate governmental interest.

The second issue is whether, when considered as a whole, the ordinances' real-world effect as applied to Hinga are not so burdensome to be oppressive in light of the governmental interest. When Hinga purchased the Property, his use was nonconforming. (CR 753-756 ¶¶ 5, 8, 9, 16.) While he does not plead any burden by the termination of the use, Hinga complains about the cost of improvements to the Property, despite being aware his business was nonconforming. (CR 754 ¶ 7, 1410 ¶ 86.) But in terminating a use a landowner can only obtain amortization of a nonconforming use for the time necessary for recoupment of the landowner's investment in the structure at the time of the zoning change. *Murmur Corp. v. Bd. of Adjustment*, 718 S.W.2d 790, 794 (Tex. App.—

Dallas 1986, writ ref'd n.r.e.). Hinga was not due any amortization time and he was allowed to continue his business for ten years. On February 4, 2016, at the City Planning Commission hearing, Hinga acknowledged that two years earlier, he had told the commission that he was only going to request two more years. (CR 940.) Hinga had no burden.

Hinga's pleading is devoid of any assertions that the zoning changes in PD298 are so burdensome as to be oppressive to Hinga. Hinga's pleading does not allege a viable claim that City's ordinances deprived Hinga of property, privileges, or immunities without due course of the law. Accordingly, the City's immunity has not been waived under article I, section 19 of the Texas Constitution. Hinga's claim of deprivation of due course of law has not been and cannot be properly pleaded and the trial court correctly held there was no subject-matter jurisdiction.

VI. The City's zoning did not result in a regulatory taking under article I, section 17 of the Texas Constitution.

This Court holds that the Texas Constitution waives immunity for a valid taking claim. *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.). To have a valid claim a person's property must has been "taken, damaged, or destroyed for or applied to public use without adequate compensation being made." *Blanton*, 200 S.W.3d at 271 & n.1 (citing Tex. Const. art. I, § 17), *Bell v. City of Dallas*, 146 S.W.3d 819, 825 (Tex. App.—Dallas 2004, no pet.). However, as in this case, when the plaintiff does and cannot not allege a valid

inverse condemnation claim, governmental immunity does apply, and the trial court should grant the plea to the jurisdiction. *Bell*, 146 S.W.3d at 825.

To state a cause of action for inverse condemnation, a plaintiff must allege (1) an intentional government act (2) that resulted in property being taken, damaged, or destroyed (3) for public use. *Blanton*, 200 S.W.3d at 271; *see* Tex. Const. art. I, § 17. A taking is classified as either a physical taking or regulatory taking. *Blanton*, 200 S.W.2d at 271 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998)). A physical taking occurs when the government authorizes a physical occupation of an individual's property. *Mayhew*, 964 S.W.2d at 933. A regulatory taking is when a regulation denies the property owner all economically beneficial or productive use of the land or unreasonably interferes with the property owner's rights to use and enjoy his property. *Id*. at 935. Hinga does not claim the City has physically taken the Property, but rather that the City's ordinance prevents him from operating a vehicle or engine repair facility. (CR 1410.) Hinga claims the City did this to benefit the local homeowner's association and private entities the City hopes will replace Hinga. (CR 1409-10.)

A restriction denies the property owner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. *Mayhew*, 964 S.W.2d at 935. The fact that an ordinance has prevented the most profitable use of the property does not conclusively establish

there has been a taking. *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994). Hinga's pleading asserts that the ordinances threaten the investment made into the Property, and will force Hinga to incur moving costs, loss of customers, and disruption of the business. (CR 1410.) Hinga does not plead that the ordinances render the Property valueless or that he has been deprived of all economically beneficial or productive use of the Property.

The *Benners* opinion indicates the "prevailing view" that involuntary termination of a nonconforming use after "allowing a period of amortization for recoupment of the investment in a nonconforming structure does not amount to a taking in the constitutional sense." *Murmur Corp.*, 718 S.W.2d at 794 (citing *Benners*, 485 S.W.2d at 777).

> [T]here are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming uses which most often do not disappear but tend to thrive in monopolistic positions in the community. We are in accord with the principle that municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power; and that property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made.

Benners, 485 S.W.2d 778, *quoted in Murmur Corp.*, 718 S.W.2d at 794. The reasonableness standard governs the measure of recoupment for amortization of a nonconforming use, it only requires a reasonable opportunity to recoup the owner's actual investment in the nonconforming use or structure. *Murmur Corp.*, 718

S.W.2d at 798. A landowner can only recoup his investment in the structure at the time of the zoning change. *Id.* at 794. Hinga purchased the Property after the zoning change. Br. Appellant, *Ahmed v. Hinga*, No. 17-00457, 2017 WL 3580004, at *15-16. Under this standard, Hinga would have no investment to recoup.

Moreover, Hinga has been given a reasonable opportunity to recoup his investment. Hinga's opportunity to recoup his investment was 27 years from the passage of PD298 in 1988 and ten years from the passage of the amendment of PD298 in 2005. Clearly, Hinga was provided more than a reasonable opportunity to recoup his investment.

Additionally, Hinga claims that the ordinances at issue destroy, or deprive him of the right to use, his property for the benefit of private parties in violation of the 2009 amendment to article I, section 17 of the Texas Constitution. (CR 1404.) The prohibition under section 17 is in the context of an exercise of eminent domain; the provision prohibits the City from exercising its power of eminent domain to take a person's private property and transfer it to another private party. *See* Tex. Gov't Code § 2206.001 (limiting eminent domain for private parties or economic development purposes); *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 194-95 (Tex. 2012) (discussing that the exercise of eminent domain cannot be for private use). This case is not about the City improperly exercising its eminent domain powers to take property and then

transfer it to a private party, so Hinga's reliance on this constitutional provision is misplaced.

Hinga's assertion that the ordinances destroy or deprive him of the right to use the Property is conclusory and unsupported. As a result, Hinga does not make a viable claim for violation of article I, section 17 of the Texas Constitution and Hinga's claim has not been and cannot be properly pleaded and the trial court correctly held there was no subject-matter jurisdiction.

PRAYER

For the foregoing reasons, the City requests the Court to affirm the trial court's order granting the City's plea to the jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2017, a copy of the foregoing document was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure (1) through an electronic filing manager (EFM) upon each person listed below if the email address is on file with the EFM or (2) by email (if the address is available) and first-class mail upon each person below who does not have an email on file with the EFM:

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/s/Amy I. Messer
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Dated: 10/09/17

APPENDIX

USE CHARTS

USE PROHIBITED.

● USE PERMITTED BY RIGHT.

S USE PERMITTED BY SUP (See Section 51A-4.219).

Ⓛ USE PERMITTED BY RIGHT AS LIMITED USE (Subject to restrictions in Section 51A-4.218).

Ⓓ USE PERMITTED SUBJECT TO DEVELOPMENT IMPACT REVIEW (See Division 51A-4.800).

Ⓡ USE PERMITTED SUBJECT TO RESIDENTIAL ADJACENCY REVIEW (See Division 51A-4.800).

RC USE PERMITTED AS A RESTRICTED COMPONENT IN THE G0(A) DISTRICT (See the use regulations in Division 51A-4.200).

★ CONSULT THE USE REGULATIONS IN DIVISION 51A-4.200.

NOTE: The use charts on the following pages have not been formally adopted by the city council; they are prepared by the city staff and are intended for use as a guide only. It is necessary to see the text of this chapter for specific regulations. In the event of a conflict between the use charts and the text of this chapter, the text of this chapter controls.

Tab 1