

CAUSE NO. DC-16-07983

CITY OF DALLAS,	§	IN THE DISTRICT COURT
	§	DALLAS COUNTY, TEXAS
Plaintiff,	§	
	§	68th JUDICIAL DISTRICT
v.	§	
	§	
HINGA MBOGO, HINGA AUTOMOTIVE CO.,	§	
d/b/a HINGA AUTO REPAIR, and 3516	§	
ROSS AVENUE, DALLAS, TEXAS, <i>in rem</i> ,	§	
	§	
Defendants,	§	
	§	
v.	§	
	§	
MICHAEL S. RAWLINGS,	§	
in his official capacity as Mayor	§	
of the City of Dallas, Texas; SCOTT GRIGGS, in	§	
his official capacity as City Council member;	§	
ADAM MEDRANO, in his official capacity as	§	
City Council member; CASEY THOMAS, II, in	§	
his official capacity as City Council member;	§	
CAROLYN KING ARNOLD, in her official	§	
capacity as City Council member; RICKEY D.	§	
CALLAHAN, in his official capacity as City	§	
Council member; MONICA R. ALONZO, in her	§	
official capacity as City Council member;	§	
TIFFINNI A. YOUNG, in her official capacity as	§	
City Council member; ERIK WILSON, in his	§	
official capacity as City Council member; MARK	§	
CLAYTON, in his official capacity as City Council	§	
member; B. ADAM McGOUGH, in his official	§	
capacity as City Council member; LEE M.	§	
KLEINMAN, in his official capacity as City	§	
Council member; SANDY GREYSON, in her	§	
official capacity as City Council member;	§	
JENNIFER S. GATES, in her official capacity as	§	
City Council member; PHILLIP T. KINGSTON,	§	
in his official capacity as City Council member,	§	
	§	
Third-Party Defendants.	§	

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DEFENDANTS' ORIGINAL ANSWER, SPECIAL EXCEPTION, RULE 91A MOTION TO DISMISS,  
AFFIRMATIVE DEFENSES, COUNTERCLAIMS, AND THIRD-PARTY COMPLAINT

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendants/Third-Party Plaintiffs Hinga Mbogo (“Mr. Mbogo”), Hinga Automotive Co. (“Hinga’s Automotive”) and the *in rem* property located at 3516 Ross Avenue in Dallas, Texas (“the Property”) (collectively, “Defendants”), by and through the undersigned counsel, file this Original Answer, Special Exception, Rule 91a Motion to Dismiss, Affirmative Defenses, Counterclaims, and Third-Party Complaint in response to Plaintiff City of Dallas’ Original Petition, Application for Temporary and Permanent Injunction, and Requests for Disclosure (the “Petition”), and in support respectfully state:

### **I. GENERAL DENIAL**

1. Subject to matters that may be admitted during discovery and upon trial of this cause, and in reliance upon their rights as provided by Rule 92 of the Texas Rules of Civil Procedure, Defendants generally deny the allegations in Plaintiff’s pleadings and request that Plaintiff prove its claims and allegations as required by law.

### **II. VERIFIED DENIAL**

2. Subject to and without waiving the foregoing General Denial, or in the alternative, but only to the extent to protect their rights, and only for purposes of preserving this Verified Denial should it become necessary, Defendants specifically deny, pursuant to Texas Rules of Civil Procedure 4, the allegation in paragraph 4 of the Petition that Defendant Hinga Mbogo owns the Property. Mr. Mbogo does own the Property; however, another individual, Mr. Ahmed Mohamed, is listed along with Mr. Mbogo on the title. Mr. Mbogo and Mr. Ahmed are currently in litigation regarding whether, or to what extent, Mr. Ahmed possesses any ownership interest in the Property. In the event the courts determine Mr. Ahmed does not own any portion of the Property, Defendants will amend this pleading to remove this Verified Denial.

### **III. DEFENDANTS' SPECIAL EXCEPTION**

3. Defendants specially except to paragraph 26 of the Petition in which Plaintiff alleges that Defendants received notice of Ordinance No. 29099 “by letter (enclosing the ordinance) dated February 20, 2014.” Plaintiff did not attach or incorporate such letter into its Petition. Nor did it quote or otherwise allege that any of the statements contained in such letter were sufficient to provide actual notice. Actual notice is a statutory prerequisite to recovering penalties under TEXAS LOCAL GOV'T CODE ANN. § 54.017(a)(1). Plaintiff's failure to specifically identify this letter, what this letter said, what notice was purportedly provided, or who received the letter, and this pleading failure prevents Defendants from having “fair notice of the claim involved,” as required by TEX. R. CIV. P. 47(a), and from preparing an adequate defense. Subject to Defendants' motion for dismissal of baseless causes of action below, Defendants respectfully request that this Court sustain this special exception, order Plaintiff to cure these deficiencies by amending the Petition within a reasonable time, and order that paragraph 26 be stricken and the action dismissed if Plaintiff fails or refuses to amend within a reasonable amount of time.

### **IV. RULE 91A MOTION TO DISMISS BASELESS CAUSES OF ACTION**

#### **A. Standard for a Motion to Dismiss Baseless Causes of Action**

4. Defendants' motion to dismiss Plaintiff's baseless causes of action is timely because it is filed within 60 days after service of the Petition. *See* TEX. R. CIV. P. 91a.3(a).

5. Under TEX. R. CIV. P. 91a.1, “a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” A dismissal under this rule “is appropriate if the court determines beyond doubt that the plaintiff can prove no set of facts to support a claim that would

entitle him to relief.” *GoDaddy.com, LLC v. Hollie Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied). A motion to dismiss under this rule “must (1) state that it is made pursuant to the rule, (2) identify each cause of action to which it is addressed, and (3) state specifically the reasons the cause of action has no basis in law, in fact, or both.” *Walker v. Owens*, No. 01-15-00361-CV, 2016 Tex. App. LEXIS 4103, at \*4 (Tex. App.—Houston [1st Dist.] April 19, 2016, no pet. h.). When deciding a motion, a court may not consider evidence outside the pleading. TEX. R. CIV. P. 91a.6.

6. Defendants seek to dismiss Plaintiff’s second cause of action entitled “Civil Penalties Pursuant to Chapter 54 of the Texas Local Government Code,” Petition at 6, and comprising paragraphs 31-33 of the Petition (as well as paragraph (b) of Plaintiff’s “Prayer for Relief”). This cause of action seeks penalties of up to \$1,000 a day since August 15, 2015, for Defendants’ purported violation of Ordinance No. 29099. This Court should dismiss Plaintiff’s second cause of action for two reasons. First, Ordinance No. 29099 explicitly limits penalties to “a fine not to exceed \$2,000.” Ex. 1 to Petition, at 6, sec. 10. Second, by seeking a Specific Use Permit (“SUP”), Defendants were taking action necessary to comply with the ordinance and penalties cannot statutorily accrue during the time Defendants were seeking a new SUP. *TCI West End, Inc. v. City of Dallas*, 486 S.W.3d 692, 702 (Tex. App.—Dallas 2016, pet. filed) (“*TCI II*”) (discussed *infra* Section IV.C).

**B. There Is No Basis in Law for Penalties Greater than Those Listed in Ordinance No. 29099**

7. Defendants first move to dismiss Plaintiff’s second cause of action for civil penalties under Chapter 54 of the Texas Local Government Code, Petition ¶¶ 31-33, in its entirety. Plaintiff claims that it is entitled to “civil penalties of up to \$1,000 per day for each day that Defendants have operated a vehicle engine repair or maintenance facility without [a Specific

Use Permit] in violation of Ordinance No. 29099.” Petition at 7. The sole ordinance Plaintiff alleges Defendants have violated explicitly provides, however, that a person who violates that ordinance “is punishable by a fine *not to exceed \$2,000.*” Ex. 1 to Petition, at 6, sec. 10 (emphasis added). Plaintiff’s penalty is therefore limited to a fine of \$2,000 in total, not \$1,000 a day, and Plaintiff’s claim for an additional \$1,000 a day in penalties has no basis in the law.

8. Plaintiff nonetheless alleges that it is entitled to recover a \$1,000 a day penalty based on TEX. LOC. GOV’T CODE ANN. § 54.017. *See* Petition ¶ 33. “Chapter 54 provides municipalities with *general* authority to enforce ordinances....” *City of Dallas v. TCI West End, Inc.*, 463 S.W.3d 53, 57 (Tex. 2015) (“*TCI I*”) (emphasis added). In Texas, however, “before a general penalty provision of an ordinance may be utilized for a conviction, it is incumbent upon the State to show that a specific penalty is not prescribed.” *W.B. Brown v. State*, 366 S.W.2d 563, 564 (Tex. Crim. App. 1963). Here, a specific penalty is prescribed: one “not to exceed \$2,000.” Ex. 1 to Petition, at 6, sec. 10. Thus, Plaintiff cannot use the general penalty.

9. This outcome is consistent with what “has long been the rule of construction in Texas regarding the application of the law that where a general statute and a special statute for a particular class or set of facts are in apparent conflict, the general must yield to the specific insofar as the particular class (set of facts) is concerned... The special act is regarded as a qualification of, or an exception to, the general act on the particular set of facts, subject or class involved, which is the subject matter of the specific act.” *Magnolia Fruit & Produce Co. v. Unicopy Corp.*, 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, no pet.) (citation omitted).

10. Here, there is a clear conflict between the general penalties in Chapter 54 and the specific penalty in Ordinance No. 29099: a defendant cannot be penalized for violating Ordinance No. 29099 by a fine “not to exceed \$2,000” and also be fined \$1,000 a day in excess

of that amount. The general penalty sought by Plaintiff must therefore yield to the specific penalty set out in Ordinance No. 29099.

11. Thus, to the extent that Plaintiff seeks more than \$2,000 in penalties, that claim has no basis in law and Plaintiff is not entitled to that relief. Tex. R. Civ. P. 91a. This Court should therefore dismiss Plaintiff's second cause of action in its entirety.

**C. By Seeking an SUP, Defendants Were Taking Action to Comply with the Ordinance and Daily Penalties Cannot Accrue During this Time**

12. In the alternative, should this Court conclude that the penalties in Chapter 54 apply here, Defendants move to dismiss Plaintiff's second cause of action for civil penalties pursuant to Chapter 54 to the extent that such cause of action seeks any penalties accruing prior to Plaintiff's denial of Defendants' request for an SUP on April 13, 2016. *See* Petition ¶¶ 31-33.

13. Plaintiff alleges that it is entitled to recover penalties dating from August 15, 2015, of up to \$1,000 a day pursuant to Section 54.017 of the Texas Local Government Code. Petition at ¶ 33. Section 54.017 provides that, in order to recover a civil penalty for violation of an ordinance, a municipality must prove that "after the defendant received notice of the ordinance provisions, the defendant committed acts in violation of the ordinance or *failed to take action necessary for compliance with the ordinance.*" TEX. LOC. GOV'T CODE ANN. § 54.017(a)(2) (West 2015) (emphasis added). However, Plaintiff's own Petition demonstrates that Defendants did, in fact, "take action necessary for compliance with the ordinance" by applying for an SUP with Plaintiff.<sup>1</sup>

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<sup>1</sup> In fact, Defendants, by filing counterclaims to strike down the retroactive application of Plaintiff's zoning code to them, continue to take action necessary for compliance with the ordinance in that they are seeking to have the unconstitutional portions of the ordinance struck down. Defendants therefore respectfully request that this Court deny Plaintiff any penalties against Defendants that accrue prior to the final resolution of this suit.

14. The question of whether this Court should dismiss this claim is directly controlled by *TCI West End, Inc. v. City of Dallas*, 486 S.W.3d 692, 702 (Tex. App.—Dallas 2016, pet. filed) (“*TCI II*”). In *TCI II*, TCI violated a city ordinance by demolishing a building without seeking approval of the landmark commission. The City of Dallas (plaintiff here as well) sued TCI for \$750,000 in cumulative daily civil penalties under Section 54.017, which the jury awarded. The City argued that the entire amount that accrued was the correct penalty because it reflected the time period that TCI “fail[ed] to seek approval [from the landmark commission] from the date demolition began until trial.” *Id.* at 701. In *TCI II*, Plaintiff recognized that TCI’s submission of an application would have tolled the accrual of daily fines: “According to the City, TCI was required to seek demolition approval from the landmark commission by submitting a proper application. From there, the burden of action would shift to the City.” *Id.* at 702. The Court of Appeals agreed: “Because TCI never submitted an application to the landmark commission, the possible daily penalty continued to accrue.” *Id.*

15. Here, as Plaintiff’s Petition alleges, Defendants did submit an application for a new SUP. Petition ¶ 21. As such, it was “tak[ing] action necessary for compliance” and the daily penalty could not accrue while this process played out. Plaintiff nonetheless apparently now reads the requirement that the municipality prove that the property owner was not taking action necessary for compliance as identical with the requirement that it prove that the property was not in compliance with the ordinance. But “Section 54.017 requires only that the property owner ‘take action necessary for compliance.’” *TCI II*, 486 S.W.3d at 702 (quoting TEX. LOC. GOV’T CODE ANN. § 54.017(a)(2) (West 2015)). The reading urged by Plaintiff here would make a violation of the ordinance the sole basis for penalties. This would make Section 54.017(a)(2)’s second prerequisite superfluous and the courts should “eschew constructions of a statute that

render any statutory language meaningless or superfluous.” *TCI I*, 463 S.W.3d at 57; *see also* TEX. GOV’T CODE ANN. § 311.021 (West 2015) (“In enacting a statute, it is presumed that . . . the entire statute is intended to be effective.”).

16. Because Plaintiff’s pleading recognizes that Defendants did take action necessary to comply with the ordinance, daily penalties could not accrue during that time period and there is no basis in the law for Plaintiff’s second cause of action alleging they did. As such, pursuant to TEX. R. CIV. P. 91a, this Court should dismiss Plaintiff’s second cause of action to the extent that it seeks penalties for time prior to Plaintiff’s denial of Defendants’ SUP on April 13, 2016.

## **V. DEFENDANTS’ AFFIRMATIVE DEFENSES**

17. Defendants assert the following affirmative defenses, each subject to Defendants’ motion for dismissal of baseless causes of action and special exception:

18. The claims Plaintiff seeks cannot be asserted because they would give effect to unconstitutional retroactive legislation in violation of Article I, § 16 of the Texas Constitution.

19. The claims Plaintiff seeks cannot be asserted because they would give effect to legislation that would deprive Defendants of property and privileges or immunities without due course of law in violation of Article I, § 19 of the Texas Constitution.

20. The claims Plaintiff seeks cannot be asserted because they would take private property for private purposes and without just compensation in violation of Article I, § 17 of the Texas Constitution.

21. Temporary and injunctive relief should be denied because Plaintiff cannot show probable or irreparable harm.

22. Temporary and injunctive relief should be denied because Plaintiff cannot show a probable right to relief.



23. Plaintiff is estopped from asserting the claims in this lawsuit.

## **VI. DEFENDANTS' COUNTERCLAIMS**

24. Separately from the foregoing answer, Defendants complain of Plaintiff and allege the following by way of counterclaims:

25. Jurisdiction & Venue - Defendants seek damages within the jurisdictional limits of the Court, including monetary relief of \$100,000 or less and non-monetary relief. Venue is proper in Dallas County, Texas, pursuant to Chapter 15 of the Civil Practice and Remedies Code, as all of the events giving rise to the claim occurred in Dallas County, Texas.

26. Claim 1 – Violation of Article I, § 16 of the Texas Constitution: Plaintiff's efforts to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Defendants from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 16 of the Texas Constitution.

27. Claim 2 – Violation of Article I, § 19 of the Texas Constitution: Plaintiff's efforts to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Defendants from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 19 of the Texas Constitution.

28. Claim 3 – Violation of Article I, § 17 of the Texas Constitution: Plaintiff's efforts to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Defendants from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 17 of the Texas Constitution.

29. Attorneys' Fees: Defendants hereby request all costs and reasonable attorneys' fees, as permitted by Section 37.009 of the Texas Civil Practices and Remedies Code.

30. Permanent Injunction: Defendants respectfully ask this Court for a permanent injunction against Plaintiff and to set this application for a hearing and, following the hearing, to issue a permanent injunction against Plaintiff.

## **VII. DEFENDANTS' THIRD-PARTY CLAIM**

### **A. Parties**

31. Third-Party Plaintiff Mr. Mbogo is an individual residing in Dallas County, Texas. He is the owner and operator of Hinga's Automotive, an automotive repair shop, located at 3516 Ross Avenue, Dallas, Texas 75204. Subject to Defendants' Verified Denial above, Mr. Mbogo alleges he is the owner of the property on which Hinga's Automotive sits. He may be served with process at Hinga's Automotive at the address listed above.

32. Third-Party Plaintiff Hinga's Automotive is a Texas corporation doing business in Dallas County. It may be served with process through Third-Party Plaintiff Mr. Mbogo at the address listed above.

33. In rem Third-Party Plaintiff Block 513, Tract 4, 1.8921 acres, Dallas County, Dallas, Texas, also known as 3516 Ross Avenue, Dallas, Texas 75204, is the real property at issue in this lawsuit and may be served through Third-Party Plaintiff Mr. Mbogo at the address listed above.<sup>2</sup>

34. Third-Party Defendant Mayor Michael S. Rawlings is named solely in his official capacity as Mayor and Presiding Officer for the Dallas City Council. He may be served at 1500 Marilla Street, #5EN, Dallas, TX 75201.

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<sup>2</sup> As noted in Defendants' Verified Denial above, there is ongoing litigation regarding whether Mr. Mbogo is the sole owner of the Property.

35. Third-Party Defendant Scott Griggs is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall, 1500 Marilla Street, Dallas, TX 75201 (“Dallas City Hall”).

36. Third-Party Defendant Adam Medrano is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

37. Third-Party Defendant Casey Thomas, II, is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

38. Third-Party Defendant Carolyn King Arnold, is named solely in her official capacity as a Dallas City Council member. She may be served at Dallas City Hall.

39. Third-Party Defendant Rickey D. Callahan is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

40. Third-Party Defendant Monica R. Alonzo is named solely in her official capacity as a Dallas City Council member. She may be served at Dallas City Hall.

41. Third-Party Defendant Tiffinni A. Young is named solely in her official capacity as a Dallas City Council member. She may be served at Dallas City Hall.

42. Third-Party Defendant Erik Wilson is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

43. Third-Party Defendant Mark Clayton is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

44. Third-Party Defendant B. Adam McGough is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

45. Third-Party Defendant Lee M. Kleinman is named solely in his official capacity as a Dallas City Council member. He may be served at Dallas City Hall.

46. Third-Party Defendant Sandy Greyson is named solely in her official capacity as a Dallas City Council member. She may be served at Dallas City Hall.

47. Third-Party Defendant Jennifer S. Gates is named solely in her official capacity as a Dallas City Council member. She may be served at Dallas City Hall.

48. Third-Party Defendant Philip Kingston is named solely in his official capacity as a member of the Dallas City Council. He may be served at Dallas City Hall.

**B. Jurisdiction & Venue**

49. Defendants/Third-Party Plaintiffs seek damages within the jurisdictional limits of the Court, including monetary relief of \$100,000 or less and non-monetary relief. Venue is proper in Dallas County, Texas, pursuant to Chapter 15 of the Civil Practice and Remedies Code, as all of the events giving rise to the claim occurred in Dallas County, Texas.

**C. Facts**

50. Mr. Mbogo is an immigrant from Kenya, an American citizen, and a long-time Dallas resident. He has operated his small business, which specializes in general auto repair, at 3516 Ross Avenue, Dallas, Texas 75204, since 1986.

51. Mr. Mbogo and his employees have provided the residents of Dallas—including, among others, the city of Dallas itself—quality automotive care during that period. The business has also received accolades for its quality and customer service.

52. Hinga's Automotive has never been cited for any environmental violation, nor has it been the subject of any nuisance complaints from its neighbors.

53. Hinga's Automotive (then known as Universal Automotive) complied with all applicable zoning standards for Ross Avenue when it opened in 1986.

54. In 2005, the Dallas City Council and the Mayor, Third-Party Defendants here, created Planned Development District 298 (“PDD No. 298”), which includes 3516 Ross Avenue, where Hinga’s Automotive is located.

55. By creating Subdistrict 1 of PDD No. 298, Third-Party Defendants made Hinga’s Automotive a “nonconforming use” by not including automobile repair shops on the list of permitted uses in the subarea.

56. Making Hinga’s Automotive a nonconforming use meant that, upon application of the zoning regulations to the Property, Third-Party Plaintiffs would either have to conform the use of the property to the zoning rules (by stopping auto repair on that location) or by moving Hinga’s Automotive to a location where Third-Party Defendants permit auto repair shops.

57. Third-Party Defendants did not, and will not, provide any governmental compensation to Third-Party Plaintiffs for making Hinga’s Automotive a nonconforming use.

58. Typically, nonconforming uses are permitted to continue indefinitely.

59. Third-Party Defendants instead set a time by which Third-Party Plaintiffs must bring the Property into compliance.

60. Specifically, Ordinance No. 25960, enacted on April 27, 2005, set two compliance date categories for nonconforming uses in this subdistrict. For Hinga’s Automotive, conformance was to be established by April 26, 2010. Ordinance No. 25960 also stated that, “[t]he 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....” Dallas, Tex., Dallas City Code, ch. 51P, art. 298, § 51P-298.108(b) (2016).

61. Mr. Mbogo appealed to the Dallas Board of Adjustment before April 26, 2010, and was approved for a later compliance date of April 13, 2013.

62. In December 2012, prior to the expiration of the compliance date for the property, Hinga's Automotive filed a zoning change application with the City Plan Commission to create a new subarea in PDD No. 298 and an SUP for vehicle or engine repair or maintenance.

63. Hinga's Automotive sought an SUP for ten years with eligibility for one automatic two-year renewal, which was similar to an SUP Third-Party Defendants had granted to an auto-related business located across the street from Hinga's Automotive.

64. The City Plan Commission considered this request on June 6, 2013. The Plan Commission approved a new subdistrict within PDD No. 298 and approved an SUP for a vehicle or engine repair or maintenance use for a two-year period. Third-Party Defendants then affirmed that recommendation. That SUP expired on August 14, 2015.

65. Third-Party Defendants' grant of an SUP until August 14, 2015, came with an extraordinary condition, however. Despite Third-Party Defendants' granting a ten-year SUP with an automatic renewal for two years to an auto-repair shop across the street from the Property, Third-Party Defendant Councilmember Kingston—the member of the Dallas City Council representing the area in which Hinga's Automotive sits—told Mr. Mbogo that the Bryan Place Neighborhood Association (the "Association") would oppose, and Mr. Kingston would vote against, Mr. Mbogo's request for an SUP unless he agreed to a two-year SUP and promise not to seek another SUP at the end of that time period.

66. Mr. Mbogo agreed to the conditions sought by the Association and Third-Party Defendant Kingston and Third-Party Defendants approved a two-year SUP on August 14, 2013.

67. The Dallas City Code does not contain any requirement that applicants agree to such a condition in order to obtain an SUP.

68. The SUP issued by Third-Party Defendants does not contain any reference to the condition insisted upon by the Association.

69. Because he wishes to continue to operate his business, earn his livelihood, and not move the shop, in 2015, Mr. Mbogo sought a new three-year SUP, as he was entitled to under the Dallas City Code.

70. After concluding that Hinga's Automotive met the conditions for the issuance of an SUP contained in the Dallas Code, Dallas City Plan Commission Staff recommended that the Plan Commission approve Hinga's Automotive's application for an SUP.

71. Regardless, the Plan Commission ultimately denied the application because it was inconsistent with the condition that he not seek another SUP that the Association had insisted upon in 2013.

72. Mr. Mbogo appealed this decision to the City Council.

73. At the urging of the Association, Third-Party Defendants denied the application for an SUP on April 13, 2016.

74. The Dallas City Code does not provide for an administrative appeal of a denial of an SUP.

**D. Injury to Third-Party Plaintiffs**

75. Third-Party Defendants are seeking to force Mr. Mbogo to close his business at its current location—a location which is fully paid for and at which Mr. Mbogo has established a thirty-year presence—and either cease auto repair altogether or reopen at another, less-desirable, and unpaid-for location.

76. Mr. Mbogo does not wish to close Hinga's Automotive or relocate it.

77. Third-Party Defendants' unnecessary and unconstitutional actions here threaten to destroy the investments that Third-Party Plaintiffs have made to the property and the building housing Hinga's Automotive in order to run an auto repair business, and threaten to force Third-Party Plaintiffs to incur moving costs, loss of customers, and disruption of the business for no legitimate governmental reason.

78. Third-Party Plaintiffs have relied on the expectation that Third-Party Defendants would not make Hinga's Automotive a nonconforming use.

79. Third-Party Plaintiffs have, in good faith, changed their position and incurred substantial expenditures in reliance on Third-Party Defendants' zoning designation for Hinga's Automotive when Mr. Mbogo began the business.

80. Third-Party Defendants' actions threaten Third-Party Plaintiffs' reasonable, settled investment-backed expectations and frustrate that reliance.

81. Third-Party Defendants' actions are ultimately for the benefit of private industries and are not designed to achieve any compelling, important, or legitimate governmental interest.

82. Third-Party Defendants' actions threaten to permanently harm the economic viability of Third-Party Plaintiffs' established business.

83. Third-Party Defendants have not proposed to pay any compensation whatsoever for the harm they seek to cause to Third-Party Plaintiffs' investment-backed expectations and property interests in land, chattels, and business.

84. Third-Party Defendants' actions here threaten to change the legal consequences of actions taken under a previously valid legislative rule.



85. Third-Party Defendants' actions here threaten to take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, and attach a new disability with respect to transactions or considerations already passed.

86. Third-Party Defendants' actions affect acts or rights that came into force before Third-Party Defendants' changed the zoning designation for the area in which Hinga's Automotive sits.

#### **E. Causes of Action**

87. First Cause of Action – Violation of Article I, § 16 of the Texas Constitution:  
Third-Party Defendants' efforts, in their official capacity, to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Third-Party Plaintiffs from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 16 of the Texas Constitution.

88. Second Cause of Action – Violation of Article I, § 19 of the Texas Constitution:  
Third-Party Defendants' efforts, in their official capacities, to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Third-Party Plaintiffs from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 19 of the Texas Constitution.

89. Third Cause of Action – Violation of Article I, § 17 of the Texas Constitution:  
Third-Party Defendants' efforts, in their official capacities, to apply Ordinance No. 29099, or any other ordinance, statute or rule, that prevents Third-Party Plaintiffs from operating a vehicle or engine repair or maintenance facility at 3516 Ross Avenue, Dallas, Texas 75204 violate Article I, § 17 of the Texas Constitution.

90. Fourth Cause of Action – Attorneys’ Fees: Third-Party Plaintiffs hereby request all costs and reasonable attorneys’ fees regarding their claim for a declaratory judgment, as permitted by Section 37.009 of the Texas Civil Practices and Remedies Code.

91. Fifth Cause of Action – Permanent Injunction: Third-Party Plaintiffs seek a permanent injunction against Third-Party Defendants’ enforcement of the aforementioned unconstitutional ordinance.

92. Sixth Cause of Action – Temporary Injunction: Third-Party Plaintiffs request that the Court set this application for a hearing and, following the hearing, to issue a temporary injunction against Third-Party Defendants during the pendency of this case and until the Court issues its permanent injunction.

### **VIII. REQUEST FOR DISCLOSURE**

93. Defendants/Third-Party Plaintiffs hereby request Plaintiff/Third-Party Defendants disclose, within the applicable time period, the information and materials described in Rules 194.2(a)-(c), (e), and (l) of the Texas Rules of Civil Procedure.

### **IX. PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Defendants/Third-Party Plaintiffs pray

- (i) That their special exception be sustained;
- (ii) That their motion for dismissal be granted and Plaintiff’s causes of action for penalties above \$2,000, or, in the alternative, for daily penalties accruing prior to Plaintiff’s denial of Defendants/Third-Party Plaintiffs’ SUP on April 13, 2016, be dismissed with prejudice;
- (iii) That, if a trial is necessary, that Plaintiff/Third-Party Defendants take nothing;
- (iv) For an injunction barring Plaintiff/Third-Party Defendants from enforcing any zoning law preventing Defendants/Third-Party Plaintiffs from operating an automotive repair

shop at 3516 Ross Avenue, Dallas, Texas;

(v) For an injunction barring Plaintiff/Third-Party Defendants from imposing fines or filing any enforcement action against Defendants/Third-Party Plaintiffs based on the operation of an automobile repair shop at 3516 Ross Avenue, Dallas, Texas;

(vi) For a declaratory judgment that Plaintiff/Third-Party Defendants violate the prohibition against retroactive legislation in Tex. Const. art. I, § 16, deprive Defendants/Third-Party Plaintiffs of the process due them pursuant to Tex. Const. art. I, § 17, and take their private property without compensation and for a private use in violation of Tex. Const. art. I, § 19;

(vii) For an award of one dollar in nominal damages;

(viii) For an award of attorneys' fees and court costs; and

(ix) For all other relief to which Defendants/Third-Party Plaintiffs may show themselves entitled.

RESPECTFULLY SUBMITTED this 21st day of July, 2016.

By: /s/ Warren Norred  
Warren Norred (Texas State Bar No. 24045094)  
C. Chad Lampe (Texas State Bar No. 24045042)  
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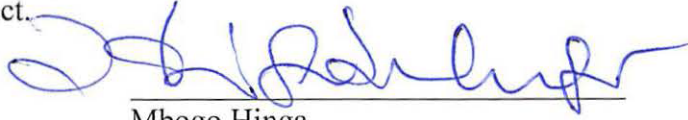
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*\*Verified Motions for Admission Pro Hac Vice Pending*

Attorneys for Defendants/Third-Party Plaintiffs

**VERIFICATION** - Before me, the undersigned notary public, on this day personally appeared Defendant/Counter-Plaintiff Mbogo Hinga, who being by me duly sworn stated that he has read Section II of the foregoing Original Answer, and that the statements contained in them are within his personal knowledge and true and correct.

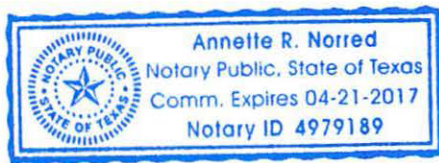


Mbogo Hinga

Signed and sworn to before me, the undersigned notary public, on July 21, 2016 to certify which witness my signature and seal of office.



Notary



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of July, 2016, a true and correct copy of the foregoing *Defendants' Original Answer, Special Exceptions, Motion to Dismiss Baseless Causes of Action, Affirmative Defenses, Counterclaims, and Third Party Complaint in Response to Plaintiff City of Dallas' Original Petition, Application for Temporary and Permanent Injunction, and Requests for Disclosure* was filed with the Clerk of Court and served in compliance with TEX. R. CIV. P. 21 and TEX. R. CIV. P. 21a via email using the Court's electronic filing service on the following counsel of record:

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Executive Assistant City Attorney  
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*Counsel for Plaintiff*

/s/Warren V. Norred

Warren Norred (Texas State Bar No. 24045094)