

No. 26-0293

In the
Supreme Court of Texas

AZAEL SEPULVEDA,
Petitioner,

v.

CITY OF PASADENA,
Respondent.

From the First Court of Appeals, No. 01-24-00327-CV

PETITION FOR REVIEW

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INTRODUCTION

A Texan wishing to bring a dispute to court regarding how they want to use their land can do so once the government has made it clear that it will not allow the landowner to use their property in their desired way. This is a “relatively modest” requirement that demands that the government has “committed to a position” but does not insist on more. It does not require that a municipality issue a particular form denying the request or that a law prohibit the governmental body from doing more. That is what this Court’s caselaw has said consistently since first addressing the question nearly thirty years ago. This Court has also said and reiterated the point that futile requests are not required; a landowner need not reapply once the government has made clear that it will not approve the desired use.

But the question of what makes a subsequent application futile has not been fully explored by this Court. Without the necessary guidance, lower courts are inconsistently approaching the question. And, as a result, Texans must guess whether they can vindicate their property rights in court. In some cases, a landowner’s five rejected requests are enough to deem any more futile. Some courts only require a single rejection. Some courts look to what the government said in its denial, while others do not. Variance applications may or may not be required, depending on the draw. Sometimes courts insist

on an appeal, and sometimes they do not. This presents a problem for landowners entrenched in disputes with their municipalities over how they may use their own land. How many more requests must they submit, spending time and money on engineers and applications rather than using their land as they see fit, before a court will deem their dispute ripe? It encourages municipalities to give equivocal responses to protect themselves from litigation. And it leaves property owners in the untenable position of not knowing how much pre-litigation work they must do before they can bring a dispute to court.

The problem is perfectly presented in the present case. Petitioner Azael Sepulveda (Oz) is an auto mechanic who owns and operates a one-man auto-repair shop called Oz Mechanics where he diagnoses and repairs electrical malfunctions. After outgrowing his rented space, he bought his own property in Pasadena that had been home to an auto-machine shop for many years. It has plenty of parking for his business, but the City demanded that he provide 28 outdoor parking spaces—an amount that literally will not fit. He sued, challenging the unconstitutional parking requirements, and obtained a temporary injunction. The parties reached a settlement, by which the City agreed Oz could open if he provided seven parking spots along with a few other requirements. But the City immediately went back on its word. Indeed,

the same day that the City Council approved the agreement, a regulator whose review is necessary told Oz she thought it was impossible for a certificate of occupancy to be granted. Nevertheless, Oz submitted three site plans for review, but the City rejected each one, repeatedly making demands of Oz that conflict with the settlement agreement. Oz was thus out of options; he cannot apply for a certificate of occupancy without an approved site plan, and the City refuses to approve his site plan.

Oz sued a second time, but the First Court of Appeals dismissed his case as unripe. In the court's view, the City's denial of Oz's site plan was not a final decision, and he should have sought a certificate of occupancy, variance, or appeal. Without those, Oz's concerns were speculative. The court did not address futility or why three submitted and denied site plans was insufficient to cement the City's position. This holding is at odds with this Court's caselaw and is part of an inconsistent patchwork of appellate decisions contemplating ripeness and futility in land-use cases. This Court's intervention is warranted.

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In the District Court of Harris
County, Texas
190th Judicial District

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STATEMENT OF THE CASE

Nature of the Case:	Action for declaratory judgment, injunctive relief, nominal damages of \$1, and monetary damages in the amount of \$250,000 or less, alleging a breach of contract and challenging the constitutionality of the City of Pasadena's off-street parking demands as reflected in City Code § 9-7 and as agreed to in a settlement agreement, under Article I, §§ 19 and 3 of the Texas Constitution, the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003.
Trial Court Judge:	The Honorable Beau A. Miller.
Trial Court Designation:	190th Judicial District, Harris County, Texas
Trial Court Disposition:	Respondent City of Pasadena and the other city defendants filed a plea to the jurisdiction, arguing that the case was not ripe and that the city was immune from both the constitutional and breach-of-contract claims. The district court denied the plea. The City took an interlocutory appeal, which triggered an automatic stay of proceedings. <i>See</i> Tex. Civ. Prac. & Rem. Code § 51.014(b).
Trial Court Parties:	The Appellant was City of Pasadena. The Appellee was Azael Sepulveda.
Court of Appeals:	The First Court of Appeals.
Court of Appeals Justices:	Justice Morgan, joined by Chief Justice Adams and Justice Dokupil.
Court of Appeals Citation:	<i>City of Pasadena v. Sepulveda</i> , No. 01-24-00327-CV, 2025 WL 3006553 (Tex. App.—Hous. [1st Dist.] Oct. 28, 2025, pet. filed (mem.

op.).

Court of Appeals
Disposition:

The First Court reversed the district court and rendered judgment granting the City's plea to the jurisdiction, dismissing Petitioner's claims for lack of jurisdiction. The First Court held that Petitioner's claims were not ripe, depriving the courts of jurisdiction to hear them.

Petitioner moved for en banc reconsideration. After calling for a response, the First Court denied the motion on February 19, 2026. No motions for rehearing or en banc reconsideration are pending.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Tex. Gov't Code § 22.001(a) because this case presents questions of when courts have jurisdiction to hear constitutional and breach-of-contract disputes, which are important to the jurisprudence of the state and likely to recur.

ISSUES PRESENTED

1. Ripeness is a “relatively modest” requirement, insisting only that the government commit itself to a position for a claim to be ripe. Here, the property owner filed successive lawsuits and submitted multiple site plans toward obtaining the certificate of occupancy he needs to open his auto-repair business for which he purchased the property, and the City opposed him at every turn. Should the City be permitted to continue requiring the property owner to play “Mother, May I?” until exhaustion when there is no confusion as to what the owner wanted to do with his property or whether the City would allow it?

STATEMENT OF FACTS

The First Court of Appeals' account of the facts and procedural history is reliable in some ways though suffers from one major flaw: its insistence that Petitioner Azael Sepulveda (Oz) apply for a certificate of occupancy to obtain the City of Pasadena's final decision as to his property. The crux of this appeal centers on the City making this a practical impossibility: Oz cannot apply for a certificate of occupancy without the City's approval of his site plan, which City regulators refuse to give. Beyond that, the First Court's decision omits key context and history about the dispute and interactions between the City and Oz.

Oz owns and operates a one-man auto-repair shop, Oz Mechanics, in Pasadena. CR.8, 11; App.33, 36. Oz is in the business of repairing cars—not filing lawsuits—but this case is his second lawsuit against the City. Part I addresses Oz's first lawsuit. Part II explains Oz's repeated attempts at getting the City to comply with a settlement agreement so that he could open his shop. Part III shows why Oz had to sue the City a second time—after nearly 1,000 days of the City stifling Oz's attempts to use his property to earn an honest living.

I. Petitioner Azael Sepulveda wants to use his property to work on cars, as the land has been used for many years, but the City of Pasadena has resisted his efforts for over 1,000 days.

Oz is a specialty mechanic who focuses on diagnosing and repairing electrical malfunctions. CR.11; App.36. He does not change transmissions or do other heavy auxiliary work. CR.11; App.36. He takes clients by appointment only. CR.11; App.36. Oz Mechanics currently operates out of a rented location; Oz bought his own property at 1615 Shaver Street (the “Property”) in 2021, which he funded through a home-equity loan, to grow his business. CR.12; App.37. The Property is ideal for Oz as it was previously used for many years as an auto-machine shop by Houston Engine and Balancing Service. CR.12; App.37. The Property has room for nine cars (a parking lot with five spaces plus room for four cars inside the garage), which is more than enough for Oz Mechanics. CR.12; App.37.

But the City wasn’t concerned with the facts of Oz’s actual business. A few months before Oz purchased the Property, the City increased its parking requirements in a way that required the Property to have 28 total outdoor parking spaces. CR.13; App.38. Oz discovered this when the City first refused to allow him to open his business at the Property. CR.13; App.38. He tried to comply but discovered that it was physically impossible to add the new

parking the City demanded, in addition to being too expensive and unnecessary. CR.13; App.38.

Out of options, Oz sued the City to challenge its unconstitutional mandatory minimum parking requirements. CR.13–14; App.38–39. The Harris County District Court, 281st Judicial District granted a temporary injunction following an evidentiary hearing. CR.14–15, 135–36; App.39–40. The court’s findings of fact and conclusions of law included that: (1) the Property could not fit 28 parking spaces, CR.124, 134; (2) the previous use of the Property as an auto-machine shop was materially the same as Oz’s auto-repair shop, CR.134; (3) the City’s witness testimony “lack[ed] credibility,” CR.134;¹ (4) there was no public interest in requiring the parking spaces the City demanded, CR.131; and (5) the City’s mandatory minimum parking requirement was unduly burdensome and unconstitutionally oppressive, CR.134. The City filed a plea to the jurisdiction arguing, among other things, that Oz’s claims were not ripe—a contention that the court rejected. CR.134–35. After ruling in Oz’s favor, the court ordered the parties to attend mediation. CR.135–36.

¹ This witness was Natalie Herrera, who then attended the mediation ostensibly to settle the dispute but told Oz shortly after the settlement that it would be “impossible” for a certificate of occupancy to be granted. CR.17; App.42; *see also infra* Facts II.

The City appealed from these orders, though it filed no briefs in the court of appeals. *See* CR.138–39. Instead, it waited while its interlocutory appeal stayed the lower court proceedings and prevented enforcement of Oz’s temporary injunction. *See* Tex. R. App. P. 29.1; Tex. Civ. Prac. & Rem. Code §§ 6.002, 51.014(a)(8), (b). Ultimately, the First Court dismissed the City’s appeal for want of prosecution. CR.138–39. During this time, the parties attended mediation and later settled Oz’s first lawsuit.² CR.15–16; App.40–41; *see also* CR.65–66.

II. The City settles Oz’s first lawsuit but immediately goes back on its word, refusing to allow Oz to use his property.

Oz’s second lawsuit comes on the heels of Oz settling his first lawsuit. Oz was forced to sue the City a second time (the instant case), to challenge the City’s breach of the settlement agreement that resolved the first lawsuit and because the City violated Oz’s constitutional rights after settling with him. *See* CR.22–30; App.47–55. By the time Oz filed this second lawsuit, it had been nearly 1,000 days since he first tried to secure the City’s approval to use his Property.

² Before nonsuiting his first lawsuit, Oz sought to raise the issue of the City violating the settlement agreement before the ink was dry. CR.21; App.46. That court ordered mediation. CR.21; App.46. In response, the City filed a counterclaim against Oz seeking damages and claiming breach for his not yet dismissing the case. CR.21; App.46. After an unsuccessful mediation, CR.21–22; App.46–47, Oz nonsuited his claims, and the City nonsuited its counterclaim. CR.22; App.47. This concluded the first litigation.

The City requires an approved site plan before a property owner can seek a certificate of occupancy. But the City has prevented Oz from securing the approved site plan that he needs to open his mechanic's shop. Oz submitted three site plans after settling his first lawsuit, and the City rejected each one by taking positions that conflict with the Agreement it entered and that violates the Constitution.

The settlement agreement that resolved Oz's first lawsuit states that the City would approve Oz's application to open Oz Mechanics if he complied with four conditions and nonsuited³ his first lawsuit (the "Agreement"). CR.15–16; App.40–41; *see also* CR.65–66. Specifically, Oz needed to: (1) provide seven parking spots (three in front, four on the side); (2) pave the side of the building from the Property line to the shed and remove some fencing; (3) pave the floor area of the shed; and (4) add bollards behind the building. CR.15–16; App.40–41. In exchange, the City would pay Oz \$10,000 and allow him to open. CR.15–16; App.40–41. Oz agreed to these terms because his ultimate goal is to open Oz Mechanics at the Property. CR.16; App.41.

³ Oz's nonsuiting was without prejudice to any action not encompassed by his original petition, including a breach-of-contract action regarding the Agreement. *See* CR.22; App.47.

Oz got to work performing his obligations under the Agreement; unfortunately, the City did not keep its word. CR.16–17; App.41–42. Oz settled his first lawsuit but is caught in an endless game of “Mother, May I” to use his own property. Indeed, the same day that the City Council approved the Agreement, Defendant Natalie Herrera of the City’s Planning Department⁴ congratulated Oz and told him to submit a site plan, but then said the City’s other requirements made it “impossible” for him to obtain a certificate of occupancy. CR.17; App.42. Her approval of a site plan was critical. The first step in obtaining a certificate of occupancy is to get the City’s approval of a site plan. Pasadena, Tex. Code of Ordinances § 28-66(1)(e)(ii); CR.18; App.43 (City staff told Oz that the City would not move forward with his certificate-of-occupancy application without a “corrected” site plan); App.81. Oz submitted multiple site plans for review to Ms. Herrera. Although the site plans complied with the Agreement, Ms. Herrera told Oz that they would nonetheless be rejected. CR.17–18; App.42–43. What’s more, she sent Oz an email marking up one of his site plans in ways that openly contradicted the Agreement’s terms. CR.18; App.43. The City staked out its position, and thus Oz was unable to secure an approved site plan.

⁴ In addition to being the City witness whose testimony the court found lacking credibility, CR.102, 134, Ms. Herrera was also present at the mediation where the settlement was reached, CR.17–18; App.42–43.

What followed was a back-and-forth between counsel, where the City indicated that Oz needed to submit finalized engineering plans for the site layout with a certificate-of-occupancy application. CR.18; App.43. Yet there can be no certificate-of-occupancy application without an approved site plan from the City's planning department. Pasadena, Tex. Code of Ordinances § 28-66. So, Oz tried again and submitted the engineered site plan the City requested (his third effort), which showed how the Property would be laid out. CR.18; App.43. Oz's third attempt fared no better with the City.

The City *again* rejected Oz's site plan. And it again marked up Oz's site plan in ways that conflict with the Agreement. CR.18; App.43. For instance, the City's letter rejected Oz's proposed drive-aisle widths. CR.18; App.43. The problem with the City's position on this point is that it flouts the Agreement the City entered, by making it impossible for Oz to add the parking spots on the side of the Property that the Agreement contemplates. There is simply not enough space for both. By taking this position, the City boxed Oz in such that no site plan can get approved. CR.18–19; App.43–44. This pattern repeats itself.

In addition to the reasons the City invoked in its rejection letter, the City's mark-up of Oz's site plan contained four further concerns, two of which

conflict with the Agreement.⁵ One issue that conflicts with the Agreement is the City’s requirement that Oz add a five-foot grass setback. CR.19–20; App.44–45. Complying with this demand only further narrows the drive-aisle width (one of the two reasons the City invoked in its denial letter) in conflict with the Agreement’s call for paving the side of the building “from the Property line to the shed.” CR.20; App.45. As with the City’s objections to the drive-aisles widths, this new demand conflicts with the Agreement—which Oz insists the City comply with. The City’s remaining issue cashes out the same. The City opposes vehicles backing into the right-of-way, which it arrives at by erroneously expanding the definition of “right-of-way” from road to all paved area across the property line—this also renders the Agreement unenforceable. CR.20; App.45.

At this point Oz had submitted three site plans after settling his first lawsuit. The City committed to its position in writing for why it was not approving Oz’s site plan, even marking up Oz’s site plan in ways that conflict with the Agreement. Unable to use his Property, Oz sued the City a second time to vindicate his property rights and enforce the Agreement.

⁵ The two remaining issues that do not conflict with the Agreement were minor concerns that Oz agreed to fix. CR.19; App.44.

III. Oz sues the City a second time to vindicate his property rights and enforce the settlement agreement's terms.

Oz's second lawsuit raises three ripe claims that center on challenging the positions that the City took post-settlement. First, Oz claimed the City materially breached the Agreement by refusing to comply with its terms when rejecting his site plans. CR.24–25; App.49–50. Second, Oz challenged the City's demands that he add parking spots, including elements that are physically impossible to comply with, as unconstitutional deprivations of liberty and property that violate Article I, Section 19 of the Texas Constitution. CR.6, 25–27; App.31, 50–52. Third, Oz raised an equal rights claim under Article I, Section 3 to challenge the City's actions of routinely allowing similarly situated businesses to operate with less parking than it demands of Oz. CR.27–28; App.52–53. His breach-of-contract claim seeks equitable relief and monetary damages, and his two constitutional claims seek equitable relief and nominal damages of one dollar. CR.29–30; App.54–55.

The City responded by filing a plea to the jurisdiction, arguing that Oz's claims were not ripe and that the City was immune from judicial enforcement of the Agreement and from Oz's constitutional claims. CR.37–47. The trial

court held two hearings on the City's plea.⁶ At the first hearing, the City's outside counsel was unable to answer questions about the Agreement, so the district court reset the hearing and demanded that the city attorney appear instead. *See* 2 RR.10:17–13:24. The city attorney appeared at the next hearing, where the court denied the City's plea to the jurisdiction, rejecting the City's argument that the court lacked jurisdiction to enforce a settlement agreement that the City itself voluntarily entered and that the Pasadena City Council voted to approve. 1 RR.7:15–19, 26:18–21. The court followed up the next day with a written order denying the City's plea to the jurisdiction. CR.163; App.14. The City filed an interlocutory appeal and continued pressing its jurisdictional defenses. CR.169.

The First Court of Appeals reversed the trial court's order in a memorandum opinion. It concluded that Oz's claims were not ripe, which was dispositive, and declined to address the City's immunity arguments. The decision below reasons that Oz's claims were not ripe because the City's denial of Oz's site plan was not a final decision. Op. 8–10; App.9–11. It gave three reasons for this holding. First, it concluded that Oz's intent to change part of the site plan to comply with some of the City's demands that Oz didn't

⁶ The Reporter's Record consists of two transcripts from the district court. This brief's citations to the April 29, 2024 hearing are styled as "1 RR.[page:line]" and the citations to the April 15, 2024 hearing are "2 RR.[page:line]."

object to reflected “futuristic language” that “evinces that his claims are not ripe.” Op. 8–10; App.9–11. Second, it deemed fatal his decision not to seek a variance or appeal to the Planning and Zoning Commission or to the City Council (despite the City committing to a position when reviewing and rejecting Oz’s site plans). Op. 9; App.10. Finally, it credited the City’s argument that the site plan did not comply with the Agreement, making Oz’s “allegation that the City breached the Agreement ... mere speculation about a future event.” Op. 9; App.10. According to the First Court, all of this made it “uncertain whether the City will approve Sepulveda’s future application for a certificate of occupancy that complies with the Agreement’s conditions” and thus Oz’s claims were unripe. Op. 9–10; App.10–11.

Oz moved for en banc reconsideration. After calling for the City to respond, the First Court denied the motion. This petition follows.

SUMMARY OF THE ARGUMENT

This Court should grant review to address what degree of finality is necessary for a case to be ripe in Texas, specifically in the context of futility. It is an important question that guides parties across the state in knowing how far they must go in requesting that their municipality allow them to use their property in their desired way before they file suit. This Court’s decisions establish that finality is not a high bar in Texas, yet the lower courts continue

to struggle with how to apply it. In particular, they struggle with identifying when a municipality has made its final decision and when demanding any further applications would be futile.

The City's resistance to Oz using his property shows why this Court's intervention is needed once more. A landowner sought to use his property the way it had been used for years—as a business to work on cars—but faced a municipality that inexplicably refused to allow him to open. He asked three times and was told no three times. The City's position could not be clearer, and its approval is necessary. Yet the First Court concluded that the City might still change its mind, more than five years after Oz first asked if he could open his business. He continues to be deprived of his property rights, both by the City and by a cramped view of ripeness that calls for this Court's attention.

ARGUMENT

For a court to consider a land-use dispute, the government must have committed to a position. That's all. This Court refers to this “de facto” requirement for finality as a “relatively modest” demand. It does not require that property owners engage in futility before bringing a dispute to the judiciary. Rather, the caselaw recognizes that subsequent applications become futile when the government has made clear that a landowner cannot

obtain approval for their desired use. This low hurdle is designed to draw out opposing positions and provide enough information for courts to understand the dispute at issue.

The question of when futility arises is not clear in the caselaw, however, leaving property owners to guess how many applications a lower court will insist upon before deeming a case ripe. This has given rise to courts below demanding that municipalities be given opportunity after opportunity to consider how a property owner may use their own land. Perhaps an official will change their mind if they're simply asked again after they have cemented their "no." At the same time, other courts are finding ripeness in the face of remarkably similar facts. The lower courts are in disarray in their treatment of the threshold question of when a case is properly in court. This Court's intervention is warranted.

I. The Lower Courts Need this Court's Guidance on Futility, as the First Court's Decisions Make Clear.

The First Court concluded that Oz's claims are not ripe because there has not been a "final" determination by the City. Perhaps, according to the court, the City would have changed its mind had Oz sought a variance or appealed to the Planning and Zoning Commission or the City Council. This perspective suffers from two fatal flaws: It ignores the years-long back-and-forth between Oz and the City, which was colored by a previous lawsuit that

concluded with the Agreement that the City now refuses to follow, and it fails to contemplate that Oz cannot even get to the “final” determination without the City first approving his site plan. On the latter point, the First Court never grappled with this Court’s futility caselaw. Left standing, the decision below prevents meritorious claims from reaching the merits under an amorphous version of futility. The lower courts need this Court’s guidance as to when a land-use application process becomes futile.

A. This Court erects a low bar for ripeness but has not fleshed out futility.

Ripeness and futility are two sides of the same jurisdictional coin that asks whether a land-use dispute is sufficiently final for the courts to weigh in. In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928–30 (Tex. 1998), and *Commons of Lake Houston, Ltd. v. City of Houston*, 711 S.W.3d 666, 684–86 (Tex. 2025), this Court discussed ripeness at length, first setting out the basic rule that courts may only address ripe land-use claims, which demands a final decision about how land may be used under a regulation, and later reiterating and expanding upon the rule. In both cases, this Court recognized that a landowner’s request was ripe and needed no further percolation before the courts could address the dispute. This baseline is supposed to be “relatively modest”; “[o]nly de facto finality is required, demonstrating that the government has committed to a position.” *Commons of Lake Houston*, 711

S.W.3d at 684–85 (quotation marks omitted). Further, the rule never insists on owners making futile requests. *Mayhew*, 964 S.W.2d at 929 (“[F]utile variance requests ... are not required.”); *Commons of Lake Houston*, 711 S.W.3d at 684–85 (same).

Despite this Court’s prior pronouncements, municipalities use the ripeness doctrine “to whipsaw” landowners, with ripening a claim becoming “a costly game of ‘Mother, May I,’ in which the landowner is allowed to take only small steps forwards and backwards until exhausted.” *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 63 (Tex. 2006) (Hecht, J., dissenting); see also William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833, 855 (2002) (“[W]here relief is theoretically possible, landowners remain confronted with the vexatious problem of determining whether and how many times to reapply.”).

This Court’s decisions in *Mayhew* and *Commons of Lake Houston* lay out the ripeness doctrine, which seems clear enough as a general matter. But what makes a further application futile? This Court has given some guideposts, such as that a request is futile “when the government has made it clear that the owner cannot obtain approval for its desired use, that its request for a permit has been definitively rejected, or that any subsequent request

would make no difference.” *Commons of Lake Houston*, 711 S.W.3d at 685 (quotation marks omitted). But what that means in practice is an open question that warrants the Court’s review. How many site plans must a landowner pay an engineer to generate and submit before another will be considered futile? How many refusals must he receive from a city planner until he can ask the judiciary to vindicate his property rights? Should courts look at the reasons behind the denial, or only at the number of rejections? How does futility analysis apply if a municipality will not allow the owner to complete the steps necessary to get a “final” denial? Without guidance on these questions, lower courts are left guessing, leaving landowners to devote more time and resources to obtaining permission to use their land in a vain effort that a court may or may not agree is futile.

B. The courts below are not consistently applying futility.

The courts of appeals below vary widely in their application of this Court’s ripeness and futility principles. Accordingly, this futility patchwork makes it difficult for a litigant to know which version of ripeness the court will apply to them, leaving property owners in the untenable position of not knowing how many more steps they need to pursue before they can bring their dispute to court and vindicate their property rights.

1. *The First Court’s approach to futility is confusing.*

Since this Court issued its *Commons of Lake Houston* decision last year, the First Court has cited it twice. In one case, the landowner applied four times for a preliminary plat to develop property into an RV park. *City of Pasadena v. Carousel Vill. Condo’s, Inc.*, No. 01-24-01032-CV, 2025 WL 3635891 (Tex. App.—Houston [1st Dist.] Dec. 16, 2025, pet. denied). Between the second and third plat applications, the landowner submitted two variance requests, both of which were denied, and unsuccessfully appealed to the city council. *Id.* at *2. Finally, the landowner submitted a site plan review application, which was also denied. *Id.* The city argued that this effort—five applications, two variance requests, and respective appeals—was not enough to create a ripe case. The First Court disagreed, deeming the case ripe by hanging its decision on a letter from the city’s planning commission describing the city’s denial as a “final decision.” *Id.* at *4.

Here, the First Court deemed three rejected site plans insufficient even though approval of a site plan is necessary for a landowner to move forward. Apparently, a landowner needs two denied variance requests, five denied applications, and a document titled “final decision” to have a ripe case. The First Court did not explain why the planning commission’s usage of the

phrase “final decision” became talismanic, why a variance was necessary, or why futility was inapplicable. *Cf. Mayhew*, 964 S.W.2d at 929–30.

Instead, it concluded that perhaps the City would change its position if Oz sought a variance. The court gave no credence to the fact that the City and Oz have been arguing about how many parking spaces he must have at his property for five years and this application should have been granted pursuant to the Agreement. The parties agreed that Oz would put four parking spaces on the side of the building. Yet the City’s planning department has imposed a series of other conditions that make it physically impossible to have four spaces on the side of the building. And they have made it clear that Oz cannot meet these conditions.

Moreover, without the City’s approval of his site plan, Oz cannot submit a certificate of occupancy application—yet the First Court insisted he must submit a certificate of occupancy application for this case to be ripe, Op. 9–10; App.10–11. This is made clear in the City’s code, its employees’ statements to Oz, and in its briefing in this case. Pasadena, Tex. Code of Ordinances § 28-66(1)(e)(ii) (“The building official shall not issue a certificate of occupancy ... unless the planning director or designee approves the site plan.”); CR.18 (City planning employee “told Oz that the City would not move forward with his certificate-of-occupancy application unless he corrected the alleged

deficiencies with the site plan”); CR.17; App.42–43; App.81 (“By ordinance, the City will not decide whether to issue Sepulveda a certificate of occupancy until **after** (1) the City approves a site plan” (emphasis in original)). This issue has festered for years with the sides’ positions entrenched; no further percolation is needed.

The First Court also rebuffed Oz’s reliance on *City of Houston v. Mack*, 312 S.W.3d 855 (Tex. App.—Houston [1st Dist.] 2009, no pet.). It concluded that *Mack* was distinguishable because an ordinance there stripped the government of discretion to issue the sought permit, causing the owners’ claims to fall “within the narrow futility exception to the final decision requirement.” Op. 8; App.9. This gets futility backwards, as the exception drawn by this Court is not narrow and the final decision requirement “relatively modest.” *Commons of Lake Houston*, 711 S.W.3d at 684. And, again, the City cannot issue a certificate of occupancy until it has in hand an approved site plan. Pasadena, Tex. Code of Ordinances § 28-66(1)(e)(ii); CR.17–18; App.42–43; App.81. There is no discretion to approve anything until the City approves his site plan, and the City’s unmistakable position is that it does not approve Oz’s plan. *See supra* Facts II.

The First Court’s cases pre-dating *Commons* provide no more clarity. In *City of Kemah v. Crow*, No. 01-23-00417-cv, 2024 WL 3528440 (Tex.

App.—Houston [1st Dist.] July 25, 2024, pet. denied), a landowner spent 17 months going back and forth with city officials seeking their approval to use her land before filing suit. The city argued that this was too soon—her claim was not ripe because she never obtained a final decision from City Council. *Id.* at *4. She argued otherwise and pressed futility in the alternative; the First Court deemed her case ripe without analyzing exactly what factor got her over the line. *Id.* at *7.

Not all disputes stretch a year and a half, yet they are nonetheless final. In *Allen v. City of Baytown*, an applicant for an off-premises billboard sign failed to timely apply to the city’s sign committee after his permit application was rebuffed. No. 01-09-00914-cv, 2011 WL 3820963 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.). Despite submitting just one application and no appeal, the First Court deemed his case ripe because “the City expects Allen to comply with its decision.” *Id.* at *6.

2. *Other lower courts unevenly apply ripeness and finality.*

No other lower court has yet cited *Commons* for the ripeness and futility points. But a look at those cases predating *Commons* reveals that they, too, inconsistently apply ripeness and finality.

Some demand a “final decision,” while others don’t. Compare, e.g., *City of Harlingen v. Obra Homes, Inc.*, No. 13-02-268-CV, 2005 WL 74121, *3

(Tex. App.—Corpus Christi-Edinburg Jan. 13, 2005, no pet.) (city’s inaction on two rezoning applications, even without explicit denial, was sufficient to establish final decision because it acted as an “effective denial”), *with City of Galveston v. Murphy*, 533 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (city’s denial of special-use permit not final as city encouraged landowner to reapply).

Some look at what a city denial says, while some deem that irrelevant. *Compare, e.g., City of Crowley v. Ray*, 558 S.W.3d 335, 344 (Tex. App.—Fort Worth 2018, pet. denied) (looking to reason that city gave in denial and concluding that city would “probably” reach the same decision even with changes to the proposal), *with Buffalo Equities, Ltd. v. City of Austin*, No. 03-05-356-CV, 2008 WL 1990295, *7-8 (Tex. App.—Austin May 9, 2008, no pet.) (mem. op.) (letter from City employee stating that intended use did not comply was not sufficient to establish final rejection of plan).

Some insist on a variance application, and some do not. *Compare, e.g., City of Houston v. Kolb*, 982 S.W.2d 949, 952–54 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (no variance application required when the second application failed to comply with city’s plans), *with Abbott v. City of Paris*, 429 S.W.3d 99 (Tex. App.—Texarkana 2014, no pet.) (permit denial coupled

with request for grandfathered use and appeal not sufficient to establish finality).

Some require multiple applications, while others deem such activities futile. *Compare, e.g., City of Sherman v. Wayne*, 266 S.W.3d 34, 42 (Tex. App.—Dallas 2008, no pet.) (deeming a rejected re-zoning application, concessions to a city’s planning board, and denial of specific use permit request “sufficient to allow the City to reach a final decision.... Wayne was not required to re-apply numerous times to the City to change the zoning because the City’s first refusal was clear and such additional efforts would have been futile.”), *with City of Carrollton v. HEB Parkway S., Ltd.*, 317 S.W.3d 787, 798-99 (Tex. App.—Fort Worth 2010, no pet.) (holding that hiring experts, meeting with city officials over two years, and receiving indications from City that it would not approve any variances did not demonstrate futility when plaintiff did not apply for a variance).

Some require an appeal; others do not. *Compare, e.g., TCI W. End, Inc. v. City of Dallas*, 274 S.W.3d 913, 920–21 (Tex. App.—Dallas 2008, no pet.) (no final decision when property owners did not appeal permit revocation), *with Maguire Oil Co. v. City of Houston*, 243 S.W.3d 714, 720–21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (deeming a case ripe without an appeal).

All told, the lower courts vary widely in their treatment of ripeness in land-use cases, and this Court's intervention is warranted.

C. Further attempts to get City approval here would be futile; Oz's case is ripe.

Deeming Oz's case ripe should have been a quick endeavor. The day that the City Council approved the Agreement, Oz spoke with Natalie Herrera, an employee of the City's Planning Department who had attended the mediation, excited to apply and get his shop open. And Oz proceeded in good faith despite the district court's finding that Ms. Herrera "lack[ed] credibility" when she testified for the City in Oz's first lawsuit. Yet Ms. Herrera took an ominous tack from that first day, telling Oz that it would be "impossible" to grant him a certificate of occupancy. CR.17; App.42. Her opinion here was critical: her approval of site plans was necessary to obtain the certificate of occupancy Oz so desperately sought. Nevertheless, Oz spent the next nine months trying to get the City's approval of his plans to open his shop in accordance with the Agreement.

Oz submitted two site plans for Ms. Herrera's review, and she told him neither were acceptable. CR.17–18; App.42–43. She followed up by email with a marked-up site plan that conflicted with the Agreement. CR.18; App.43. Oz continued his efforts at the City's insistence. He submitted a third site plan—at significant expense—that the City also disapproved, responding

again with markups. CR.18; App.43. The City's markup stated that Oz could not have four parking spaces on the side of the building, as it would render him noncompliant with the City's drive-aisle width requirements. CR.18; App.43. It is impossible to add a larger drive aisle and still have the number of parking spots that the City agreed Oz could have under the Agreement approved by City Council. CR.18; App.43. The City tacked on two more demands for its denial that conflict with the Agreement. CR.19; App.44. Its position was clear.

Thus, in this nine-month period, Oz submitted three site plans, all of which the City rejected for reasons that conflicted with the Agreement. City staff told Oz that the City would not move forward with his certificate-of-occupancy application unless he corrected the alleged deficiencies with his site plan. CR.18; App.43. It was futile for Oz to keep asking. Indeed, the City *cannot* issue a certificate of occupancy "unless the planning director or designee approves the site plan." Pasadena, Tex. Code of Ordinances § 28-66(1)(e)(ii). It was impossible to correct the alleged deficiencies in the way the City said while complying with the Agreement. If the City's demands conflict with the Agreement, and Oz has alleged they do, it must defend its demands on the merits.

This is the exact circumstance that futility contemplates. Oz tried again and again, and the City made its position crystal clear: it was not going to allow Oz to open in accordance with the Agreement. What good would a fourth application for site plan approval do? A fifth? Oz cannot apply for a certificate of occupancy (the “final decision” the First Court wants to see) without the approved site plan that city planners said they won’t approve. And demanding that he apply for a variance request makes little sense in a situation where the City already approved Oz’s specific requested land use with seven parking spaces. The Agreement settled a land-use challenge against the City and authorized Oz to open with fewer parking spaces than demanded by the code. Even though the City Council voted to approve these terms for the Property, one of the City’s architects of the Agreement is blocking it by refusing to approve Oz’s site plan. Further attempts would be futile. The district court recognized this when it deemed Oz’s claims ripe. Yet the First Court disagreed, demanding he do more while refusing to consider how futility applied. The futility doctrine requires a stronger foundation if the government can make property owners like Oz spend years trying to use their property to earn a living, forced to ask “Mother, May I” again and again and again. *Cf. Hallco Tex.*, 221 S.W.3d at 63 (Hecht J., dissenting).

PRAYER

Petitioner asks this Court to grant his petition for review, reverse the judgment of the Court of Appeals, and remand for resolution on the merits.

Dated: May 5, 2026

Respectfully submitted,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2026, a true and correct copy of the foregoing was filed with the Clerk of Court and served in compliance with the Texas Rules of Appellate Procedure via the Court's electronic filing manager on all counsel of record.

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CERTIFICATION

I certify that all factual statements in this Petition for Review are supported by competent evidence in the appendix or record to which the petition has cited.

/s/ Arif Panju
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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Petition for Review contains 6,481 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1). Within that total word count is the Introduction, which contains 655 words. *See* Tex. R. App. 53.2(a).

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APPENDIX

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TAB 1

Opinion and Judgment of the Court of Appeals, First District

Opinion issued October 28, 2025



In The
Court of Appeals
For The
First District of Texas

NO. 01-24-00327-CV

CITY OF PASADENA, Appellant
V.
AZAEL SEPULVEDA, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2023-62583

MEMORANDUM OPINION

This appeal arises from the City of Pasadena's rejection of a preliminary site plan submitted by Azael Sepulveda. An approved site plan is a prerequisite to obtain a certificate of occupancy, which Sepulveda needs to open his automobile repair shop. Sepulveda and the City previously agreed to certain conditions upon which the City would approve a certificate of occupancy. When the City rejected Sepulveda's

preliminary site plan, Sepulveda sued the City for breach of contract and constitutional violations of due course of law and equal protection. The City moved for a plea to the jurisdiction, which the trial court denied.

In two issues, the City contends that the trial court erred by denying its plea to the jurisdiction because Sepulveda's claims are not ripe and are barred by the City's governmental immunity.

Because we conclude Sepulveda's claims are not ripe, we reverse the trial court's order denying the City's plea to the jurisdiction and render judgment dismissing Sepulveda's claims for lack of jurisdiction.

Background

This is Sepulveda's second suit against the City of Pasadena regarding property he purchased on Shaver Street ("the Property") in Pasadena. Sepulveda purchased the Property with the intent of using it as an automobile electrical repair shop, Oz Mechanics. A City ordinance requires automobile repair shops to have ten off-street parking spaces per one thousand square feet. To comply with this ordinance, the Property must provide 28 parking spaces. In 2021, the City denied Sepulveda's land use compliance review application, a prerequisite to applying for a certificate of occupancy, because (1) the Property did not comply with the ordinance and (2) the paving and drives did not comply with the City codes.

Sepulveda applied for a variance, but the City denied his application because it failed to meet the variance criteria in the City code.

This denial led Sepulveda to bring his first suit against the City regarding the Property, alleging the City's parking requirements as applied to the Property were unconstitutional. The trial court denied the City's plea to the jurisdiction and issued a temporary injunction forbidding the City from enforcing the parking ordinance against Sepulveda. The City filed an interlocutory appeal.

Thereafter, the parties entered into a mediated settlement agreement (the "Agreement") by which the City agreed, among other things, to approve Sepulveda's application for certificate of occupancy for Oz Mechanics to use the Property for automotive electrical repair according to the four following conditions:

- The Property will provide seven parking spots: three in front of the main building on the Property and four on the western side of the building. No cars parked on the property may back out on to the right of way;
- The area on the western side of the building will be paved from the Property line to the shed with asphalt or concrete and the fencing on this portion of the Property will be removed;
- The floor area of the shed will be paved with concrete, if it is not already; [and]
- Bollards will be installed . . . with a maximum of four feet between bollards

Taking the first step in submitting a certificate of occupancy application, Sepulveda submitted a site plan to the City. But the City disapproved his site plan.

The City's letter reasoned, "(1) [B]ollards must be a maximum of four feet apart, necessitating that [Sepulveda] add more bollards; and (2) the drive-aisle widths did not meet City requirements." The City also added four further requirements in its marked-up site plan included with the letter:

- The site plans needed to include drainage and restrictor calculations, and the Property needed to use a particular internal drainage system;
- The Property needed a six-inch curb around the paving and driveways;
- The Property needed a five-foot setback made of grass; and
- Vehicles could not back into the right-of-way.

Upon the denial of his site plan, Sepulveda did not apply for any variances or appeal the denial of his site plan. Sepulveda brought this second suit against the City, alleging the City breached the Agreement and violated the Texas Constitution's "Due Course of Law" and equal protection provisions. In his petition, Sepulveda agreed to fix the bollards, add drainage calculations, follow the City's preferred system, and add a curb throughout the Property. Sepulveda alleged that the City breached the Agreement because (1) the City's requirement of larger drive-aisle widths would not allow the Property to have the four parking spaces on the side; (2) the City's requirement of a five-foot grass setback conflicts with the provision of the Agreement that the area on the side of the building "will be paved from the Property line to the shed;" and (3) the City contorts the definition of "right-of-way" by prohibiting vehicles from backing into the "right-of-way."

Sepulveda defined the City's requirements that allegedly breach the parties' Agreement as the "New Parking Demands." He alleged that these "New Parking Demands," as applied to Sepulveda, violate the Texas Constitution's Due Course of Law guarantee. Additionally, he alleged that the City's disparate treatment of him violates his right to equal protection of the laws.

In its plea to the jurisdiction, the City argued that Sepulveda's claims were not ripe and that the City's governmental immunity bars Sepulveda's claims. After two hearings, the trial court denied the City's plea to the jurisdiction.

Ripeness

In its first issue, the City contends that the trial court erred in denying its plea to the jurisdiction because Sepulveda's claims are not ripe. We agree.

A. Standard of Review

Ripeness is an element of subject-matter jurisdiction and thus is subject to a de novo standard of review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998). When reviewing a plea to the jurisdiction in which disputed evidence implicates both the court's subject-matter jurisdiction and the merits of the case, we consider relevant evidence submitted by the parties to determine whether a fact issue exists. *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632-33 (Tex. 2015). "We take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant's favor." *Id.* at 633. If the evidence creates

a fact question regarding jurisdiction, then the plea must be denied because the fact finder must resolve the issue. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004). “If the evidence fails to raise a question of fact, however, the plea to the jurisdiction must be granted as a matter of law.” *Suarez*, 465 S.W.3d at 633.

B. Analysis

“Ripeness is a jurisdictional prerequisite to suit.” *Zaatari v. City of Austin*, 615 S.W.3d 172, 183 (Tex. App.—Austin 2019, pet. denied). “[A]voiding premature litigation prevents courts from entangling themselves in abstract disagreements over administrative policies while at the same time serving to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex. 1998) (citation modified).

When determining whether a claim is ripe, “courts must consider whether, *at the time the suit is filed*, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote.” *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015) (citation modified). Thus, a case is not ripe if it involves uncertain or contingent future events that may not occur as anticipated. *Id.*

In land use cases, a claim is not ripe without a “final and authoritative determination” regarding the application of a regulation because a court “cannot determine whether a regulation has gone ‘too far’ unless it knows how far the regulation goes.” *Commons of Lake Houston, Ltd. v. City of Houston*, 711 S.W.3d 666, 684 (Tex. 2025). Generally, to obtain a final determination, the property owner must submit an application for the permitted use and seek a variance if the application is denied. *Id.* But “futile variance requests or re-applications are not required.” *Id.* at 685 (citing *Mayhew*, 964 S.W.2d at 929). A subsequent application or variance request is futile when the government has clarified that the owner cannot obtain approval for his desired use, that his request for a permit has been definitively rejected, or that any subsequent request would not make a difference. *Id.*

Sepulveda argues that the City, by denying his site plan, gave him its definitive position that he may not open his automobile repair shop at his Property. In support of his argument, Sepulveda relies on our decision in *City of Houston v. Mack*, 312 S.W.3d 855, 863 (Tex. App.—Houston [1st Dist.] 2009, no pet.). There, flood insurance rate maps adopted by the city in 2007 placed the Macks’ property in a floodway for the first time. *Id.* The city also amended its flood ordinance to further restrict development in the floodway. *Id.* According to the Macks, the new designation prohibited the Macks from obtaining building permits for new

construction or improvements to existing structures on their property. *See id.* at 859, 862.

The Macks sued the city for inverse condemnation. *Id.* at 859. The city argued that the Macks' claim was not ripe because they had not applied for a building permit or sought a variance. *Id.* But, noting that the flood ordinance stripped the government's discretion, this Court concluded that the property owners' claims fell within the narrow futility exception to the final decision requirement such that the plaintiff-landowners' claims were ripe. *See id.*

Sepulveda does not direct us to an ordinance that has a similar effect in this case. Here, once Sepulveda formally applies for a certificate of occupancy, the City retains the discretion regarding whether to approve Sepulveda's application or grant a variance. Thus, there must be a final decision by the City regarding the application of the ordinances at issue. *See Mayhew*, 64 S.W.2d at 929.

Sepulveda has not obtained a final decision from the City. The City denied his preliminary site plan based on a number of requirements Sepulveda had not met. Sepulveda agrees that the following requirements do not or are unlikely to conflict with the Agreement: (1) fixing the bollards, (2) adding drainage calculations and using a particular drainage system, and (3) adding a curb throughout the Property. Yet, Sepulveda did not submit a revised preliminary site plan. In his petition, he admits that he "will agree" to revise his site plan to comply with these requirements.

But such futuristic language itself evinces that his claims are not ripe. Additionally, although Sepulveda complains of the City's requirements regarding the drive-aisle widths, setback spacing, and right-of-way definition, Sepulveda did not seek a variance from any of these requirements. *See Mayhew*, 964 S.W.2d at 929 (“A ‘final decision’ usually requires both a rejected development plan and the denial of a variance from the controlling regulations.”). Further, he did not appeal the denial of his site plan to the Planning and Zoning Commission or to the City Council. *See PASADENA, TEX. CODE OF ORDINANCES* ch. 28, art. VII § 28-66(e). Because there is not yet a final determination by the City, his constitutional claims are not ripe.

Regarding his breach-of-contract claim, Sepulveda contends that his site plan “generally complied with the Agreement” and that the City’s disapproval of his site plan conflicts with the Agreement. The City responds that his site plan did not comply with the Agreement. We agree with the City. The Agreement states that the bollards must be installed with a “maximum of four feet between bollards” and “[n]o that cars parked on the property may back out on to the right of way.” Non-compliance with these conditions in the Agreement were two of the reasons the City gave for denying Sepulveda’s site plan. Because Sepulveda has not yet submitted a site plan complying with the conditions in the Agreement, his allegation that the City breached the Agreement is mere speculation about a future event. At this time, it is uncertain whether the City will approve Sepulveda’s future application for a

certificate of occupancy that complies with the Agreement's conditions. *See Patterson*, 971 S.W.2d at 443 ("A case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass."). Thus, his breach of contract claim is not ripe for adjudication.

Because Sepulveda's claims are not ripe, we hold that the trial court erred in denying the City's plea to the jurisdiction. Accordingly, we sustain the City's first issue.¹

Conclusion

We reverse the trial court's order denying the City's plea to the jurisdiction and render judgment dismissing Sepulveda's claims for lack of jurisdiction.

Clint Morgan
Justice

Panel consists of Chief Justice Adams and Justices Morgan and Dokupil.

¹ Because the first issue is dispositive, we need not address the City's second issue, which contends that the trial court erred in denying the plea because Sepulveda's claims are barred by governmental immunity. *See* TEX. R. APP. P. 47.1.



JUDGMENT

Court of Appeals First District of Texas

NO. 01-24-00327-CV

CITY OF PASADENA, Appellant

V.

AZAEL SEPULVEDA, Appellee

Appeal from the 190th District Court of Harris County. (Tr. Ct. No. 2023-62583).

This case is an appeal from the interlocutory order denying the plea to the jurisdiction signed by the trial court on April 30, 2024. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court lacked subject-matter jurisdiction over the case. Accordingly, the Court **vacates** the trial court's order and **dismisses** the case for lack of jurisdiction.

The Court **orders** that the appellee, Azael Sepulveda, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered October 28, 2025.

Panel consists of Chief Justice Adams and Justices Morgan and Dokupil. Opinion delivered by Justice Morgan.

TAB 2

Order Denying Defendants' Plea to the Jurisdiction

P-1
PJURY

CAUSE No. 2023-62583

AZAEEL SEPULVEDA,
Plaintiff,

v.

CITY OF PASADENA, TEXAS, ET
AL,
Defendants.

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IN THE DISTRICT COURT

OF HARRIS COUNTY, TEXAS

190TH JUDICIAL DISTRICT

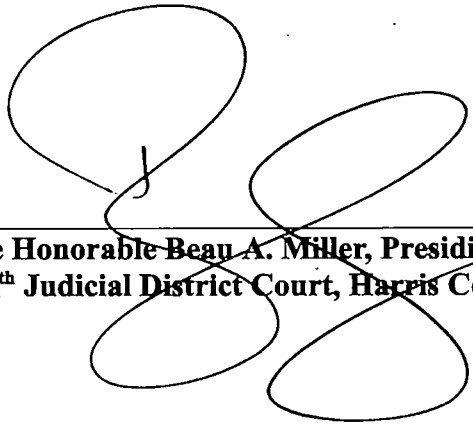
ORDER DENYING DEFENDANTS' PLEA TO THE JURISDICTION

On April 29, 2024, the Parties appeared before this Court for Status Conference. There, the Court heard continued arguments regarding Defendants' Plea to the Jurisdiction. Having considered Defendant's Plea, Plaintiff's Response, Defendants' Supplement, arguments of Counsel, and applicable law, this Court is of the opinion that the Defendants' Plea to the Jurisdiction should be **DENIED**. It is therefore

ORDERED that Defendants' Plea to the Jurisdiction is **DENIED**.

It is so **ORDERED**.

Signed on April 30, 2024,
In Harris County, Texas.

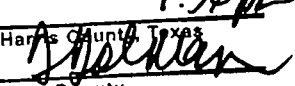


The Honorable Beau A. Miller, Presiding Judge
190th Judicial District Court, Harris County, Texas

FILED

Marilyn Burgess
District Clerk

APR 30 2024 4:56 PM

Time: _____
By: 
Deputy

RECORDER'S MEMORANDUM

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TAB 3

Pasadena, Tex. Code of Ordinances §§ 28.66 and 9-7

Sec. 28-66. - Specific procedures.

(1) *Site plans.*

- (a) The purpose of the site plan is to ensure compliance with the site development standards of the City of Pasadena.
- (b) *Applicability.* Site plan review is required for:
 - i. New development including buildings and structures; parking areas; driveways; laydown yards and material storage areas; fencing; and other site features except single-family residential.
 - ii. The construction of residential or private garages, shops, barns, barn/residence, storage and other utility type structures over one thousand two hundred (1,200) square feet.
 - iii. Redevelopment, remodel or addition to an existing development, which includes the property, buildings, accessory uses or structures, utility improvements, parking and outdoor storage areas, except single-family residential.
 - iv. Change in use if required by the planning director.
 - vi. Revision to plans previously approved by the City of Pasadena.
- (c) The site plan may not be approved unless the tract or property on which the development is proposed is legally platted except development that meets all of the following:
 - i. Development that does not involve a change of use, or increase in the area occupied by a use, increase in dwelling units per acre (DUA), increase in the floor area ratio (FAR), or increase in the number of required parking spaces; and
 - ii. Development that does not involve an addition to existing building(s), improvement(s) or structure(s).
- (d) *Site plan requirements.*
 - i. An applicant or responsible party shall submit a site plan to the planning department prior to obtaining a building permit or certificate of occupancy as applicable in this section. The site plan shall provide sufficient information to adequately determine compliance with all applicable requirements established by this chapter. The planning director may require additional information as deemed appropriate.
 - ii. The Traffic Director may require a traffic study as deemed appropriate.
 - iii. The site plan shall:
 - a) Be accompanied by a non-refundable fee set forth for this provision in section 28-46 of this chapter;
 - b) Be to scale, provide a north arrow, and describe the property lines of all tracts and/or lots related to the development; and

- c) Be accompanied by a copy of a survey dated within the last five (5) years or the most recently recorded subdivision plat.
- iv. The following documents shall be submitted with a site plan, as applicable:
 - a) A survey sealed and certified by a Texas registered professional land surveyor showing the location of each existing building, structure or improvement; each easement and right-of-way within or abutting the boundary of the surveyed property; and the dimensions of each sidewalk, alley, driveway, or other part of the site development dedicated to the public;
 - b) Covenants and restrictions recorded in the real property records affecting the tracts and/or lots included in the site plan;
 - c) Licenses, permits, and other documentation required by federal, state, and other governments for the operation of the use; and
 - d) A title report if required by the planning director.
- v. The site plan shall include the following information:
 - a) Locations and dimensions of all existing and proposed structures;
 - b) Bearings, dimensions and locations of existing property lines, easements and building setback lines;
 - c) Floor plan with dimensions and gross floor area (GFA) of all buildings and uses on site;
 - d) Surrounding land uses, adjoining streets, alleys, and other public improvements;
 - e) Locations of existing trees, including identifying those trees to be preserved, as well as existing landscape to be preserved;
 - f) Dimensions, design, materials, location of driveways, parking spaces, bicycle spaces, bicycle racks, service areas, loading areas, drive aisles, landscaping islands, curbs, wheel stops and other physical features related to layout of parking and loading facilities;
 - g) Calculations used to determine the number of required parking spaces;
 - h) Locations of above-ground existing and proposed physical features such as utility poles, fire hydrants, trash receptacles, dumpsters, dumpster enclosures, bollards and other features;
 - i) Location and materials of sidewalks, patios and other improvements;
 - j) Location, dimensions, distance, and clearly delineated pedestrian route to parking facilities, as applicable;
 - k) Location and configuration of each drop-off, drive-in, or drive-through facility, as applicable;
 - l)

Proposed trees, shrubs, parking lot landscaping, lawn areas, groundcovers and buffer yards;

- m) Proposed plant list including type, size, variety and number of plants;
- n) Landscape irrigation plan;
- o) Proposed fence and/or wall information, including materials, height, and, if needed, certification by a registered engineer;
- p) Existing and proposed signs, and similar features; and
- q) Any additional information/materials (such as plans, maps, exhibits, information about proposed uses, etc.) as deemed necessary by the Planning Director in order to ensure that the application is understood.

(e) *Review of site plan and permits.*

- i. Upon receipt of a site plan application containing all the information and fees required by this chapter, the planning director or designee shall perform a review of the site plan to verify compliance with the landscaping, parking, fencing, and setback ordinances and requirements of the City of Pasadena. Site plan approval does not indicate compliance with any other ordinances or requirements of the City of Pasadena. Site plan approval does not indicate compliance with regulations, standards or requirements of other relevant jurisdictions.
- ii. The building official shall not issue a certificate of occupancy, building permit or fence permit unless the planning director or designee approves the site plan.
- iii. A site plan application is not filed with the planning director until the applicant has provided a complete and correct submittal with all required information and fees.
- iv. The planning director or designee shall approve, approve with conditions, or disapprove with reasons the site plan. The planning director or designee shall provide written notice of approval, approval with conditions, or disapproval.
- v. Any site plan approved, building permit or certificate of occupancy issued on the basis of either erroneous documentation or false information is void with the same force and effect as if it had never been approved or issued without the necessity of any action by the city or any other person or agency.
- vi. Appeals from the decision of the planning director are to the planning and zoning commission. A notice of appeal shall be submitted within 30 working days following receipt of written notice by the planning director. Appeals from the planning and zoning commission are to the city council. A notice of appeal shall be submitted within thirty (30) working days following receipt of written notice by the planning and zoning commission.
- vii. The approved site plan shall be included in the application for certificate of occupancy and/or building permit, as applicable.

- viii. After the completion of development in conformance to the approved site plan, the development shall remain in compliance with the approved site plan.

(f) *Violations.*

- i. It is a violation of this article for any person to construct a building or alter a building or property within the city without first complying with the provisions of this Code. Any person violating any provision of this Code is guilty of a misdemeanor and, upon conviction, shall be fined an amount not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00). Each day that a violation continues shall constitute a separate offense. Prosecution or conviction under this provision shall never be a bar to any other remedy or relief for violation of this chapter.
- ii. If a person constructs a building or alters a building or property prior to complying with the requirements of this article, the fees described in this Code shall be doubled for construction or alteration required to comply with the provisions of this Code. The paying of a double fee shall not relieve a person from complying with the requirements of this Code, and shall never be a bar to any other remedy or relief for violation of this chapter.

(2) *Master site plan.*

(a) *Purpose.*

- i. The purpose of a master site plan is to provide for continuity of development over a large area through various phases. Master site plans are intended to implement the city's adopted plans, and provide for greater flexibility for redevelopment that creates high-quality, desirable places. The master site plan review process allows for coordination of public and private infrastructure, open space, and park improvements.

(b) *Applicability.* This section shall apply when the following criteria are met:

- i. The property is under single ownership, or if the property has multiple owners, all owners of record consent in writing to the master site plan review and agree to the requirements of an adopting ordinance approved by city council;
- ii. The property is generally ten (10) acres or greater and the applicant desires development to be phased over a period not to exceed seven (7) years; and
- iii. The development anticipates establishing, extending, expanding or otherwise changing the public street grid, public utility infrastructure and/or publicly accessible park and open space.

(c) *General master site plan requirements.*

- i. An application for master site plan review shall be initiated by the owner or owners of the entire subject property prior to application for site plan review, building permit or certificate of occupancy. The master site plan shall provide sufficient information to

adequately determine compliance with all applicable requirements established by this chapter. The planning director may require additional information as deemed appropriate.

- ii. The master site plan shall provide for development as an integrated place of mixed uses. It establishes shared site development standards for the entire property by identifying uses, density, lot area, pedestrian and vehicle circulation, loading areas, parking requirements and areas, signage, lighting, landscaping and screening, open space, architectural character, and other related elements. The master site plan shall also establish project phasing or scheduling, management associations, covenants, restrictions and other requirements as the planning commission may deem appropriate.
- iii. Each individual phase, portion, building, use or occupancy of the development shall comply with all applicable City of Pasadena site development standards unless explicitly prescribed or granted variance by the city council in the adopting ordinance.
- iv. Each phase of the development shall contain all the streets, utilities, landscaping, open space, and other improvements required to comply with the master site plan, and shall not depend upon subsequent phases for these improvements.
- v. The master site plan shall be set forth in the adopting ordinance and include requirements as the city council may deem appropriate.
- vi. After approval of the master site plan, each phase, building or portion of the development shall conform to the applicable procedures of section 28-66(1) of the Pasadena Code of Ordinances.

(d) *Specific master site plan application requirements.*

- i. The application materials shall include:
 - a) Master site plan shall be of sufficient specification to demonstrate conformance to City of Pasadena site development requirements and justify any requested variance. Requirements not explicitly addressed in the master site plan application will be required to comply with all applicable site development standards. The master site plan may include:
 - i) A plat plan including all information required for a preliminary plat in conformance with Appendix A of the Pasadena Code of Ordinances.
 - ii) Size and location of buildings and proposed building groups on each individual lot (not applicable to single-family attached or detached buildings).
 - iii) Detailed landscaping plans including turf areas, screening, ornamental planting, parking lot planters, street trees and natural areas.
 - iv)

Architectural plans and elevations illustrating the design and character of proposed structures may be required by the planning commission or city council if deemed appropriate.

- b) Written consent of all owners of record
- c) Site development standards:
 - i) Permitted land uses shall be individually and specifically described.
 - ii) Density, height, setbacks, fencing, landscape, parking, lot size, lot coverage, open space and all other development standards shall be individually and specifically described.
 - iii) There shall be a minimum of twenty (20) percent of the gross acreage dedicated for useable permanent open space, which open space area shall not include land set aside for utility easements (with the exception of easements which provide permanent open space), rights-of-way, roadway or lot area.
 - iv) New distribution power-lines required to serve the subject property shall be placed underground.
- d) Phasing plan establishing the timing and responsibility for construction of improvements, infrastructure and open space.
- e) Variance request in conformance with all applicable requirements of section 9-79 and/or appendix A, section 6 of the Pasadena Code of Ordinances.
- f) Traffic Impact Analysis (if required by city engineer).
- g) Drainage and Utility Study (if required by city engineer).
- h) If applicable, covenants, conditions, restrictions, management entities.
 - i) Any additional information/materials (such as plans, maps, exhibits, information about proposed uses, etc.) as deemed necessary by the Planning Director in order to ensure the application is understood.
- ii. Master site plan application materials may be submitted concurrently with the submittal of the preliminary plat. However, the master site plan will not receive final approval prior to approval of the final plat and submittal of recordation materials to the planning department.
- iii. Review procedures.
 - a) Upon receipt of a master site plan application containing all the information required by this chapter, the planning director or designee shall perform a review of the master site plan to verify compliance with all applicable planning development standards. Master site plan approval does not indicate compliance with any other ordinances or

requirements of the City of Pasadena. Master site plan approval does not indicate compliance with regulations, standards or requirements of other relevant jurisdictions.

- b) A master site plan application is not filed with the planning director until the applicant has provided a complete and correct submittal with all the required information.
 - c) The planning commission, after notice and public hearing shall formulate its recommendation. The recommendation of the commission shall be forwarded to the city council for decision.
 - d) If the master site plan is recommended favorably by planning commission, the planning director shall prepare the adopting ordinance.
 - e) City council shall approve, approve with conditions, or deny.
 - f) No building permit or certificate of occupancy shall be issued not in strict compliance with the Pasadena Code of Ordinances or the adopting ordinance as approved by the city council.
- iv. The planning commission in making its recommendations to city council, and the city council in determining whether the master site plan shall be approved, shall consider as to whether or not the master site plan is consistent with the spirit and intent of this chapter, whether or not the master site plan is consistent with the city's adopted plans, and whether or not the following criteria have been met:
- a) Character and integrity of land use. The land uses proposed and their intensity and arrangement shall be of character which:
 - i) Are compatible to the physical nature of the site with preservation of natural features, existing trees and green space;
 - ii) Would produce a place of aesthetic desirability, enhanced ecological functions and compatibility with the character and form of the city; and
 - iii) Would not create traffic or parking demands incompatible with the existing and proposed development.
 - b) Economic feasibility. The applicants shall provide evidence satisfactory to the Planning Commission and City Council of economic feasibility, availability of adequate financing, and that the proposal will enhance the long-term fiscal health of the city.
 - c) Preservation and maintenance of open space. Adequate provisions shall be made for the permanent preservation and maintenance of open space either by reservation or dedication to the public.
 - i) For private open space, the area to be reserved shall be protected against building development or use except as consistent with that of providing landscaped open space.

- ii) The care and maintenance of private open space shall be ensured by the establishment of an appropriate management organization. The manner of assuring maintenance and assessing such costs to individual properties shall be included in any contractual agreements and in the title to each property.
- iii) Ownership and tax liability of private open space shall be established in a manner acceptable to city council and included as part of the conditions of plan approval.
- d) Public services. Provision has been made for adequate public facilities and services such as fire and police protection, street maintenance, water, sanitary sewer and stormwater drainage, and maintenance of public areas.
- (e) *Master site plan amendments.*
 - i. The planning director, with city engineer and building official approval, may administratively approve changes to an approved master site plan in conformance with the city's Code of Ordinances to correct errors, make adjustments, or other minor revisions that do not:
 - a) Increase the area occupied by a use, increase in dwelling units per acre (DUA), increase in the floor area ratio (FAR), or increase in the number of required parking spaces;
 - b) Change the uses permitted;
 - c) Substantially alter the arrangement of buildings, increase the number of buildings, change the use of buildings or exterior spaces or reduce a required setback;
 - d) Substantially alter the pedestrian and vehicular circulation or decrease the amount of off-street parking;
 - e) Reduce the amount of open space or landscaped areas; or
 - f) Conflict with site development standards established by the master site plan.
 - ii. All other changes to an approved master site plan shall require a new application and review following the procedures of this section.

(Ord. No. 19-185, § 3, 11-5-19; Ord. No. 21-164, § 3, 10-5-21)

Sec. 9-7.1. - Minimum construction standards for off-street parking areas.

- (a) The builder shall submit to the building official, a geometric design in the form of a scaled drawing for any proposed off-street parking area, including driveway locations and details, pavement elevations and details, any existing or proposed easements and any access agreements, along with a survey plat showing the location and the size of the area for the proposed parking site and topography showing the drainage plan. The geometric drawing shall be approved by the building official before a permit shall be issued under this section for either permanent or temporary placement.
- (b) Fee for a commercial, equipment/storage yard or multifamily residential parking lot area shall be based upon twenty dollars (\$20.00) per first ten thousand (10,000) square feet and ten dollars (\$10.00) per any additional five thousand (5,000) square feet or portion thereof. Fee for a one- or two-family residential off-street parking area shall be twenty dollars (\$20.00).
- (c) All off-street parking areas shall be constructed by one (1) of the following minimum standards:
 - (1) *Commercial ordinary passenger car areas.*
 - a. Five and one-half (5½) inches of 2500 PSI concrete reinforced with No. 3 rebar at eighteen (18) inches O.C.E.W. poured on a subbase compacted to ninety-five (95) per cent density; or
 - b. One and one-half (1½) inches of hot mix asphalt laid on a six-inch compacted limestone or crushed concrete base on a subbase compacted to ninety-five (95) per cent density.
 - (2) *Commercial heavy truck lanes.* Each commercial business which provides a separate loading/docking area shall designate all delivery routes designed to facilitate delivery and/or transportation of products and such areas shall be clearly defined on the parking lot drawings. Five and one-half (5½) inches of 3000 PSI concrete reinforced with No. 4 rebar at eighteen (18) inches O.C.E.W., or three (3) inches of hot mix asphalt laid on an eight-inch compacted limestone or crushed concrete base on a subbase compacted to ninety-five (95) per cent density shall be required in these locations.
 - (3) *Equipment and storage yards.* All areas that are required to comply with parking requirements, including areas traveled by vehicles, trucks, trailers, machinery, and equipment, shall be constructed from concrete or asphalt with a compacted base and/or subbase as described above. The balance shall be allowed to be constructed of six (6) inches of crushed concrete or crushed limestone with a one-inch minimum aggregate size.
 - (4) *Multifamily residential.* Five and one-half (5½) inches of 2500 PSI concrete reinforced with No. 3 rebar at eighteen (18) inches O.C.E.W. poured on a subbase compacted to ninety-five (95) per cent density. All pad sites constructed for commercial solid waste receptacles and solid

waste truck loading and unloading operations shall be five and one-half (5½) inches of 3000 PSI concrete reinforced with No. 3 rebar at eighteen (18) inches O.C.E.W. poured on a subbase compacted to ninety-five (95) per cent density.

- (5) *One- and two-family residential.* Three and one-half (3½) inches of 2500 PSI concrete reinforced with No. 6 wire mesh poured on a subbase compacted to ninety-five (95) per cent density and with 1"×4" redwood or treated pine expansion joints installed not to exceed twelve and one-half (12½) feet in any direction; or

One and one-half (1½) inches of hot mix asphalt laid on a six-inch compacted limestone or crushed concrete base on a subbase compacted to ninety-five (95) per cent density.

- (d) All commercial off-street parking areas and equipment/storage yards not constructed of poured concrete shall be permanently held true to square by a 2"×8" treated wood form with treated stakes or by a concrete curb six (6) inches in width and having a depth that extends to the bottom of the base material. Such concrete form shall have one No. 3 rebar placed at mid-depth.
- (e) Minimum stall and aisle width dimensions for all commercial off-street parking areas angled at 30°, 45°, 60°, 75° and 90° shall be in accordance with Exhibit "1". Parking lots shall be of such a design that no vehicle shall be required to back out of a driveway onto a street, alley, or way or back from a street, alley, or way into a driveway.
- (f) A six-inch curb or wheel-stop (pin or epoxy to pavement) shall be required at all parking spaces that abut a public right-of-way, property line, or building in accordance with Exhibit "2". A wheel-stop may serve two (2) parking spaces.
- (g) All parking spaces shall be striped using four-inch wide painted lines and all handicap markings shall comply with American Disabilities Act requirements.
- (h) Construction of an off-street parking area on a public utility easement shall be allowed. Off-street parking constructed on a public utility easement shall provide an expansion joint placed along the easement line and such parking area shall be constructed with a compacted flexible base with appropriate asphalt complying with minimum paving standards. Should any utility work become necessary within the easement, all damages shall be repaired by the owner of such property and all costs associated with such repairs shall be totally borne by the owner.
- (i) All commercial off-street parking shall have a six (6) inch curb constructed around the perimeter.
- (j) All off-street parking shall be setback a minimum of five (5) feet from the property line. Additional setbacks may be required to provide adequate drainage and obtain a maintainable side slope from five (5) feet of the structure to the existing elevation at the property line.
- (k) Driveways accessing off-street parking shall be located and constructed as to prevent wrong way traffic to and from the street right-of-way.
- (l)

No residential or commercial driveway shall be permitted to be constructed as the continuation of a dead end street.

OFF STREET PARKING REQUIREMENTS

Exhibit "1"

Angle of Parking (deg.)	Direction of Traffic	Width of Stall (ft.)	Depth of Stall Perpendicular to Aisle (ft.)	Width of Aisle (ft.)
30	one way	8.5	16.4	11
45	one way	8.5	18.7	14.5
60	one way	8.5	19.8	18
75	one way	8.5	19.6	21.5
90	two way	8.5	18.0	25
parallel	two way	8.0	—	20

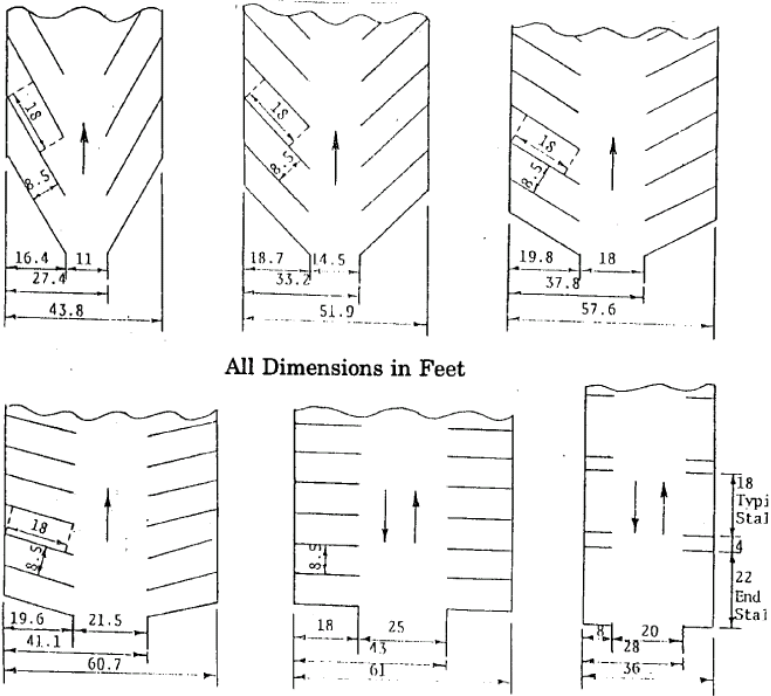
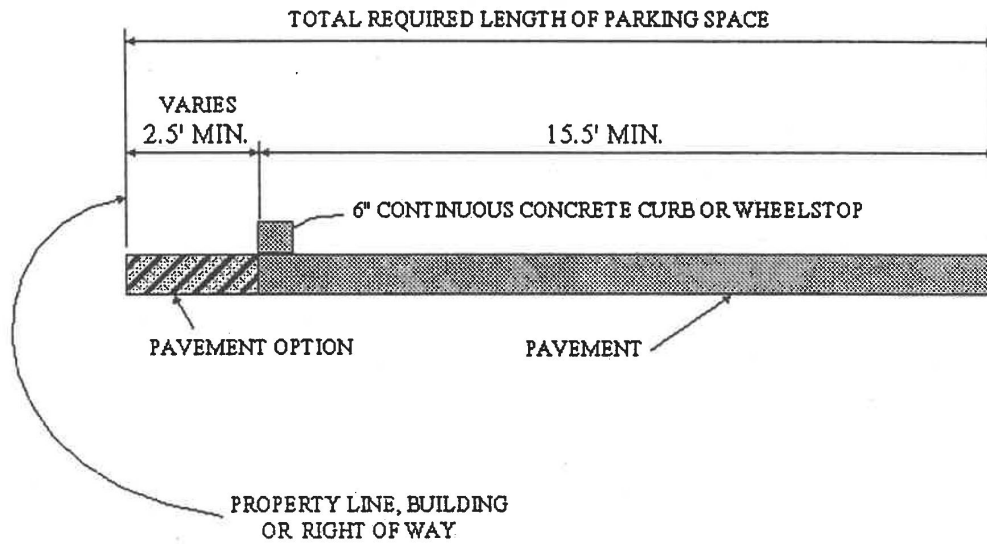


Exhibit "2"***Off-street Parking***

(Ord. No. 19-190, § 1(Exh. A), 11-5-19; Ord. No. 20-186, § 1(Exh. 1), 1-5-21)

TAB 4

Plaintiff's Verified Original Petition and Application for Equitable Relief, Injunctive Relief, and Declaratory Relief

CAUSE NO. _____

AZAEL SEPULVEDA,

Plaintiff,

v.

CITY OF PASADENA, TEXAS; JEFF WAGNER, in his official capacity as City Mayor; MELISSA TAMEZ, in her official capacity as Director of the City Planning Department; NATALIE HERRERA, in her official capacity as City employee; DENICE MORALES, in her official capacity as City employee; RUBEN VILLARREAL, in his official capacity as City Council member; BIANCA VALERIO, in her official capacity as City Council member; EMMANUEL GUERRERO, in his official capacity as City Council member; PAT VAN HOUTE, in her official capacity as City Council member; JONATHAN ESTRADA, in his official capacity as City Council member; DOLAN DOW, in his official capacity as City Council member; ORNALDO YBARRA, in his official capacity as City Council member; and THOMAS SCHOENBEIN, in his official capacity as City Council member,

Defendants.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

**PLAINTIFF'S VERIFIED ORIGINAL PETITION AND APPLICATION FOR
EQUITABLE RELIEF, INJUNCTIVE RELIEF, AND DECLARATORY RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Azael Sepulveda and files his Verified Original Petition and Application for Equitable Relief, Injunctive Relief, and Declaratory Relief against Defendants City of Pasadena, Texas; Jeff Wagner, in his official capacity as City Mayor; Melissa Tamez, in her

official capacity as Director of the City Planning Department; Natalie Herrera, in her official capacity as City employee; Denice Morales, in her official capacity as City employee; Ruben Villarreal, in his official capacity as City Council member; Bianca Valerio, in her official capacity as City Council member; Emmanuel Guerrero, in his official capacity as City Council member; Pat Van Houte, in her official capacity as City Council member; Jonathan Estrada, in his official capacity as City Council member; Dolan Dow, in his official capacity as City Council member; Orinaldo Ybarra, in his official capacity as City Council member; and Thomas Schoenbein, in his official capacity as City Council member. Plaintiff would show the Court the following:

I. INTRODUCTION

1. All Plaintiff Azael Sepulveda wants to do is operate his ten-year-old auto-repair shop at the property he purchased for it, 1615 Shaver Street. But the City of Pasadena, which entered into a settlement agreement allowing Mr. Sepulveda to open after he challenged the constitutionality of the City's parking requirements and won a temporary injunction, has gone back on its word. The City now will not allow him to open unless he does the impossible—and requiring Mr. Sepulveda to do the impossible is not what the City agreed to when it entered into a settlement agreement after becoming subject to a temporary injunction. In doing so, the City has breached a contract it signed, leaving a hard-working entrepreneur in the lurch, and violating the Constitution anew.

2. This lawsuit challenges the actions of the City of Pasadena, its officials, and its staff in preventing Mr. Sepulveda (who goes by Oz), a longtime resident and small-business owner, from running his auto-repair business, Oz Mechanics, at 1615 Shaver Street (the "Property"). The Property had operated as an auto machine shop for the three decades before Oz purchased it, and he wished to continue working on cars there.

3. In December 2021, Oz filed suit challenging the constitutionality of the City's off-street parking requirements. Oz was forced to file suit after the City stifled his plans by requiring him to add 23 additional parking spaces to the Property (the "2021 Parking Requirements") even though he did not need the additional parking spaces and they would not even physically fit on the Property. That litigation resulted in Oz obtaining a temporary injunction from the Harris County District Court, 281st Judicial District, *see* Cause No. 2021-80180, concluding that the City's parking requirements were unduly burdensome and oppressive as applied to the Property and enjoining the City from enforcing its parking requirements against the Property. (Temporary Injunction Order, Mar. 21, 2022). The court also ordered the parties to attend mediation.

4. At mediation, the parties reached an agreement (the "Agreement") that would allow Oz to open by adding a few new spots and requiring him to nonsuit the case. (Mediated Settlement Agreement, Apr. 11, 2022). Oz complied with his obligations under the Agreement. However, the City has not, instead steadfastly refusing to comply with its obligations. Though it agreed to allow him to open if he had seven parking spaces, it now will not let him open with seven parking spaces unless he complies with new City demands, including adding elements to the Property that neither physically fit nor comply with the Agreement, such as a setback and minimum drive-aisle width (the "New Parking Demands"). As a result, the Property remains shuttered unless Oz completes the physically impossible, forcing Oz to spend money operating out of a rental shop rather than moving his business onto his Property.

5. This situation has left Oz under substantial financial stress. He renovated the Property so that he could operate Oz Mechanics there, while paying monthly on the loan for the Property. He did so under the assumption that the City would allow him to open under the terms

that the City agreed to. Meanwhile, he continues to pay rent for his leased location to keep his business running. He cannot afford to continue making both payments.

6. The City's actions flouting the Agreement operate as a breach of contract. A settlement agreement is enforceable as a written contract, and Oz tendered all performance due while the City has breached its obligations, damaging Oz.

7. Further, the City's New Parking Demands are physically impossible to comply with, which make them unconstitutional under Article I, § 19 of the Texas Constitution. As Plaintiff shows, the City's New Parking Demands violate the Texas Constitution's Due Course of Law protections because they restrict his liberty, property, and privileges or immunities in violation of "the due course of the law of the land." Tex. Const. art. I, § 19. The City's New Parking Demands lack a "rational[] relat[ion] to a legitimate governmental interest" in the "actual, real-world." *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). Moreover, the "actual, real-world effect" of the ordinance "as applied to" Oz "is so burdensome as to be oppressive in light of[] the governmental interest." *Id.*

8. Plaintiff Azael Sepulveda urges this Court to grant declaratory relief, injunctive relief, nominal damages, and monetary damages against the City for: (1) the City's breach of contract, and (2) the City's New Parking Demands, which violate Article I, § 19 of the Texas Constitution.

II. JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction because Defendants lack immunity from this breach-of-contract suit brought to enforce a settlement agreement, because Plaintiff seeks to vindicate his rights under the Texas Constitution, because Plaintiff seeks a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code § 37.003,

and because Plaintiff seeks injunctive relief against a municipality organized under the laws of the State of Texas, *see* Tex. Civ. Prac. & Rem. Code § 65.021.

10. Defendants are not immune from this case. This is for several reasons, some of which are alternative, including: Defendants lack immunity for Article I, Section 19 claims that seek equitable relief; the Defendants lacked immunity in Oz’s 2021 lawsuit that the City settled; the City was acting within its proprietary powers when it entered into the Agreement; Texas waived Defendants’ liability by statute; and Defendants’ litigation activities waived any immunity it might have otherwise had.

11. Venue is proper in Harris County under Tex. Civ. Prac. & Rem. Code § 15.002(a)(1)–(3).

III. PARTIES

NAMED PLAINTIFF

12. Azael Sepulveda is a resident of Pasadena, Texas, and the sole owner and employee of Oz Mechanics. Azael owns the subject property in his individual capacity and operates Oz Mechanics as a sole proprietorship.

DEFENDANTS AND SERVICE OF PROCESS

13. Defendant City of Pasadena is a home-rule city organized under the laws of Texas and incorporated in Harris County, Texas. Pursuant to Tex. Civ. Prac. & Rem. Code § 17.024(b), the City may be served with citation through its Mayor, Jeff Wagner, or its Secretary, Amanda Mueller, at the City’s offices located at 1149 Ellsworth Drive, Pasadena, TX 77506.

14. Defendant Jeff Wagner is the mayor of the City of Pasadena. As Mayor, Mr. Wagner is the chief administrator and executive officer of the City and is responsible for the proper administration of City affairs. City of Pasadena Code of Ordinances (hereinafter “City Code”), Charter, Article III, § 1. Mayor Wagner is sued in his official capacity.

15. Defendant Melissa Tamez is the director of the City of Pasadena Planning Department. She is responsible for overseeing the City's office of city planning and all of its employees. She is sued in her official capacity. She may be served with process at her place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else she may be found.

16. Defendant Natalie Herrera is a City employee. Specifically, she is a real estate and land use planner for the City of Pasadena. She is sued in her official capacity. She may be served with process at her place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else she may be found.

17. Defendant Denice Morales is a City employee. She, too, is a member of the City's planning department. She is sued in her official capacity. She may be served with process at her place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else she may be found.

18. Defendant Ruben Villarreal is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt and amend city ordinances. City Code, Charter, Article II, § 10. Mr. Villarreal is sued in his official capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

19. Defendant Bianca Valerio is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Ms. Valerio is sued in her official capacity. She may be served with process at her place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else she may be found.

20. Defendant Emmanuel Guerrero is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Mr. Guerrero is sued in his official capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

21. Defendant Pat Van Houte is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Ms. Van Houte is sued in her official capacity. She may be served with process at her place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else she may be found.

22. Defendant Jonathan Estrada is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Mr. Estrada is sued in his official capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

23. Defendant Dolan Dow is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Mr. Dow is sued in his official capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

24. Defendant Ornaldo Ybarra is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Mr. Ybarra is sued in his official

capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

25. Defendant Thomas Schoenbein is a member of the Pasadena City Council, the legislative body of the City. The City Council exercises final authority about whether to adopt or amend city ordinances. City Code, Charter, Article II, § 10. Mr. Schoenbein is sued in his official capacity. He may be served with process at his place of business, Pasadena City Hall, 1149 Ellsworth Drive, Pasadena, TX 77506, or wherever else he may be found.

IV. DISCOVERY CONTROL PLAN

26. Plaintiff intends to conduct Level 2 discovery under Rule 190.3 of the Texas Rules of Civil Procedure.

V. FACTUAL ALLEGATIONS

AZAEAL SEPULVEDA AND OZ MECHANICS

27. Azael is 36 years old and immigrated from Mexico. He is a U.S. citizen.

28. Azael has lived in Pasadena for 32 years. He feels pride in his city and is happy to be part of its community. He volunteered as a firefighter for the Pasadena Fire Department for three years.

29. Azael loves everything to do with cars. At 25 years old, he opened Oz Mechanics in Pasadena, which specializes in fixing electrical issues with vehicles. Since then, he has built an excellent reputation. For example, he has 75 5-star reviews on Google Reviews.

30. Oz Mechanics is a one-man specialty shop. Other than Oz, there are no employees; Oz is the only mechanic working at Oz Mechanics. He takes clients by appointment only, and he is a diagnostician, meaning that he diagnoses and repairs electrical malfunctions in automobiles. He does not change transmissions or do any type of heavy auxiliary work.

31. Oz Mechanics first opened at a rented location on Spencer Highway, where it operated for about two-and-one-half years.

32. Oz Mechanics then moved to a rented location at 2713 Almdares Avenue, where it has operated ever since. Oz pays \$1,200 per month for this property.

33. Oz wished to invest in his business, so he sought to purchase a storefront in Pasadena.

1615 SHAVER STREET

34. Oz found 1615 Shaver Street (the Property)¹ for sale after searching with his father. He purchased it on July 12, 2021, for \$86,313.54.

35. Oz purchased the Property using all of his savings along with a personal loan, for which his house is collateral.

36. The Property was previously used as an auto machine shop by Houston Engine and Balancing Service, and so Oz believed it would only need a few minor modifications. The Property has a parking lot with five parking spaces, along with room for four cars inside the garage, which never generated any problems or complaints. These spaces are more than enough for Oz Mechanics.

37. The City Code imposes parking requirements based on the type of business along with the size of the business's building.² Complying with the City's parking requirements is necessary for a business to secure a certificate of occupancy from the City. City Code § 9-7(b).

¹ The Property is also known as 1615 Main Street because of the way the roads merge.

² These requirements are available from the City at <https://www.pasadenatx.gov/DocumentCenter/View/472/Off-Street-Parking-Ordinance-PDF>.

38. In January 2021, the City increased some of its parking requirements, including those for auto repair establishments. Under this ordinance, an auto repair establishment needs “ten (10) spaces per one thousand (1,000) square feet of G.F.A.” City Code § 9-7, Ex. A.

39. Under the 2021 Parking Requirements, Oz Mechanics would need 28 total outdoor parking spaces. When Oz purchased the Property, he believed that he would be able to open an auto shop at a location that had been home to another auto shop for decades without problem, especially since Oz’s appointment-only auto shop requires fewer parking spaces than the previous auto shop that had been located at the Property.

40. Oz first learned of the 2021 Parking Requirements when he applied for his certificate of occupancy from the City of Pasadena around August 2021, which the City denied, telling him that he needed to add 23 more parking spaces.

OZ FILES SUIT AGAINST THE CITY AND ITS OFFICIALS

41. Oz looked into adding the 23 parking spaces that the City demanded in its 2021 Parking Requirements. He learned that it would cost at least \$40,000 to add *some* parking spaces and that the full amount of parking spaces the City demanded would not even fit on the Property.

42. Oz filed a constitutional suit on December 9, 2021, challenging the City’s 2021 Parking Requirements. Specifically, he raised three claims: (1) the City’s 2021 Parking Requirements violated the Due Course of Law Clause in Article I, Section 19, of the Texas Constitution; (2) the City’s 2021 Parking Requirements violated equal protection in Article I, Section 3, of the Texas Constitution; and (3) the City violated procedural due process, protected by Article I, Section 19, of the Texas Constitution, in its handling of Oz’s application for a variance and grandfathering for the Property. Among the relief Oz sought was an injunction and declaratory relief. No. 2021-80180, Plaintiff’s Verified Original Petition and Application for Temporary

Injunction, Injunctive Relief, and Declaratory Relief and in the Alternative, Request for Writ of Mandamus (Dec. 9, 2021).

43. On February 28, 2022, the Harris County District Court, 281st Judicial District, held an evidentiary hearing on Oz’s motion for a preliminary injunction. At that hearing, the Court entered findings of fact and conclusions of law, which included:

- The City would not allow Mr. Sepulveda to open Oz Mechanics at the Property because it does not have 28 outdoor parking spaces.
- The Property could not fit 28 parking spaces.
- There was no public interest in requiring 28 parking spaces at the Property.
- The Property already contained more than enough parking for Oz Mechanics.
- The previous use of the Property as an auto machine shop was materially the same as Oz’s auto repair shop.
- The apparent and obvious use of the Property is as an auto shop.
- Adding some parking spaces on the Property would serve no reasonable purpose.
- Oz’s claims were ripe.
- The City’s witness testimony was “not credible.”
- The City’s demand that Oz provide 28 parking spaces at the Property was unduly burdensome and oppressive.

No. 2021-80180, Order Granting Plaintiff’s Motion for Temporary Injunction and Denying in Part Defendants’ Plea to the Jurisdiction (Mar. 21, 2022).

44. Accordingly, the Court entered a temporary injunction, which enjoined Defendants from:

- (i) Enforcing the ten spaces per 1,000 square feet of G.F.A. requirement against Mr. Sepulveda or otherwise requiring Mr. Sepulveda to add any additional parking spots at his automobile repair shop at 1615 Main Street, Pasadena, Texas 77502, as a condition for him to operate or as a condition for him to obtain a certificate of occupancy; and
- (ii) Imposing any fines or penalties against Mr. Sepulveda for operating an automobile repair shop at 1615 Main Street, Pasadena, Texas 77502, without adding any additional parking spaces.

Id.

45. The Court also ordered the parties to attend mediation. *Id.*

THE PARTIES AGREED TO RESOLVE THE DISPUTE

46. The parties attended mediation on April 11, 2022, where they reached the Agreement and signed it.

47. The Agreement was signed April 11, 2022, by Jay Dale for the City of Pasadena and Victoria Clark and Azael Sepulveda for Oz.

48. The Agreement stated that the City would approve Oz's certificate-of-occupancy application if he added a handful of spots and nonsuited his case.

49. Specifically, the Agreement called for Oz to submit an engineered site plan and other drawings and to complete four conditions relating to improving the Property. These conditions are:

- Provide three parking spots in the front of the building and four on the side of the building, with spots not backing out into the right-of-way;

- Pave the area on the side of the building to the property line and remove fencing in that area;
- Pave the floor area of the existing shed; and
- Install bollards to block vehicle access to the area behind the shop building.

50. The City faced three obligations under the Agreement:

- Present the Agreement for approval by City Council on final approval by May 31, 2022;
- Pay Oz \$10,000; and
- Approve Oz's application for a certificate of occupancy once he completed the four conditions listed above in Paragraph 49.

51. In addition, Oz would nonsuit his case against the City.

52. Oz entered into this Agreement because he took the City for its word that it would meet its contractual obligation to approve his application for a certificate of occupancy for the Property once he added seven parking spaces, paved the side of the Property, installed bollards, and completed the remaining conditions.

53. Oz would not have entered into an Agreement that paid him \$10,000 to nonsuit his lawsuit without ensuring that the City issue a certificate of occupancy for the Property. Indeed, such a deal would not even make sense: The Property cost him more than \$86,000; why would he have it sit empty in exchange for \$10,000?

OZ PERFORMED HIS OBLIGATIONS UNDER THE AGREEMENT

54. The Agreement required that Oz complete four specific conditions relating to the improvement of his property, obtain and submit engineering documents to the City for its approval of his certificate-of-occupancy application, and nonsuit the case.

55. Oz obtained and submitted engineering drawings to the City with his certificate-of-occupancy application on January 24, 2023.

56. Oz nonsuited his case against the City on July 3, 2023.

57. Oz submitted a plan to the City showing compliance with his obligations under the Agreement, which he will complete once the City approves the plan.

THE CITY BREACHED THE AGREEMENT

58. The City complied with its first two obligations. First, the Pasadena City Council approved the Agreement at its May 17, 2022 meeting. Second, Oz received a check from the City in June 2022.

59. But the City failed to perform its remaining obligations under the Agreement. It made clear quickly that it would not comply with its last obligation—the one that mattered the most to Oz. The same day that the City Council approved the agreement, Oz spoke with Natalie Herrera of the City’s Planning Department. Ms. Herrera congratulated Oz on the City Council’s approval of the Agreement but told him that he still needed to submit a site plan showing that the seven parking spaces would fit in accordance with the rest of the City’s requirements, which, in her view, made it impossible for a certificate of occupancy to be granted.

60. Ms. Herrera was present at the mediation where the Agreement was reached. Her statement after the City Council meeting contradicted the Agreement the City had entered into with Oz.

61. Nevertheless, Oz wanted to open, so he went out of his way to work with the City to attempt to make sure that City staff would approve of his site plan before he continued with his formal certificate-of-occupancy application, as that would incur significant expense.

62. Oz informally submitted two site plans for Ms. Herrera’s review in the summer of 2022, each of which were drawn by an engineering firm and complied with the Agreement.

63. Ms. Herrera orally told Oz that neither plan was acceptable to the City.

64. Ms. Herrera told Oz via email on September 2, 2022, that one of his site plans was unacceptable because it supposedly didn't comply with the City Code. Her email also included a marked-up site plan that conflicted with the Agreement.

65. The City demanded that Oz submit a formal certificate-of-occupancy application. He complied, which cost him significant fees from the engineering firm that created the plans.

66. Oz received a letter from the City on February 13, 2023, stating that it was disapproving his site plan for two reasons: (1) bollards must be a maximum of four feet apart, necessitating that he add more bollards, and (2) the drive-aisle widths did not meet City requirements.

67. In addition to the City's denial letter, the City also included marked-up site plans.

68. City employee Denice Morales orally told Oz that the City would not move forward with his certificate-of-occupancy application unless he corrected the alleged deficiencies with the site plan. She did not give any other reason for the City's disapproval and did not request any additional documents from Oz.

69. As for the bollards, that is an easy fix that complies with the Agreement. Accordingly, Oz is happy to make it.

70. But the City's concern about the drive-aisle widths presents a problem. The marked-up site plans the City included with its denial letter state that Oz cannot have four parking spaces on the side of the building because doing so would render Oz "[n]oncompliant" with the City's drive-aisle width requirements.

71. But the Property cannot physically hold the four parking spaces on the side of the building with a larger drive aisle.

72. The parties agreed that the Property would have four parking spaces on the side of the building.

73. Now, the City will not allow the Property to have four parking spaces on the side of the building. This is a breach of the Agreement.

74. In addition to the two reasons the City invoked in its denial letter, its marked-up site plans supposedly add four further requirements. These issues were not invoked as justifications for the City's denial of Oz's certificate-of-occupancy application.

75. The four further issues were: (A) the site plans needed to include drainage and restrictor calculations, and the Property needed to use a particular internal drainage system; (B) the Property needed a six-inch curb around the paving and driveways; (C) the Property needed a five-foot setback made of grass; and (D) vehicles could not back into the right-of-way.

76. Of these four further issues, two conflict with the Agreement, one does not, and another likely does not, depending on how the City interprets it.

77. First, the issue regarding drainage does not conflict with the Agreement. Despite the fact that it was not included on the City's denial letter, Oz will agree to add drainage calculations and follow the City's preferred drainage system if the City will grant him a certificate of occupancy.

78. Second, the issue regarding adding a curb throughout the Property likely does not conflict with the Agreement, though it was not part of the Agreement and would render various parts of the lot unusable. Moreover, it was not included in the City's denial letter. Despite that, Oz will agree to add a curb throughout the Property if the City will grant him a certificate of occupancy.

79. Third, the issue regarding a five-foot grass setback conflicts with the Agreement, which provides that the area on the side of the building “will be paved from the Property line to the shed.” Complying with this demand would also further narrow the drive aisle—one of the two reasons the City invoked for its denial. Oz is not willing to comply with City demands that conflict with the Agreement.

80. Fourth, the issue regarding the right-of-way conflicts with the Agreement, as it contorts the definition of “right-of-way” and renders the Agreement unenforceable. Oz is not willing to comply with City demands that conflict with the Agreement.

81. Ultimately, Oz is willing to comply with reasonable City ordinances and requirements to obtain a certificate of occupancy for the Property. But the City refuses to issue Oz a certificate of occupancy for the Property for reasons conflicting with the Agreement.

82. The City has no justification for its breach of the Agreement.

83. The City signed the Agreement with the provision that the Property would have seven parking spaces: four on the side and three in front.

84. But now the City has taken the position that the Property cannot have seven parking spaces due to the City’s drive-aisle-width requirements.

85. One possibility to explain the City’s actions is that the City signed the Agreement and later regretted it, with City staff deciding not to grant a certificate of occupancy subject to the Agreement.

86. If this possibility is true, then the City breached the Agreement.

87. In the alternative, the City signed the Agreement without ever intending to grant Oz a certificate of occupancy for the Property with seven parking spaces, instead wishing to dismiss his lawsuit for \$10,000.

88. If this alternative explanation is true, then the City signed the Agreement in bad faith and also breached the Agreement.

89. In either scenario, the City has not held up its side of the deal, thus breaching the Agreement and harming Oz.

THE CONCLUSION OF THE FIRST LAWSUIT

90. While the parties discussed Oz's certificate-of-occupancy application and whether the City would abide by the terms it had agreed to in the Settlement Agreement, the case remained pending at the District Court.

91. Oz did not immediately nonsuit his case upon receiving the \$10,000 check from the City because the Agreement did not include any indication that time was of the essence and Oz wished to be able to seek the Court's involvement in light of the City's backtracking on the Agreement.

92. On March 22, 2023, he moved to enforce the Agreement.

93. The City responded by filing a counterclaim that alleged that Oz had breached the Agreement by not nonsuiting his case immediately upon receiving the \$10,000 check from the City. No. 2021-80180, City of Pasadena, Texas' Original Counterclaim (Mar. 31, 2023). The City sought damages from Oz along with attorneys' fees. *Id.* The City's counterclaim declined to make any mention of the City's breach of the Agreement. *See id.*

94. The District Court ordered the parties to return to mediation in an effort to resolve the dispute after the City filed its counterclaim.

95. The parties scheduled a second mediation for June 23, 2023.

96. But before the mediation could occur, the City filed a motion for summary judgment on its counterclaim and scheduled a hearing for three business days after the scheduled mediation.

97. The parties attended a second mediation on June 23, 2023, where they were unable to reach an agreement.

98. The week after the City's summary-judgment hearing and before the Court decided the City's motion or entered judgment in the lawsuit, Oz nonsuited his case. No. 2021-80180, Plaintiff's Notice of Nonsuit (July 3, 2023). He did so without prejudice to any action not encompassed by his original petition, including an action for breach of contract regarding the Agreement. *See* No. 2021-80180, Order Granting Nonsuit, signed by Judge Weems (July 5, 2023); *see also* Order Granting Defendant's Motion to Modify the Order Granting Plaintiff's Notice of Nonsuit, signed by Judge Weems (July 20, 2023).

99. Shortly after Oz nonsuited his case, the City nonsuited its counterclaim without prejudice. No. 2021-80180, Defendant's Notice of Nonsuit (July 5, 2023).

THE CITY'S BREACH HAS HARMED OZ

100. The City's refusal to approve Oz's certificate-of-occupancy application has harmed Oz.

101. Oz pays for two locations for Oz Mechanics: (1) the Property, where he wishes to open, and (2) his leased space on Almdares Avenue, where he continues to operate his business.

102. Oz pays \$624.74 per month on the loan for the Property.

103. Oz pays \$1,200 per month for his leased space on Almdares Avenue.

104. In addition to the lease payment, Oz also pays utilities and insurance for his leased space. These cost around \$230 per month.

105. Oz does not want two locations for Oz Mechanics; he wants one—the Property.

106. Oz would give up his lease to the Almdares Avenue location if the City granted him a certificate of occupancy for the Property, allowing him to open Oz Mechanics there.

107. Oz has spent considerable time and resources—at least \$50,000—renovating the inside of the building at the Property. He did so in anticipation of being able to open Oz Mechanics at the Property pursuant to the Agreement.

108. Much of the work Oz has done on the Property was sweat equity done with his father, whose dream it was for Oz to open his own shop.

109. Oz’s father unfortunately passed away before he could see his dreams come to fruition.

110. Oz remains focused on his and his father’s dream: Opening Oz Mechanics at the Property.

VI. INJURY TO PLAINTIFF

111. Oz has invested substantial time and resources into his efforts to open Oz Mechanics.

112. He originally sued the City because it was requiring the impossible for him to open Oz Mechanics at the Property.

113. After winning a temporary injunction on his initial constitutional claims, he entered into an Agreement with the City, pleased that the City had come to its senses, and agreed to allow an auto shop to open with the parking that it needed and no more.

114. But the City apparently signed the Agreement in an effort to rid itself of a meritorious lawsuit and without intending to fulfill its contractual obligations.

115. Today, the City continues to require the impossible for Oz Mechanics to open at the Property. It demands more space than physically exists at the Property, defying physics and the Agreement.

116. Meanwhile, Oz bears the brunt of the City’s unreasonable demands. He continues to pay for two locations for his business when he can only use one.

117. It is a burden to own property that he cannot use and that no one can use for its apparent and obvious use as an auto shop.

118. The City's demands make the Property unusable for anyone as an auto shop, making it difficult to rent out or sell.

119. Because of the City's actions, Oz's finances have become extremely strained.

120. Had the City abided by the terms of the Agreement, Oz Mechanics could have been open at the Property by now and would have given up the lease on the Almdares Avenue location.

VII. CLAIMS

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

121. Oz hereby incorporates the allegations set forth above in paragraphs 1 to 120, all of which are fully re-alleged here.

122. On April 11, 2022, Oz and the City executed a valid and enforceable written contract.

123. Oz fully performed his obligations under the Agreement.

124. The City materially breached the Agreement. Specifically, the City breached the Agreement by refusing to grant Oz's application for a certificate of occupancy for allegedly too-narrow drive-aisle widths, lacking a five-foot grass setback, and having vehicles back into the right-of-way.

125. The City was required to grant the certificate-of-occupancy application Oz submitted in January 2023. In not doing so, it breached the Agreement and harmed Oz.

126. The City's breach caused injury to Oz, which resulted in at least the following damages: (1) monthly payments of \$1,200 for the leased property on Almdares Avenue; (2)

monthly utility and insurance payments of around \$230 for the leased property on Alameda Avenue; and (3) loss of use of the Property.

SECOND CAUSE OF ACTION: DUE COURSE OF THE LAW OF THE LAND

(TEX. CONST. ART. I, § 19—DEPRIVATION OF LIBERTY, PROPERTY, AND PRIVILEGES OR IMMUNITIES)

127. Oz hereby incorporates the allegations set forth above, in paragraphs 1 to 120, all of which are fully re-alleged here.

128. Article I, § 19 of the Texas Constitution provides: “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.”

129. This “due course of the law of the land” guarantee of the Texas Constitution is commonly known as the Constitution’s “Due Course of Law” provision. Article I, Section 19 guarantees that Texas courts will review the substance of the government’s restrictions to determine if those restrictions are valid and comport with the provision’s “due course of the law of the land” requirement. Among the rights protected by the Due Course of Law Clause is the right to pursue one’s chosen occupation free from unreasonable restrictions by the government—Oz’s economic liberty, property rights, and privileges or immunities.

130. To show that an economic restriction violates the Due Course of Law Clause’s substantive protections, a plaintiff must show either that (1) the regulation’s purpose is not 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.

131. The City's requirement that Oz provide certain parking spaces at the Property before he can open, and the City's New Parking Demands, are economic restrictions on Oz's liberty, property, and on his privileges or immunities.

132. This lawsuit does not challenge the constitutionality of the 2021 Parking Requirements. Instead, this cause of action challenges the City's New Parking Demands.

133. The City's New Parking Demands, as applied to Oz, violate Texas's Due Course of Law guarantee.

134. The City's New Parking Demands interfere with Oz's right to economic liberty, specifically his right to earn an honest living. They also restrict Oz's property rights and his privileges or immunities of state citizenship.

135. Defendants lack a legitimate governmental interest for demanding that Oz add a physically impossible parking layout to the Property.

136. The City's application of its New Parking Demands on Oz and his property are not rationally related to a legitimate government interest. Nor is the "actual, real-world effect" of the City's New Parking Demands rationally related to a legitimate governmental interest.

137. Even if the City's New Parking Demands were rationally related to a legitimate government interest, the New Parking Demands would still be unconstitutional as applied to Oz because their actual, real-world effect is so burdensome as to be oppressive in light of the governmental interest.

138. It is physically impossible to comply with the City's New Parking Demands.

139. Requiring Oz to attempt to comply with physically impossible demands is completely irrational and so burdensome as to be oppressive.

140. Pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code §§ 37.001 *et seq.*, Plaintiff respectfully requests the Court enter a judgment declaring that the City’s New Parking Demands violate Oz’s protections under Article I, Section 19 of the Texas Constitution.

THIRD CAUSE OF ACTION: EQUAL PROTECTION

(TEX. CONST. ART. I, § 3—EQUAL RIGHTS AND EQUALITY UNDER THE LAW)

141. Oz hereby incorporates the allegations set forth above, in paragraphs 1 to 120, all of which are fully re-alleged here.

142. Article I, § 3 of the Texas Constitution provides: “All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.”

143. Among other things, Section 3 protects Oz’s right to equal protection of the laws, which includes the right to use his property in a productive manner free from irrational treatment at the hands of Defendants.

144. Defendants routinely allow businesses to have parking similar to what Oz is attempting to have, specifically, a few spots in front and on the side of the business.

145. Oz is similarly situated to the businesses that have parking similar to what Oz is attempting to have.

146. Defendants rejected Oz’s application anyway.

147. Defendants’ disparate treatment of Oz is the sole reason why Oz has not been able to open his business at his new location, while Defendants currently allow other similarly situated businesses with similar parking to operate.

148. There is no constitutionally legitimate reason for Defendants’ disparate treatment of Oz.

149. The actual, real-world effect of Defendants' disparate treatment of Oz does not serve any legitimate governmental purpose.

150. The actual, real-world effect of Defendants' disparate treatment of Oz is so unduly burdensome as to be unconstitutionally oppressive.

151. Defendants' disparate treatment of Oz cannot survive any standard of review.

152. Defendants' disparate treatment of Oz is irrational.

153. Defendants' disparate treatment of Oz is arbitrary.

154. Defendants' disparate treatment of Oz is unreasonable.

155. Defendants' disparate treatment of Oz is unduly burdensome.

156. Defendants' disparate treatment of Oz is oppressive.

157. Defendants' disparate treatment of Oz does not further any legitimate governmental interest.

158. Defendants' disparate treatment of Oz is not tailored to any legitimate governmental purpose.

159. Defendants' disparate treatment of Oz is based on a law that is arbitrarily enforced and is therefore unenforceable against Oz.

160. Defendants' disparate treatment of Oz is based solely on animus.

161. Pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code §§ 37.001 *et seq.*, Plaintiff respectfully requests the Court enter a judgment declaring that the City's New Parking Demands violate Oz's protections under Article I, Section 3 of the Texas Constitution.

VIII. EQUITABLE RELIEF

162. Plaintiff seeks the equitable relief of specific performance of the Agreement.

163. Damages are inadequate compensation if the Property remains closed. Oz seeks to open the Property with four parking spaces on the side of the building and three parking spaces in front of the building—just as the parties agreed to in the Agreement.

164. Oz wants to open Oz Mechanics at the Property. To do so, he needs a certificate of occupancy from the City.

IX. APPLICATION FOR PERMANENT INJUNCTION

165. After adjudication of this case on the merits, Plaintiff requests that the Court enter a permanent injunction enjoining Defendants from enforcing the City’s parking demands against Plaintiff, thus allowing Plaintiff to receive a certificate of occupancy to open his business.

X. ATTORNEYS’ FEES

166. Plaintiff hereby requests all costs and reasonable attorneys’ fees, as permitted by Section 37.009 of the Texas Civil Practices and Remedies Code.

XI. REQUEST FOR JURY TRIAL

167. Plaintiff requests a trial by jury.

XII. PRAYER AND RELIEF REQUESTED

WHEREFORE, Plaintiff requests that the Court render judgment in his favor and grant the following specific relief:

- A. A declaratory judgment that Defendants breached the Agreement;
- B. A declaratory judgment that the Defendants’ New Parking Demands of Oz are unconstitutional under the substantive due process protections of Article 1, Section 19 of Texas Constitution as applied to Plaintiff Oz’s intended location for his business, Oz Mechanics, at 1615 Shaver Street;
- C. A permanent injunction granting Plaintiff a certificate of occupancy to open Oz Mechanics at 1615 Shaver Street pursuant to the Agreement, with four parking spaces on the side

of the building and three parking spaces in the front of the building, and without imposing conditions irreconcilable with the Agreement and the layout of the Property;

D. An award of one dollar in nominal damages;

E. An award of monetary damages in the amount of \$250,000 or less, specifically, \$1,500 for each month after the City denied Oz’s certificate-of-occupancy application;

F. An award of reasonable attorneys’ fees and costs; and

G. All other legal and equitable relief to which Plaintiff may be entitled.

H. In sum, Plaintiff requests “monetary relief of \$250,000 or less and non-monetary relief.” *See* Texas R. Civ. P. 47(c)(2). In addition, Plaintiff’s requested nominal damages and attorney fees are within the jurisdictional limits of the Court. *See id.*

RESPECTFULLY SUBMITTED this 14th day of September 2023.

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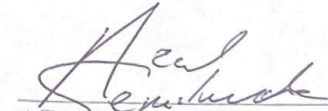
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STATE OF TEXAS

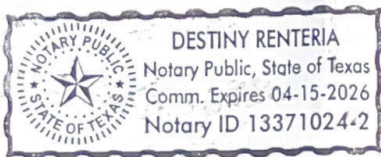
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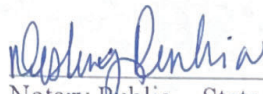
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared AZAEL SEPULVEDA, whose name is subscribed below and after having been duly sworn, on his oath stated that the facts set forth in paragraphs 12, 27-36, and 39-120 of the foregoing Plaintiff's Verified Original Petition and Application for Equitable Relief, Injunctive Relief, and Declaratory Relief are within his personal knowledge and are true and correct.


AZAEL SEPULVEDA

SUBSCRIBED AND SWORN TO before me on this the 13 day of September, 2023.




Notary Public – State of Texas

My Commission Expires: April, 15, 2023

Automated Certificate of eService

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Arif Panju on behalf of Arif Panju

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Filing Description: Plaintiff's Verified Original Petition and Application for Equitable Relief, Injunctive Relief, and Declaratory Relief

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TAB 5

Brief of Appellant, City of Pasadena Court of Appeals, First District

NO. 01-24-00327-CV

***IN THE FIRST COURT OF APPEALS
AT HOUSTON, TEXAS***

CITY OF PASADENA,

Appellant,

v.

AZAEEL SEPULVEDA,

Appellee.

On Appeal from the 190th District Court
of Harris County, Texas
Trial Court No. 2023-62583

APPELLANT'S BRIEF

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ATTORNEYS FOR APPELLANT

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. The representations are made so the Judges of this Court may evaluate possible disqualification or recusal.

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Plaintiff/Appellee: Azeal Sepulveda

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STATEMENT OF THE CASE

- Nature of the case:* Azael Sepulveda sued the City of Pasadena for monetary damages, a declaratory judgment, and an injunction because an employee in the City planning department rejected a preliminary site plan. CR 4-32. Sepulveda alleges the City's application of what Sepulveda terms "parking demands" violates the Texas constitution and that the City breached a settlement agreement. *Id.*
- Trial court:* The 190th Judicial District Court of Harris County, Texas, the Hon. Beau Alan Miller, Presiding.
- Course of proceedings:* The city filed a plea to the jurisdiction asserting Plaintiff's claims are not ripe and are barred by governmental immunity. CR 37-47. The trial court denied the plea orally, on the record on April 29, 2024, 1 RR 6, and in a written order signed April 30, 2024. App. A. On April 29, 2024, the City filed a notice of appeal under Tex Civ. Prac. & Rem. Code §51.014(a)(8). CR 169.

STATEMENT REGARDING ORAL ARGUMENT

The Court should hear oral argument. This case turns on significant questions of ripeness and governmental immunity, and oral argument will allow the parties to answer questions the Court is likely to have concerning the record and legal issues presented.

STATEMENT OF ISSUE PRESENTED

Sepulveda is suing the City because he believes the City will not issue him a certificate of occupancy for an automobile repair shop. He alleges the City breached a settlement agreement and violated the Texas Constitution in its application of the City's parking ordinance and parking requirements. The City filed and urged a plea to the jurisdiction because Sepulveda's claims are not ripe and are barred by the City's governmental immunity. The trial court denied the plea. This Court should reverse and render judgment for the following reasons:

I. Sepulveda's claims are not ripe because the City has not denied Sepulveda a certificate of occupancy. Sepulveda's claim rests solely on a planning department employee's rejection of a preliminary site plan that did not comply with the settlement agreement and with City ordinances. The City has not undertaken any action, let alone definitive action resulting in a concrete injury to Sepulveda.

II. Sepulveda fails to overcome the heavy presumption of the City's governmental immunity because (A) the Declaratory Judgment Act does not waive governmental immunity where Sepulveda alleges only that the City's *application* of what Sepulveda terms parking

demands violate the Texas Constitution; and (B) Governmental immunity bars Sepulveda's claim for breach of contract where the Legislature has not waived governmental immunity for claims for breach of a settlement agreement and the City's governmental immunity was not waived with respect to the claims resolved by the settlement agreement.

INTRODUCTION

Sepulveda is suing the City for allegedly denying him a certificate of occupancy for which Sepulveda admitted he has yet to apply, and thus the City has yet to issue or (perhaps) deny.

This is the second time Sepulveda has brought this lawsuit instead of complying with the City code like every other business in the City must do. Sepulveda's claims are still not ripe and, even if they were ripe, are barred by the City's governmental immunity.

STATEMENT OF FACTS

A. The City's duly enacted requirements for obtaining a certificate of occupancy.

Like most Texas cities, the City of Pasadena requires a property owner who intends to change the use of a nonresidential property to first secure a certificate of occupancy. Pasadena Mun. Code ch. 9, art. III §9-60(20). The City code specifies the procedure a property owner must follow in order to secure a certificate of occupancy.

A property owner begins the process by submitting and securing approval of a site plan. The site plan must be drawn to scale, "provide sufficient information to adequately determine compliance with" the City code, and be accompanied by a survey. Pasadena Mun. Code ch. 28, art.

VII §28-66(1)(d). The City’s planning director or a designee reviews the site plan “to verify compliance with the landscaping, parking, fencing, and setback ordinances and requirements of the City of Pasadena.” Pasadena Mun. Code ch. 28, art. VII §28-66(e). The planning director or a designee will either approve the site plan, approve the site plan with conditions, or disapprove the site plan with stated reasons for the denial. *Id.* The property owner may appeal the planning director’s site plan determination to the City’s planning and zoning commission and, in turn, to City Council. *Id.*

The certificate of occupancy is the final step. The City does not issue the certificate until (1) *after* the owner performs the work on the property necessary to comply with the City code, and (2) *after* the City’s inspectors have verified such compliance: “A certificate of occupancy shall be approved only after application is made and all codes deemed in compliance after inspection by the building official, the fire marshal, health department, traffic department and the planning department or designated representatives.” Pasadena Mun. Code ch. 9, art. III §9.60(20).

B. Sepulveda's first lawsuit.

On July 12, 2021, Sepulveda purchased a building and land at 1615 Shaver Street in Pasadena, Texas. CR 12. The property had been used as a machine shop. CR 12-13. Sepulveda intended to use the building as an automobile repair shop. *Id.*

A City ordinance requires automotive repair shops to have ten off-street parking spaces per one thousand square feet. CR 13. Sepulveda submitted a preliminary site plan to the City planning department for review. CR 126. The planning department rejected Sepulveda's plan because the "Paving/drives do not comply with current city codes." CR 126-27.

Sepulveda applied for a variance. 128-29. City staff denied Sepulveda's variance application. CR 130. Sepulveda sued the City alleging the City's parking requirements as applied to 1615 Shaver Street are unconstitutional. CR 134. The City filed a plea to the jurisdiction asserting governmental immunity and challenging the ripeness of Sepulveda's claims. CR 134-35. On March 4, 2022, the trial court denied the City's plea and issued a temporary injunction forbidding the City

from enforcing the parking ordinance against Sepulveda. CR 135. The City appealed.

C. Sepulveda and the City reach a mediated settlement agreement.

On April 11, 2022, the parties reached a mediated settlement agreement. CR 65-66. Sepulveda agreed to dismiss his lawsuit, the City paid Sepulveda \$10,000.00, and the City and Sepulveda agreed Sepulveda would obtain a certificate of occupancy once Sepulveda made the following changes to the property, which were necessary to comply with the City code requirements applicable to every business in the City:

- a. The Property will be improved to provide a total of seven parking spots: three in front of the main building on the Property and four on the western side of the building. No cars parked on the property may back out on to the right of way.
- b. The area on the western side of the building will be paved from the Property line to the shed with asphalt or concrete and the fencing on this portion of the Property will be removed.
- c. The floor area of the shed will be paved with concrete, if it is not already.
- d. Bollards will be installed in order to block vehicular access to the area behind the building, with a maximum of four feet between bollards. The Landowner retains the right to remove these bollards and use this area for vehicular traffic or parking if it is paved and approved by the City in the future.

CR 65. Sepulveda agreed that in meeting these requirements he would follow the procedure for obtaining a certificate of occupancy, including by

submitting engineering drawings and obtaining construction permits.

*Id.*¹ City Council approved the agreement. CR 17.

D. Instead of performing the conditions in the agreement and applying for a certificate of occupancy Sepulveda sues the City again.

As his counsel acknowledged on the record at the hearing on the City's plea to the jurisdiction, Sepulveda has not performed the agreed conditions to obtain a certificate of occupancy and, based on his attorney's statements at the plea hearing, may never do so. Sepulveda's attorney told the trial court that Sepulveda will not spend money performing the work needed to comply with the conditions because he wants to receive a certificate of occupancy first. 1 RR 16. Sepulveda does not understand the process. The City, like almost all cities, does not issue a certificate of occupancy until after the City's inspectors confirm the owner has performed the work necessary to comply City ordinances. Pasadena Mun. Code ch. 9, art. III §9.60(20).

Submitting the preliminary site plan is the only step (of the several *agreed* steps) Sepulveda has taken toward securing a certificate of

¹ Sepulveda breached the agreement by initially refusing to dismiss his lawsuit. Sepulveda only complied after the City filed a counterclaim for breach of the agreement.

occupancy. Yet, Sepulveda failed to comply with city code as to even this first step. Sepulveda's preliminary site plan did not comply with the settlement agreement because (1) bollards were spaced more than four feet apart, and (2) vehicles would be required to back into the right-of-way. CR 17-20.

Sepulveda alleges a planning department employee sent him a letter declining to approve the site plan because the bollards were spaced too far apart, and the drive aisle did not comply with the City code. CR 17-20. Sepulveda alleges the employee noted in comments to the site plan that vehicles may not back into the right-of-way (a requirement of the settlement agreement), and because the property requires a drainage system, a six-inch curb, and a five-foot grass set-back. *Id.*

Sepulveda never submitted a revised site plan, and he did not appeal to the zoning commission and City Council. Instead, Sepulveda sued the City because he *believes* the City will not issue him a certificate of occupancy—a certificate he has not applied for, nor fulfilled the conditions for. Contrary to Sepulveda's unfounded assertion, the City has clearly stated it will provide Sepulveda a certificate of occupancy if

Sepulveda complies with the code requirements identified in the parties' agreement. CR 157-58.

Sepulveda alleges the City breached the settlement agreement and that the City's *application* of what Sepulveda self-servingly labels "new parking demands" violate the Texas constitution. CR 24-28. Notably, Sepulveda unequivocally disavows any challenge to the constitutionality of the City's parking ordinance. CR 26. Sepulveda seeks monetary damages, a declaratory judgment and an injunction requiring the City to grant him a certificate of occupancy without the necessity of Sepulveda's compliance with City code. CR 29-30.

E. The City files a plea to the jurisdiction, which the trial court denies.

The City filed a plea to the jurisdiction challenging ripeness of Sepulveda's claims given his failure to apply for a certificate of occupancy—a fact that Sepulveda does not dispute—and raising its governmental immunity to Sepulveda's claims for breach of contract and for declaratory and injunctive relief. CR 37-47. The trial court held two non-evidentiary hearings on the City's plea. The trial court denied the City's plea orally on the record at the second hearing held on April 29, 2024. 1 RR 6. The court stated he believed granting the plea in light of

the agreement would be bad public policy. 2 RR 6-7. The trial court signed a written order denying the plea the following day. App. A.

SUMMARY OF THE ARGUMENT

The trial court erred in denying the City's plea to the jurisdiction, and the Court should reverse and render judgment for the City.

First, Sepulveda's claims against the City are not ripe for the simple reason that Sepulveda *admits* he has not applied for, and the City has not denied, a certificate of occupancy. Sepulveda is suing the City only because he *believes* the City will deny him a certificate of occupancy *if* he complies with the settlement agreement by bringing his property into compliance with City code. But the City has not no action at all, let alone definitive final action with respect to Sepulveda's property, and no action that would elevate Sepulveda's claim among the level of mere supposition. To the contrary, the City has explicitly stated it will issue the certificate of occupancy when Sepulveda complies with the code as required by the settlement agreement.

Second, Sepulveda cannot overcome the heavy presumption of governmental immunity. The Declaratory Judgment Act does not waive governmental immunity for Sepulveda's claim that the City's *application*

of so-called parking demands violate the Texas Constitution. This is as true in this case as it was in Sepulveda’s previous lawsuit.

The settlement agreement does not change the result. The Legislature has not waived governmental immunity for breach of a settlement agreement. A party may sue the government for breach of a settlement agreement only where Legislature waived governmental immunity as to the claims resolved by the settlement agreement. Here, the City retained its immunity for the claims resolved by the settlement agreement.

ARGUMENT

I. Sepulveda’s claims are not ripe.

“Ripeness is a component of subject matter jurisdiction.” *Riner v. City of Hunter’s Creek*, 403 S.W.3d 919, 922 (Tex. App. –Houston [14th Dist. 2013, no pet.) (citing *Robinson v. Parker* 353 S.W.3d 753, 755 (Tex.2011)). A claim is not ripe unless, at the time the lawsuit is filed, an “injury has occurred or is likely to occur, rather than being contingent or remote.” *Robinson*, 353 S.W.3d at 755. The ripeness doctrine prevents courts “from entangling themselves in abstract disagreements” and “protect[s] [the government] from judicial interference until an

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *City of Paris v. Abbott*, 360 S.W.3d 567, 578 (Tex. App. –Texarkana 2011, pet. denied).

Ripeness requires government action to be final before it will be judicially reviewed. *El Paso v. Madero Dev.*, 803 S.W.2d 396, 398 (Tex. App. –El Paso 1992, writ denied) (citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). “The ‘final determination’ is a condition precedent to conferring jurisdiction to the trial court.” *Id.* “The finality requirement concerns itself with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury.” *Id.* 22.El “A ‘final decision’ usually requires both a rejected development plan and the denial of a variance from the controlling regulations.” *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). Because the City has not taken a “final, definitive position” on any permit Plaintiff allegedly seeks, Plaintiff’s *anticipation* of a denial makes Plaintiff’s claims unripe. *DM Arbor Court, Ltd. v. City of Houston*, 988 F.3d 215, 219 (5th Cir. 2021).²

² In *Mayhew*, the Texas Supreme Court expressly held that Texas courts “should look to the experience of the federal courts in determining the ripeness of constitutional challenges to land-use regulations.” *Id.*, at 928-29.

See also, *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1041-42 (5th Cir. 1998) (affirming dismissal of takings claim because plaintiff did not “follow through with any formal process of appeal” with the city).

Sepulveda’s claims are not ripe because Sepulveda admits he has not applied for a certificate of occupancy and the City has not denied him a certificate of occupancy. By ordinance, the City will not decide whether to issue Sepulveda a certificate of occupancy until **after** (1) the City approves a site plan, (2) Sepulveda makes the improvements necessary to bring the property into compliance with the approved site plan and city code, and (3) the City’s inspectors have inspected the property and confirmed the property complies with the site plan and code. Pasadena Mun. Code ch. 9, art. III §9.60(20). Sepulveda has not fulfilled any of these requirements.

Sepulveda has not even submitted a preliminary site plan that complies with the settlement agreement.³ And *if* Sepulveda ever submits a site plan complying with the settlement agreement and *if* the planning

³ Given Sepulveda’s attorney’s representation that Sepulveda will not make the improvements to the property unless he first receives a certificate of occupancy, it is not even clear whether Sepulveda will ever bring his property into compliance with code.

department disapproves the site plan, Sepulveda will be permitted to appeal to the City planning and zoning commission and City Council. Pasadena Mun. Code ch. 28, art. VII §28-66(1)(d). And under *Mayhew*, Sepulveda will be required to take the appeal in order to present a ripe claim.

Sepulveda is not suing the City because the City denied a completed application for a certificate of occupancy based on compliance with city code. Sepulveda is suing the City because an employee in the planning department declined to approve Sepulveda's *preliminary* site plan—a site plan that did not even comply with the settlement agreement.

Sepulveda's counsel even admitted Sepulveda seeks to compel the City to issue a certificate of occupancy before Sepulveda performs the work necessary comply with the City code. 1 RR 16. That is, Sepulveda seeks to compel the City to ignore the requirements in the city code that govern Sepulveda's business and every other business. Certificates of occupancy do not issue until after the property complies with the City

Code. This is true in the City of Pasadena, and it is true in other municipalities across Texas.⁴

Sepulveda did not submit a revised site plan to the planning department. Sepulveda did not appeal any planning department determination. Sepulveda has not even applied for a certificate of occupancy. In short, Sepulveda has not given the City the opportunity to take definitive action, and he “can hardly maintain that the [planning director’s] disapproval of the [preliminary site plan] was equivalent to a final decision” by the City. *Williamson*, 473 U.S. at 190.

If more is necessary, Sepulveda admits the planning department withheld approval because Sepulveda’s site plan does not comply with the City code, including the settlement agreement requirements for

⁴ See, e.g., *Ritchey v. Pinnell*, 357 S.W.3d 410, 411 (Tex. App.—Texarkana 2012, no pet.) (Plaintiff “was unable to obtain a certificate of occupancy from the City because...electrical and plumbing work failed to comply with building code requirements.”); *Broadway Inc. v. J&J Martindale Ventures, LLC*, No. 04-16-00447-CV, 2017 Tex. App. LEXIS 5926, at *3 (Tex. App.—San Antonio June 28, 2017, no pet.) (“renovations were complete; however, the city’s inspectors refused to issue a certificate of occupancy because the work was not up to city code.”); *Sumner v. Bd. of Adjustment*, No. 14-15-00149-CV, 2016 Tex. App. LEXIS 5173, at *8 n.1 (Tex. App.—Houston [14th Dist.] May 17, 2016, pet. denied) (“For example, Sumner alleged that Spring Valley ordinances “require [Flores] to determine whether the property complies with all provisions of the Zoning Ordinance before issuing a certificate of occupancy and compliance.”).

spacing of bollards and forbidding vehicles from backing into the City's right-of-way. Sepulveda's failure to submit a revised plan curing these issues means he cannot demonstrate the City's alleged failure to comply with the settlement agreement and the City's application of its parking ordinance and parking requirements "has caused him a concrete injury or will soon do so." *Riner*, 403 S.W.3d at 924.

Sepulveda's claim is not ripe because he has not applied for, and the City has not denied him a certificate of occupancy. The Court should reverse and render judgment for the City.

II. Governmental immunity bars Sepulveda's claims against the City.

A. Sepulveda fails to overcome the heavy presumption of governmental immunity.

Governmental entities are presumed immune from suit. *See Lubbock Cnty Water Control & Improv. Dist. v. Church & Akin*, 442 S.W.3d 297, 300 (Tex. 2014). The presumption in favor of governmental immunity is a "heavy" one, *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007). Sepulveda bears the burden of overcoming this heavy presumption by proving a statutory waiver of the City's immunity from suit. *Tex. Dep't of Wildlife v. Miranda*, 133 S.W.3d 217, 220 (Tex. 2004).

To carry this burden, Sepulveda must plead facts establishing all elements of a statutory waiver of the City's governmental immunity. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 606, 512 (Tex. 2019). Absent a waiver of governmental immunity, the court does not have subject matter jurisdiction and may not issue a valid judgment. *Miranda*, 133 S.W.3d at 225-26.

Even if Sepulveda's claim was ripe, which it is not, this Court would still reverse and render judgment because Sepulveda has failed to disprove the heavy presumption of governmental immunity.

B. Governmental immunity bars Sepulveda's claim for declaratory and injunctive relief.

The Declaratory Judgment Act waives governmental immunity for claims challenging the validity of a statute, but that is as far as the waiver goes. The waiver does not apply where, as here, the plaintiff challenges the government's application of a statute or ordinance or seeks a declaration of rights under a statute. *TexDOT v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *Fallon v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 586 S.W.3d 37 (Tex. App. –Houston [1st Dist.] 2019, no pet.)

This issue is easily resolved in favor of dismissal based on immunity because Sepulveda explicitly disclaims any challenge to the validity of a City ordinance:

This lawsuit does not challenge the constitutionality of the 2021 Parking Requirements. CR 26. Rather, Sepulveda challenges “the City’s application” of its parking ordinance what he terms “the City’s new parking demands.”

CR 26.

The Uniform Declaratory Judgment Act does not waive immunity for these claims. The Court should reverse and render judgment for the City.

C. Governmental immunity bars Sepulveda’s claim for breach of contract.

Governmental immunity has two components: immunity from liability and immunity from suit. *Tex. A & M University-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). By entering into a contract, the government might waive its immunity from liability, but it does not waive its immunity from suit. *Id.* Only the Legislature can waive immunity from suit, and the waiver must be explicit. Tex. Gov’t Code §311.034; *Oncor Elec. Delivery Co., LLC v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 849 (Tex. 2012).

The Legislature has waived local governmental immunity from suit for breach of only two discrete categories of contracts: “(A) a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed by on behalf of the local governmental entity,” or (B) certain contracts to sell waste water. Tex. Local Gov’t Code §§271.151(2), 271.152. The settlement agreement is not within the scope of this narrow waiver.

A settlement agreement is not a contract to supply goods or services and, therefore, is not subject to this limited waiver of immunity. *Lawson*, 87 S.W.3d at 521. The government is subject to suit for breach of a settlement agreement only where the settlement agreement resolves claims for which immunity is waived. *Id.* While “[t]he government cannot recover waived immunity by settling without defeating the purpose of the waiver in the first place,” *id.* at 521, the inverse is equally true. The government does not waive immunity by agreeing to settle claims for which it retained immunity because only the Legislature may waive governmental immunity. Tex. Gov’t Code §311.034,

The settlement agreement resolved the same claims as Sepulveda re-urges in this case. As already shown, the City retains governmental

immunity for those claims. Governmental immunity, therefore, also bars Sepulveda's claim for breach of the settlement agreement. Sepulveda does not overcome the heavy presumption of governmental immunity. The Court should reverse and render judgment in favor of the City on this point as well.

REQUEST FOR RELIEF

Sepulveda *admits* he is not suing the City because of any action the City has already taken. Rather, Sepulveda is suing the City because of action he imagines, without any identified basis, that the City *may* take in the future. Sepulveda's claims are not ripe. And even if Sepulveda presented a ripe claim, the City's immunity would bar this action.

The City requests the Court to reverse and render judgment in the City's favor and against Sepulveda and award the City all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I certify that this Brief contains 3,834 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Sean M. Higgins

Sean M. Higgins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record via electronic filing on this the August 12, 2024.

/s/ Sean Higgins
Sean Higgins

APPENDIX

Order denying plea to the jurisdiction..... App. A

P-1
PJURY

CAUSE No. 2023-62583

AZAEEL SEPULVEDA,
Plaintiff,

v.

CITY OF PASADENA, TEXAS, ET
AL,
Defendants.

§
§
§
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§
§
§
§

IN THE DISTRICT COURT

OF HARRIS COUNTY, TEXAS

190TH JUDICIAL DISTRICT

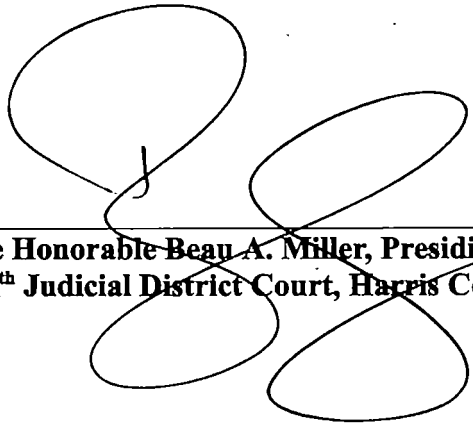
ORDER DENYING DEFENDANTS' PLEA TO THE JURISDICTION

On April 29, 2024, the Parties appeared before this Court for Status Conference. There, the Court heard continued arguments regarding Defendants' Plea to the Jurisdiction. Having considered Defendant's Plea, Plaintiff's Response, Defendants' Supplement, arguments of Counsel, and applicable law, this Court is of the opinion that the Defendants' Plea to the Jurisdiction should be **DENIED**. It is therefore

ORDERED that Defendants' Plea to the Jurisdiction is **DENIED**.

It is so **ORDERED**.

Signed on April 30, 2024,
In Harris County, Texas.

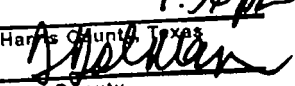


The Honorable Beau A. Miller, Presiding Judge
190th Judicial District Court, Harris County, Texas

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District Clerk

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