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In The Eighth Court of Appeals
El Paso, Texas

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8th COURT OF APPEALS
EL PASO, TEXAS
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ELIZABETH G. FLORES
Clerk

Max Grossman,
Appellant

v.

The City of El Paso,
Appellee

COMBINED REPLY BRIEF AND CROSS-APPELLEE'S BRIEF

From the 384st Judicial District Court,
El Paso County, Texas
Cause No. 2017-DCV2528

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INTRODUCTION

The City spends the bulk of its Brief on the Merits on re-posturing this appeal into something it is not. This appeal is not about whether the City's intended "Arena" project is a basketball arena or, as was promised to the El Paso voters, a multipurpose performing arts and entertainment facility. This appeal is also not about protecting the many historic buildings in the Duranguito neighborhood. Nor is this appeal about whether the executive director of the Texas Historical Commission did or did not do his job in permitting an archaeological survey in the Arena's footprint.

But the appeal *does* implicate El Paso's rich and diverse history. Unknown until recently, a large number of Mescalero Apaches encamped in an area that was centered around the "Arena Footprint" in Duranguito intermittently from 1778 until 1825, peaking at peaking at 800 to 1,000 men, women and children in 1790-1795. The size of this "peace camp" and its longetivity are significant, and its very existence constitutes a unique discovery because the Mescalero Apaches primarily resided in the mountain ranges of central and southern New Mexico. Its discovery is an historic opportunity for historians and archaeologists to learn how the Spanish established a peace camp in order to encourage the Apaches to cease their raiding and learn farming with the aim of curbing the violence that had long characterized their relations. The opportunity to explore the archaeology of this camp will be forever lost if the City is allowed to proceed with an archaeological survey that is not designed to locate, protect, and preserve the remains of the Apache peace camp in the Arena footprint. The footprint is virtually the

only area in downtown El Paso where it is practical to excavate for Apache remains. The City's failure to insist on a proper archaeological survey is a blatant violation of the Texas Antiquities Code.

The City is attempting to reframe the appeal, and spends much energy doing so, because its legal position is too weak to stand on its own. The trial court's decision not to enjoin temporarily the City from proceeding with the archaeological survey until a final trial on the merits was arbitrary and unreasonable based on the evidence presented at the hearing. On the one hand, the trial court correctly accepted jurisdiction over this case, but then irrationally refused to grant a temporary injunction to maintain the status quo while the case proceeded to the merits. The order denying the temporary injunction should be reversed, and the order denying the City's plea to the jurisdiction affirmed.

REPLY IN SUPPORT OF APPELLANT'S BRIEF

I. The trial court abused its discretion to the extent it found Grossman unlikely to succeed on the merits of his claim that the City is in violation or threatened violation of the Antiquities Code.

The City offers several arguments for why Grossman did not show a probable right to relief: (1) the City's consultant recognized the possibility that Native American artifacts could be located within the arena footprint and accounted for such artifacts within its scope of work; (2) Grossman's claims are barred by res judicata and/or already decided by the Third Court of Appeals in Austin; (3) the Antiquities Code does not

permit the relief Grossman seeks; and (4) Grossman's claims should be dismissed. None of these arguments is factually or legally correct.

A. The City has failed to correctly articulate the burden that an applicant for a temporary injunction must meet.

Grossman was not required to establish a violation or threatened violation of the Antiquities Code (*i.e.*, that he ultimately will prevail at trial). *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). The sole issue at the temporary injunction hearing is the need for immediate relief pending the trial on the merits. *Transport Co. v. Roberson Transp.*, 261 S.W.2d 549, 552 (Tex. 1953). Thus, an applicant need only introduce probative evidence that shows a likelihood of success on the merits. *Tri-Star Petro. Co. v. Tipperary Corp.*, 101 S.W.3d 583, 588 (Tex. App.—El Paso 2003, pet. denied).

The City argues that its "consultant recognized the likelihood of Native American artifacts within the MPC's footprint and accounted for such artifacts within its scope of work"[1] as if this statement of fact disposes of all issues before the Court. *This is the very heart of this lawsuit.*

This case turns on the evidence that the City's scope of work and research design are inadequate to uncover underground remains of the Mescalero Apache peace camp in the Arena footprint. As detailed in Grossman's opening brief, the evidence was undisputed that Mescalero Apache remains are likely located within the Arena footprint. The evidence showed that the City's archaeologist, Mangum, has no experience

[1] City BOM at 18.

surveying or protecting low-visibility remains as would likely be found in a Mescalero Apache peace camp and made no attempt to study or more fully understand the uniqueness of this particular Native American people. Grossman's expert archaeologist (Dr. Carmichael), on the other hand, has extensive experience excavating sites with low visibility remains. He faults Mangum's scope of work in several critical ways: (1) the scope of work omits any systematic means for the discovery of Mescalero Apache material;[2] (2) the ground penetrating radar Mangum intends to use has proven to be ineffective for finding the kind of low-visibility remains that will likely be discovered in the archaeological strata corresponding to the period of Mescalero Apache occupation;[3] and (3) Mangum's use of screens (with quarter-inch mesh) will be ineffective for discovering the kinds of remains the Mescalero Apaches left behind.[4] The City offered no evidence to refute these identified flaws in the scope of work.

The City's approach is essentially encapsulated in the following statement: "our expert says he will account for Native American remains so it must be true." But that is what a trial on the merits will determine. Nor is this a case of conflicting evidence. This is about an applicant thoroughly presenting evidence of the flaws in Mangum's approach, and the City offering nothing that would allow the trial court to discount Carmichael's opinion. Thus, the trial court was unreasonable in not accepting this evidence as sufficient to support Grossman's burden to show a probable right to relief

[2] 2RR183.
[3] 2RR182-83
[4] 2RR184.

under the Antiquities Code. Any higher burden that the trial court may have imposed, or imposed by this Court, would undermine the evidentiary task of an applicant for temporary injunctive relief.

B. The City's alleged violations or threatened violations of the Antiquities Code have never been litigated before, so they are not barred by res judicata.

The claim in this lawsuit is that the City has violated, or threatens to violate, the Antiquities Code by submitting (or refusing to revise) a scope of work that will locate, protect, and preserve the remains of the Mescalero Apache Tribe that are undisputedly located within the area of the City's Arena project. The research that made the Mescalero Apache peace camp in the area known was not published until October 2018. These alleged violations have never been litigated in any other jurisdiction.

The City bases its res judicata argument by recasting Grossman's claims as a "challenge [to] the sufficiency of the THC's issued Permit."[5] The permit is irrelevant to the City's own obligation to comply with the Antiquities Code. Grossman seeks no action from the THC in this lawsuit. Nor does he seek judicial alteration of the City's permit.

The only similarity between this case and the THC lawsuit is that both suits involve compliance with the Antiquities Code. But that is where the similarity ends. The THC litigation sought to stop an ultra vires act by THC's executive director, specifically, issuing a permit that only the Commission itself may issue. The relief

[5] City BOM at 19.

sought in the THC litigation was to void the unlawfully entered permit. The suit had nothing to do with the City's own obligations under the Antiquities Code.

The fact that the City intervened in the THC lawsuit does not create privity between the City and the THC. The City cites two cases for its position, with no explanation of their application to the facts here. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996); *Tex. Real Estate Comm'n v. Nagle*, 767 S.W.2d 691 (Tex. 1989). Neither case advances the City's position. *Amstedt* involved whether a successor homeowner had privity with an original homeowner, and the Court unsurprisingly held they did because they were successors in title. 919 S.W.2d at 653 ("Although the rule that res judicata bars the *claims of successors in title* arose in the context of land and property rights disputes, it applies here as well."). *Nagle* did involve whether a private party shared privity with a state agency, but the Court held there was no privity. 767 S.W.2d at 695 ("[I]t is unreasonable to interpret the act to create an identity of interest between the defendant broker and the commission.").

Nor is the fact that Grossman used the same expert witness in both cases relevant to the res judicata test. The City cites no authority for this proposition. Dr. Carmichael's role in the THC suit was a single affidavit opining that demolition of buildings in the Arena footprint was unnecessary to conducting an archaeological survey. His testimony was offered only to support Dr. Grossman's efforts to maintain the status quo in Duranguito pending resolution of whether the permit was issued without statutory authorization. In contrast, Dr. Carmichael's role in this case was

opining about whether Mangum's scope of work was sufficient to locate the low-visibility remains of the Mescalero Apache remains that are now known (but during the THC lawsuit, unknown) to be in the Arena's footprint. This testimony was offered to show Grossman's probable right to relief on his claim against the City. It is not surprising that Dr. Carmichael, based in El Paso and with a strong passion for El Paso's rich and diverse history, volunteered his time and experience in both cases. But this does not create a basis for finding that an unrelated lawsuit against an entirely different defendant is res judicata in this lawsuit involving entirely different claims.

C. The Third Court of Appeals' decision has nothing to do with the City's alleged violations or threatened violations of the Antiquities Code.

The City uses the Third Court of Appeals' decision in the THC lawsuit in support of an argument that Grossman is wrong that demolition of buildings is commencement of the project that, under the Antiquities Code, cannot occur prior to the completion of the archaeological survey. The City faults Grossman for noting that the decision is not binding on this Court "without providing a rational basis for this Court to depart" from the decision.[6]

The City, again, can only make this accusation through procedural distortion of the THC appeal. The Third Court was presented with the issue of whether Grossman had pleaded an ultra vires claim. The appellate court held that he had not. But its reasoning was grounded in whether the Commission had discretion in how it permits

[6] City BOM at 23.

public projects. This is because, as the Third Court noted, a proper ultra vires suit cannot "complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Grossman v. Wolfe*, 578 S.W.3d 250, 258 (Tex. App.—Austin 2019, pet. denied) (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)). It is a narrow holding that must be considered in the proper procedural context. It does not broadly hold that demolition does not constitute commencement of project. It simply holds that Grossman's claims failed because his claims against THC entered a world of governmental discretion and thus were not ultra vires claims.

As to the legal question involved in this lawsuit, the Antiquities Code is clear: the "project may not commence until the archaeological survey is completed." TEX. NAT. RES. CODE §191.0525(b). This case is founded on the issue whether the City's scope of work presents a plan to effectively locate, protect, and preserve the Mescalero Apache remains. And, at this phase (where the merits are not to be decided) the sole question for this Court is whether the trial court abused its discretion in refusing to enjoin the City from commencing the project until it revises its scope of work to comply with the Antiquities Code. Because the current status quo is that the City has not started the archaeological survey, the City should not be allowed to do anything on the Arena site until Grossman has the opportunity to have the merits of his claim fully decided.

D. The City distorts the relief Grossman seeks in this lawsuit.

Casting Grossman's claim as "an attempt to rewrite the THC permit,"[7] the City argues, with no citation to authoritative cases, that the Antiquities Code does not allow the relief Grossman seeks in this lawsuit. But Grossman seeks no relief from the THC. Grossman seeks to compel the City to comply with the Antiquities Code by submitting a revised scope of work that will effectively locate, preserve, and protect the Mescalero Apache remains that undisputedly are likely under the soil of its planned Arena project.

The City seems to think that the THC is the sole authority to determine whether the City has complied with the Antiquities Code. But this is false. the Antiquities Code makes us *all* stewards of the historical and archaeological assets within the borders of Texas. The THC is not the only steward, nor is the THC the only entity responsible for ensuring compliance with the Antiquities Code. To the contrary, the Antiquities Code creates a steward in every Texan to protect these assets and directly grants "any court of competent jurisdiction" the authority to ensure compliance with its mandates. *See* TEX. NAT. RES. CODE §191.173(a) ("A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.") (emphasis added). Thus, Texas courts has both the authority and the obligation to ensure that the City, through its agent Moore, fully complies with all the obligations under the Antiquities Code, including its obligation to locate, protect, and preserve Native

[7] City BOM at 23.

American remains, specifically here, remains from the Mescalero Apache peace camps in Duranguito. *See* TEX. NAT. RES. CODE §191.002.

The City attempts to use its cross examination of the various trial witnesses to prove otherwise. But this is a legal issue, not a factual one. And any acknowledgment by a witness that the THC had the *authority* to require the City, through its agent Moore, to resubmit a research design or scope of work is not a concession that *only the THC* can grant the relief Dr. Grossman seeks in this lawsuit, *i.e.*, a revised research design and scope of work that comply with the Antiquities Code. Dr. Grossman does not dispute the THC's authority and submitted a letter to the THC about the newly discovered Mescalero Apache peace camp specifically to avoid any further litigation against the City.

E. The City's motion to dismiss was not noticed for hearing and cannot be a basis for affirming the trial court's order.

The City also argues that the trial court did not abuse its discretion in finding no probable right to relief because, under the Third Court's decision in *Ex Parte El Paso*, 563 S.W.3d 517, 527 (Tex. App.—Austin 2018, pet. filed), the "underlying suit will be permanently enjoined which will result in the trial court dismissing Grossman's suit before it ever gets to trial."[8] But the City filed a motion to dismiss the underlying suit[9] yet, importantly, *did not set it for hearing*. When the City attempted to argue for dismissal

[8] City BOM at 27.
[9] 5CR2890.

at the temporary injunction hearing, Grossman objected.[10] Whether dismissal is warranted was not before the trial court, nor is it a proper basis for affirming the trial court's order.

In any event, the Third Court's judgment only enjoins the filing of lawsuits, not proceeding with previously filed lawsuits. The Third Court's decision followed an appeal by the City of a Final Judgment issued by a Travis County district court in a bond validation suit that the City brought to get preclearance to build a sports arena in Duranguito, rather than the promised performing arts center.

On appeal, Third Court reformed the Final Judgment, in part, and then affirmed the remainder of the judgment. The Final Judgment stated in relevant part:

> The Court takes judicial notice of Cause No. 2017-DCV-2528; *Max Grossman v. City of El Paso*, filed on July 31, 2017, and pending in the 384th Judicial District Court of El Paso County, Texas, wherein injunctive relief is being sought against the City pursuant to the Antiquities Code of Texas to refrain from the demolition of properties within the Duranguito neighborhood until the City complies with applicable notice requirements for projects on public lands and the requirements of the Texas Historical Commission. TEX. NAT. RES. CODE §191.0525 (the "Antiquities action"). Venue over the Antiquities action lies in El Paso County, Texas. TEX. NAT. RES. CODE §191.173(b); TEX. CIV. PRAC. & REM. CODE §15.002. This Judgment does not adjudicate or affect the claims asserted therein.[11]

The Third Court's judgment deleted this paragraph and reformed the Final Judgment by adding the following paragraph:

> IT IS FURTHER ORDERED that, as specified by Texas Government Code section 1205.151, this Final Judgment is a permanent injunction against the ***filing*** by any person or entity of any proceeding contesting the

[10] 3RR108.

[11] 6CR2963-64.

> validity of the bonds, the authorization of the bonds, the expenditure of money relating to the bonds in conformity with this judgment, the provisions made for payment of the bonds or of interest thereon, any matter adjudicated by this Final Judgment, and any matter that could have been raised in these proceedings.[12]

Importantly, this language precludes only the filing of bond-related proceedings. It does not preclude proceeding with previously filed lawsuits. This lawsuit was filed on July 31, 2017—before Final Judgment was entered on August 7, 2018, and well before the Final Judgment was affirmed as modified on November 7, 2018.

This plain reading of the Third Court's reformation language is confirmed by the relief the City sought from the Third Court. In its prayer, the City sought, in relevant part, the following grounds for relief: to "[e]njoin[] Max Grossman from maintaining Cause No. 2017-DCV-2528; Max Grossman v. City of El Paso, in the 384th Judicial District Court of El Paso County; ***and***" to "[r]eplace the second full paragraph on page 3 of the judgment with" the injunctive language that the Third Court adopted in its injunction.[13] Thus, the City must know that the Third Court's injunction does not enjoin the "maintenance" of this lawsuit; it specifically sought two separate forms of relief. And the Third Court's judgment adopts only one.

The plain reading is further confirmed by Chapter 1205 itself. Section 1205.061 authorizes a trial court hearing a bond validation suit to "enjoin the ***commencement, prosecution, or maintenance*** of any proceeding by any person . . . an action or

[12] 6CR2968 (emphasis added).
[13] 6CR3045–46 (emphasis added).

expenditure of money relating to the public securities, a proposed action or expenditure, or both." TEX. GOV'T CODE §1205.061(a)(4) (emphasis added). Rather than use this all-encompassing language in Chapter 1205, the Third Court, tracking the City's own proffered language, used one word: ***filing***. This choice has consequences. The City could have challenged the language in the judgment, but it did not.

To be forthright, the Third Court's opinion holds:

> Because Grossman's El Paso suit is a proceeding that "contests the validity of . . . an action or expenditure of money relating to the public securities, a proposed action or expenditure, or both," the district court was authorized to enjoin the prosecution or maintenance of the suit. The district court's failure to do so was an abuse of discretion because Grossman's El Paso suit prevents final resolution of all matters subject to the City's EDJA lawsuit.

563 S.W.3d at 527 (citations omitted).

But an appellate court's opinion is simply a statement of the court's reasoning for the judgment that it is entering. It is the judgment that controls. *Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 277 (Tex. 1996) ("In the case of a conflict between the appellate judgment and an appellate opinion, the judgment controls over the opinion."); *see also Simulis, L.L.C. v. G.E. Capital Corp.*, 276 S.W.3d 109, 111 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (deferring to the disposition of sister Houston court of appeals' judgment, even though inconsistent with disposition suggested in opinion).

Applied here, the Third Court's judgment enjoins only the filing of bond-related suits. Even if this suit were bond-related (an issue still on appeal and that Grossman

disputes), nothing in the Third Court's judgment prohibits this Court from proceeding with this previously filed lawsuit.

Even assuming the Third Court's judgment enjoined this lawsuit, dismissal would be premature. Grossman intends to file a motion for rehearing in the Texas Supreme Court, and, because the appeal remains pending, the Third Court has not issued a mandate. It is upon the issuance of the mandate that the judgment of the court of appeals, if not corrected by the Texas Supreme Court, would be effective. *See* TEX. R. APP. P. 51.1(b) ("When the trial court clerk receives the mandate, the appellate court's judgment must be enforced."); *see also In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) ("Absent an order to the contrary by the trial court or an appellate court, the Clerk could not be held in contempt for violating the injunction until all appeals relating to the judgment were exhausted and a mandate enforcing the injunction was issued. [T]he Clerk was not obligated to comply with the injunction until the appeals were final and mandate issued . . .."). And, as the Texas Supreme Court has cautioned, enforcing the court of appeals' opinion before the mandate issues contravenes the "orderly dispatch of justice" and risks "conflicting orders" that may come from the appellate courts before that mandate issues. *Continental Casualty Co. v. Street*, 364 S.W.2d 184, 187 (Tex. 1963). Thus, even if the Third Court's opinion is an injunction of this lawsuit, it would be premature to dismiss the suit while appellate review of that injunction is pending.

II. The City conflates two elements for obtaining a temporary injunction in an attempt to hold Grossman to an impossible standard for establishing irreparable injury.

The City also asserts that the trial court was within its discretion to deny the temporary injunction because it had "discretion to reject Grossman's criticism of the scope of work."[14] But that argument goes to Grossman's probable right to relief (*see supra* 7–9, explaining why the trial court abused its discretion under this record), not whether Grossman showed irreparable and imminent harm absent an injunction. By confusing these two elements, the City attempts to hold Grossman to a heightened standard for obtaining a temporary injunction. Essentially, the City's position is that unless Grossman *conclusively* proved the scope of work violates the Antiquities Code, *i.e.*, the merits of the case, he also cannot show the trial court could not have unreasonably found there is no irreparable injury. But that was not Grossman's burden.

The City also ignores Grossman's argument that proof of a violation of a statute alone establishes a case for injunctive relief without the need to prove irreparable harm. *See, e.g.*, *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 108 (Tex. App.—San Antonio 2000, no pet.) ("A city seeking to enjoin a violation of its zoning ordinance, however, need not prove that a violation would cause injury to it or its residents. Similarly, an act that violates a statute or city ordinance may be enjoined without a showing that the legal remedy is inadequate." (citations omitted)).

[14] City BOM at 32–33.

In truth, common sense dictates that the trial court abused its discretion if it based its denial of the temporary injunction on lack of irreparable injury. As established above, the evidence is undisputed that Mescalero Apache remains are likely under the Arena footprint, and the evidence was unrefuted in specificity that Mangum's inexperience in sites with low-visibility Native American remains, as well as his unsystematic approach and ineffective tools, create a real and imminent risk that the remains will not be found under the current research design and scope of work. The clock cannot be unwound. If these remains are lost, so will this unique opportunity for historians and archaeologists to better understand this tribe during the Spanish colonial period.

Finally, the City also accuses Grossman of mischaracterizing Mangum's testimony concerning his opinions about the depth of an archaeological survey sufficient to discover the Mescalero Apache remains. Perhaps Mangrum, as the City intimates, answered a very direct question with a hypothetical instead of specifying the likely depth of his archaeological survey for this particular project. But Mangum is clear that he believes Carmichael's opinion on the likely depth of Mescalero Apache remains is an "exaggeration"[15] and "a stretch:"[16] "whether [Mescalero Apache remains] are deep or

[15] 2RR155.
[16] 2RR156.

not, whether they are still present or not, I think is less certain."[17] So Grossman's statements that Mangum and Carmichael disagree about depth is accurate.

III. The Court should give zero credence to the City's *ad hominum* attacks on Grossman and his counsel under the auspices of "balance of equities."

The City argues that equities favored denial of the temporary injunction because Grossman sought injunctive relief with "unclean hands."[18] The City then proceeds to attack Grossman and his counsel for a variety of offenses, none of which should be given any credence.

First, the City attempts to paint Dr. Grossman as a rogue litigant, unnecessarily filing, by the City's account, "eight separate actions" to stop the demolition in Duranguito. The City's case count is vastly overstated. Many of the so-called "eight actions" were just appeals, sometimes in the form of an original petition (as required by the appellate rules), from the same underlying trial court proceeding. But no legal proceedings (appellate or otherwise) would be needed if the City were not so blatantly violating the law and the will of its constituents at every corner in pursuing its plan to demolish a historically sensitive area to build another sports arena in downtown El Paso.

Second, the City faults Grossman's attorneys in how they initially obtained a Temporary Restraining Order from the trial court prior to the temporary injunction hearing that is the subject of this appeal. These accusations are misleading and wholly

[17] 2RR173.

[18] City BOM at 36.

irrelevant. The TRO is not on review in this appeal. In any event, there is no factual basis to support the claim that counsel for Grossman violated Local Rule 1.05(d). Counsel for Grossman filed their application for TRO on October 6, 2019, and, commensurate with the filing, electronically served the City's counsel. The application clearly stated that Grossman intended to seek a TRO to prevent the demolition of the buildings because demolition could destroy any Mescalero Apache remains in the underlying ground. The following morning, the City sent a letter to the trial court asking to be permitted to participate when the TRO was being requested. This letter was not seen by either the trial court or by Grossman's counsel before the TRO was heard and issued. Local Rule 1.05(d) does not require counsel for the party seeking a TRO to notify opposing counsel of the time when they actually intend to speak to the judge about issuing a TRO. If the trial judge—who has a long history with this litigation and the City's procedural gamesmanship during the litigation—felt the City's presence was needed, he could have easily called counsel before issuing the TRO.

Finally, the City attacks Grossman's counsel for "lack of candor" with the Court about the City's actions on that fateful day in September 2017 when five buildings within the Arena footprint were partially destroyed despite this Court issuing an emergency order prohibiting the demolition of the buildings. The Court is well aware of the events surrounding that emergency order and subsequent order to show cause. It is true that ultimately Grossman decided not to pursue holding the City in contempt. But it is equally true that once this Court ordered the City to suspend the demolition

permit, the City did so and demolition ceased immediately—a simple action that could have easily occurred upon issuance of the Court's first emergency order and that would have prevented the grave damage to the five historic buildings in Duranguito.

Grossman presented his Second Amended Petition and Application for Temporary Injunction with clean hands. He acted promptly upon the discovery of the Mescalero Apache peace camp. He sought to resolve this issue without the need for further litigation. When those efforts failed, he sought judicial intervention, as the Antiquities Code allows. He obtained a TRO within the bounds of local rules, worked hard to complete discovery requested by the City within the few weeks between the TRO and the temporary injunction hearing, and presented probative evidence showing his entitlement to preserving the status quo until his claim is resolved on the merits. The City's "equity" arguments are nothing more than a completely unjustified and unprofessional ad hominem attack in an attempt to prejudice this Court against Grossman's counsel and to hide the weaknesses of the City's legal position.

RESPONSE TO CITY'S CROSS APPEAL

The City argues it is immune from suit and, relying on a Third Court of Appeals decision, maintains that the Texas Antiquities Code does not waive immunity from suit. The trial court correctly denied the City's plea because:

- The City has already conceded that the Antiquities Code provides a limited waiver of immunity, which its plain-language undoubtedly does.
- The Third Court of Appeals decision—on which the City now relies—has no analysis and is based on a single case that is itself was not well-reasoned.

I. As the City previously conceded, the Legislature has waived sovereign immunity for claims seeking to enforce the provisions of the Antiquities Code.

This is not the first attempt by the City to dismiss this lawsuit on immunity grounds, but the arguments the City makes now are different—and in direct contradiction to the position it has taken previously before this Court and appellate courts in the case. It previously stated to the trial court (as a heading in its original plea to the jurisdiction): "Section 191.173 of the Antiquities Code Provides a Limited Waiver of Governmental Immunity."[19] It continued in the body of its original plea:

> The narrow waiver of governmental immunity is expressly limited to restraining orders and injunctive relief, and is only for the purpose of restraining or enjoining violations or threatened violations of the Antiquities Code. There are no other causes of action or rights created under Section 191.173.[20]

The City continued this concession in the courts of appeals, noting that the "Antiquities Code provides only a limited waiver of governmental immunity."[21] Ultimately, the City dropped its appeal of this Court's denial of its original plea to the jurisdiction, further conceding the jurisdiction of this Court. In short, almost two years ago, the City had the opportunity to present this argument and have it resolved by a court of appeals. It chose not to.

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[19] 2CR623.

[20] 2CR624.

[21] Appellant's Brief in No. 08-17-00200-CV at 11, available online at http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=258c51b3-18e3-45f6-b344-989be2259cec&coa=coa08&DT=Brief&MediaID=3d106ac5-5a73-4d27-99b2-7eb8bd6eb685.

The City's concessions are not surprising. It is, in fact, the only reasonable interpretation of the Antiquities Code. Section 191.173(a) provides that:

> A citizen of the State of Texas may bring an action in any court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter." TEX. NAT. RES. CODE §191.173(a).

That provision clearly and unequivocally waives immunity and grants jurisdiction to this Court to grant the injunctive relief Dr. Grossman seeks.

Further clarifying what language constitutes a grant of sovereign immunity, the Texas Supreme Court has held that some statutes may evince the Legislature's intent to waive sovereign immunity despite not being a "model of perfect clarity." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). This intent is found "when the provision in question would be meaningless unless immunity were waived." *Id.*; *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 8 (Tex. 2000) (holding that the anti-retaliation statute had no meaning absent waiver of sovereign immunity). In such circumstances, where one can "discern no other reasonable intent in the Act's provisions," the court will find waiver of immunity. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 297 (Tex. 1995).

The provisions of the Antiquities Code necessarily imply that the Legislature intended for those provisions to be enforceable against government actors, including a municipality. The mandates, requirements and duties imposed by the Antiquities Code relate primarily to restrictions placed on *public* land projects. For example, section 191.0525 requires that a "person," which includes governmental subdivisions and state

agencies,[22] primarily responsible for a project located on local public land must notify the Texas Historical Commission, which then must determine if the site requires protection or if an archaeological survey is necessary. "Public lands" is defined to mean "non-federal public lands that are owned or controlled by the State of Texas or any of its political subdivisions, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas." 13 TEX. ADMIN. CODE §29.4(25). Moreover, section 191.0525(d) imposes notice obligations and restrictions on government entities, such as the City of El Paso. TEX. NAT. RES. CODE §191.0525(d). This undoubtedly contemplates suits against governmental entities. The Antiquities Code clearly places important restrictions on governmental actors that are necessary to safeguard the State's archaeological heritage. To argue that the explicit enforcement provision in the Antiquities Code does not allow for enforcement by a citizen is utterly nonsensical. Concluding that the Antiquities Code does not waive sovereign immunity would nullify the entire thrust and purpose of the Antiquities Code.

Nor is Dr. Grossman's suit an attempt to control state action. As an initial matter, this defense was not pleaded or raised in the City's plea to the jurisdiction. So the Court should not consider it on appeal. But, in any event, the theory is inconsistent with the relief sought. Dr. Grossman asked nothing of the THC in this lawsuit. Dr.

[22] A "person" includes a governmental subdivisions and agencies. *Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 851 & n.17 (Tex. 2012) (explaining that "Since the adoption of the Code Construction Act in 1967, the Legislature has instructed that in construing its codes, the word "person" includes the "government or governmental subdivision or agency" "unless the statute or context ... requires a different definition" (citing TEX. GOV'T CODE §311.005(2))).

Grossman seeks only to compel the City of El Paso, through its agent, Moore, to submit a revised research design and scope of work that complies with the Antiquities Code's mandate to locate, protect, and preserve Native American remains and, in particular, the remains of the newly discovered Mescalero Apache peace camps. The requested directive is to the City only; Grossman does not request the Court compel the THC to do anything. Ordering *the City*, through its agent Moore, to comply with the Antiquities Code does not in any way attempt to control the THC or state action.

II. The Court should not ignore the plain (and conceded) waiver of sovereign immunity based on a recently decided Third Court of Appeals opinion.

The City's sudden about-face on immunity is grounded in a recent Third Court of Appeals opinion. The Third Court opinion is not binding on this Court, and it is based on flawed reasoning and should not be followed, even as persuasive authority.

The Austin court of appeals' decision summarily found, as an alternative holding, that the Antiquities Code does not waive immunity. In one paragraph, the court cited a single, poorly reasoned decision of its own to arrive at the point where it chose to ignore the plain language of the Antiquities Code. *See Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161 (Tex. App.—Austin 2013, no pet.). In *Bacon,* the Austin court of appeal was construing section 442.012(a) of the Government Code, as opposed to section 191.173(a) of the Antiquities Code, and held that 442.012(a) was not a waiver of sovereign immunity. A holding that sovereign immunity is not waived under one statute, does not necessitate a holding that sovereign immunity is not waived under an

entirely different statute. Unfathomably, the court of appeals did not even address the distinctions between the two provisions.

First, the statutory contexts in which the two provisions reside are quite dissimilar. Chapter 442 of the Government Code is the enabling statute that created the Commission. By contrast, the Antiquities Code is a more narrow and specific statute enacted to protect Texas's archaeological heritage, especially on public lands. In furtherance of this goal, the Legislature authorized Texas citizens to bring suit to enforce those provisions and protections. By contrast, in *Bacon*, the plaintiff was not seeking to enforce Section 442.012(a). Bacon was seeking a review of an agency decision on his application to change the text on a historical marker

Second, *Bacon*'s sole rationale does not apply to section 191.173(a). In *Bacon*, the court of appeals determined that because chapter 442 "mentions nothing about immunity or governmental defendants," it was not a clear waiver of immunity. In clear contrast, Chapter 191 expressly contemplates suits against defendants who would otherwise be immune from suit. Indeed, as mentioned above, the entire premise of the relevant provisions is that a project is occurring on public land. In short, the Antiquities Code is a statute to protect public lands from governmental actions and actors and expressly grants any citizen of the state of Texas the right to enforce its provisions

against those actors. Thus, section 191.173 provides a clear, though limited, waiver of immunity.

The Antiquities Code places important restrictions on governmental actors that are necessary to safeguard the State's archaeological heritage. To construe an explicit enforcement statute to not allow for enforcement is tantamount to holding that the statute has no effect, which is nonsensical. Concluding that the Antiquities Code does not waive sovereign immunity would require this Court to ignore the entire thrust and purpose of the Antiquities Code.

PRAYER

For these reasons, Appellant Dr. Max Grossman requests that the Court (1) reverse the trial court's order denying a temporary injunction; (2) remand the case to the trial court with instructions that the trial court enter a temporary injunction enjoining the City from commencing the Project, including any demolition of buildings within the Project's footprint, pending a trial on the merits; and (3) affirm the trial court's denial of the City's plea to the jurisdiction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that this brief contains 6,513 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.

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CERTIFICATE OF SERVICE

I certify that on February 18, 2020, I electronically served a copy of this brief on the following attorneys of record:

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