No. 08-19-00272-CV

IN THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT
EL PASO, TEXAS

MAX GROSSMAN,

Appellant,

v.

CITY OF EL PASO,

Appellee.

Consolidated Interlocutory Appeal arising out of the
384th Judicial District Court, El Paso County, Texas
Cause No. 2017-DCV2528

CITY OF EL PASO'S BRIEF ON THE MERITS

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REFERENCES TO THE PARTIES

Appellee/Cross-Appellant City of El Paso will be referred to as the City. Appellant/Cross-Appellee Max Grossman will be referred to as Grossman.

REFERENCES TO THE RECORD

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STATEMENT OF THE CASE

Nature of the Case	This lawsuit is brought by Max Grossman against the City seeking injunctive relief under Section 191.173(a), Natural Resources Code. 6 CR 3060-3204. Grossman seeks to judicially challenge the scope of Archeology Permit 8525 issued by the Texas Historical Commission, which allows the City to conduct an archeological investigation beneath land in downtown El Paso on which the City intends to construct a multipurpose performing arts and entertainment facility. Grossman asserts that governmental immunity has been waived.
Course of Proceedings	The City filed a plea to the jurisdiction arguing that: (1) Grossman's claims should be dismissed because they are barred by governmental immunity; and (2) Grossman's request for relief is an attempt to control state action which is barred by governmental immunity. The trial court held a hearing on the City's plea to the jurisdiction and on Grossman's application for a temporary injunction.
Trial Court's Disposition	The 348th District Court, El Paso County, Texas, Judge Patrick Garcia presiding, denied the City's plea to the jurisdiction and denied Grossman's application for temporary injunction.
Related Proceeding	Grossman appealed the denial of his application for temporary injunction and sought emergency relief with this Court seeking to halt the demolition of any buildings within the footprint of the City's planned multipurpose performing arts and entertainment facility. *Grossman v. City of El Paso*, No. 08-19-00272-CV (Tex. App.—El Paso, filed October 24, 2019). The Court granted emergency injunctive relief, prohibiting the City from demolishing any buildings within the footprint of the planned facility. *See* Order in *Grossman v. City of El Paso*, Case No. 08-19-00272-CV, dated October 24, 2019. The City appealed the denial of its plea to the jurisdiction. The Court consolidated the interlocutory appeals into this appeal.

STATEMENT REGARDING ORAL ARGUMENT

The City of El Paso believes the Court should decide this case by submission on the briefs. As discussed herein, the underlying suit and this appeal are part of multiple actions by Grossman brought for the purpose of delaying or preventing the demolition of buildings in the footprint of a new facility to be built by the City of El Paso. In line with that purpose, Grossman has obtained emergency relief from this Court prohibiting the City's demolition of those buildings. The City of El Paso seeks to have this matter resolved as quickly as possible and, therefore, requests that the Court decide the case by submission on the briefs. The delay in the resolution of this case resulting from granting oral argument will only serve to further Appellee's purpose of causing delay. The City of El Paso requests oral argument only in the event that the Court grants Grossman's request for oral argument.

ISSUES FOR REVIEW

Did the trial court err when it denied the City's plea to the jurisdiction?

Did the trial court err when it denied Grossman's application for temporary injunction?

To the Honorable Eighth Court of Appeals:

Grossman's claim in the underlying suit is that if the City proceeds to conduct the archeological survey permitted by the Texas Historical Commission it will violate the Antiquities Code by failing to locate, protect and preserve objects of archeological interest. 6 CR 3060, 3067. Grossman claims that his only interest is in locating, protecting and preserving Native American artifacts and seeing that the Antiquities Code provisions are followed. In that regard his pleadings do not mention the buildings on the planned multipurpose performing arts and entertainment center (the "MPC") site. However, his actual purpose does not involve Native American artifacts but rather preserving the buildings. Grossman has been involved in 8 separate legal actions against the City for the purpose of preventing the demolition of the buildings in the footprint of the MPC.

Grossman's interest in preserving the buildings is demonstrated by the TRO he drafted and had the trial court enter that restrains the City from demolishing the buildings and otherwise commencing the project but says nothing about Native American artifacts. 6 CR 3260-1. It is also demonstrated by the proposed temporary injunction that Grossman drafted and asked the trial court to enter which also would restrain the City from demolishing the buildings and otherwise commencing the project but says nothing about Native American artifacts. *See* Exhibit M to City of El Paso's Motion to Reconsider, filed October 31, 2019, in this appeal. Finally, Grossman filed a motion for emergency relief in this appeal and obtained an order

from this Court that stays commencement of the project including any demolition of the buildings but says nothing about Native American artifacts.

The testimony in the trial court, however, showed demolition of the buildings will not impact Native American artifacts which are projected to possibly be found at depths of 12 feet or more below ground. Dr. Carmichael, the lone archeologist offered by Grossman, testified that demolition of the buildings would not affect the artifacts below ground. "Tearing down the buildings will not affect the artifacts below ground." 2 RR 87. If Grossman were genuinely concerned about artifacts rather than the buildings he would have sought an injunction that allowed demolition to proceed along with the Ground Penetrating Radar survey but enjoined subsequent excavation. This is an important distinction because the Antiquities Code has no application to the buildings - the buildings are not protected in any way by the provisions of the Antiquities Code. Indeed, in *Grossman v. Wolfe,* 578 S.W.3d 250, 261(Tex. App.—Austin 2019, pet. denied), the Austin Court of Appeals determined "[t]here is no indication that the buildings have historical or archeological value."

Grossman has admitted that the purpose of his numerous legal actions against the City involving the MPC is to delay the demolition of the buildings until the City just gives up. In his recent online comment he admitted that that he and JP Bryan, the wealthy individual from Houston who is paying Grossman's legal fees, are involved in "litigation that has spread into more than a half-dozen other courtrooms, in Austin, Fort Worth, San Antonio and El Paso, and several lawsuits have reached

the Supreme Court of Texas." Grossman's final online comment is most telling: "The final outcome of the 'Arena' litigation cannot be predicted, but I can assure you of one thing. JP Bryan and I will *never* give up. We will press ahead in the courts until the City agrees to abandon its corrupt plan and preserve the birthplace of El Paso." 2 RR 79-83; 5 RR Defendant's Exhibit 20 (pdf 232-237). Grossman's goal is not to locate, protect, and preserve Native American artifacts; his goal is to delay demolition of the buildings until the City abandons the MPC project – not a goal that finds any support in the Antiquities Code.

Moreover, Grossman's claims in this case have already been considered and rejected by both the Austin Court of Appeals and the Texas Historical Commission (the "THC"). Grossman attacked the THC's permitting of the archeological survey for the footprint of the MPC in a suit he brought against Mark Wolfe, the Executive Director of the THC, and the City intervened as a party opposing Grossman in that suit. On appeal the Austin Court of Appeals rejected Grossman's attacks on the permitted archeological survey. *Grossman v. Wolfe*, 578 S.W.3d 250 (Tex. App.—Austin 2019, pet. denied). Grossman next went to the THC and presented the same claims that are set out in his Second Amended Petition. Upon consideration of those claims attacking the permitted archeological survey, the THC rejected those claims. 5 RR Exhibit 9 (pdf 188-90). The underlying suit and this appeal are Grossman's attempt to avoid the results of those decisions by not making the THC a party to these proceedings. That attempt must ultimately fail.

Grossman contends that the THC's permitted archeological survey "does not require locating, much less protecting and preserving, Native American artifacts." Brief of Appellant, at 1. In fact the evidence shows the THC's permitted archeological survey recognizes the potential presence of Native American artifacts which the survey is designed to locate, protect and preserve by demolishing the buildings to allow an underground survey of the site using Ground Penetrating Radar, and a subsequent subsurface investigation including excavation to depths at or below the depths of excavation for the construction of the MPC. Dr. Carmichael, Grossman's only archeological expert, testified that he would conduct the survey in a different manner, but he also recognized that experts can legitimately hold different opinions on the subject, he respects the opinion and reputation of the Texas State Archeologist, Patricia Mercado-Allinger, he recognizes that Mr. Mangum who prepared the permitted archeological survey and Ms. Allinger who permitted it disagree with him, and that the THC has the final decision on the matter. 2 RR 211-218.

This is not a case of doing an archeological survey or not doing one. The City has engaged an experienced archeology firm to design and conduct the archeological survey for the MPC site. The survey has been reviewed and permitted by the THC as required by the Antiquities Code. That the permit is proper has been confirmed both by the THC and the Austin Court of Appeals. Once the survey is begun it is designed to locate, protect and preserve the Native American artifacts Grossman

professes to be concerned about. The trial court considered the evidence presented by 5 witnesses over 2 days and 2 days later determined Grossman's request for a temporary injunction should be denied. The trial court did not act irrationally as Grossman claims. Brief of Appellant, at 1. The trial court did not act arbitrarily or unreasonably; there is no basis for overturning its decision on appeal. The sooner the THC's permitted archeological survey is allowed to be commenced and completed, the sooner any Native American artifacts at the MPC site will be located, protected and preserved in accordance with the provisions of the Antiquities Code.

STATEMENT OF FACTS

Grossman brings a suit in El Paso to challenge the Multipurpose Performing Arts and Entertainment Center project.

Over seven years ago, in 2012, the voters of El Paso overwhelmingly approved a bond issue that included the construction of a multipurpose performing arts and entertainment center (the "MPC") in downtown El Paso. 2 CR 615. The construction of the MPC requires the City to obtain an archeological permit from the Texas Historical Commission ("THC") to conduct an archeological survey of any potential prehistorical or historical artifacts beneath the footprint of the MPC. 7 CR 3749; *Grossman v. Wolfe*, 578 S.W.3d 250, 253 (Tex. App.—Austin 2019, pet. denied).

Grossman originally filed this suit on July 31, 2017, claiming that the City should notify the THC of the MPC project in accordance with the provisions of the Antiquities Code. (Chapter 191 of the Natural Resources Code is referred to as the "Antiquities Code." Tex. Nat. Res. Code Ann. § 191.001.) 1 CR 13-237. The City had not yet notified the THC about the MPC project because it had not yet broken ground at the project and did not yet own the project site. *See* Tex. Nat. Res. Code Ann. § 191.0525. 2 CR 626. In May 2018, through its archeology consultant, Moore Archeological Consulting, Inc. ("Moore"), the City notified the THC about its construction project as required by the Antiquities Code. *Grossman v. Wolfe*, 578

S.W.3d 250, 254 (Tex. App.—Austin 2019, pet. denied). This mooted the claims raised in Grossman's Original Petition and his requested relief.

Grossman brings another suit to challenge the THC's permit for an archeological survey.

Following notification of the planned MPC construction, the THC instructed the City to submit a permit application and research design and the City complied. *Grossman v. Wolfe*, 578 S.W.3d at 254. Moore submitted a proposed research design, a proposed scope of work for an archeological survey of the footprint of the MPC, a permit application, and after consultation with the THC, a revised proposed scope of work. "In its permit application, the City proposed that it be allowed to demolish the existing buildings at the project site so that it could investigate the project site using ground-penetrating radar," prior to construction of the MPC. *Grossman v. Wolfe*, 578 S.W.3d at 254.

On October 15, 2018, the THC issued state archeological permit #8525 (the "Permit") authorizing Moore, on behalf of the City, to proceed with the archeological survey of the area beneath the footprint of the MPC in accordance with the revised scope of work submitted by Moore. 5 RR Defendant's Exhibit 5 (pdf 163-164). The archeological survey approved by the THC included 3 different phases: (1) the demolition of the buildings in the footprint of the MPC (the "buildings"), (2) an underground survey of the site using Ground Penetrating Radar, and (3) a subsurface investigation. 5 RR Defendant's Exhibit 13 (pdf 191-225).

On October 23, 2018, immediately after the issuance of the Permit, Grossman filed suit against Mark Wolfe, the Executive Director of the THC, in the 261st District Court in Travis County, Texas (the "THC Suit"), claiming that Wolfe's issuance of the Permit on behalf of the THC was ultra vires because he was not authorized to issue the Permit and because the Permit violated Section 191.0525(c) of the Antiquities Code as it allowed the City to commence demolition of the buildings before the archeology survey is completed. *Grossman v. Wolfe*, 578 S.W.3d at 254. Grossman brought these claims as ultra vires claims because Section 191.173 of the Antiquities Code does not provide a waiver of governmental immunity that would allow a direct claim against the THC. *Id.* Grossman alternatively asserted claims against the THC for violations of the Antiquities Code, asserting that Section 191.173 of the Antiquities Code waived immunity for the claims. *Id.* The City intervened in Grossman's suit against Wolfe to defend the Permit. *Grossman v. Wolfe,* 578 S.W.3d 250.

On October 25, 2018, Grossman filed an amended petition in the underlying lawsuit asserting claims against the City identical to those raised in the THC Suit. 4 CR 1858-2194. The trial court stayed all proceedings on those amended claims pending the outcome of the THC Suit. 6 CR 3058-3059. Those claims became moot with the final decision of the Austin Court of Appeals in the THC Suit.

The THC Suit resolved Grossman's claims challenging the validity of the Permit. On November 15, 2018, the Travis County trial court held a hearing on

Wolfe's plea to the jurisdiction, which asserted that Grossman's claims were barred by governmental immunity, and on Grossman's application for a temporary injunction. 6 CR 3209. The trial court granted the plea to the jurisdiction, did not grant Grossman a temporary injunction, and dismissed the suit. *Id.* Grossman then appealed to the Austin Court of Appeals, which granted Grossman an emergency stay, preventing the City from doing the archeological survey, including demolishing the buildings, while it considered the appeal. On June 21, 2019, the Austin Court of Appeals affirmed the trial court's judgment. *Grossman v. Wolfe,* 578 S.W.3d 250 (Tex. App.—Austin 2019, pet. denied). In its opinion, the court determined that Grossman's claims against Wolfe were not valid ultra vires claims, Wolfe was authorized to issue the Permit, the Permit's requiring demolition of the buildings prior to performing the subsurface survey was within the THC's broad discretion under the Antiquities Code and did not constitute commencing the project before completion of the archeological survey, and did not violate Section 191.0525(c) of the Antiquities Code. *Id.* The Austin appellate court also determined that Section 191.173 of the Antiquities Code does not waive governmental immunity so Grossman could not bring claims against the THC for alleged violations of the Antiquities Code. *Id.* Grossman then filed a petition for review with the Texas Supreme Court, which was denied, and thereafter, a motion for rehearing, which was also denied, but while the petition for review and the motion for rehearing were being considered by the Texas Supreme Court, Grossman's motions for emergency

relief filed in the Texas Supreme Court were granted, resulting in the THC being ordered to suspend the Permit, again preventing the City from doing the archeological survey, including demolishing the buildings. On June 24, 2019, the THC sent a letter to the City notifying the City that the Permit was suspended pursuant to an order from the Texas Supreme Court granting one of Grossman's motions for emergency relief. 5 RR Defendant's Exhibit 6 (pdf 165).

Although Grossman's challenges to the Permit were rejected, Grossman was nonetheless successful in his true purpose in bringing the THC suit in that he was able to prevent the City from proceeding with the archeological survey under the Permit from November of 2018 through October of 2019, when the Texas Supreme Court finally lifted its stay. Ultimately, despite the significant interruption of the City's ability to proceed as a result of Grossman's legal challenges, the courts determined they had no jurisdiction over Grossman's claims. *Grossman v. Wolfe*, 578 S.W.3d at 261.

Grossman complains to the THC about the permitted archeological survey.

On September 3, 2019, while the Permit was suspended, Grossman's counsel wrote a letter to the THC making a formal request for the identical relief that Grossman subsequently sought in the underlying lawsuit, as set out in his Second Amended Petition filed on October 6, 2019. 5 RR Defendant's Exhibit 7 (pdf 166-187). That letter had attached to it the identical six expert declarations that were attached to Grossman's Second Amended Petition in this case. *Id.* In his letter,

Grossman requested that the THC keep the Permit suspended until Moore did additional research and revised its research design and scope of work based on the year-old book by Mark Santiago discussing the presence of Apaches in El Paso, including of an Apache peace camp (the "Santiago book"), and on the stated need for an archeological survey specifically designed to address the presence of Apaches in El Paso. *Id.* This request was made by Grossman despite the fact that the Permit requires that the City conduct an archeological survey of *any* potential prehistorical or historical artifacts beneath the footprint of the MPC, and Moore's scope of work and research design specifically contemplated and accounted for the presence of Apaches in the area of the MPC. *See* 5 RR Defendant's Exhibit 5 and 13 (pdf 163-164 and 191-225).

Grossman amends his claims in the El Paso suit to challenge the THC's permitted archeological survey.

On October 6, 2019, prior to receiving a response from the THC, Grossman filed his Second Amended Petition in the underlying lawsuit asking for injunctive relief to require Moore to do additional research and revise its research design and scope of work based on the Santiago book and on the stated need for an archeological survey specifically designed to address the presence of Apaches in El Paso.[1] This

[1] Grossman states that he filed his Second Amended Petition alleging violations of Section 191.002 of the Antiquities Code only after the THC's response to Mr. Ainsa's letter did not comport with its statutory obligations. Brief of Appellant, at 7. That statement is not correct. Grossman filed his Second Amended Petition on October 6, 2019 (6 CR 3060-72) and the THC response was not sent out by the

requested relief is identical to that sought a month earlier from the THC with the same six expert declarations presented to the THC that were attached to the Second Amended Petition. 5 RR Defendant's Exhibit 7 (pdf 166-187). The Second Amended Petition was filed immediately after the Texas Supreme Court lifted its stay in the THC Suit on October 4, 2019. 6 CR 3240. The Second Amended Petition also asserts that the trial court has jurisdiction over the suit under Section 191.173 of the Antiquities Code and claims that the Permit is illegal because it violated Section 191.0525(c) of the Antiquities Code by improperly allowing the City to commence its construction of the project before the archeology survey is completed and allowing the demolition of the buildings as part of the archeological survey—jurisdictional bases and claims which had already been rejected by the Travis County trial court and Austin Court of Appeals. 6 CR 3060-3204; *Grossman v. Wolfe*, 578 S.W.3d at 261.

On October 7, 2019, at approximately 8 a.m., in violation of El Paso County Local Rule 1.05(d) (see appendix), counsel for Grossman had *ex parte* communications with the trial court in the underlying lawsuit and obtained the entry of a temporary restraining order enjoining the City from demolishing the buildings. 6 CR 3260-3261. Later that same day, the THC sent a letter to the City reinstating

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THC until October 7, 2019 (5 RR Defendant's Exhibit 9 (pdf 188-90) and was not received by the City until several days later that week.

the Permit and recommending that Moore familiarize itself with the Santiago book and specifically consider the potential for encountering cultural deposits associated with the historical peace camp in the vicinity during its investigation but imposed no new requirements on Moore. 5 RR Defendant's Exhibit 9 (pdf 188-190). The letter did not keep the Permit suspended and rejected the relief Grossman had requested. *Id.*

The temporary injunction and plea to the jurisdiction hearing.

On October 21 and 22, 2019, the trial court held a hearing on Grossman's request for a temporary injunction and on the City's plea to the jurisdiction in this case. 1 RR 1. At the hearing, the trial court heard testimony from Grossman and three of the designated experts which Grossman had offered previously to the THC and to the trial court in connection with obtaining the temporary restraining order. 2 RR 123, 175-220, 221-263; 3 RR 15-74. The trial court also heard from Mr. Mangum, the City's retained archeologist and Moore representative. 2 RR 123-174.

Grossman's experts acknowledged that the THC's decisions in archeological permitting matters must be given deference. Grossman testified that he deferred to Dr. Carmichael on all archeology issues. 2 RR 73-74. Dr. Romo, a historian, testified that he did not know anything about THC permitting or about the archeological survey process. 2 RR 251. Dr. Babcock, another historian with no archeology expertise, testified that once he learned about the decision of the THC as set out in its October 7, 2019 letter, he was satisfied with the THC decision. 3 RR 19. Dr.

Carmichael, the lone archeologist offered by Grossman, testified that demolition of the buildings would not affect the artifacts below ground. "Tearing down the buildings will not affect the artifacts below ground." 2 RR 87. Dr. Carmichael testified that he recognizes that experts can have different opinions and he said although he disagreed with Moore's plan for an archeological survey, it is the job of the THC to issue permits for archeological surveys, to decide these types of disputes, and to follow the law and see that archeologists follow the law. 2 RR 214-218. He testified that the THC makes the final decision, he recognizes that the THC decided against his views, and he respects the decision of the THC in that regard. *Id.* Finally, he testified that he knows that the THC's decision cannot be challenged and that the THC's decision is the end of the matter. *Id.*

On October 24, 2019, the trial court entered orders denying the City's plea to the jurisdiction and Grossman's request for a temporary injunction. 7 CR 3766-3767. Later that same day, Grossman filed an interlocutory appeal of the denial of his request for a temporary injunction and a motion for emergency relief in this court. 7 CR 3768-3770. The Order granting the motion for emergency relief was entered that same day, which "stays the commencement of the Project, including any demolition of buildings within the Project footprint …."

On October 30, 2019, the City filed a cross interlocutory appeal of the denial of its plea to the jurisdiction. 7 CR 3775-3776.

SUMMARY OF THE ARGUMENT

The Court should deny Grossman's latest effort to prevent the City of El Paso from moving forward with its planned construction of a multi-purpose performing arts and entertainment facility in downtown El Paso. The trial court did not abuse its discretion when it denied Grossman's request for a temporary injunction. Grossman has no claim against the City for a violation or threatened violation of the Antiquities Code because the Antiquities Code does not contain a waiver of governmental immunity, thus, the City is immune from suit. Grossman has not alleged a cause of action or offered evidence that tends to support his right to recover on the merits because the City's archeological survey already accounts for potential artifacts that may be found at the project site, and the THC has already considered Grossman's arguments that the Permit issued to the City should be modified and rejected those arguments. Grossman's claim that demolition cannot begin until the survey has been completed – a Catch 22 as the survey requires the demolition of buildings – is barred by *res judicata* as that claim has been rejected by the Austin Court of Appeals. The Antiquities Code does not authorize Grossman's attempt to have the Court act in the place of the THC with respect to archeological permitting decisions. Grossman has no probable, imminent or irreparable injury meriting injunctive relief. Furthermore, equity favors denial of injunctive relief in this case as Grossman has continued to abuse the legal system in order to obtain repeated delays without ever prevailing on the merits. Although the trial court properly denied Grossman's request for

injunctive relief, this case should never have proceeded to hearing on the temporary injunction because Grossman's claims are barred by governmental immunity. Grossman's suit is in reality an improper attempt to control state action which is barred by governmental immunity.

ARGUMENT AND AUTHORITIES

Response Point

The trial court did not abuse its discretion when it denied Grossman's request for a temporary injunction.

A. Standard of Review

This Court reviews a denial of a temporary injunction for an abuse of discretion. *Navarro Auto-Park, Inc. v. City of San Antonio*, 580 S.W.2d 339, 340 (Tex. 1979). To establish a right to injunctive relief in the trial court, a party must show a cause of action, a probable right to the relief sought and a probable, imminent and irreparable injury for which there is no adequate remedy at law. *Butnaro v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). On review, the merits of the underlying case are not reviewed. *Id.* Rather, the evidence must be viewed in the light most favorable to the trial court's decision, indulging every reasonable inference in its favor. *Diesel Injection Sales & Service, Inc. v. Gonzalez*, 631 S.W.2d 193, 195 (Tex. App.—Corpus Christi 1982, no writ). The evidence is reviewed in the light most favorable to the trial court's judgment and all legitimate inferences are to be made to support the trial court's ruling. *Id.* When no findings of fact or conclusions of law

are filed, an appellate court will affirm the judgment on any legal theory supported by the evidence. *Id.*; *Seaman v. Seaman*, 425 S.W.2d 339 (Tex. 1968).

B. Grossman has no cause of action against the City for a violation or threatened violation of the Antiquities Code.

As discussed more fully in the City's cross-point, Grossman has no claim against the City for a violation or threatened violation of the Antiquities Code because the Antiquities Code does not contain a waiver of governmental immunity. Because there was no waiver, the City is immune from suit and Grossman cannot articulate or assert a claim for injunctive relief against it. The City refers the Court to those arguments contained in its Cross-Point, *infra*.

C. Grossman did not establish a probable right of relief.

In order to establish a probable right to the relief sought, Grossman was required to allege a cause of action and offer evidence that tends to support his right to recover on the merits, which he failed to do. *See Dallas Anesthesiology Assocs., P.A. v. Tex. Anesthesia Grp., P.A.*, 190 S.W.3d 891, 896-91 (Tex. App.—Dallas 2006, no pet.).

Here, Grossman alleges that the City, through its hired consultant, will fail to locate, protect, and preserve Native American remains in the footprint of the MPC. 6 CR 3060-3204. However, the overwhelming evidence presented to the trial court at the temporary injunction hearing more than justifies the trial court's refusal to find Grossman demonstrated a probable right to relief on his claims.

1. *The City's archeological consultant recognized the potential for Native American artifacts and the City's archeological survey provides for the location, protection, and preservation of any potential artifacts.*

First, the City's consultant recognized the likelihood of Native American artifacts within the MPC's footprint and accounted for such artifacts within its scope of work. Therefore, the potential presence of Mescalero Apache peace camps within the footprint of the MPC is not new evidence of potential archeological artifacts. Grossman's focus on the Santiago book and related recent research does not raise any new possibilities that the City's consultant has not already addressed. The evidence presented by Grossman by himself individually, Dr. Romo, Dr. Carmichael, Mr. Mangum, and Moore's research design and permitted scope of work, established that prior to the publication of the Santiago book, the City's consultant had already recognized the potential for Native American archeological artifacts and had developed its survey to account for the potential presence of these Native American archeological artifacts.

Moreover, the THC—the agency charged with enforcement of the Antiquities Code and permitting of archeological surveys—agreed with the City's proposed archeological survey (which contains the manner and method by which Native American artifacts are to be located, preserved and protected) and issued the Permit accordingly. Grossman raised his concerns concerning the sufficiency of the City's archeological survey in light of the additional evidence from the Santiago book and

related recent research with the THC—the exact same concerns which form the basis for his suit here—and the THC determined that no additional action was necessary, thereby rejecting Grossman's claims that the survey was deficient or would not locate, protect or preserve Native American artifacts. The trial court, faced with this evidence—that the permitted survey already accounted for the potential presence of Native American artifacts and that the state agency entrusted with the duty to oversee, approve and permit archeological surveys disagreed with Grossman's contentions—did not abuse its discretion when it likewise disagreed with Grossman.

2. *Grossman challenged the sufficiency of the City's archeological survey in the THC Suit and lost, therefore his claims are barred by res judicata.*

Additionally, the trial court heard evidence and argument that Grossman challenged the sufficiency of the THC's issued Permit in the THC Suit and lost. The Austin appellate court found against Grossman's claims challenging the permitted archeological survey, thus, those claims are barred by *res judicata*.

"For res judicata to apply the following elements must be present: (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) the same parties or those in privity to them, and (3) a second action based on the same claims as were raised or could have been raised in the first action." *New Talk, Inc. v. Sw. Bell Tele. Co.*, 520 S.W.3d 627, 645 (Tex. App.—Fort Worth 2017, no pet. h.). In determining whether two claims are the same under *res judicata*, Texas courts follow a "transactional approach." *Samuel v. Fed. Home Loan Mortg. Corp.*, 434 S.W.3d 230,

234 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Under this approach, courts consider "the factual bases, not the legal theories, presented in the cases." *Id*. In determining whether claims arise from a single transaction, courts "consider whether the facts are related in time, space, origin, or motivation, and whether they form a convenient unit for trial." *Id*. "The main concern is whether the cases share the same nucleus of operative facts." *Id*. (citing *Pinebrook Props., Ltd. v. Brookhaven Lake Prop. Owners Ass'n*, 77 S.W.3d 487, 496 (Tex. App.—Texarkana 2002, pet. denied)).

Furthermore, the City and Mark Wolfe are in privity with each other as both share an identity of interest in the legal right that is the subject of the litigation. *See Amstadt v. U.S. Brass Corp.,* 919 S.W.2d 644, 653 (Tex. 1996); *Texas Real Estate Comm'n v. Nagle*, 767 S.W.2d 691, 694 (Tex. 1989). The City intervened in the THC Suit and participated throughout the litigation, was served with all pleadings and argued with Mark Wolfe that governmental immunity barred Grossman's claims in addition to arguing the insufficiency of the evidence and law to support Grossman's claim for injunctive relief.

As outlined above, the potential for Native American artifacts to be found within the footprint of the MPC has been known and accounted for by the City's archeologist in developing the archeological survey that has been permitted by the THC. Grossman challenged the sufficiency of the archeological survey in the THC Suit including submitting a declaration of Dr. Carmichael (the same archeologist

who testified in the present case on Grossman's behalf) criticizing the City's archeologist's scope of work. On appeal, the Austin Court of Appeals determined that the permit as issued by the THC was proper. That judgment is now final and, therefore, bars Grossman's attempt to re-litigate his claim challenging the archeological survey permitted by the THC.

3. *Grossman's specific allegation that demolition cannot begin until completion of the archeological survey has been rejected by the THC and the Austin Court of Appeals.*

Based on the same authorities, *res judicata* likewise bars Grossman's specific claim that the City cannot demolish buildings within the MPC's footprint until completion of the archeological survey. Grossman has argued, in this lawsuit and in the THC Suit, that under the Antiquities Code, "commencement" includes demolition and, therefore, demolition cannot be part of a permitted archeological survey. Grossman contends that demolition cannot occur under the Antiquities Code until after the archeological survey is complete. In this case, the City's permitted archeological survey calls for demolition as part of the archeological survey in order to locate, preserve and protect historical artifacts below ground. Of course, the THC rejects Grossman's interpretation of the Antiquities Code as it permitted the archeological survey that includes demolition as part of the survey. Grossman then raised this argument in the THC Suit. On appeal the Austin Court of Appeals specifically considered and rejected this argument writing,

> The City filed an application for an archeological permit that included a scope of work for the project, research design, and maps. The proposed scope of work contemplated, as the first phase of the archeological survey, demolition of the existing buildings on the project site to allow for investigation using ground-penetrating radar (GPR) … Ultimately, the Commission granted a permit that allows the City, as outlined in the scope of work, to demolish the existing buildings on the site as part of the archeological survey. Grossman asserts that this permit violates the Antiquities Code … because the demolition of existing buildings on a project site constitutes commencement of the project before an archeological survey is completed. … We disagree. … In sum, the Antiquities Code and Commission rules appear to give the Commission broad discretion regarding archeological surveys and permits. … In other words, based on the City's notification and the Commission's response, the Commission determined that an archeological survey was necessary, but more specifically that a subsurface archeological survey was necessary. And the record before us indicates that demolition of existing buildings is required to perform a subsurface survey, and that is what the permit at issue here allows. As such, Wolfe did not act ultra vires in issuing the permit.

Grossman v. Wolfe, 578 S.W.3d 250, 261 (Tex. App.—Austin 2019, pet. denied).

4. *This Court should follow the Austin appellate court's interpretation of the statute which allows demolition as part of an archeological survey prior to commencement of a project.*

A companion appellate court's decision on the merits should be given considerable significance and rejected only for sound reason. *See* 40 Tex. Prac., Criminal Practice and Procedure § 2.21 *Significance of the deciding court* (3d ed.). The Austin Court of Appeals' decision interpreting the provisions of the Antiquities Code to allow demolition as part of an archeological survey when appropriate and not barred as constituting commencement of the project should be followed for the reasons set out in the decision, even if the decision did not constitute a bar under *res*

judicata. Grossman cursorily dismisses this rejection of his claim by stating that the decision is not binding on this Court—without providing a rational basis for this Court to depart from the well-reasoned and thoughtful review of a sister court.

5. *The relief sought by Grossman is not allowed by the Antiquities Code.*

At its foundation, Grossman's most recent complaint asks the trial court to supplant the THC's position. Grossman wants the trial court to order the City to undertake additional work—not contemplated or provided for in the Permit issued by the THC. The Antiquities Code does not allow such a result. Rather, the City is required to follow the parameters of the THC's Permit. It cannot undertake any work not permitted. Grossman points to no statutory rule or regulation that would allow the trial court to rewrite the Permit or to step into the shoes of the THC and require an additional archeological scope of work. Nor can the trial court order the City to undertake work associated with the archeological survey that has not already been permitted or that is outside of the parameters of the Permit. If the City were to do so, it would be in violation of the Permit and the Antiquities Code. That result is untenable—making trial court the regulatory body when that role has already been legislatively delegated to the THC. Grossman's real claim is against the THC and the Permit issued by the THC. Having already lost that challenge, he now attempts to pursue the same claim without involving the THC in hopes of achieving a different

result. However, without the presence of the THC, he cannot legally obtain the relief he seeks.

Grossman's brief contends that this case has nothing to do with the THC. Brief of Appellant, at 18. While Grossman wishes that was the case, nothing could be further from the truth. To support his contention Grossman references a cite from the testimony of Dr. Babcock (3 RR 71). The only problem is that Grossman fails to provide the relevant context. Dr. Babcock was being questioned about the use of his declaration, and specifically about whether he was aware that his declaration was going to be attached to Mr. Ainsa's letter to the THC. Mr. Babcock answered he was aware his declaration was going to be used in this lawsuit. Dr. Babcock ultimately answered that he did not know his declaration was going to be attached to Mr. Ainsa's letter to the THC. As part of that line of questioning it was necessary to explain to Dr. Babcock that when Mr. Ainsa's letter was sent to the THC it was not filed with the trial court as part of the pleadings in the lawsuit, hence the statement, "this letter has nothing to do with this case." 7 CR 3411-12. In the broader context of Grossman's claims that the archeological survey permitted by the THC violates the Antiquities Code, the THC is very much a part of this case.

6. *Grossman's lawsuit will be dismissed before his claims could be determined by a trial on the merits.*

On January 17, 2020 the Texas Supreme Court denied Grossman's petition for review filed in the EDJA/Bond Validation Lawsuit. *Ex parte City of El Paso*, No.

19-0022 (Tex. Jan. 17, 2020), *available at* http://www.txcourts.gov/supreme.orders-opinions/2020/january/january-17-2020/. The EDJA/Bond Validation Lawsuit was filed by the City seeking a declaration regarding the City's authority to use certain bond proceeds to finance the design and construction of the MPC. *Ex parte City of El Paso*, 563 S.W.3d at 519. While that suit was pending, Grossman filed the present suit. *Id.* at 526.

In the EDJA/Bond Validation Lawsuit, the City requested that the Austin trial court enjoin the present case. *Id.* The statutory authority for the City's EDJA/Bond Validation Lawsuit contains a specific provision that authorizes the trial court to enjoin certain proceedings. *See* Tex. Gov't Code Ann. sec. 1205.061. The Austin district court denied the City's request to enjoin the present suit. *Id.* However, on appeal the City argued that it was error for the trial court not to enjoin the present lawsuit based on Tex. Gov't Code Ann. sec. 1205.151(c). *Id.* at 527. That section provides:

> Sec. 1205.151 EFFECT OF JUDGMENT
> (c) The judgment is a permanent injunction against the filing by any person of any proceeding contesting the validity of:
> (1) the public securities, a public security authorization, or an expenditure of money relating to the public securities described in the petition;
> (2) each provision made for the payment of the public securities or of any interest on the public securities; and
> (3) any adjudicated matter and any matter that could have been raised in the action.

The Austin Court of Appeals, in reversing the trial court's denial of any injunction in the present suit, wrote:

> The EDJA grants a trial court broad authority to enjoin related proceedings. … Thus, under the plain language of the EDJA, the district court may enjoin a legal action that disputes or challenges the justness or legality of something done in connection with the public security. Grossman's El Paso lawsuit against the City falls under this plain language. His proceeding seeks to stop the City from taking certain actions in connection with the development and construction of the Facility funded by the bond proceeds …. The 'actions' sought to be enjoined 'relat[e]' to the 'public securities' and to the 'expenditure of money relating to the public securities' because the actions are taken in connection with the development and construction of the Facility using proceeds from the public securities. … Grossman argues that the district court did not have the authority to enjoin his El Paso suit because that suit 'has no relation to the expenditure of bond funds.' But the standard under the EDJA is not whether the El Paso suit relates to the expenditure of bond funds, it is whether, as we noted and discussed above, his El Paso lawsuit 'contests the validity' of 'an action or expenditure of money relating to the public securities, a proposed action or expenditure, or both.' … Because Grossman' 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'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.

Id. at 527 (internal citations omitted). Grossman has acknowledged that the Austin Court of Appeal's decision enjoins his underlying suit. ("The decision of the court of appeals to reverse the trial judge's decision to refuse to enjoin the El Paso Litigation is also inexplicable." Grossman's Reply Brief on the Merits, at 10, *Ex parte City of El Paso*, No. 19-0022 (Tex. Dec. 20, 2019) (Grossman's Petition for Review of the Austin Court of Appeals decision).)

In reaching its decision, the Austin Court of Appeals relied upon *Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 149 (Tex. 1982). Therein, the Texas Supreme Court reiterated that the legislative purpose behind the EDJA is to prevent what Grossman is doing here—filing multiple suits to delay public projects approved by voters. ("We agree with the trial court's determination that a legislative purpose in enacting the statute was to stop 'the age old practice allowing one disgruntled taxpayer to stop the entire bond issue by simply filing suit.'" *Glaser*, 632 S.W.2d at 149.)

The Austin Court of Appeal's judgment contains the following mandatory injunction:

> 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 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.

Ex parte City of El Paso, 563 S.W.3d at 528-29.

Pursuant to that judgment and the decision of the Austin Court of Appeals, as an action that could have been raised in the EDJA/Bond Validation Lawsuit, the underlying suit will be permanently enjoined which will result in the trial court dismissing Grossman's suit before it ever gets to trial.

D. Grossman has no probable, imminent or irreparable injury meriting injunctive relief.

1. *It was within the discretion of the trial court, when presented with conflicting evidence, to discount and reject Grossman's criticisms of the City's permitted archeological scope of work.*

Grossman requests that this Court overturn the trial court's decision and accept the testimony of his expert, Dr. Carmichael, while acknowledging that there was conflicting evidence relating to the adequacy of the City's archeological survey. Brief of Appellant, at 13. However, this Court "may not substitute its judgment for that of the trial court. … An abuse of discretion does not exist where the trial court bases its decisions on conflicting evidence." *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

Here, the trial court heard evidence presented by Grossman that both the THC and the City's archeologist confirmed the adequacy of the archeological survey. 2 RR 125-26. When asked specifically about Grossman's criticisms, Mr. Mangum, an archeologist hired by the City, testified as follows:

> Q. Okay. Let me hand you what I've marked as Exhibit 7. And can you tell what that is?
> A. This is a letter from Mr. Ainsa to Kimberly—I'm afraid I always mess up her name—F-U-C-H-S.[2]
> Q. Okay. And have you seen this letter before?
> A. I have.
> Q. Have you read it?
> A. I have.

[2] Mr. Mangum, called to testify by Grossman, appeared by deposition at the temporary injunction hearing. Line and page references to his deposition transcript are omitted for ease of reading.

Q. And are you aware that it's requesting the THC to do certain things?
A. I am.
Q. Okay. Are you aware that the letter is requesting the THC to order Moore to do more research, more archeological research in connection with the permit for the archaeological survey for the MPC?
A. Yes, I'm aware.
Q. Are you aware that the letter is requesting that THC require Moore to do a new research design?
A. I am aware of that also.
Q. And are you aware that this letter is requesting that the THC require Moore to do a revised scope of work?
A. Yes.
Q. Let me hand you what I've marked as Exhibit 9. Can you tell me what that is?
A. This is the renewal of the antiquities permit for the MPC project.
Q. And what are the recommendations in the letter with respect to the permit that's being reinstated?
A. They make note of the publication of Mark Santiago's book A Bad Peace and The Good War. They recommend that we—let me see if I can find it, it's specific. They recommend that we familiarize ourselves with the work and consider the potential for encountering cultural deposits associated with the peace camp during our investigations.
Q. Do you understand those to be recommendations that the THC wants you to do?
A. Yes.
Q. Will you do those two things?
A. Absolutely.
Q. You will follow the recommendations of the THC?
A. I will.
Q. You continue to comply with those recommendations?
A. Absolutely.
Q. And you are—are you in the process of complying?
A. Yes.
Q. Will you comply?
A. Yes.

> Q. From reading this letter, did the THC follow Mr. Ainsa's recommendations or requests?
> A. No.
> Q. Did the THC require you to do more research?
> A. Aside from familiarizing myself with Mr. Santiago's work, no.
> Q. And that's not actually a requirement in the letter, is it?
> A. That's correct.
> Q. It's only a recommendation, correct?
> A. Yes, yes.
> Q. So there's no requirement that you do additional research, is there?
> A. True, yes.
> Q. Is there a requirement that you do a new research design?
> A. No.
> Q. Is there a requirement that you do a revised scope of work?
> A. No.

2 RR 127-30.

Dr. Carmichael, Grossman's only archeologist expert, testified that experts could differ in their opinions and that the THC's permitting of the City's archeological survey ended any further inquiry:

> Q. Yeah. Now, look at Exhibit 7, and that's the letter that Mr. Ainsa wrote for Mr. Grossman to the THC. Do you see that?
> A. I've got it.
> ...
> Q. Okay. And you understood that that letter was going to request that the THC keep the permit suspended?
> A. Yes.
> Q. And you understood that letter was going to ask the THC to require Moore to do additional research?
> A. To update their scope of work, yes.

Q. Well, just to begin with, you understood the letter was going to require Moore to do additional research first?
A. Well, we're not talking field research.
Q. No. Like research of books and things?
A. Yes. Right.
Q. Okay. And you understood the letter was going to require the THC to require Moore to do a new research design?
A. that's not what I said in my deposition.
Q. It's not?
A. No. I said a revised—
Q. Oh, I'm sorry—
A. –not brand new.
Q. Revised?
A. Yes.
Q. Okay. I'm with you on that. The letter was going to require—was going to ask the THC to require Moore to do a revised research design. Correct?
A. Correct.
Q. And you understood the letter was going to ask the THC to require Moore to do a revised scope of work—
A. Yes.
Q.—right? You agreed with all those requests being presented to the THC?
A. Yes.
Q. And you think they're appropriate?
A. Yes, I do.
Q. Okay. And you had hoped that the THC would grant those requests. Right?
A. I did indeed.
Q. And you know who Patricia Mercado-Allinger is?
A. Yes.
Q. You understand she's the state archeologist for the State of Texas?
A. I do.
Q. Do you understand she works at the THC?
A. Yes.
Q. And she has a good reputation, in your mind?
A. Yes.

Q. And you recognize that experts, different archaeologists, can have different opinions on these subjects. Right?
A. Absolutely.
Q. Okay. And you know that your requests that are in your declaration—those same requests are in your declaration. Right?
A. Right.
Q. And you know those requests were presented to the THC?
A. Yes, sir.
Q. And you know that they are the decision maker in this area. Right?
A. Correct.
Q. That's the job of that agency. Right?
A. Yes.
Q. And it's the job of the THC to know the law regarding archaeological surveys. Right?
A. That's correct.
…
Q. And you—look at Exhibit 9. And you see that's the letter from the THC. Right?
A. Yes.
Q. Written just recently, October 7, 2019?
A. Correct.
Q. That letter was after the THC got Mr. Ainsa's letter. Right?
A. Yes.
Q. And after it got your declaration—
A. Yes.
Q. –right? And that letter reinstates the permit, doesn't it?
A. It does.
Q. It doesn't keep it suspended as you requested, does it?
A. Correct.
Q. It does not require Moore to do additional research, does it?
A. No, it doesn't.
Q. It does not require Moore to do a revised research design, does it?
A. No.

Q. It does not require Moore to do a revised scope of work, does it?
A. No.
Q. All of your requests were rejected by the THC. Correct?
A. Correct.
Q. The THC makes no additional requirements of Moore, does it?
A. No.
...
Q. Right. And the letter is the THC's decision on this matter. Correct?
A. Yes.
Q. And you accept it?
A. As I must.
Q. Even though you don't agree with it?
A. Correct.
Q. And it's the right of the THC to make the decision in this matter. Right?
A. Sure.
Q. It's their job. Right?
A. Yes.
Q. You would like Moore's plan or scope of work to be more specific. Right?
A. Absolutely.
Q. But the THC has not required that, have they?
A. No.
Q. And unless the THC does, that's the end of the matter, isn't it?
A. It would appear to be.

2 RR 211-17. Presented with this evidence, the trial court was within its discretion to reject Grossman's criticisms and that decision is not reviewable here.

Grossman's brief also attempts to mislead the Court regarding the permitted archeological survey and Mr. Mangum's testimony regarding that survey. Grossman's brief incorrectly states that Mr. Mangum believes that any remains will

likely be found immediately below the surface and references the record at 2 RR 141. Brief of Appellant, at 13. What Mr. Mangum said at that record cite is that prehistoric and Native American artifacts will probably be found immediately below the surface of any recent historic finds. Historic finds means finds from the earliest Spanish presence and based on other testimony that means that Mr. Mangum was saying that prehistoric and Native American artifacts may possibly be located at depths around twelve feet below ground, not immediately below the surface of the ground. In the same sentence in his brief, Grossman further misleads the Court regarding the depth of planned excavations. Grossman's brief incorrectly states that Mr. Mangum currently plans to excavate only 3 feet below ground to discover remains and references the record at 2 RR 134. Brief of Appellant, at 13. At the cited reference in the record Mr. Mangum was discussing a hypothetical involving the construction of a road and he testified that if road construction is only going to impact down to 3 feet below the surface then excavation would only go down 3 feet below the surface or maybe a little more as a buffer. With respect to the MPC site and the permitted survey, Mr. Mangum testified the excavation would go as deep as necessary to reach the depth of actual construction for the project. In other words if the planned construction excavation for the MPC is 30 feet, the excavation for the archeological survey will be at least that deep. At present, the depth of excavation for construction is unknown. However, Mr. Mangum did testify that even at the

deepest anticipated depths for the Native American artifacts, the anticipated excavation for the archeological survey will proceed below those depths. 2 RR 172.

Grossman also references *Seaborg Jackson Partners v. Beverly Hills Savings*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, no writ), in an attempt to modify the Court's standard of review to include a balancing of equities. Such a consideration is misplaced in this case. *Seaborg Jackson Partners* reaffirmed the rule that the trial court does not abuse its discretion when it bases its decision on conflicting evidence. *Id.* However, in that case, the trial court was asked to enjoin a foreclosure pending a trial on the merits construing loan documents and security agreements. *Id.* at 244. The property sought to be protected from foreclosure was certified by the Department of the Interior as an historical structure. *Id.* at 245. Here, there are no similar considerations to weigh. *Seaborg Jackson Partners* is not applicable.

A comparison of this case and one involving a foreclosure is informative. If a suit involves a scheduled foreclosure prior to trial, there is no dispute that the result of the foreclosure will be that the owner loses title to the property which presents a possible imminent or irreparable injury. This case is entirely different. Here Grossman's claimed probable, imminent or irreparable injury is the possible failure to locate, preserve and protect Native American artifacts. In contrast to a case involving a foreclosure where there is no dispute that ownership of property will be lost if foreclosure occurs, in this case there is substantial evidence that Native

American artifacts will be located, protected, and preserved if the archeological survey proceeds as permitted by the THC. The evidence presented by Mr. Mangum, by the THC Permit, and by the research design and permitted scope of work, all show that the goal of the permitted archeological survey is to locate and protect Native American artifacts and that that goal will be accomplished by carrying out the survey. Dr. Carmichael testified that he would do the survey differently, but he also acknowledged that this was a subject on which experts could disagree, and he recognized that both Mr. Mangum and Patricia Mercado-Allinger, the State Archeologist for Texas, do not agree with his opinion. There is conflicting evidence of whether there is a probable, imminent or irreparable injury and the trial court did not find that there is probable, imminent or irreparable injury. Probable, imminent or irreparable injury certainly was not established with any certainty so there is no basis for finding an abuse of discretion by the trial court which is required to reverse its decision.

2. *Equity favors denial of injunctive relief.*

Grossman points to equity as a basis for overturning the trial court's ruling but a review of the record shows that Grossman comes to court with unclean hands. Under the doctrine of unclean hands, a court may refuse to grant equitable relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute. *Lazy M Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App.—Austin 1998, pet. denied). The trial court was presented with more than

sufficient evidence of Grossman's misfeasance to justify its refusal to grant injunctive relief.

This is just one in a long line of cases filed by Grossman for the purpose of delaying the construction of the MPC. Before seeking the temporary restraining order, Grossman has been involved in eight separate actions for the purpose of attempting to delay or prevent the demolition of buildings in the footprint of the MPC. Those eight actions are: (1) *Ex parte City of El Paso*, No. D-1-GN-17-001888 (250th Dist. Ct., Travis County, Tex. May 2, 2017) (EDJA/Bond Validation Lawsuit), and the appeal of the district court's final judgment in that lawsuit, *Ex parte City of El Paso*, 563 S.W.3d 517 (Tex. App.—Austin 2018, pet. denied); (2) *Grossman v. City of El Paso*, No. 2017DCV2528 (384th Dist. Ct., El Paso County, Tex. July 31, 2017); (3) *In re Max Grossman*, No. 08-17-00199-CV (Tex. App.—El Paso 2017, orig. proceeding) (original proceeding filed in Eighth Court of Appeals seeking injunctive relief to prevent demolition of the buildings, subsequently transferred to the Second Court of Appeals, No. 02-17-00383-CV (Tex. App.—Fort Worth 2017, orig. proceeding.)); (4) *Grossman v. Wolfe*, No. D-1-GN-18-006433 (261st Dist. Ct., Travis County, Tex. Oct. 23, 2018), *affirmed* 578 S.W.3d 250 (Tex. App—Austin 2019, pet. denied); (5) *In re Max Grossman*, No. 03-19-00001-CV (Tex. App.—Austin 2019, orig. proceeding.) (original proceeding in the Third Court of Appeals seeking injunction to prevent demolition of the buildings); (6) *Grossman v. City Clerk, Mayor, et. al*, No. 2018DCV2172 (171st Dist. Ct., El Paso County,

Tex. June 12, 2018) (zoning lawsuit); (7) *In re Max Grossman*, No. 08-18-00141-CV (Tex. App.—El Paso 2018, orig. proceeding) (pet. for writ of mandamus), which was subsequently transferred to the Fourth Court of Appeals, No. 04-18-00572-CV (Tex. App.—San Antonio 2018, orig. proceeding [mandamus denied]); and (8) *In re Max Grossman,* No. 18-0774 (Tex. 2018) (orig. proceeding [mandamus denied]) (pet. for writ of mandamus in the Texas Supreme Court). Grossman has not ultimately prevailed on the merits in any of these actions.

In this case, Grossman is now attempting to re-litigate claims he brought and lost in the THC Suit. Moreover, Grossman, in seeking an *ex parte* temporary restraining order, violated El Paso County Local Rule 1.05(D) by failing to state within his application "whether or not, within, the knowledge of applicant and applicant's attorney, the opposing party is represented by counsel and, if so, the name of such counsel, and whether or not such counsel/party has been apprised of the application for ex parte relief." El Paso (Tex.) Loc. R. 1.05(D) (see appendix).

Equally troubling is the evidence that Grossman offered to the trial court to support his claim for a TRO and a temporary injunction. In his application for the issuance of a temporary restraining order Grossman presented to the trial court the same declarations which were attached to the letter his attorney, Mr. Ainsa, wrote to the THC. 6 CR 3060-3204; 5 RR Defendant's Exhibit 7 (pdf 166-87). One of those declarations was signed by Dr. Babcock. 6 CR 3188-90; 5 RR Defendant's Exhibit 7 (pdf 166-87). Dr. Babcock's declaration references the Permit, and Moore's

research design and scope of work. *Id.* The declaration states that it is Dr. Babcock's opinion that Moore's research design is invalid. 6 CR 3188-90. When deposed regarding his declaration, Dr. Babcock admitted that did not know the City was trying to conduct an archeological survey (3 RR 23), that the City had obtained the Permit from the THC (3 RR 23), or that the Permit allowed the demolition of the buildings (3 RR 24). He said he had never seen Moore's scope of work (3 RR 27, 38-39) and he had never seen Moore's research design (3 RR 38-39) which he had sworn under oath was invalid (6 CR 3188-90). Finally, he admitted that it was a false statement when he said he had reviewed Moore's research design. 3 RR 63. After realizing that Grossman had submitted Dr. Babcock's misleading declaration to the trial court (once Dr. Babcock's deposition was taken), Grossman did not take any action to notify the trial court or to withdraw Dr. Babcock's declaration. Instead Grossman objected to the admission of Dr. Babcock's testimony at the temporary injunction hearing. 3 RR 4-5. Similarly, Dr. Romo submitted a declaration that referenced the Permit and the fact that it had been suspended by the THC. 6 CR 3191-93. In his testimony at the temporary injunction hearing, Dr. Romo admitted that when he signed his declaration he had never seen the Permit and did not know it had been suspended. 2 RR 252-59. The trial court also heard Grossman's public statement that "[t]he final outcome of the 'Arena' litigation cannot be predicted, but I can assure you of one thing. JP Bryan and I will *never* give up. We will press ahead in the courts until the City agrees to abandon its corrupt plan and preserve the

birthplace of El Paso." 2 RR 798-83; 5 RR Defendant's Exhibit 20 (pdf 232-37). The trial court was well within its discretion to discount the testimony of Grossman's witnesses given the issues regarding their credibility that came to light during the hearing.

Moreover, Grossman's misleading comments did not stop in the trial court. In his brief Grossman states that in an earlier appeal from the underlying lawsuit, this Court entered an injunction, which "the City ignored … and, the very next morning at 7:30 am, authorized demolition …." In addition, in footnote 80 Grossman states "[t]he shocking events that transpired ultimately resulted in the Court issuing a 'show cause' order, demanding that the City account for its conduct." Brief of Appellant, at 22. This is nothing other than a misrepresentation to this Court included in Grossman's brief for the sole purpose of attempting to prejudice the City. There is no evidence in the record that the City did anything at 7:30 am on the morning in question and certainly no evidence that the City authorized demolition at that time. Grossman cites to nothing in the record to support his statement because in fact the City did not do anything relevant to the MPC project at 7:30 am on the morning in question. Indeed, on cross examination Grossman admitted that the City did not attempt to demolish the buildings on the day after this Court entered its injunction. 2 RR 117-19. This Court entered its show cause order after Grossman filed a motion asking for that relief. However, prior to that motion being heard, once the appeal had been transferred to the Second Court of Appeals, Grossman filed a motion asking

that the Second Court of Appeals dismiss the show cause proceedings with prejudice. Grossman admitted on cross examination that he knew that his motion to show cause had been dismissed. 2 RR 119. In his motion asking the Second Court of Appeals to dismiss the motion to show cause proceedings with prejudice, Grossman told the court "Dr. Grossman now stipulates that the evidence produced during discovery will likely not show that officials with decision making authority at the City intentionally took any action (or failed to take any action) to violate the Order of the 8th Court of Appeals order. … Dr. Grossman seeks to withdraw his Motion to Show Cause." Motion to Withdraw Verified Emergency Motion for Immediate Show Cause Hearing and Order in Enforcement of Injunction, at 2, *In re Max Grossman*, No. 02-17-00383 (Tex. App.—Ft. Worth March 12, 2018) (see appendix). Grossman demonstrates a remarkable lack of candor with this Court by raising the irrelevant reference to the Court's show cause order without explaining that he subsequently moved to dismiss his motion because there was no evidence to support it.

Cross-Point

Grossman's claims are barred by governmental immunity.

Although the trial court properly denied Grossman's request for injunctive relief, this case should have been dismissed by the trial court because Grossman's claims are barred by governmental immunity. For the reasons explained below,

Grossman's claims should have been dismissed and the trial court erred when it denied the City's plea to the jurisdiction.

A. Standard of Review

The City's cross-appeal of the trial court's denial of its plea to the jurisdiction begins with the pleadings. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) ("*Miranda*"). Here, Grossman has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Whether Grossman has met this burden is a question of law that the court of appeals reviews *de novo*. *Miranda*, 133 S.W.3d at 226. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing Grossman an opportunity to amend. *Id.* at 227.

B. The trial court erred when it denied the City's plea to the jurisdiction.

1. *The issue of governmental immunity has already been decided against Grossman.*

Grossman claims the trial court had jurisdiction solely under § 191.173(a) (the "Statute") of the Antiquities Code which he contends provides a waiver of governmental immunity to allow his suit. Thus the only question to be decided is whether there is a waiver of governmental immunity within the Statute that would allow Grossman to bring his suit. This issue, however, has already been determined against Grossman. In the THC Suit, Grossman challenged the scope and content of

the Permit issued to the City by the THC—the same issue raised here. The Austin trial court and the Austin Court of Appeals were presented with the exact same question under the exact same provision that Grossman relies upon in the present suit. Grossman was unsuccessful in arguing to the Austin trial court that the Antiquities Code contained a waiver of governmental immunity and that decision was upheld on appeal.

In *Grossman v. Wolfe*, the Austin Court of Appeals specifically found that there was no waiver of governmental immunity for the claims that Grossman raises herein. *Wolfe*, 578 S.W.3d at 261. There, the court held:

> Specifically, Grossman argues in his second issue that even if this Court determines that he has not asserted valid ultra vires claims against Wolfe, Grossman's claims are still not barred by sovereign immunity because section 191.173 of the Antiquities Code waives sovereign immunity for claims seeking to enforce the provisions of the Antiquities Code. … [T]he jurisdictional defect would remain because the Antiquities Code does not waive the Commission's sovereign immunity." *Id (citing Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 177 (Tex. App.—Austin 2013, no pet.).

Id.

Grossman would have this Court disregard the Austin Court of Appeals' analysis, advocating that the Austin decision is not binding upon this Court. While the Austin decision is not binding, a merits-based decision should be given considerable significance and rejected only for sound reason. *See* 40 Tex. Prac., Criminal Practice and Procedure § 2.21 *Significance of the deciding court* (3d ed.). Grossman has not offered any sound reason to reject the Austin court's analysis.

Additionally, if this Court were to reject the Austin Court of Appeals' analysis, it must do so clearly. *Gen. Am. Life Ins. Co. v. Rios*, 154 S.W.2d 191, 194 (Tex. Civ. App.—El Paso 1941), *rev'd on other grounds*, 139 Tex. 554, 164 S.W.2d 521 (1942); *Eubanks v. Mullin*, 909 S.W.2d 574 n.1 (Tex. App.—Ft. Worth 1995, no writ). In this instance, needless to say, Grossman and the City were parties to the *Grossman v. Wolfe* appeal, and they presented the same arguments to the Austin Court of Appeals as those being raised in this appeal, and those arguments were already considered by the Austin Court of Appeals in reaching its decision that there is no waiver of governmental immunity.

2. *There is no waiver of governmental immunity in the Antiquities Code.*

For the same reasons argued to the Austin courts, there is no waiver of governmental immunity within the Statute. Grossman relies upon § 191.173(a) and contends that there is a waiver of governmental immunity within the Statute to allow his suit. However, that is not the case.

In order to waive immunity, a statute must do so "clearly and unambiguously." *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 177 (Tex. App.—Austin 2013, no pet.). Although the Antiquities Code may provide a private right of action for an individual to seek injunctive relief to stop conduct that may be a violation, a government entity is not a party contemplated by the statute. *Id.* The statutory language in the Antiquities Code is not a clear and unambiguous waiver of

governmental immunity. *Id.* In fact, the language of the Antiquities Code that Grossman relies on is almost identical to that contained in Tex. Gov't Code Ann. § 442.012. Both statutes allow a Texas citizen to bring suit for injunctive relief to enjoin violations or threatened violations of the Antiquities Code. Neither statute, however, mentions or refers to government actors or addresses governmental immunity. Without that clear reference, neither statute waives immunity. *Id.*

Recognizing that the statute does not contain a clear and unambiguous waiver of governmental immunity, Grossman claims that a waiver of immunity must be read into the statute or it would be meaningless because it has no application to other non-governmental actors. This argument fails because it ignores the provisions of the Statute that are clearly applicable to nongovernmental actors. *See* Tex. Nat. Res. Code Ann. §§ 191.131-191.133. These prohibitions include conducting a salvage or recovery operation without a permit; defacing or destroying historical structures; and entering land belonging to another person and damaging sites or artifacts. Each of these provisions speak directly to non-governmental actors and corresponding enforcement provisions. Therefore, the statute is not meaningless without a waiver of governmental immunity. Moreover, "any purported statutory waiver of sovereign immunity should be strictly construed in favor of retention of immunity." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 513 (Tex. 2012).

Had the Legislature wanted to waive immunity it certainly knows how to do so. *See* Tex. Nat. Res. Code chapter 33 (wherein the Legislature specified that a suit

for declaratory judgment can be brought against the State of Texas.). The failure of the Legislature to include similar language within the Statute is confirmation that no waiver was intended or granted.

And despite Grossman's claim to the contrary, a party cannot concede subject matter jurisdiction. *See In re A.C.S.*, 157 S.W.3d 9, 15 (Tex. App.—Waco 2004, no pet.). Regardless, the issue for the trial court's determination in the previous hearing was much narrower and did not address whether the Antiquities Code waives governmental immunity in general.

3. *Grossman's claims are a mere attempt to control state action, which is barred by governmental immunity.*

A suit challenging a specific administrative order implicates governmental immunity because it seeks to *control* state action, *i.e.*, it seeks to restrain the state or its officials in the exercise of discretionary statutory authority. *See Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 514 (Tex. App.—Austin 2010, no pet.); and *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Grossman's claims are premised on his complaint that the Permit was issued and he wants the courts to intercede and force the THC to issue a different permit.

As the Austin Court of Appeals found in *Grossman v. Wolfe*, 578 S.W.3d 250, whether to grant an archeological permit, and if a permit is granted, what its terms should be, are matters firmly within the discretion of the THC. Grossman does not like that the Permit was issued by the THC and wants the courts to mandate that it

be rewritten in a manner desired by Grossman. Regardless of the merits of Grossman's particular arguments, that is an effort to control state action, and an attempt to control state action is barred by governmental immunity. *See Tex. Logos, L.P. v. Tex. Dep't of Transp.*, 241 S.W.3d 105, 118 (Tex. App.—Austin 2007, no pet.).

Grossman argued to the trial court that the THC was not a party in the underlying suit, that he was not asking the THC to do anything, but rather that he wanted the court to order the City to require Moore to do additional research, revise its research design and revise its scope of work, and then finally proceed only under that revised scope of work. That is Grossman's clever, but unsuccessful attempt to escape the decision in *Grossman v. Wolfe*, 578 S.W.3d 250. Neither the courts nor the City could impose those requirements on Moore and Moore could not act upon them because the Antiquities Code requires Moore to act only in accordance with the Permit issued by the THC. The THC has already considered and rejected Grossman's requests. The City and Moore have no alternative but to follow the decision of the THC. Any attempt by Grossman to require the City and Moore to do otherwise, regardless of how it is framed, is an effort to control state action, and is barred by governmental immunity.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the City requests that the Court affirm the trial court's denial of Grossman's request for a temporary injunction and reverse the trial court's decision denying the City's plea to the jurisdiction, and render judgment that Grossman's claims are dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run in Word 2010, this brief contains 12,207 words, excluding the portions of the brief exempt from the word count under Rule 9.4(i)(1).

/s/ Mark N. Osborn
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CERTIFICATE OF SERVICE

I certify that on January 29, 2020, a copy of the foregoing was delivered via the court's electronic efile service to the following:

Lisa Hobbs
Frank Ainsa
Carlos Cardenas

/s/ Mark N. Osborn
MARK N. OSBORN

Appendix

A

Vernon's Texas Rules Annotated El Paso County El Paso County Local Rules Part One. General Rules
TX El Paso Cty.Loc. Rule 1.05

RULE 1.05 EMERGENCY AND SPECIAL SESSIONS; TEMPORARY ORDERS

Currentness

(A) Except in emergencies, when the clerk's office is not open for business, no application for immediate or temporary relief shall be presented to a judge until it has been filed and assigned to a court as is provided in these rules.

(B) If the judge of the court to which such case is assigned is absent or is occupied with other matters, such application may be heard by any other district or county court at law judge who may sit for the judge of the court in which the case is pending and who shall make all orders, writs and process returnable to the Court to which the case is assigned.

(C) Hearings on applications for temporary injunctions, temporary receiverships, and the like, shall be set in the court to which the case has been originally assigned by consulting with that court.

(D) All applications for ex parte relief shall state whether or not, within, the knowledge of applicant and applicant's attorney, the opposing party is represented by counsel and, if so, the name of such counsel, and whether or not such counsel/party has been apprised of the application for ex parte relief.

(E) Texas Family Code cases that are exceptions to Section 3.58 must be presented to the court by an attorney.

(F) Except for cases filed under the Texas Family Code, the party requesting such temporary relief shall be present in court at the time such relief is requested, unless the court waives this requirement for good cause shown.

(G) Whenever immediate action of a judge is required in an emergency when the clerk's office is not open for business, the case shall, nevertheless, at the earliest practicable time be docketed and assigned to a court as provided by these rules, and all writs and process shall be returnable to the assigned court.

El Paso Cty. Loc. Rule 1.05, TX R EL PASO CTY LOC Rule 1.05
Current with amendments received through August 1, 2019

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B

No. 02-17-00383-CV

Second Court of Appeals
Fort Worth, Texas

In re Max Grossman

MOTION TO WITHDRAW VERIFIED EMERGENCY MOTION FOR IMMEDIATE SHOW CAUSE HEARING AND ORDER IN ENFORCEMENT OF INJUNCTION

TO THE HONORABLE SECOND COURT OF APPEALS:

Relator Max Grossman files this Motion to Withdraw his previously filed Verified Emergency Motion for Immediate Show Cause Hearing and would respectfully show the Court as follows:

1. On September 12, 2017, Relator, Max Grossman, filed a Verified Emergency Motion for Immediate Show Cause Hearing and Order in Enforcement of Injunction ("Motion for Show Cause Order") in the Eighth Court of Appeals. The Motion for Show Cause Order alleged that the City willfully violated a series of injunctions issued by the Eighth Court of Appeals on September 11 and 12, 2017, related to the demolition of the Duranguito neighborhood in El Paso, Texas.

2. On October 18, 2017, following additional briefing by the parties, the Eight Court of Appeals issued a Show Cause Order, ordering the City of El Paso to appear and show cause why it should not be held in contempt for the demolition activity

that occurred on September 12, 2017, after the Eighth Court of Appeals' injunctions had issued.

3. Upon the Eight Court of Appeals' recusal, on November 2, 2017, this original proceeding (and its related appeal, No. 02-17-00384-CV) were transferred to this Court.

4. On December 7, 2017, this Court granted Grossman's petition for writ of injunction and ordered that the injunction placed by the El Paso Court of Appeals remain in effect during the pendency of the interlocutory appeal (No. 02-17-00384-CV).

5. Around that same time, this Court also referred the Show Cause Order to the Senior Judge David Peeples as a magistrate to conduct an evidentiary hearing on the Show Cause Order and make written findings of fact pertinent to this contempt proceeding.

6. As the parties conferred on discovery for the show cause proceeding, they requested, and Judge Peeples allowed, mediation of the show cause proceedings. Mediation occurred on February 28, 2017, and continued this week with the consent of both parties and the mediator.

7. As reflected in the attached letter to Judge David Peeples, Dr. Grossman now stipulates that the evidence produced during discovery will likely not show that officials with decision making authority at the City intentionally took any action (or failed to take action) to violate the Order of the 8th Court of Appeals order.

8. As such, and without objection from the City of El Paso, Dr. Grossman seeks to withdraw his Motion to Show Cause. Dr. Grossman and the City seek an order dismissing the show cause proceedings with prejudice. Each side agrees to pay its own costs and fees.

9. This motion is not intended to, nor should it have, any effect on the validity and continuation of the injunction entered by the Eighth Court of Appeals on September 12, 2017, and ordered to remain in place by this Court on December 7, 2017. It simply is intended to resolve the show cause proceeding that was referred to Judge Peeples, should this Court grant the motion.

PRAYER

For the foregoing reasons, Relator Max Grossman requests the Court to grant this motion and enter an order dismissing the show cause proceedings, with each party bearing any costs that they have incurred. Relator prays for any and all other relief to which he is justly entitled to receive.

Dated: March 12, 2018

Respectfully submitted,

/s/ Lisa Bowlin Hobbs

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CERTIFICATE OF CONFERENCE

I certify that on March 12, 2018, I conferred with Mark Osborn, counsel for the City of El Paso, and through a formal mediation process, and Mr. Osborn has no objection to the relief sought in this motion.

/s/ Frank S. Ainsa
Frank S. Ainsa

CERTIFICATE OF SERVICE

I certify that on March 12, 2018, I electronically served this motion on counsel of record as follows.

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APPENDIX A
LETTER TO JUDGE PEEPLES

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March 12, 2018

Via email
dpeeples99@gmail.com

Judge David Peeples
Master for the Second Court of Appeals
Tim Currey Criminal Justice Center
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Re: Ex Parte City of El Paso
No. 02-17-00383
Second Court of Appeals
Ft. Worth, Texas

Dear Judge Peeples:

Since the close of mediation, we have continued to evaluate the question whether the evidence will show that the City intentionally violated the Order of the 8th Court of Appeals prohibiting demolition of buildings in Duranguito.

We have concluded that the evidence will likely not show that officials with decision making authority at the City intentionally took any action (or failed to take action) to violate the Order of the 8th Court of Appeals. Consequently, Max Grossman is withdrawing his Verified Emergency Motion for Immediate Show Cause Hearing and Order in Enforcement of Injunction and requesting the 2nd Court of Appeals to dismiss the show cause proceeding, without any hearing and with prejudice. Mark Osborn has informed me that the City has no objection to this Motion.

Very truly yours,

Francis S. Ainsa, Jr.

FSA/
cc: Mark N. Osborn by electronic mail
Harriet O'Neill by electronic mail
Lisa Kuhn Hobbs by electronic mail