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SUPREME COURT OF TEXAS
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No. _____

In the Supreme Court of Texas

THE CITY OF HOUSTON,

Petitioner,

v.

TEXAS PROPANE GAS ASSOCIATION,

Respondent.

On Appeal from the Third Court of Appeals at Austin, Texas
Cause No. 03-18-00596-CV

THE CITY OF HOUSTON'S PETITION FOR REVIEW

RONALD C. LEWIS
City Attorney
JUDITH L. RAMSEY
Chief, General Litigation Section

Collyn A. Peddie
Texas Bar No. 15707300
Tiffany S. Bingham
Texas Bar No. 24012287
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby Street, 4th Floor
Houston, Texas 77002
832.393.6463 (telephone)
832.393.6259 (facsimile)
collyn.peddie@houstontx.gov
tiffany.bingham@houstontx.gov

Attorneys for The City of Houston

IDENTITY OF PARTIES AND COUNSEL

Petitioner:	**Trial and Appellate Counsel:**
City of Houston	Collyn A. Peddie Senior Assistant City Attorney CITY OF HOUSTON LEGAL DEPARTMENT 900 Bagby Street, 4th Floor Houston, Texas 77002 collyn.peddie@houstontx.gov Tiffany S. Bingham Senior Assistant City Attorney CITY OF HOUSTON LEGAL DEPARTMENT 900 Bagby Street, 4th Floor Houston, Texas 77002 tiffany.bingham@houstontx.gov
Respondent:	**Trial Counsel**
Texas Propane Gas Association	Leonard B. Smith P.O. Box 50003 Austin, Texas 78763-003 lsmith@leonardsmithlaw.com Elisabeth G. "Heidi" Bloch Greenberg Traurig, LLP 300 West 6th Street, Suite 2050 Austin, Texas 78701 blochh@gtlaw.com
	Appellate Counsel:
	Jane N.M. Webre Scott Douglass & McConnico LLP 303 Colorado Street, Suite 2400 Austin, Texas 78701 jwebre@scottdoug.com

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STATEMENT OF THE CASE

Nature of the case: This is an action for declaratory judgment, brought by Plaintiff/Respondent Texas Propane Gas Association ("TPGA"), a trade association of propane marketers, against numerous Texas cities, including Defendant/Petitioner the City of Houston ("Houston") and the Railroad Commission of Texas ("RRC"), seeking a declaration that each of those cities' propane regulations, fire code provisions, and ordinances is preempted and void under Tex. Nat. Res. Code Ann. § 113.054 (West 2019), which includes a provision empowering cities to enact more stringent propane regulations than those promulgated by the RRC. CR221. No party disputes that that the RRC has not yet established any procedure to enable cities actually to obtain an enforceable order allowing them to enforce more stringent propane regulations. TPGA does not seek injunctive relief. *Id.* TPGA also did not plead that the *Morales* exception, discussed herein, applies to confer jurisdiction on the civil courts to declare preempted propane regulations that impose criminal penalties. *Id.*

Trial court proceedings: After TPGA filed its Fourth Amended Petition, CR221, a Motion for Summary Judgment on the Merits, CR175, abandoned its claims against the RRC, and settled or dropped the remaining defendant cities, Houston filed a motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction, CR259, alleging that TPGA's claims were barred for lack of standing, jurisdiction, or, alternatively, because they were not ripe or, alternatively, were moot. Houston also filed an alternative motion for summary judgment on the merits. CR259.

Trial court disposition: Judge Meachum, 261st District Court of Travis County, sitting as a civil judge, denied both pleas/motions, by order, dated Sept. 10, 2018, attached as Exh. A. CR582. The same day, Houston filed notice of interlocutory appeal on its motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction only. CR584.

Ct. of App. Disposition The case was heard before a Third Court of Appeals panel consisting of Chief Justice Rose, and Justices Kelly and Smith. *See City of Houston v. Texas Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530 (Tex. App.—Austin July 18, 2019, pet. filed) (mem. op.) ("TPGA Opin."), attached as Exh. B. The Court reversed in part, concluding that the trial court erred in holding that TPGA had met its burden to plead facts affirmatively demonstrating that it had associational standing to bring its claims, and remanding the case to the trial court to allow TPGA an opportunity to cure the pleading defect. *Id*. at *1. Chief Justice Rose dissented. *Id.* at *8, The Court otherwise affirmed the trial court's denial of Houston's plea/motion which alleged, among other things, that civil courts lack jurisdiction over TPGA's claims relating to penal laws, it held that, "based on this [same] per day-violation fine and on the Texas Supreme Court's recent decision in City of Laredo, we must conclude that TPGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution' … [and] TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court." *Id.* (citing *State v. Morales,* 869 S.W.2d 941, 945 (Tex. 1994)) ("*Morales*"). From this portion of the Court's decision alone, Houston files this timely petition for review. TPGA also filed one the same day.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to grant review here. By following this Court's *dicta* in footnote 28 of *City of Laredo v. Laredo Merch.'s Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018) ("Laredo"), the court of appeals unconstitutionally expanded the jurisdiction of the Texas civil courts and the narrow exception to criminal jurisdiction this Court recognized in *Morales*, 869 S.W.2d at 945. In addition, the court effectively eliminated plaintiffs' long-standing jurisdictional pleading and proof requirements. In so doing, the court of appeals committed errors of law so fundamentally important to the State's jurisprudence that they should be corrected by this Court. *See* Tex. Gov't Code § 22.001(a). If not corrected, these errors will surely reoccur.

Finally, the Third Court of Appeals' decision conflicts directly on the issue presented with dozens of court of appeals decisions, of which the following decisions of its sister courts are representative: *Destructors, Inc. v. City of Forest Hill*, No. 02-08-0440-CV, 2010 WL 1946875, at *2-5 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.) ; *The Town of Flower Mound, Tex.*, *v. Eagleridge Operating, LLC*, No. 02-18-00392-CV, 2019 WL 3955197, at *5 (Tex. App.—Fort Worth Aug. 22, 2019, no pet. h.). Resolution of these conflicts is critical to the State's jurisprudence as well.

ISSUE PRESENTED

In Morales, 869 S.W.2d at 945, this Court held that "the holdings of our courts are legion that intervention by an equity court is inappropriate … unless the statute is unconstitutional and there is the threat of irreparable injury to vested property rights." In dicta in Laredo, this Court reaffirmed the Morales exception but stated, without benefit of pleadings or proof, that the exercise of civil jurisdiction over the interpretation of a criminal statute was nevertheless proper in that lawsuit because the ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the bans' constitutionality in defense to a criminal prosecution."[1] *The court of appeals here, also without the benefit of pleadings or proof, relied on the same per day-violation fine and on Laredo in holding that "[T]PGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution'" and, therefore, "TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court."*[2]

THE ISSUE PRESENTED IS: Whether the *civil* courts' assertion of subject-matter jurisdiction over construction of *criminal* laws here, based on *dicta* in *Laredo*'s footnote 28, unlawfully expands or supplants the *Morales* exception *Laredo* ostensibly reaffirmed, improperly removes a plaintiff's burden to plead and prove jurisdiction, conflicts with sister court of appeals' decisions, and/or violates the Texas Constitution by usurping the jurisdiction of the State's criminal courts?

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[1] *Id.* at 592 n.28 (citing *Morales*, 869 S.W.2d at 945; *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528, 529-30 (Tex. 1894)).

[2] TPGA Opin. at *8 (citing *Morales*, 869 S.W.2d at 945).

STATEMENT OF RELEVANT FACTS

This petition addresses only questions of law. Consequently, this Court needs only a few facts in order to grant review.

TPGA conceded in its brief in the court of appeals that violations of the challenged provisions subject violators to criminal fines.[3] Houston's propane ordinances and regulations are enforced in municipal courts, punishable by relatively small fines, but no jail time.[4] It is undisputed that fire officials may elicit the help of the Houston Police Department to enforce code provisions, including propane regulations. Even violations of Houston's *Code of Ordinances* § 29-123 (which governs fuel supply and storage) subject one to limited criminal penalties. CR327. Appropriately, the court of appeals assumed the challenged law were penal in nature. TPGA Opin. at *8.

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[3] *See* Appellee's Brief in the Court of Appeals at 30. TGPA *had already conceded* that many, if not all, of the regulations and ordinances it challenges are criminal in nature. First, TGPA conceded in its Response that "Houston cite[d] to several provisions of its Fire Code [] that make certain conduct unlawful, *reference criminal citations and/or impose fines*." CR365 (TPGA Response at 3) (emphasis supplied). Second, Houston cited to *eight provisions* in the challenged Fire Code provisions that specifically mention "*criminal penalty*," "*unlawful*" *acts*, "*offenses and misdemeanors*," and "*prosecutions of violations*." CR270-72.

[4] *See, e.g.*, City of Houston, Tex., *Code of Ordinances* § 21-162(c). CR325-27. Excerpts of all City of Houston Code of Ordinances relied on by the court of appeals below are attached as Exh. C. *See* CR325-27.

SUMMARY OF ARGUMENT

Houston seeks review of a portion of the court of appeals' decision to enable this Court to halt unconstitutional, if inadvertent, "jurisdiction creep" that threatens to undermine the foundations of Texas' bifurcated judicial system. There can be no issue more important to the State's jurisprudence.

For a century, this Court held that civil courts had no jurisdiction to construe criminal laws unless claimants could show that a law was unconstitutional and that its potential enforcement threatened claimants with irreparable injury to vested property rights. *See, e.g.*, *Morales*, 869 S.W.2d at 945. By utilizing this high standard, this Court ensured that civil courts would not infringe upon the jurisdiction of criminal courts except in rare circumstances and would avoid confusion, "hamstringing" the efforts of law enforcement officers, and the "'precise contradiction of opinions between the [civil courts] and the Court of Criminal Appeals to which the Constitution has entrusted supreme and exclusive jurisdiction in criminal matters.'"[5]

While this Court attempted to reaffirm the *Morales* exception in *Laredo*'s footnote 28, it added *dicta*[6] that actually expanded that exception

[5] *Morales*, 869 S.W.2d at 947–48 (quoting *Roberts v. Gossett*, 88 S.W.2d 507, 509 (Tex. Civ. App.—Amarillo 1935, no writ)).

[6] Neither party in *Laredo* challenged jurisdiction.

unconstitutionally by substituting or improperly equating the adequacy of a claimant's legal remedy for irreparable injury to a vested property right as the test for civil courts' exercise of jurisdiction to construe criminal laws. Unfortunately, it did so without requiring that those plaintiffs plead or prove compliance with the *Morales* exception's requirements. Consequently, civil courts that follow *Laredo*, like the Third Court here, now have almost no real limit on their ability to construe criminal laws. This case illustrates the serious constitutional problems thus created.

Following this Court's *Laredo* footnote to the letter, the court of appeals here held that, if a municipal law is punishable by a fine, at the Class C misdemeanor[7] level or above, a civil court may presume, from that fact alone, that claimants are deprived of their ability to challenge that law in defense to a criminal prosecution and, therefore, may construe the criminal law. By this circular logic, the more severe the punishment that may be imposed for violating a criminal statute is, the more certain it is that *civil* courts have jurisdiction to construe that statute. Put another way, *because* a law imposes serious criminal penalties, civil courts have jurisdiction to construe it. under a hollowed-out *Morales* exception, civil courts are arguably free to construe virtually any statute the violation of which is punishable as a misdemeanor or felony.

[7] *See* Tex. Penal Code Ann. §§ 12.21-23 (West 2019).

By holding, without pleadings, proof, or explanation, that *Laredo*'s assumptions about the financial impact of potential fines somehow constitute threatened irreparable injury to a vested property right under the *Morales* exception, the court of appeals here turned *Morales* on its head, stripped the plain meaning from its requirements, ignored its express *rejection* of adequacy of remedy or personal rights as the test for jurisdiction, eschewed long-standing jurisdictional pleading and proof requirements, unconstitutionally usurped the jurisdiction of the Texas criminal courts, and effectively eviscerated Texas' bifurcation of its judicial system.

This Court, therefore, should grant review to 1) clarify that *Morales* and Texas law still require pleading and proof of threatened irreparable injury to a vested property right for a civil court to construe a criminal law *and* that neither adequacy of remedy, personal rights, nor the unsupported assumptions regarding potential penalties used in *Laredo* and by the court of appeals here, will suffice to meet *Morales*' stringent requirements; and 2) resolve the conflicts the court of appeals' decision on this issue created with sister appellate decisions. This is issue is ripe for resolution and would not benefit from further percolation in the courts of appeals. Instead, this Court should rule now to stop the ongoing, unconstitutional, yet potentially tectonic shift in Texas' criminal and civil courts' respective jurisdictions.

ARGUMENT AND AUTHORITIES

I. REVIEW IS ESSENTIAL TO THE STATE'S JURISPRUDENCE BECAUSE, BY FOLLOWING *LAREDO'S DICTA*, THE COURT OF APPEALS VIOLATED *MORALES'* CORE PRINCIPLES

Under Texas' bifurcated judicial system, the Court of Criminal Appeals is the court of last resort for criminal matters, and this Court has final review in civil matters.[8] As this Court explained: "this framework, while at times imperfect, has been in place since 1876, and is the cornerstone of the bifurcated system of appeals in this state."[9] Consequently, "a civil court simply has no jurisdiction to render naked declarations of 'rights, status or other legal relationships arising under a penal statute,'"[10] the only relief TPGA seeks.[11] Instead, questions, such as whether a penal statute is preempted by State law, must ultimately be resolved by the Court of Criminal Appeals.[12]

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[8] Tex. Const. art. V, §§ 3 & 5; *In re Reece*, 341 S.W.3d 360, 370–71 (Tex. 2011).

[9] *Reece*, 341 S.W.3d at 370; *see State ex rel. McNamara, Co. Atty. v. Clark,* 79 Tex. Crim. 559, 187 S.W. 760, 762 (1915) ("whether wisely or unwisely, the people of this state in framing their Constitution divided the jurisdiction of the civil and criminal courts of final resort…").

[10] *Morales*, 869 S.W.2d at 947 (citing *Malone v. City of Houston*, 278 S.W.2d 204, 206 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.)). TPGA seeks only such declarations here.

[11] "The 'naked' declaration that section 255.001 was unconstitutional, without a valid request for injunctive relief, was not within the jurisdiction of the civil district court sitting in equity." *Dallas Cty. Dist. Atty. v. Doe*, 969 S.W.2d 537, 542 (Tex. App.—Dallas 1998, no pet.) (citing *Morales*, 869 S.W.2d at 942).

[12] *See, e.g.*, *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, pet. ref'd) (the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction). In *Unger*, the plaintiff appealed his criminal conviction

Over time, however, Texas courts crafted a narrow exception to the Texas Constitution's division of judicial responsibilities. In *Morales*, 869 S.W.2d at 943, 945, & n.8, this Court recognized that "[i]ntervention by an equity court is inappropriate … unless the statute is unconstitutional *and there is the threat of irreparable injury to vested property rights*."[13] Otherwise, a person's remedy is to "'continue his activities until he is arrested and then procure his release by showing that the law is void.'"[14]

The *Morales* Court made clear that vested property rights and personal rights are *not* interchangeable and limited its exception to the former. "We did *not* hold … that a personal right can be uniformly substituted for a property right and that a civil court's equity jurisdiction over criminal statutes was thereby expanded."[15] Consequently, the *Morales* exception is available only when a claimant is threatened with irreparable injury to a vested property right that

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under a local drilling ordinance. The Court held that the local permitting provisions did not conflict with and were not preempted by Railroad Commission regulations. *See id*. at 813.

[13] *Id.* at 945 & n.8 (emphasis supplied); *Crouch v. Craik*, 369 S.W.2d 311, 315 (Tex. 1963).

[14] *Id*. (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 221 (Tex. App.—Austin 2017, pet. denied).

[15] *Morales*, 869 S.W.2d at 945, 946 (emphasis supplied); *City of New Braunfels*, 520 S.W.3d at 221 ("the supreme court [in *Morales*] also rejected any notion that injury to personal rights, as opposed to 'vested property rights,' sufficed as a basis for a civil court's equity jurisdiction over criminal statutes").

flows from the challenged law's enforcement against that claimant. As one court recently summarized:

> the upshot of *Morales* is that (1) the appellee businesses would have to demonstrate that the ordinances' enforcement against their customers has irreparably injured the businesses' vested property rights; (2) injury to any personal rights does not suffice; and (3) *any perceived inability of the businesses to obtain remedy through criminal proceedings does not change that analysis*.[16]

Indeed, the *Morales* court made the centerpiece of its decision the idea that the adequacy of legal remedies did *not* drive civil jurisdiction. In fact, it began its opinion by observing that "*equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law*, nor can it originate solely from a court's good intentions to do what seems 'just' or 'right' …" 869 S.W.2d at 942 (emphasis supplied). Later, it reaffirmed that "*equity jurisdiction does not rise or fall solely on the basis of the adequacy of their remedy at law*." *Id*. at 947 (emphasis supplied).

Although the *Morales* exception and the trial court's lack of jurisdiction was not raised by any party in that case, in *dicta* in footnote 28 in *Laredo*, 550 S.W.3d at 592 n.28, this Court stated, without benefit of pleadings or proof, that the exercise of civil jurisdiction over the interpretation of that criminal statute was nevertheless proper because the bag ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the

[16] *City of New Braunfels*, 520 S.W.3d at 222–23 (citing *Morales*, 869 S.W.2d at 942, 947).

bans' constitutionality in defense to a criminal prosecution."[17] Despite clear language in *Morales* and its progeny eschewing the use of adequacy of legal remedies as the basis for civil jurisdiction, and this Court's reaffirmation of the *Morales* exception's requirements in *Laredo*, this Court nevertheless substituted the presumed absence of an adequate legal remedy as the test for civil jurisdiction and effectively discarded the requirement that a plaintiff must plead and prove threatened irreparable injury to some vested property right in order for civil courts to construe criminal laws. As testament, both TPGA and the plaintiff in *Laredo* failed to identify *any* vested property right allegedly injured. There is not one.

Texas courts have consistently held that there is no vested property right to engage in a particular business, or to engage in one's business in a particular manner, free of restrictions or regulation.[18] Even when a business is severely impacted by local law, vested property rights are not implicated.[19] In fact, the

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[17] *Id.* (citing *Austin City Cemetery Ass'n*, 28 S.W.2d at 529); *City of Houston v. Richter*, 157 S.W. 189, 191 (Tex. Civ. App.—Galveston 1913, no writ) (citing *Austin City Cemetery*).

[18] *See, e.g.*, *Kemp Hotel Operating Co. v. City of Wichita Falls*, 170 S.W.2d 217, 219 (Tex. 1943) (holding that garbage haulers had no vested property right in the business of hauling garbage); *City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C.*, No. 09-11-00229-CV, 2001 WL 6748506 (Tex. App.—Beaumont Dec. 22, 2011, pet. denied) (mem. op.); *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.).

[19] *See, e.g.*, *Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 239-40 (Tex. App.—Eastland 2007, pet. dism'd) ("Truckload's pleadings are clearly sufficient to articulate a claim that a total ban on the use of fireworks would result in a tremendous financial loss. This loss, even

Morrow court explained that, "even if the [fireworks] ban had eliminated Truckload's Midland County retail business, no vested property right would be implicated." *Id*. at 240.

TPGA did not plead or attempt to prove any threatened injury to vested property rights.[20] And this is true even though TPGA carries the burden to plead and prove a court's subject matter jurisdiction.[21] Instead, TPGA admitted that "what TPGA objects to is the fact that Houston purports to regulate the LPG industry *at all*." *See* Appellee's Brief at 34. (emphasis in original). Consequently, the court of appeals, following *Laredo*, simply presumed that TPGA members were thus threatened because their legal remedy—challenging local propane laws in defense to a criminal prosecution—was inadequate because of potential fines that could be imposed. The Court explained:

> Section 109.4 of the City's Fire Code provides that the doing of any act that the Fire Code declares to be unlawful, and for which no specific penalty is provided, 'shall be punished by a fine of not less than $500.00 and no more than $2,000.00' and that 'each day any violation of this code shall continue shall constitute a separate

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though tangible and significant, *is insufficient to constitute a vested property right because it represents losses due to restrictions on personal rights*") (emphasis supplied) (citing *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 483 (Tex. App.—Austin 2004, pet. denied); *Hang On III, Inc. v. Gregg Cty.*, 893 S.W.2d 724, 726 (Tex. App.—Texarkana 1995, writ dism'd by agr.)).

[20] Houston contends TPGA expressly waived reliance upon the *Morales* exception when it stated that "[T]PGA does not need to show irreparable injury to any vested property rights." CR365. The Court of Appeals, however, incorrectly failed to address or find waiver.

[21] *See, e.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

> offense.' Based on this per day-violation fine and on the Texas Supreme Court's recent decision in *City of Laredo*, we must conclude that TPGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution.' Because there is a 'threat of irreparable injury to vested property rights,' TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court.'[22]

Following a century of Texas law, the Court in *Morales* recognized that there must be irreparable injury to vested property rights for civil courts to assert criminal jurisdiction. Alleged injury to personal rights or inadequacy of legal remedies would not suffice. While ostensibly reaffirming *Morales*, *Laredo* nevertheless substituted inadequacy of legal remedy and/or loss of personal rights as its jurisdictional touchstone *as did the court of appeals in this case*. Because, by following Laredo's dicta, the court of appeals violated Morales' core tenets, this Court should grant review to clarify whether *Morales* still imposes real limits on a civil courts' jurisdiction or is now merely a convenient fig leaf to cover civil courts' usurpation of criminal courts' jurisdiction.

II. REVIEW IS ESSENTIAL TO REAFFIRM THAT PLAINTIFFS MUST PLEAD AND PROVE THE APPLICABILITY OF THE *MORALES* EXCEPTION FOR EACH CRIMINAL LAW CHALLENGED

"[A] plaintiff must demonstrate that the court has jurisdiction over … each of his claims; the court must dismiss those claims (and only those claims) over

[22] TPGA Opin. at *7-8 (citing *Morales*, 869 S.W.2d at 945).

which it lacks jurisdiction."[23] When, as here, a defendant challenges a trial court's subject-matter jurisdiction, the burden shifts *to the plaintiff* to allege and prove facts affirmatively demonstrating that the trial court has subject-matter jurisdiction.[24] Consequently, when Houston challenged the district court's (sitting as a civil court) subject-matter jurisdiction, the burden shifted to TPGA to demonstrate, by pleadings and proof, that the court had jurisdiction to construe each challenged local criminal law under *Morales*.[25] TPGA did not carry that burden. Indeed, *until oral argument*, TPGA contended that *it had no need* to do so. *See supra* note 20.

In its opinion, however, the court of appeals, following *Laredo*'s *dicta*, effectively absolved TPGA of its sins and *presumed* that the severity of the fines that could have been but were never imposed *alone* prevents TPGA from challenging Houston's propane regulations in defense to criminal prosecution. TPGA Opin. at *8. Consequently, it held that civil courts could hear TPGA's claims. *Id.* The court's presumptions are legally insupportable.

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[23] *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 152–53 (Tex. 2012); *Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 621 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

[24] *Alcala-Garcia v. City of La Marque*, No. 14-12-00175-CV, 2012 WL 5378118, at *3 (Tex. App.—Houston [14th Dist.] Nov. 1, 2012, no pet.); *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 51 (Tex. App.—Austin 2003), *aff'd*, 171 S.W.3d 845 (Tex. 2005); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

[25] *See supra* note 21; *The Town of Flower Mound*, 2019 WL 3955197, at *5.

As discussed, TPGA seeks a broad declaration holding invalid and unenforceable all of Houston's propane regulations as well as "those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendment of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas Industry, together with Chapter 61 of the Houston Amendments of the 2013 International Fire Code itself …" CR189-90. Instead of satisfying its jurisdictional burden as to each challenged regulation, TPGA stated only the bare conclusion, without citation or analysis, that Houston's Fire Code regulations and its enforcement of those regulations generally were somehow civil and not criminal. *See, e.g.*, Appellee's Brief at 34. TPGA, however, has never identified all of the specific provisions of Houston's propane laws its challenges let alone met the *Morales* standards for each one.

TPGA's anemic efforts are insufficient to support the court of appeals' finding subject-matter jurisdiction. In *The Town of Flower Mound*, 2019 WL 3955197, at *5, for example, the plaintiffs, relying on *Laredo's dicta*, actually pleaded that they would suffer irreparable injury because they would suffer "hefty" fines under the challenged ordinance. The court dismissed for want of jurisdiction because, "while the Ordinance imposes a fine for violations, *the record* does not show that the imposition of the fines would be so great so as to

destroy Appellee's business …" *Id.* (citing *Laredo*, 550 S.W.3d at 592 n.28) (emphasis supplied).

TPGA's standing here, if any, is associational. *See* CR221. While associational standing may be sufficient when there is no need for any member to participate as a party, where, as here, each must show irreparable injury to vested property rights, *the need for individualized proof exceeds the scope of associational standing and renders it inappropriate*.[26] Consequently, TPGA's individual members must be parties to this action for this Court even arguably to have jurisdiction under *Morales* over the claims asserted.[27] If each member must show that it will be so financially crippled by enforcement of Houston's propane regulations that none can effectively challenge those ordinances if prosecuted, however, none can do so. Unlike the new ordinances referenced in *Austin City Cemetery*, TPGA's members have already lived under Houston's propane regulatory regime, some for many years, without any pleaded financial ruin and will still be subject to regulation by the State even if Houston's

[26] *See, e.g.*, *Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 695-96 (5th Cir. 1995); *City of Arlington v. Scalf*, 117 S.W.3d 345, 347 (Tex. App.—Fort Worth 2003, pet. denied).

[27] TPGA, an association, thus lacks standing to proceed in the civil courts. By finding subject-matter jurisdiction here without requiring TPGA to plead and prove it, however, the court of appeals effectively papered over TPGA's lack of standing as well.

regulations are held preempted. Consequently, *TPGA* can *never* plead or prove jurisdiction here. Its repleading *for the fifth time* would be pointless.

This is also true because *TPGA has not and cannot identify any common vested property right its members possess*. Property rights are created and defined by state law.[28] Local permits do not create vested property rights.[29] As demonstrated, conducting a business free of local regulations is not a vested property right. Because TPGA members thus share no *common* vested property rights, proof of irreparable injury to vested property rights would necessarily involve individualized demonstrations and participation as a party. Because TPGA itself has no standing to assert such *individual* rights, it also lacks the ability to plead and prove them under *Morales* as Texas law requires.

Third, TPGA did not plead and cannot prove its members' individual *irreparable injury*. Indeed, its mis-citation to *Austin City Cemetery* in the court of appeals demonstrates only how far afield from irreparable injury its members, who do not face arrest but merely citations and relatively small criminal fines, are from irreparable harm. In *Austin City Cemetery*, Austin passed an ordinance than no one could be buried in the Austin city limits. 28 S.W. at 529-30. The

[28] *Reese*, 95 S.W.3d at 391.

[29] *See, e.g.*, *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965).

ordinance had the effect of putting all Austin cemeteries out of business and rendering their land unusable. *Id.* at 529. TPGA has not pleaded or proved any injury of the kind here. In fact, it had a hard time identifying any particularized injury here.

Finally, even though the challenged provisions here impose only fines,[30] "the harm inherent in prosecution for a criminal offense does not constitute irreparable harm as required by *Morales*."[31] Instead, TPGA members can challenge their convictions as the defendant did in *Unger*.[32] By assuming that they cannot do so, without pleadings or proof of anything but a fine to support that presumption, the court of appeals, following *Laredo*'s *dicta*, violated long-standing Texas law placing the burden to plead and prove jurisdiction squarely on the shoulders of TPGA members. This Court should grant review to reaffirm the necessity that all plaintiffs carry this traditional, common-sense burden.

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[30] *See supra* note 7; City of Houston, Tex., *Fire Code*, Chapter 61 § 109.4; *see also, e.g.*, City of Houston, Tex. *Code of Ordinances* §21-162(c).

[31] *Sterling*, 94 S.W.3d at 795 (quoting *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. App.—Tyler 2000, no pet.).

[32] Tex. Gov't Code Ann. § 30.00014 (West 2004); City of Houston, Tex., *Code of Ordinances* §16.54.

III. REVIEW IS ESSENTIAL TO THE STATE'S JURISPRUDENCE TO RESOLVE DIRECT CONFLICTS BETWEEN SISTER COURTS OF APPEALS' DECISIONS ON THE ISSUE PRESENTED

Although no longer a specified ground for granting Supreme Court review, resolution of conflicts between opinions of courts of appeals is critical to the State's jurisprudence. In this case, a host of sister courts have decided cases that specifically rejected the grounds on which the court of appeals decided this case. Two cases are representative. This Court should grant review to resolve those conflicts.

In *Destructors*, 2010 WL 1946875, at *2-5, for example, the court, relying upon *Morales*, held that a civil court had no jurisdiction to rule on the alleged preemption of an ordinance, making certain activities "unlawful" without a city permit, absent a showing of irreparable injury to vested property rights. *Id.* "When these questions can be resolved in any criminal proceeding that may be instituted and vested property rights are not in jeopardy, there is no occasion for the intervention of equity."[33] The *Destructors* court, however, did not consider the penalties involved or Destructors' claim that the ordinance would put them out of business to be injuries that invoke vested property rights. 2010 WL 1946875, at *1. Instead, the court reiterated that one has the right to operate a

[33] *Passel,* 440 S.W.2d at 63 (emphasis supplied); *see Unger*, 629 S.W.2d at 812.

business free of local regulation. *Id.* at *4. Moreover, the court held that "*a personal right cannot uniformly be substituted for a property right and thereby expand a civil court's equity jurisdiction over criminal statutes or ordinances*." *Id.* (emphasis supplied). Yet that is precisely what the court of appeals did here. The *Destructors* holding, therefore, directly conflicts with the court of appeals' holding on the issue presented. *See also ACE Cash Express, Inc. v. City of Denton*, No. 02-14-00146-CV, 2015 WL 3523963, at *4 (Tex. App.—Fort Worth June 4, 2015, pet. denied) (court affirmed granting of plea where plaintiff failed to show irreparable harm to a vested property right, but only alleged injury to personal rights).

Likewise, in *The Town of Flower Mound,* 2019 WL 3955197, at *5, discussed above, the court refused to apply *Morales* because "the record does not show that the imposition of the fines would be so great so as to destroy Appellee's business …" *Id.* (citing *Laredo*, 550 S.W.3d at 592 n.28). This case directly conflicts with the court of appeals' decision here on the issue presented because the court here did not require that TPGA plead or prove the alleged applicability of *Morales'* exception. TPGA never pleaded or attempted to prove that any fines imposed here (*there were none*) "effectively preclude[] small local businesses from testing the ban's constitutionality in defense to a criminal

prosecution."[34] TPGA did not plead irreparable injury or vested property rights at all. Nevertheless, the court of appeals here not only applied the *Morales* exception without pleadings or proof, but held that TPGA had met it.

Because the court of appeals effectively relieved TPGA of its threshold burden to plead and prove the *Morales* exception's applicability, this Court should grant review to resolve the conflict with *Flower Mound* as to what pleading and proof of jurisdiction *Morales* and *Laredo* now require.

CONCLUSION AND PRAYER

For the reasons stated, this Court should grant Houston's petition for review and such other relief as to which this Court finds Houston entitled.

[34] Indeed, there is no such risk here because the only applicable definition of the limiting term LPG "industry" in Tex. Nat. Res. Code § 113.054 *does not include small businesses*. *See* 31 Tex. Admin. Code § 357.11(d)(4).

Respectfully submitted,

RONALD C. LEWIS
City Attorney
JUDITH L. RAMSEY
Chief, General Litigation Section

By: */s/ Collyn A. Peddie*
Collyn A. Peddie
Senior Assistant City Attorney
State Bar No. 15707300
Tiffany S. Bingham
Senior Assistant City Attorney
State Bar No. 24012287
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby, 4th Floor
Houston, Texas 77002
Telephone: 832.393.6463
Facsimile: 832.393.6259
collyn.peddie@houstontx.gov
tiffany.bingham@houstontx.gov

Attorneys for Petitioner, The City of Houston

CERTIFICATE OF COMPLIANCE

I certify that the foregoing was prepared in Microsoft Word 2016 Version 14.0 in Calisto MT 14 point font; the word-count function shows that, excluding those sections exempted under TRAP 9.4(i)(1), the brief contains 4,437 words.

/s/ Collyn A. Peddie
Collyn A. Peddie

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, a true and correct copy of the foregoing has been served on counsel below via e-service.

Jane N.M. Webre
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
jwebre@scottdoug.com

Leonard B. Smith
P.O. Box 50003
Austin, Texas 78763-003
lsmith@leonardsmithlaw.com

Attorneys for Respondent

/s/ Collyn A. Peddie
Collyn A. Peddie

Exh. A

CAUSE NO. D-1-GN-17-001089

TEXAS PROPANE GAS ASSOCIATION, *Plaintiff,*	§	**IN THE DISTRICT COURT**
v.	§	**TRAVIS COUNTY, TEXAS**
RAILROAD COMMISSION OF TEXAS, *ET AL.* *Defendants.*	§	**261ST JUDICIAL DISTRICT**

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On May 16, 2018, the court heard Plaintiff Texas Propane Gas Association's Motion for Summary Judgment, and Defendant City of Houston's Motion for Summary Judgment for Lack of Jurisdiction and Partial Motion for Summary Judgment. The Court has considered the above-stated motions, pleadings, evidence, Responses, and Replies and rules as follows:

It is ORDERED that Texas Propane Gas Association's Motion for Summary Judgment is denied.

It is FURTHER ORDERED that the City of Houston's Motion for Summary Judgment for Lack of Jurisdiction is denied.

It is FURTHER ORDERED that the City of Houston's Partial Motion for Summary Judgment is denied.

It is FURTHER ORDERED that all written objections to summary judgment evidence are overruled.

SIGNED this 10th day of September, 2018.

PRESIDING JUDGE
AMY CLARK MEACHUM

APPROVED AS TO FORM ONLY:

Collyn A. Peddie
Senior Assistant City Attorney
State Bar No. 15707300
Tiffany S. Bingham
Senior Assistant City Attorney
State Bar No. 24012287
City of Houston Legal Department
900 Bagby, 4th Floor
Houston, Texas 77002
Telephone: 832.393.6463
Facsimile: 832.393.6259
collyn.peddie@houstontx.gov
tiffany.bingham@houstontx.gov

Attorneys for Defendant the City of Houston

Elizabeth G. Bloch
State Bar No.: 02495500
Husch Blackwell Llp
111 Congress Avenue, Suite 1400
Austin, Texas 78701
512.472.5456 – Telephone
512.479.1101 – Facsimile
heidi.bloch@huschblackwell.com

Leonard B. Smith
Post Office Box 50003
Austin, Texas 78763-0003
512.914.3732 – Telephone
512.532.6446 – Facsimile
lsmith@leonardsmithlaw.com

Attorneys for Plaintiff Texas Propane Gas Association

Exh. B

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JULY 18, 2019

NO. 03-18-00596-CV

The City of Houston, Appellant

v.

Texas Propane Gas Association, Appellee

**APPEAL FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICES KELLY AND SMITH
REVERSED AND REMANDED -- OPINION BY JUSTICE KELLY
DISSENTING OPINION BY CHIEF JUSTICE ROSE**

This is an appeal from the interlocutory order signed by the trial court on September 10, 2018. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's interlocutory order and remands the case to the trial court so that Texas Propane Gas Association may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief. Each party shall pay the costs of appeal incurred by that party, both in this Court and in the court below.

2019 WL 3227530
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

The CITY OF HOUSTON, Appellant
v.
TEXAS PROPANE GAS ASSOCIATION, Appellee

NO. 03-18-00596-CV
|
Filed: July 18, 2019

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY, NO. D-1-GN-17-001089, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

Attorneys and Law Firms

Leonard B. Smith, Leonard Smith Law, P.O. Box 50003, Austin, TX 78763-0003, Jane M. N. Webre, Scott Douglass & McConnico LLP, 303 Colorado Street, Suite 2400, Austin, TX 78701, for Appellee.

Collyn A. Peddie, City of Houston Legal Department, 900 Bagby Street, 3rd Floor, Riffany S. Bingham, City of Houston Legal Department, 900 Bagby Street, 4th Floor, Houston, TX 77002, for Appellant.
Before Chief Justice Rose, Justices Kelly and Smith

MEMORANDUM OPINION

Chari L. Kelly, Justice

***1** The City of Houston appeals from the trial court's order denying its motion for summary judgment, in which the City asserts that the court lacks jurisdiction over claims for declaratory relief made by appellee Texas Propane Gas Association (TPGA). Because we determine that the trial court erred in concluding that TPGA met its burden to plead facts affirmatively demonstrating that it has associational standing to bring its claims, we will reverse and remand to the trial court to allow TPGA an opportunity to cure this pleading defect.

BACKGROUND

Chapter 113 of the Texas Natural Resources Code, also known as the Liquefied Petroleum Gas (LP-Gas) Code, provides that the Railroad Commission of Texas "shall administer and enforce the laws of this state and the rules and standards of the

commission relating to liquefied petroleum gas." Tex. Nat. Res. Code §§ 113.001-.011. Pursuant to its authority under the Code to "promulgate and adopt rules or standards," the Commission adopted the LP-Gas Safety Rules. *Id.* § 113.051; 16 Tex. Admin. Code §§ 9.1-.403 (Railroad Comm'n of Tex., LP-Gas Safety Rules).

In 2017 TPGA filed suit against the City challenging the legality of several "ordinances and regulations" that were passed by the Houston City Council in 2015 and which took effect in early 2016. According to its petition, TPGA is a "trade association representing a statewide membership of companies and individuals actively engaged in the liquefied petroleum gas ('LP-gas' or 'propane') industry." In general, the ordinances challenged by TPGA amended the City's Fire Code and placed new restrictions on the ability to store, use, handle, or dispense LP-Gas within the City's jurisdiction. According to TPGA, the ordinances impose more restrictive conditions on the LP-Gas industry than those imposed by the Commission's LP-Gas Safety Rules. TPGA sought a declaration that these ordinances and resulting regulations are invalid because they are pre-empted by Section 113.054 of the Texas Natural Resources Code and by the LP-Gas Safety Rules. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (Declaratory Judgments Act). In relevant part, Section 113.054 states:

> The rules and standards promulgated and adopted by the [Railroad Commission] under section 113.051 preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquified petroleum gas industry.

Tex. Nat. Res. Code § 113.054. Specifically, TPGA requested that the court declare the following:

> Those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendments of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas industry, together with Chapter 61 of the Houston Amendments of the 2012 International Fire Code itself, ... are invalid and ineffective to the extent they regulate to any aspect of the LP-Gas industry ....

In the alternative, TPGA requested declarations that certain portions of the City's regulations are invalid because they are more restrictive than the LP-Gas Safety Rules, including from Chapter 61 of the Fire Code: (1) "6101.02 relating to fees and permits, (2) "6101.2 and 6103.3 relating to aggregate water capacity of LP-Gas containers," (3) "6101.3 relating to the required submission of applications and/or construction documents," and (4) "6104.2 relating to maximum storage capacity within certain storage capacity within districts of limitation." TPGA also challenged what it contends are more restrictive provisions found in Chapter 1, entitled "Scope and Administration," generally setting out the procedural mechanisms for enforcing the Fire Code's substantive regulations.

***2** TPGA subsequently filed a traditional motion for summary judgment on its claims against the City. *See* Tex. R. Civ. P. 166a. In response, the City filed a motion for summary judgment for lack of jurisdiction and a traditional motion for partial summary judgment. The trial court denied the parties' competing motions, including the City's motion for summary judgment for lack of jurisdiction. The City timely filed its notice of interlocutory appeal from the trial court's ruling on its jurisdictional challenge.[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). In three issues, the City asserts that the trial court erred in concluding that it has subject-matter jurisdiction to consider TPGA's claims.

STANDARD OF REVIEW

Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Save Our Springs All., Inc. v. City of*

Dripping Springs, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993)). A challenge to subject-matter jurisdiction may be raised in a plea to the jurisdiction or in a motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.Wd.3d 547, 553-54 (Tex. 2000). "A summary-judgment motion challenging jurisdiction may challenge either the pleadings or the existence of jurisdictional facts." *Lazarides v. Farris*, 367 S.W.3d 788, 797 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004), and applying standard of review to denial of motion for summary judgment challenging subject-matter jurisdiction). When the movant challenges the pleadings, we determine if the plaintiff has met his burden to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Miranda*, 133 S.W.3d at 226. In conducting this review, we construe the pleadings liberally, taking them as true, and look to the pleader's intent. *Id.* (citing *Texas Ass'n of Bus.*, 852 S.W.2d at 446). If the plaintiff has not affirmatively pleaded facts to support jurisdiction or negate jurisdiction, the matter is one of pleading sufficiency, and the court should provide the plaintiff with the opportunity to amend its pleadings to cure jurisdictional issues. *Id.* at 226-27. But if the pleadings affirmatively negate the existence of jurisdiction, the motion should be granted. *Id.*

In addition, we may consider evidence that the parties presented below and must do so when necessary to resolve jurisdictional issues. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 547. When a motion for summary judgment challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 226. If a fact question is presented by the evidence regarding a jurisdictional issue, the trial court is precluded from granting summary judgment on the jurisdictional challenge. *Id.* at 227-28; *Lazarides*, 367 S.W.3d at 797. When the relevant evidence is undisputed or fails to raise a fact issue on the jurisdictional issue, the court should grant or deny the motion for summary judgment as a matter of law. *Miranda*, 133 S.W.3d at 228; *Lazarides*, 367 S.W.3d at 797.

***3** Whether a trial court has subject-matter jurisdiction is a question of law, which we review de novo. *Miranda*, 133 S.W.3d at 228. "Our ultimate inquiry is whether the particular facts presented, as determined by the foregoing review of the pleadings and any evidence, affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction." *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.).

DISCUSSION

Standing

In its first and third issues on appeal, the City contends that the trial court erred in denying its jurisdictional challenge on grounds that there is no justiciable controversy between the parties. *See Texas Quarter Horse Ass'n v. American Legion Dep't of Tex.*, 496 S.W.3d 175, 180 (Tex. App.—Austin 2016, no pet.) (referring to doctrines of ripeness, mootness, and standing as justiciability doctrines derived from Texas Constitution). Specifically, in its first issue, the City asserts that the relevant pleadings and jurisdictional evidence fail to establish that TPGA has standing to sue as an organization on behalf of its members. In its third issue, the City argues that the relevant pleadings and jurisdictional evidence fail to establish that TPGA's claims are not ripe or, alternatively, are moot. We turn first to the City's arguments with respect to standing.

"Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case." *Bland Indep. Sch. Dist*, 34 S.W.3d at 553-54. A plaintiff must demonstrate standing for each of his claims, and the court must dismiss any claim for which it lacks jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *Andrade v. NAACP*, 345 S.W.3d 1, 14 (Tex. 2011)). The general test for constitutional standing in Texas is whether there is a "real" (i.e., justiciable) controversy between the parties that will actually be resolved by the judicial declaration sought. *Texas Ass'n of Bus.*, 852 S.W.2d at 446. The requirement of standing is derived from the Texas Constitution's separation-of-powers provision, which denies the judiciary authority to decide cases in the abstract, and from the open-courts provision, which provides court access only to a "person for an injury done him." *Meyers v. JDC/Firestone*,

Ltd., 548 S.W.3d 477, 484 (Tex. 2018) (citing Tex. Const. art. I, § 13). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." *Texas Ass'n of Bus.*, 852 S.W.2d at 444.

Standing is a constitutional prerequisite to filing suit for both individuals and associations. *South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). When, as in this case, an association sues on behalf of its members, the association's standing is established by a three-prong test established by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See Texas Ass'n of Bus.*, 852 S.W.2d at 447 (adopting *Hunt* test for associational standing). Under this test, an association must demonstrate that (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members. *Id.* (quoting *Hunt*, 432 U.S. at 343). In its motion and on appeal, the City has focused its arguments on whether TPGA has adequately shown that it meets the first prong of the *Hunt* test.

***4** The purpose of the first prong is "simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id.* (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988)). An association plaintiff satisfies this prong by showing that "at least one of the organization's members has standing individually." *Save Our Springs All.*, 304 S.W.3d at 878. That is, the plaintiff must first demonstrate that at least one of its members has suffered an "injury in fact"— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " *Meyers*, 548 S.W.3d at 485 (laying out federal test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), noting similarity to elements of standing under Texas law); *see Save Our Springs All.*, 304 S.W.3d at 878, 882-84 (applying federal test under *Lujan* to analyze associational standing under first prong of *Hunt* test). Second, the plaintiff must demonstrate that the injury is fairly traceable to the challenged action and, third, is likely to be redressed by the requested relief. *Id.* When, as in this case, the suit challenges governmental action, the plaintiff must show that the injury is distinct from that sustained by the public at large. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 555-56; *Lomas*, 223 S.W.3d at 307.

In its pleadings, TPGA alleges that one of its members, Green's Blue Flame Gas Company, Inc., became involved on a project that included installation of an LP-Gas tank "to fuel buses serving the Texas Medical Center." "During the course of this project, [an inspector from the Houston Fire Marshall's Office] refused to evaluate the LP-Gas installation under the LP-Gas Safety Rules and instead imposed inapplicable and more restrictive conditions and requirements from Houston's Fire Code and the 2006 and 2012 International Fire Codes simply on the basis that the inspector 'felt' that they were 'relevant and increased public safety.' " According to TPGA's allegations, although Green's Blue Flame Gas had filed the form for installation required with the Railroad Commission, the inspector refused to issue a permit beyond 90 days and charged Green's Blue Flame Gas Company $2,180 in permitting fees. These undisputed allegations, taken as true, demonstrate that at least one member of the association has already been assessed fees for a permit that is currently required by Chapter 61 of the Houston Fire Code but not by the rules promulgated by the Railroad Commission. We conclude that TPGA has satisfied the first prong of the *Hunt* test for associational standing to the extent TPGA is challenging this permitting requirement on LP-Gas.

In its pleadings, TPGA also generally alleges that inspectors have reviewed projects involving installation of LP-Gas tanks and have issued red tags for "unspecified violations of Houston's Building Code" to unspecified persons. In one instance, a City inspector issued a "red tag" and directed a home owner to remove a propane bottle from under a mobile home, and in another instance, an inspector served a "Notice of Deficiencies" on a homeowner, a customer of a TPGA member, related to an LP-Gas tank used to fuel a pool heater. Similarly, TPGA describes an incident where another customer of a TPGA member installed "a rack housing" for LP-Gas cylinders and was later notified by an inspector that an operational permit was required based on the number and capacity of cylinders installed. In describing these instances, TPGA's pleadings fail to explain how any TPGA member, *as opposed to its customer*, has suffered an injury "fairly traceable" to enforcement of what it contends are invalid regulations on LP-Gas. *See Save Our Springs All.*, 304 S.W.3d at 878 (laying out Supreme Court's test for individual standing under first prong of test for associational standing and concluding that allegations of harm to environmental, scientific, or recreational interests of members who did not possess property interest in or in connection to real property involved in development agreements were insufficient to demonstrate injury distinct from general public). To the extent TPGA is suggesting that members will suffer an indirect economic impact as a result of regulatory burdens placed on their customers or others, TPGA has failed to sufficiently plead facts demonstrating a particularized injury from the

challenged regulations. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 929 (Tex. App.—Austin 2010, no pet.) (explaining that indirect economic injury resulting from regulations placed on plaintiff's customers is substantially more difficult to establish than direct injury and that plaintiffs claiming that challenged ordinance "discourage[ed] tourists from visiting," and thus had "chilling effect" on their businesses, failed to meet burden).

***5** Although, as previously discussed, TPGA has established that at least one of its members has suffered an "injury in fact" that is "fairly traceable" to permitting requirements imposed by the City, TPGA's challenge to the ordinances is not limited to permitting requirements. Instead, in its pleadings to the trial court, TPGA broadly requests a declaration that "those portions of the City of Houston's [ordinances] that adopted or amended [Chapter 61] or purported to otherwise regulate the LP-Gas industry, together with [Chapter 61] itself ... are invalid and ineffective to the extent they relate to any aspect of the LP-Gas industry." The City argues that because standing must be examined on a claim-by-claim basis and because the TPGA effectively seeks a declaration that all LP-Gas regulations promulgated by the City are invalid, TPGA must establish associational standing as to each regulation but has failed to do so. *See Heckman*, 369 S.W.3d at 153, 156. In response, TPGA explains that is has sufficiently established associational standing as to each of its claims because it effectively has only one claim: a declaration that the Railroad Commission's LPG Safety Rules "preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry." (Emphasis added.). In other words, in TGPA's view, its sole claim is a challenge to the City's regulation of LP-Gas as a whole, and it has sufficiently demonstrated that at least one or more of its members has suffered injury as result of that regulation.

In effect, TPGA challenges all of the City's regulations "relating to" the LP-Gas industry. Thus, to demonstrate that the first prong for associational standing has been satisfied as to TPGA's sole claim—as it has been framed by TPGA—the pleadings and evidence must demonstrate that at least one of its members has suffered a particularized injury, distinct from the general public, that is "fairly traceable" to each of the City's regulations relating to the LP-Gas industry—whatever TPGA contends those are—that the requested declaration will "redress." *See Meyers*, 548 S.W.3d at 485. Based on our review of the pleadings, liberally construed and taken as true, we cannot conclude that this burden has been satisfied.

In its pleadings, TPGA does not specifically identify for the trial court which regulations "relat[e] to" the LP-Gas industry or where those regulations are found in the City Code, other than to assert that the entirety of Chapter 61 of the Fire Code consists of impermissible regulations. Similarly, TPGA does not identify what, if anything, the City's regulations require of TPGA members and it and has not pleaded any facts demonstrating an injury from direct restrictions imposed on its members, apart from the one previously mentioned permitting requirement. Because TPGA has not identified what action or inaction is required by the regulations and from whom, we cannot evaluate whether a member of TPGA has suffered or imminently will suffer an invasion of "some 'legally protected' interest that is sufficiently unique to the member, as distinguished from the general public," as a result of the challenged regulatory scheme. *See Stop the Ordinances Please*, 306 S.W.3d at 929. Similarly, because the relief requested, on its face, does not ask the trial court to determine which regulations, if any, qualify as being sufficiently "relat[ed] to any aspect or phase of the liquefied petroleum gas industry," we cannot conclude that the relief requested by TPGA would effectively redress any injury caused by the City's regulations related to LP-Gas.

In conclusion, TPGA has failed to demonstrate the members it represents have a sufficient personal stake in the controversy such that "the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of other branches." *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 833 (Tex. App.—Austin 2010, no pet.) (citing *Save Our Springs All.*, 304 S.W.3d at 871 (concluding that association members had not established injury distinct from that of general public)). However, because this defect is a matter of pleading sufficiency, we will reverse and remand to the trial court to allow TPGA an opportunity to cure the pleading defect, unless one of the City's remaining issues requires that we reverse and render judgment in favor of the City. *See* Tex. R. App. P. 43.3. Accordingly, we turn to the City's remaining appellate issues.

Ripeness and Mootness

***6** Next, we consider the City's argument that the trial court lacks subject-matter jurisdiction because TPGA's claims are not

ripe or, alternatively, have become moot. Like standing, ripeness and mootness doctrines concern whether a justiciable controversy exists between the parties and serve to bar the court from issuing advisory opinions. *Texas Quarter Horse Ass'n*, 496 S.W.3d at 180. Under the ripeness doctrine, a court must "consider whether, at the time the lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.' " *Id.* (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000)). Conversely, the mootness doctrine applies when a justiciable controversy existed between the parties at the time the case arose, but the live controversy no long exists because of subsequent events. *Id.*

In this case, the City's mootness and ripeness theories turn on an exception to preemption found in Section 113.054. Specifically, Section 113.054, which is the basis of TPGA's preemption claim, states in relevant part:

> A political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only if the political subdivision can prove that the more restrictive rules and standards enhance public safety.

Tex. Nat. Res. Code § 113.054. According to TPGA, there is no dispute that the Railroad Commission has not adopted any formal petition process, and therefore, the City does not have any "formal opportunity to save its propane regulations and ordinances from preemption under this [exception]." In the City's view, the Court cannot enforce the alleged restrictions of Section 113.054 "without also affording the City its statutory protections." Thus, unless and until a formal petition process is implemented by the Commission, TPGA's claims are not ripe. Similarly, in the alternative, the City asserts that the summary-judgment evidence shows that it has in fact received informal permission from the Commission to continue to enforce its local ordinances and regulations related to LP-Gas. The City reasons that this evidence establishes that the statutory exception to preemption has been met and that, as a result, TPGA's claims have become moot.

The issue of whether the City has met the statutory exception under Section 113.054 by receiving permission from the Commission to promulgate the challenged ordinances and regulations is an issue to be resolved in the lawsuit and goes to the merits of TPGA's claim. To the extent the City argues that it has been effectively prevented from obtaining permission under Section 113.054 by the Commission's failure to implement a formal process, we conclude that this has no effect on the trial court's power to decide the immediate issues in this dispute: whether the challenged ordinances and regulations are preempted by Section 113.054 and, if so, whether the ordinances and regulations are excepted from preemption because the City has obtained permission from the Commission "to promulgate more restrictive rules and standards." Finally, the City's assertion that the evidence establishes that it in fact received permission from the Commission through informal measures is, in effect, an argument that the evidence establishes that it has met the statutory exception and that TPGA cannot, as a matter of law, prevail on the merits of its suit. Because the City's arguments regarding the statutory exception go to the merits of the case and not to the court's power to decide the case, the City's third issue on appeal is overruled.

Jurisdiction of Civil Courts over Penal Ordinances

Finally, we turn to the City's second appellate issue. In this issue, the City asserts that the trial court erred in denying its motion for summary judgment for lack of jurisdiction because the ordinances and regulations at issue are penal in nature and, as a result, the civil trial court does not possess jurisdiction to determine their validity.

***7** Texas courts have long recognized that the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction. *See State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 212 (Tex. App.—Austin 2017, pet. denied); *City of La Marque* v. *Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.). This constraint on civil courts is grounded in both pragmatism, i.e., a need to avoid conflicting decisions by Texas high courts in Texas's bifurcated judicial system, and in longstanding limitations imposed on equity jurisdiction and thus, the "very balance of state governmental power imposed by framers of the

Texas Constitution." *Morales*, 869 S.W.2d at 944, 947-48; *see City of New Braunfels*, 520 S.W.3d at 212; *Ryan v. Rosenthal*, 314 S.W.3d 136, 142 (Tex. App.—Houston [14th Dist.] 2010, no pet.). If the meaning and validity of a criminal statute or ordinance can be resolved in a criminal proceeding "and vested property rights are not in jeopardy," then a court of equity should not intervene. *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 804 (Tex. App.—Dallas 2014, no pet.) (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)). "A person may continue his activities until he is arrested and then procure his release by showing that the law is void." *Id.*

When a penal statute or ordinance is being enforced and the plaintiff is being prosecuted or the threat or prosecution is imminent, an equity court will not interfere with the ordinary enforcement of the statute or ordinance unless (1) the statute or ordinance is unconstitutional and (2) its enforcement will result in irreparable injury to vested property rights. *Id.* This limitation on jurisdiction applies not only in suits where the plaintiff seeks to enjoin enforcement but also in suits seeking a declaratory judgment as to the constitutionality of the statute or ordinance. *Morales*, 869 S.W.2d at 947; *Ryan*, 314 S.W.3d at 142 ("The considerations that lead courts of equity to deny injunctive relief against enforcement of the criminal laws apply with equal force to an action for a declaratory judgment construing a penal statute.").

Recently, in *City of Laredo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018), the Texas Supreme Court considered whether the civil courts had jurisdiction in a suit that challenged an ordinance prohibiting the use of certain non-compliant plastic bags by vendors. In deciding that the exercise of civil jurisdiction was proper in the suit, the court recognized that the challenged ordinance (the violation of which constituted a class C misdemeanor, punishable by a fine of up to $2,000 per violation) was penal in nature and therefore could only be enjoined or declared void if there was "a threat of irreparable injury to vested property rights." *Id.* at 592 n.28 (citing *Morales*, 869 S.W.2d at 945). The Texas Supreme Court concluded that this exception had been met, and therefore the challenge to the penal ordinance could be brought in civil court, because the ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the ban's constitutionality in defense to a criminal prosecution." *Id.* (citing *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-30 (Tex. 1894)).

Here, the dispute on appeal centers on whether the ordinances and regulations at issue are penal in nature and, if so, whether their enforcement will result in irreparable injury to vested property rights. The City argues that Sections 104 and 109 of the Fire Code, found in Chapter 1, provide the enforcement mechanism for any substantive requirements in the Fire Code, including Chapter 61, and that these provisions make clear that violations of the Fire Code are punishable as criminal offenses. In response, TPGA asserts that the challenged LP-Gas regulations are not criminal regulations because they do not, on their face, impose criminal penalties or criminalize certain conduct.

***8** Assuming without deciding, however, that the challenged ordinances and regulations are penal in nature, we conclude that the trial court did not err in determining that it has jurisdiction over TPGA's claims. Section 109.4 of the City's Fire Code provides that the doing of any act that the Fire Code declares to be unlawful, and for which no specific penalty is provided, "shall be punished by a fine of not less than $500.00 and no more than $2,000.00" and that "each day any violation of this code shall continue shall constitute a separate offense." Based on this per day-violation fine and on the Texas Supreme Court's recent decision in *City of Laredo*, we must conclude that TPGA members are "effectively preclude[d]" "from testing the ban's constitutionality in defense to a criminal prosecution." *See id.* Because there is a "threat of irreparable injury to vested property rights," TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court. *See id.* (citing *Morales*, 869 S.W.2d at 945). We overrule the City's second issue on appeal.

CONCLUSION

Because TPGA failed to plead facts affirmatively demonstrating subject-matter jurisdiction, we conclude that the trial court erred in denying the City's motion for summary judgment for lack of jurisdiction and reverse the trial court's order. We also conclude, however, that TPGA's pleadings do not affirmatively negate the existence of subject-matter jurisdiction. Accordingly, we remand this cause so that TPGA may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief.

Dissenting Opinion by Chief Justice Rose

DISSENTING OPINION

Jeff Rose, Chief Justice

I respectfully dissent because the majority's decision imposes unreasonable obstacles to associational standing.

Under the first prong of the *Hunt* test, an association has standing to sue on behalf of its members when " 'its members would otherwise have standing to sue in their own right." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (adopting standard for associational standing articulated in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)). The purpose of this requirement "is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988). The Texas Supreme Court has warned that "[t]his requirement should not be interpreted to impose unreasonable obstacles to associational representation." *Id.*

With little analysis and no citation to supporting authority, the majority holds that an association asserting a preemption challenge to a regulatory scheme that undeniably relates to its members' industry "must demonstrate that at least one of its members has suffered a particularized injury, distinct from the general public, that is 'fairly traceable' to each of the City's regulations relating to the LP-Gas industry—whatever TPGA contends those are—that the requested declaration will 'redress.' " *Ante* at p. 10 (citing *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (describing general standing principals). But *Meyers* does not support such a restrictive interpretation of the first prong of the *Hunt* test—it held that an individual, not an association, lacked standing to sue because the relief requested would not remedy the individual's alleged injury. *See Meyers*, 548 S.W.3d at 487–89. More importantly, the majority's interpretation here does exactly what the supreme court has warned against and is contrary to the purpose of associational standing. *See Texas Ass'n of Bus.*, 852 S.W.2d at 447.

Applying the first prong of *Hunt* as directed by the supreme court, I would hold that TPGA has satisfied its burden of showing that its members have standing to sue in their own right. TPGA's suit asserts a preemption challenge to the City's authority to promulgate ordinances regulating the LP-gas industry. Specifically, TGPA claims that "under § 113.054, the LP-Gas Safety Rules adopted by the [Railroad] Commission preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of the state relating to any aspect or phase of the liquefied petroleum gas industry." *See* Tex. Const. art. XI, § 5 (mandating that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"); Tex. Nat. Res. Code § 113.054 (providing that Railroad Commission rules "preempt and supersede any" local ordinance "relating to any aspect or phase of the" LP-gas industry). TPGA makes additional allegations regarding specific City of Houston ordinances, but those allegations stem from and are resolved by TPGA's foundational claim that section 113.054 preempts all local attempts to regulate the LP-gas industry. As TPGA notes in its briefs to this Court, "Whether Houston has one such regulation or one thousand, [section] 113.054 preempts them all as a matter of law."

In support of its standing to bring this preemption claim and pursue the relief it seeks, TPGA alleges, and supports with affidavits, that it is a trade association representing a statewide membership of companies and individuals actively engaged in the LP-gas industry, and that its members have suffered adverse action and consequences as a result of the enforcement of the City's ordinances regulating the LP-gas industry. Thus, on the record before us, TPGA has satisfied the first prong of the

Hunt test. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) (holding that association's members would have standing to sue in their own right, and thus association had standing, despite the lack of evidence showing injury to specific members because the court could "fairly assume the existence of such members" based on the nature and size of the association); *Texas Ass'n of Bus.*, 852 S.W.2d at 440 (applying first prong and holding that it was satisfied that association had not "manufactured this lawsuit" because association's members had been assessed administrative penalties pursuant to the challenged enactments and members remained at risk of penalty under same enactments). Accordingly, I would affirm the district court's order overruling the City's plea to the jurisdiction.[1]

All Citations

Not Reported in S.W. Rptr., 2019 WL 3227530

Footnotes

1 Generally, appeals may only be taken from final judgments and certain appealable interlocutory orders. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see* Tex. Civ. Prac. & Rem. Code § 51.014 (listing appealable interlocutory orders). Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code provides for an interlocutory appeal from a grant or denial of a plea to the jurisdiction filed by a governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The Texas Supreme Court has construed the phrase "plea to the jurisdiction" in Section 51.014(a)(8) to mean a challenge to jurisdiction, "irrespective of the procedural vehicle used." *Thomas v. Long*, 207 S.W.3d 334, 349 (Tex. 2006); *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000) (recognizing that subject-matter jurisdiction may be challenged by motion for summary judgment). Here, the City brought its jurisdictional challenge in a motion for summary judgment, which the trial court expressly denied. As a result, we have jurisdiction to consider this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

1 I agree with the majority's conclusions that none of the City's other issues merit reversal.

Exh. C

Sec. 21-162. - Registration required; penalty.

(a) It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility.

(b) It is an affirmative defense to prosecution under this section with respect to gasoline dispensing sites that the premises has dispensed less than 10,000 gallons per month in each calendar month beginning with January 1, 1991. Any site that exceeded 10,000 gallons in January of 1991 or that has exceeded 10,000 gallons in any ensuing month is not subject to this affirmative defense.

(c) Violation of this section shall be punishable upon first conviction by a fine of not less than $250.00 nor more than $1,000.00. If the violator has been previously convicted under this section, a violation of this section shall be punishable by a fine of not less than $1,000.00 nor more than $2,000.00.

(d) Each day that any violation under this section continues shall constitute a separate offense.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 93-460, § 2, 4-21-93; Ord. No. 07-208, § 3, 2-14-07)

Editor's note— For any facility that does not have a valid registration issued under Division 2 of Article VI of Chapter 21 of the Code of Ordinances, Houston, Texas, and is required to be registered by Division 2 of Article VI of Chapter 2 of the Code of Ordinances, Houston, Texas, as amended by Ord. No. 2007-208, the effective date of Section 21-162 shall be July 1, 2007.

Sec. 29-82. - Revocation and expiration of license.

(a) A manufactured home park operator's license may be revoked if the licensee interferes with lawful inspection of the park or if there are uncorrected, repeated or serious violations of any applicable provision of the ordinances of the city or laws of the State of Texas.

(b) Upon information that grounds for revocation may exist, the building official shall cause an investigation of the facts to be conducted. If he determines that a reasonable probability of grounds for revocation exists, he shall schedule a hearing thereupon to be conducted before the building official or such other person as he may designate as a hearing examiner therefor. The building official shall not designate any person who participated in the active conduct of the investigation as the hearing examiner. Written notice of the date, time and place of the hearing shall be given to the licensee or his designated agent by certified United States mail, postage prepaid, return receipt requested, addressed to the address set forth in the application. Such notice shall be mailed at least ten days prior to the date of the hearing, shall set forth the grounds upon which revocation will be sought in sufficient detail to advise the licensee thereof and shall advise the licensee of his right to be present in person and through counsel to present evidence and cross examine witnesses appearing at such hearing.

(c) The burden of proof at such hearing shall be upon the city. If the building official determines that grounds for revocation exist, he shall order the manufactured home park operator's license revoked by written decision. Such decision may be appealed as provided in section 29-126 of this Code.

(d) After a manufactured home park operator's license has expired, or if a manufactured home park operator's license has been revoked, notice shall be given by the city to the occupants to vacate the premises within a period of 30 days and to remove their manufactured homes therefrom. Failure of any such occupant to comply therewith shall constitute a misdemeanor.

(e) Nothing contained in this section shall be construed to prevent the city from ordering the immediate evacuation or closure of any manufactured home park to the extent permitted by law in the event of imminent or extreme hazard to human life or property.

(Ord. No. 85-498, § 1, 4-10-85; Ord. No. 90-635, § 57, 5-23-90; Ord. No. 94-1268, §§ 14, 15, 11-22-94)

Sec. 29-123. - Fuel supply and storage.

(a) Liquefied petroleum gas containers installed on a manufactured home site shall be securely, but not permanently, fastened to prevent accidental overturning. Such containers shall not be less than five water gallon or more than 25 water gallon capacity.

(b) No liquefied petroleum gas vessel shall be stored or located inside or beneath any storage cabinet, carport, manufactured home, or any other structure. All installations must conform to state and city regulations.

(Ord. No. 85-498, § 1, 4-10-85)