

CAUSE NO. \_\_\_\_\_

**STEVE EVERT, OWNER OF PROPERTY  
AND MARIE HYER, D/B/A MARIE'S  
ALBATROSS; SANDRA BLUHM, D/B/A  
SANDY'S COUNTRY STORE; ROSITA  
R. CALIBUSO D/B/A ROSIE'S  
OFFSHORE; ANGIE LOPEZ D/B/A  
ANGIE'S PLACE; B. A. EVERTS,  
OWNER OF PROPERTIES FOR  
ANGIE'S PLACE; BOBBIES HOUSE  
OF SPRITS; HARD TIMES &  
MISERY SALOON; LAST CALL;  
SANDY'S COUNTRY STORE & MIKE'S  
PLACE; ABRAHAM A. COX D/B/A  
CAPTAIN JACK'S BEACH BAR;  
JUDITH KENNEY D/B/A MY PLACE  
AND AS OWNER OF THE PROPERTY;  
LARRY AND TIKIE KIRTICOS,  
OWNERS OF OLYMPIA GRILL;  
RAY SMITH, D/B/A HARD TIMES &  
MISERY SALOON; MICHAEL THOMAS  
D/B/A WOODY'S; MARGARET THOMAS  
D/B/A MS. MARGARET'S CLUB;  
EDWARD STANZA, D/B/A CLUB GROVE;  
AND BOB WALKER, D/B/A PIER  
CLUB, AND CLUB 23 AND OWNER  
OF THE PROPERTIES AND D/B/A  
TONY'S LAZY LOUNGE;**

IN THE \_\_\_\_\_

V.

JUDICIAL DISTRICT COURT

**CITY OF GALVESTON, TEXAS,  
MAYOR LYDA ANN THOMAS,  
INDIVIDUALLY AND IN HER  
OFFICIAL CAPACITY;  
TARRIS WOODS, INDIVIDUALLY AND  
IN HIS OFFICIAL CAPACITY;  
DR. LINDA COLBERT, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
ELIZABETH BEETON, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;**

**SUSAN FENNEWALD**, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
**KAREN MAHONEY**, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
**DANNY WEBER**, INDIVIDUALLY AND  
IN HIS OFFICIAL CAPACITY

GALVESTON COUNTY, TEXAS

PLAINTIFFS' ORIGINAL PETITION, REQUEST FOR DECLARATORY JUDGMENT,  
TEMPORARY INJUNCTION PENDING FINAL TRIAL,  
AND FOR PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

This lawsuit is brought by the Steve Evert, owner of property and Marie Hyer (bar owner), d/b/a Marie's Albatross; Sandra Bluhm, d/b/a Sandy's Country Store; Rosita R. Calibuso d/b/a Rosie's Offshore; Angie Lopez d/b/a Angie's Place; B. A. Everts, owner of properties for Angie's Place, Bobbies House of Sprints, Hard Times & Misery Saloon, Last Call, Sandy's Country Store and Mike's Place; Abraham A. Cox d/b/a Captain Jack's Beach Bar; Judith Kenney d/b/a My Place and Larry and Kikie Kirticos, Owners of Olympia Grill; Ray Smith, d/b/a Hard Times & Misery Saloon; Michael Thomas d/b/a Woody's; Margaret Thomas d/b/a Ms. Margaret's Club; Edward Stanza, d/b/a Club Grove; Bob Walker, d/b/a Pier Club, and Club 23 and owner of the properties, and d/b/a Tony's Lazy Lounge; and Galveston Bar and Tavern Association, hereinafter and sometimes referred to as Plaintiffs, bring this action against The City of Galveston, Mayor Lyda Ann Thomas, Individually and in her Official Capacity, Tarris Woods, Individually and in his Official

Capacity, Dr. Linda Colbert, Individually and in her Official Capacity, Elizabeth Beeton, Individually and in her Official Capacity, Susan Fennewald, Individually and in her Official Capacity, Karen Mahoney, Individually and in her Official Capacity, and Danny Weber, Individually and in his Official Capacity, hereinafter and sometimes referred to as Defendants, for violations of Plaintiffs' rights under Texas law.

Plaintiffs would show unto the Court as follows:

I.

This matter is a Schedule 3 matter as that is defined under Texas law, Rule 190.4, Texas Rules of Civil Procedure.

II.

Parties, Venue and Jurisdiction

Steve Evert at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Marie Hyer at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Sandra Bluhm at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Rosita R. Calibuso at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

B. A. Everts at all times material to this action has done business in the City of Galveston, Texas, and such businesses and properties lie within the confines of the City.

Abraham A. Cox at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Judith Kenney at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Larry Kirticos and Tokie Kirticos at all times material to this action have done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Ray Smith at all times material to this action has done business in the City of Galveston, Texas,, and such business lies within the confines of the City;

Michael Thomas at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Margaret Thomas at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Edward Stanza at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Bob Walker at all times material to this action has done business in the City of Galveston, Texas, and such business lies within the confines of the City.

Defendant, City of Galveston, is a municipal corporation, as that term is defined under Texas law, and may be served by serving the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Lyda Ann Thomas, is the Mayor for the City of Galveston, Texas, and is sued in her individually and in her official capacity, and may be served by serving her through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Tarris Woods, is the City Councilmember for District 1, is sued individually and in his official capacity, and may be served by serving him through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Dr. Linda Colbert, is the City Councilmember for District 2, is sued individually and in her official capacity, and may be served through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Elizabeth Beeton, is the City Councilmember for District 3, is sued individually and in her official capacity, and may be served through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Susan Fennewald, is the City Councilmember for District 4, is sued individually and in her official capacity, and may be served through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Danny Weber, is the City Councilmember for District 5, is sued individually and in his official capacity, and may be served through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

Defendant, Karen Mahoney, is the City Councilmember for District 6, is sued individually and in her official capacity, and may be served through the City Secretary, City of Galveston, City Hall, 823 Rosenberg, Galveston, Texas.

The City Councilmembers mentioned above cast votes that violated the rights of Plaintiffs and any declaratory judgment should be directed against Defendants.

III.

Underlying Facts

On or about December 10, 2009, the City of Galveston passed an amended smoking ordinance (a copy of the Amended Ordinance is included under **attachment 1** herein; Chapter 11.5, Galveston Code of Ordinances, entitled Clean Air: Smoking in Public Places). The Ordinance in its original form was passed by City Council on July 24, 2009 (the original Ordinance is included under **attachment 2**). The amendment to the Ordinance was passed by a vote of 5-1, with Councilmember Fennenwald absent from the meeting and with Thomas, Woods, Colbert, Beeton and Mahoney voting for the subject amendment. The amendment and vote of Council did not properly take into consideration the rights of Plaintiffs.

On November 11, 2009, Plaintiffs requested that the City of Galveston reconsider their Smoking Ordinance and make modification to it.

IV.

Takings Impact Assessment Request

On October 7, 2009, Plaintiffs requested that Defendants undertake a Takings Impact Assessment consistent with the requirements imposed by Texas law. This request was renewed by letter to City Council on November 11, 2009. The request was

directed to a then existing City Ordinance No. 09-044, which was passed on July of 2009 (Smoking Ordinance).

Plaintiffs submitted that the ordinance had a profound effect on private real property owners of bars and taverns and it restricted an owner's right to the property that would otherwise exist in the absence of the passage of the Ordinance (Tex. Gov't Code §2007.002 (4) (defining private real property); (5(B) (defining what "taking" means)). In addition, Plaintiffs brought to the Defendants attention that Texas law requires a takings analysis be performed by the City before the passage of any such ordinance.

The City refused to conduct the takings analysis and took the position that the language did not apply to its actions.

V.

The Applicable Law - Declaratory Judgment

Section 2007.002, Texas Gov't Code, defines "taking" as

(A) A governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth And Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or

(B) a governmental action that:

(i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property



that would otherwise exist in the absence of the governmental action; and

(ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Section 2007.003 (a) (1) makes clear that the adoption or the issuances of an ordinance, rule, regulatory requirement, resolution, policy, guidelines, or similar measure is deemed a governmental action. Section 2007.003 (a) (2) provides that the Act applies to "an action of a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality."

The Texas Local Government Code defines the purpose of extraterritorial jurisdiction in the following manner: "to promote and protect the general health, safety, and welfare of

persons residing **in and adjacent to the** municipalities." Tex. Local Gov't Code § 42.001 (emphasis added).<sup>1</sup>

Subsection (a) (4) of 2007.003, Tex. Gov.t Code, provides that the application of subsection (a) (3) also requires that the governmental entity enforce the ordinance, rule, regulation or plan. The enforcement can take place by permitting,

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<sup>1</sup> The purpose of extraterritorial jurisdiction is "to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities." Tex. Local Gov't Code § 42.001.

The extent of jurisdiction is defined by the Texas Local Gov't Code as follows:

§ 42.021. Extent of Extraterritorial Jurisdiction

(a) The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located:

(1) within one-half mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants;

(2) within one mile of those boundaries, in the case of a municipality with 5,000 to 24,999 inhabitants;

(3) within two miles of those boundaries, in the case of a municipality with 25,000 to 49,999 inhabitants;

(4) within 3-1/2 miles of those boundaries, in the case of a municipality with 50,000 to 99,999 inhabitants; or

(5) within five miles of those boundaries, in the case of a municipality with 100,000 or more inhabitants.

(b) Regardless of Subsection (a), the extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located within five miles of those boundaries on the barrier island if the municipality has:

(1) a population of 2,000 or more; and

(2) territory located:

(A) entirely on a barrier island in the Gulf of Mexico; and

(B) within 30 miles of an international border.

citations, orders, judicial or quasi-judicial proceedings or similar means.

The City refused the Takings Impact Assessment, relying on language contained in the statute which reads, "This chapter does not apply to the following governmental action: (1) an action by a municipality except as provided by Subsection (a)(3) (Section 2007.003 (b) (1)). The City ignored that the exclusionary language points back to subsection (a) (3). With respect to the real property owners listed in this Petition, a Takings Impact Assessment is required and compelled under Texas Private Real Property Rights Preservation Act guidelines.

The subject Ordinance went into affect on January 1, 2010, and amends and repeals existing Chapter 11.5, Ordinance No. 88-99. Defendant Council members ignored Texas law, performed no takings analysis, and applied the law to Plaintiffs without regards to their rights to such analysis. The Chief of Police for the City of Galveston has made clear in public pronouncements that the City intends to enforce the Ordinance.

## VI.

The Court is requested to declare the rights of the Parties and declare that Section 2007.002, et seq. applies to the smoking ordinance. The Court is also requested to temporarily enjoin, pending a final trial, the enforcement of the Ordinance

until the City undertakes a Takings Impact Assessment of each owner's land and the land of those similarly situated. The City cannot willfully violate the provisions of Texas law in the passage of the Ordinance and then enforce the provisions of the Ordinance.

The Ordinance in question applies to the Plaintiffs, who have no adequate remedy at all and as such the Ordinance should be declared void for the City's failure to undertake a Takings Impact Assessment prior to the effective date of the Ordinance. Plaintiffs request that this Court grant a temporary injunction pending final trial and restrict Defendants from taking action to enforce the subject ordinance.<sup>2</sup>

#### VII.

#### Equal Protection and Due Process, Takings, Overbroad and Vague with Respect to its Intended Purposes

It is Plaintiffs' position that the Ordinance also suffers from other problems - the ordinance ,as written, favors others with the privilege and right to allow smoking, thus working to deprive the Plaintiffs of equal protection of the

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<sup>2</sup> The question of whether a compensable taking has occurred is a question of law, not a question of fact (*The City of San Antonio v. El Dorado Amusement Company, Inc.*, 195 S.W.3d 238, LEXIS 1179 (Tex. 2006); motion for rehearing denied, LEXIS 523 (Tex. 2007)).

law;<sup>3</sup> the ordinance works as a takings to non-property owners and deprives them of their business model; the Ordinance is overbroad and vague with respect to its intended purpose.

The City's action amounts to a takings in that the regulations as promulgated are unreasonable in scope and have deprived Plaintiffs non-property owners of their business model.

VIII.

PRAYER FOR RELIEF

It is prayed that this Court conduct a hearing after notice and answer and grant a temporary injunction pending final trial. It is requested that the Court enjoin the Defendants in the following respects, to-wit:

- Enjoin enforcement of the Ordinance until the City undertakes a Takings Impact Assessment of each owners' land and the land of those similarly situated;
- Enjoin enforcement of the Ordinance until final trial.

Upon final trial, the Court is requested to declare the Ordinance overbroad and vague, in violation of Plaintiffs' equal protection rights, and for damages.

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<sup>3</sup> In context of equal protection (directed to property owners), the Ordinance allows smoking in hotels and places of accommodation in the City of Galveston, nursing homes, and a tobacco venue. Section 2007.003(a)(3), Tex. Gov't Code, provides for the application of the ordinance where the ordinance does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction or the municipality. It is nonsensical to apply the ordinance to bars, taverns and businesses on the Island but exempt hotels, motels, nursing homes and tobacco venues. Plaintiffs, real property owners, contend that their equal protection rights have been violated and seek damages for same.

Plaintiffs' pray for pre-judgment and post-judgment interest.

Plaintiffs' pray for costs of court, reasonable and necessary attorneys' fees, and all matter under law and equity to which Plaintiffs may be entitled.

DATE: February 18, 2010.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CAUSE NO. \_\_\_\_\_

**STEVE EVERT, OWNER OF PROPERTY AND MARIE HYER, D/B/A MARIE'S ALBATROSS; SANDRA BLUHM, D/B/A SANDY'S COUNTRY STORE; ROSITA R. CALIBUSO D/B/A ROSIE'S OFFSHORE; ANGIE LOPEZ D/B/A ANGIE'S PLACE; B. A. EVERTS, OWNER OF PROPERTIES FOR ANGIE'S PLACE; BOBBIES HOUSE OF SPRITS; HARD TIMES & MISERY SALOON; LAST CALL; SANDY'S COUNTRY STORE & MIKE'S PLACE; ABRAHAM A. COX D/B/A CAPTAIN JACK'S BEACH BAR; JUDITH KENNEY D/B/A MY PLACE AND AS OWNER OF THE PROPERTY; LARRY AND TIKIE KIRTICOS, OWNERS OF OLYMPIA GRILL; RAY SMITH, D/B/A HARD TIMES & MISERY SALOON; MICHAEL THOMAS D/B/A WOODY'S; MARGARET THOMAS D/B/A MS. MARGARET'S CLUB; EDWARD STANZA, D/B/A CLUB GROVE; AND BOB WALKER, D/B/A PIER CLUB, AND CLUB 23 AND OWNER OF THE PROPERTIES, AND D/B/A TONY'S LAZY LOUNGE;**

IN THE \_\_\_\_\_

V.

JUDICIAL DISTRICT COURT

CITY OF GALVESTON, TEXAS,  
MAYOR LYDA ANN THOMAS,  
INDIVIDUALLY AND IN HER  
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TARRIS WOODS, INDIVIDUALLY AND  
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DR. LINDA COLBERT, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
ELIZABETH BEETON, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
SUSAN FENNEWALD, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;

KAREN MAHONEY, INDIVIDUALLY  
AND IN HER OFFICIAL CAPACITY;  
DANNY WEBER, INDIVIDUALLY AND  
IN HIS OFFICIAL CAPACITY

GALVESTON COUNTY, TEXAS

FIAT

This matter is set for a temporary injunction hearing on  
the \_\_\_ day of \_\_\_\_\_, 2010, at \_\_\_ o'clock  
\_\_\_\_.m., in the \_\_\_\_ Judicial District Court, Galveston, Texas.

SIGNED AND ENTERED on this the \_\_\_ day of

\_\_\_\_\_ ,

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JUDGE PRESIDING