

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

MERGER THREE, LLC and
VOODOO HUT, LLC;

Plaintiffs,

v.

CITY OF KEMAH, TEXAS,

Defendant.

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Civil Action No. 3:24-cv-00173

JURY TRIAL DEMANDED

**PLAINTIFFS' ORIGINAL COMPLAINT AND APPLICATION FOR
TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION,
AND PERMANENT INJUNCTION**

TO THE HONORABLE JEFFREY V. BROWN,
UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiffs MERGER THREE, LLC and VODOO HUT, LLC and file this their *Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction* against Defendant CITY OF KEMAH, TEXAS, and in support would respectfully show the Court as follows:

I.
INTRODUCTION

1. This case arises from the City of Kemah's unlawful closure of a city street abutting Plaintiffs' land on which they operate a restaurant and bar called The Voodoo Hut, located on 6th Street in the heart of Kemah's Lighthouse District. On April 3, 2024, Kemah passed Resolution No. 2024-10, which, *inter alia*, closes 6th Street between Bradford Ave. and Kipp Ave to all vehicular traffic, except emergency

vehicles. In Texas, general-law municipalities, like Kemah, have no power to close a city street unless all abutting landowners submit a petition requesting closure of the street. See TEX. TRANSP. CODE § 311.008 (“The governing body of a general-law municipality by ordinance may vacate, abandon, or close a street or alley of the municipality **if a petition signed by all the owners of real property abutting the street or alley is submitted to the governing body.**”) TEX. TRANSP. CODE § 311.008. Because a “a petition signed by all the owners of real property abutting [6th] street” has *not* been submitted to Kemah City Council, Kemah has no power to close the street as matter of law. The Court should therefore declare the City’s action void and enjoin the City from closing the street.

2. Moreover, the City’s actions constitute a taking of Plaintiffs’ property without just compensation in violation of the United States and Texas Constitutions. In the event and to the extent the City of Kemah is permitted to close 6th Street or otherwise substantially and materially impair Plaintiffs’ right of access to 6th Street and Bradford Street, Plaintiffs are entitled to recover, *inter alia*, lost profits and just compensation for the diminution of their property value resulting therefrom. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *Padilla v. Metro. Transit Auth. of Harris County.*, 497 S.W.3d 78, 84 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“To obtain compensation for impairment of access, a plaintiff must establish that the governmental entity materially and substantially impaired access rights to his property.”).

II. PARTIES

3. Plaintiff MERGER THREE, LLC (hereinafter referred to as “Merger Three”) is a Texas limited liability company.

4. Plaintiff VODOO HUT, LLC (hereinafter referred to as “Voodoo Hut”) is a Texas limited liability company.

5. Defendant CITY OF KEMAH, TEXAS (herein after referred to as “Kemah”) is a Type A General Law municipality in Galveston County, Texas.¹ The City of Kemah may be served with process through its mayor, Robin Collins, at 1401 Highway 146, Kemah, Texas 77565.

III. JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this is a civil matter arising under the Constitution and laws of the United States, and to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity that the Constitution secures to the People.

7. This Court also has supplemental jurisdiction of Plaintiffs’ related claims under state law. 28 U.S.C. § 1367.

8. Plaintiffs’ claims for declaratory and injunctive relief are authorized under 28 U.S.C. § 2201, Rules 57 and 65 of the Federal Rules of Civil Procedure.

¹ See <https://www.kemahtx.gov/575/Kemahs-Form-of-Government>.

9. Venue of this case is proper in this District and Division, pursuant to 28 U.S.C. § 1391(b), because the City of Kemah and Plaintiff's property are located within the United States District Court for the Southern District of Texas, Galveston Division.

IV. FACTUAL BACKGROUND

10. In 2016, Plaintiff Merger Three, LLC began acquiring parcels of land at and near the corner of 6th Street and Bradford Street in Kemah, Texas to open a restaurant and bar that would later be called Voodoo Hut. Merger Three specifically chose this site because of its desirable, hard-corner location with ample parking on 6th Street in the heart of Kemah's popular Lighthouse District.

11. Plaintiff completed the land assemblage in 2017, acquiring six separate parcels totaling approximately 0.67 acres of land. Plaintiff also purchased the right to use 17 parking spaces in front of the Property on 6th Street and Bradford St.²

12. Merger Three spent several million dollars substantial improvements to the Property to build the restaurant and bar that would later be called Voodoo Hut.

13. From 2017 to the present, Plaintiff Voodoo Hut, LLC has continuously operated a restaurant and bar on the Property.

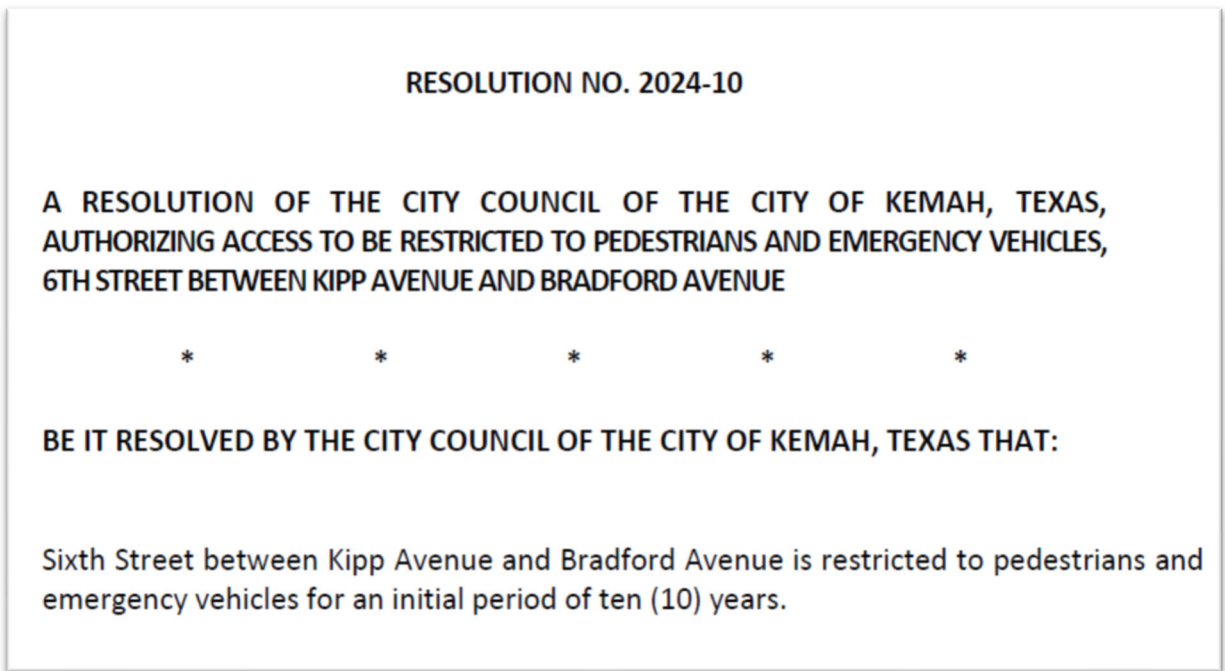
14. On February 27, 2024, Kemah City Council held a "workshop townhall meeting" to discuss "a Traffic Plan for 6th Street, 7th Street, and Lighthouse District." During the townhall meeting, the City Administrator displayed the plan and explained that it has "6th Street between Bradford and Kipp being closed off..."³ The

² In or around 1990, the previous owner purchased the 17 parking spaces on 6th Street and Bradford Ave. from the City of Kemah for \$750 per space.

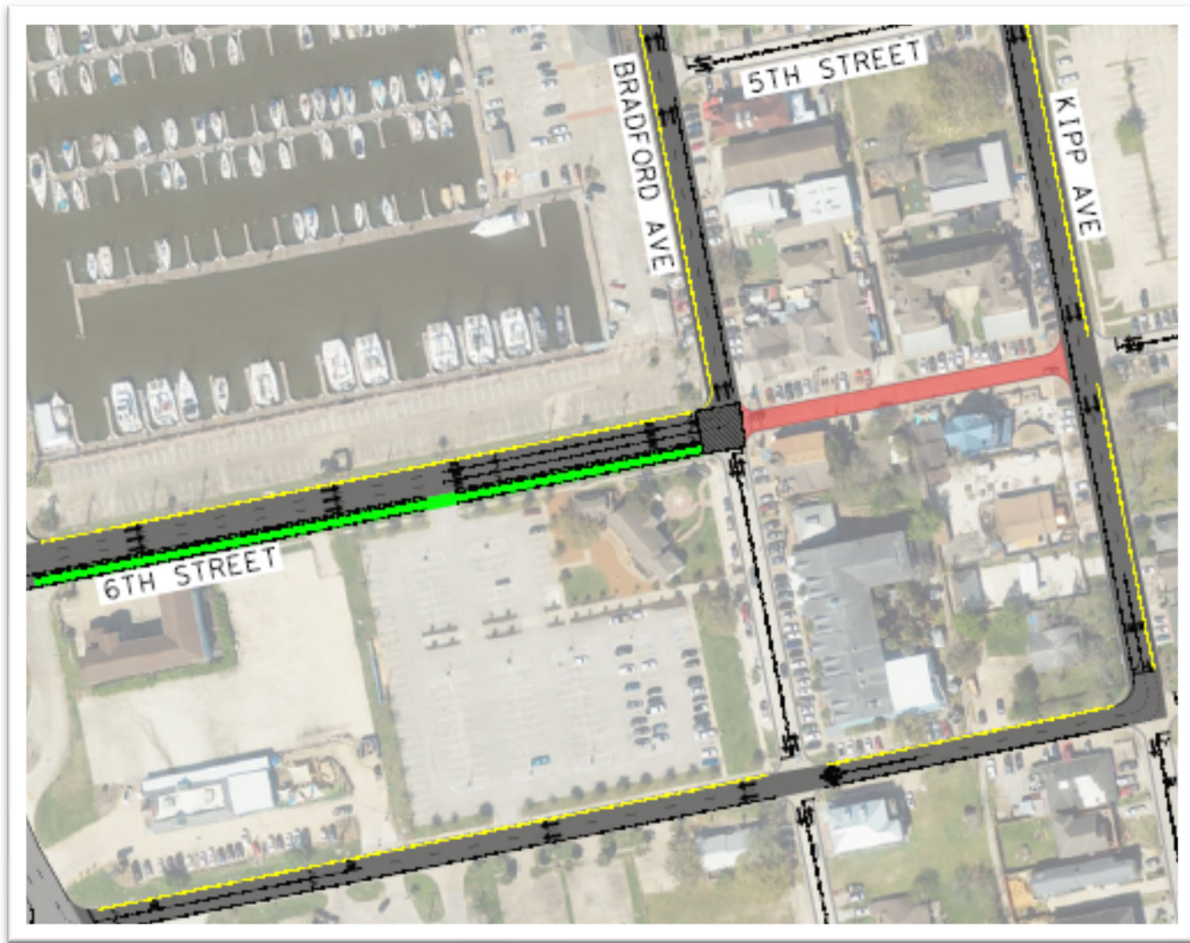
³ Kemah City Council Workshop Town Hall Meeting at 00:04:30
(https://kemah-tx.granicus.com/player/clip/67?view_id=1&redirect=true)

councilmembers repeatedly confirmed that 6th Street would be “closed” under the proposed plan.

15. On April 3, 2024, the City of Kemah passed Resolution Number 2024-10, which states as follows:



16. To implement Resolution No. 2024-10, Kemah intends to install bollards and other obstructions to fully close off all vehicular access to 6th Street on the block between Bradford Ave. and Kipp Ave., as depicted below in red:



17. Additionally, Kemah plans to install traffic signs requiring vehicles to turn left or right at the intersection of 6th Street and Bradford Ave., as illustrated below:



19. On May 29, 2024, Kemah Community Development Corporation held a board meeting to Authorize an Economic Development Project – Lighthouse District Streetscape Project and 6th Street Pavilion. The board approved the Lighthouse

District Streetscape Project and 6th Street Pavilion, which will close 6th Street to all vehicular traffic except emergency vehicles and will remove all parking spaces abutting Plaintiffs' property along 6th Street and Bradford Ave, including Plaintiffs' curb cut on 6th Street. The latest rendition of the project is depicted below:



20. Plaintiffs' counsel conferred with Kemah's City Attorney to discuss whether the city would consider any alternative plans for 6th Street, such as keeping one lane open for vehicular traffic. Unfortunately, the City of Kemah is unwilling to consider anything less than the total closure of 6th Street to all vehicular traffic (except emergency vehicles).

21. Accordingly, it has become necessary to bring this action to enjoin the City of Kemah from unlawfully closing 6th Street in violation of TEX. TRANSP. CODE §

311.008; and/or, *in the alternative*, to recover just compensation and damages for the City's taking of Plaintiffs' private property in violation of the United States and Texas Constitutions.

V.
CAUSES OF ACTION

COUNT ONE: *DECLARATORY JUDGMENT*

22. Plaintiffs incorporate by reference the foregoing paragraphs and set forth verbatim herein as allowed by Fed. R. Civ. P. 10(c).

23. Pursuant to 28 U.S.C. § 2201 and the TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, a person whose rights, status, or other legal relations are affected by a statute or municipal ordinance may have determined any question of construction or validity arising under the statute or ordinance, and may obtain a declaration of rights, status, or other legal relations thereunder.

24. In the case at bar, an actual controversy has arisen and now exists between Plaintiffs and Defendant as to whether Resolution 2024-10 is valid and enforceable. Resolution 2024-10 provides, to-wit:

RESOLUTION NO. 2024-10

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KEMAH, TEXAS,
AUTHORIZING ACCESS TO BE RESTRICTED TO PEDESTRIANS AND EMERGENCY VEHICLES,
6TH STREET BETWEEN KIPP AVENUE AND BRADFORD AVENUE

* * * * *

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF KEMAH, TEXAS THAT:

Sixth Street between Kipp Avenue and Bradford Avenue is restricted to pedestrians and emergency vehicles for an initial period of ten (10) years.

25. Kemah had no power to pass Resolution 2024-10. As previously noted, *supra* at ¶ 5, Kemah is a Type A General-Law municipality. Pursuant to TEX. TRANSP. CODE § 311.008, “A general law city may vacate, abandon, or close a street by ordinance, **if a petition signed by all of the owners of the property abutting the street is presented to the city council.**” If a general law city—like Kemah—passes an ordinance closing a street without first obtaining unanimous consent of all abutting landowners, the ordinance is void as a matter of law. *See Town of Palm Valley v. Johnson*, 17 S.W.3d 281, 287 (Tex. App.—Corpus Christi—Edinburg 2000, pet. denied) (“Palm Valley’s action purportedly closing or vacating a portion of Lemon Drive was taken without Johnson’s consent and is therefore void.”).

26. In the case at bar, Kemah has not been presented with a petition signed by all the owners of the property abutting the section of 6th Street being closed.

Further, Kemah has made no attempt whatsoever to get Plaintiffs' consent to close 6th Street. Resolution 2024-10 is therefore void as a matter of law.

27. Plaintiffs request that the Court declare Kemah Resolution No. 2024-10 void, both on its face and as applied to Plaintiffs' Property.

**COUNT TWO: UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY
IN VIOLATION OF THE UNITED STATES CONSTITUTION**

28. Plaintiffs incorporate by reference the foregoing paragraphs and set forth verbatim herein as allowed by Fed. R. Civ. P. 10(c).

29. Plaintiffs assert claims against the City of Kemah for unconstitutional takings in violation of the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

30. Pursuant to 42 U.S.C. § 1983, a person who, acting under color of law, subjects or causes any citizen to be subjected to the deprivation of any rights, privileges, or immunities secured by the United States Constitution, shall be liable to the party injured in an action at law.

31. The Fifth Amendment provides that “nor shall private property be taken for public use, without just compensation.” U.S. CONST. AMEND. V. Under the Supreme Court’s decision in *Knick*, “there is ‘no magic formula’ to determine ‘whether a given government interference with property is a taking.’” *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2187 (2019) (citation omitted). Takings claims involve several fundamental concepts.

32. In *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965), the Texas Supreme Court stated, “It is the settled rule in this state that an abutting property

owner possesses an easement of access which is a property right; that this easement is not limited to a right of access to the system of public roads; and that diminishment in the value of property resulting from a loss of access constitutes damage.”

33. By passing Resolution 2024-10, the City of Kemah, acting under color of law by and through its City Council, has both physically and inversely taken and deprived Plaintiffs of their rights, privileges, and immunities as secured by the Fifth and Fourteenth Amendments of the United States Constitution.

34. Plaintiffs are therefore entitled to just compensation, attorney’s fees and costs under 42 U.S.C. §§ 1983, 1988.

COUNT THREE: UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY IN VIOLATION OF THE TEXAS CONSTITUTION

35. Plaintiffs incorporate by reference the foregoing paragraphs and set forth verbatim herein as allowed by Fed. R. Civ. P. 10(c).

36. Plaintiffs assert claims against the City of Kemah for unconstitutional takings pursuant to the Texas Constitution, Article I, §§ 13, 17, and 19.

37. First, the validity of the law or decree that effects the taking is not the focal point. Rather, the point is “to secure compensation in the event of otherwise proper interference....” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Second, there must be a balance between “the individual’s right to retain the interests and exercise the freedoms at the core of private property ownership” and the “government’s well-established power to adjust rights for the public good.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (cleaned-up). Third, “[i]n all instances, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the

government from ‘forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Id.*, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

38. As alleged herein, the City of Kemah’s actions constitute an actual physical taking of Plaintiffs’ private property rights; and a regulatory taking that “goes too far” by materially and substantially impairing Plaintiffs’ access rights in and to the Property without just compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Plaintiffs’ claims and the remedies sought for said actions are ripe because “[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner.” *Knick*, 139 S. Ct. at 2170.

39. The City of Kemah’s actions have interfered with Plaintiffs’ distinct investment-backed expectations. The City of Kemah has not only materially and substantially impaired Plaintiffs’ private rights of ingress and egress to and from 6th Street and Bradford Ave., it has also deprived Plaintiffs of every parking space they purchased the right to use and on which they spent substantial sums of money to improve. Plaintiffs bought the property in reliance on the reasonable premise that they would be able to continue operating a restaurant and bar that has been operating since 2017; and that they would have access and parking for customers adjacent to the Property on 6th Street and Bradford Ave.

40. Accordingly, Plaintiffs request, at a minimum, damages in the form of just compensation for lost net rental value, lost profits, and lost value of the property’s

use for the period of time Plaintiffs have been deprived of the use and enjoyment of their Property.

**COUNT FOUR: VIOLATIONS OF THE DUE PROCESS CLAUSE OF THE
FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION
AND ARTICLE ONE, SECTION NINETEEN OF THE TEXAS
CONSTITUTION**

41. Plaintiffs incorporate by reference the foregoing paragraphs and set forth verbatim herein as allowed by Fed. R. Civ. P. 10(c).

42. City of Kemah's actions unlawfully deprived Plaintiffs of their Property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the United States of America Constitution. The Due Process Clause of the Fourteenth Amendment declares, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Plaintiffs' right to due process is a fundamental, constitutional guarantee, which requires fair notice and a meaningful opportunity to be heard.

43. City of Kemah's actions also unjustly deprived Plaintiffs of their Property without due process in violation of Article I, Section 19 of the Texas Constitution. Article I, Section 19 of the Texas Constitution provides "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Article I, Section 13 of the Texas Constitution further provides that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

44. Plaintiffs were given no notice and no meaningful opportunity to be heard before the City of Kemah decided to close 6th Street, nor were they given notice that the City of Kemah to deprive Plaintiffs of the parking spaces on 6th Street and on Bradford Ave. And there is no statute, ordinance, or other law that provides the City of Kemah with legal authority to take such action. To the contrary, the City of Kemah is explicitly prohibited by statute from taking such action without the consent of all abutting property owners.

45. Accordingly, Plaintiffs are entitled to, and therefore seek, at a minimum, just compensation and damages for the diminution in value, and lost profits.

VI.
APPLICATION FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

46. Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs ask the Court to issue a temporary restraining order, preliminary injunction, and permanent injunction as follows:

- i. Enjoin and restrain City of Kemah and its officers, agents, servants, employees, and attorneys and other persons who are in active concert or participation with them from closing or otherwise installing any signs, barricades, bollards, and the like that would in any way prevent, impair, or restrict Plaintiffs' right of access to 6th Street and Bradford Ave.; or the public from accessing Plaintiffs' Property from 6th Street and Bradford Ave. by impairing vehicular access to Plaintiffs' Property in any way;

- ii. enjoin the City of Kemah and its officers, agents, servants, employees, and attorneys and other persons who are in active concert or participation with them from issuing citations or otherwise enforcing Kemah Resolution No. 2024-10 pending this Court's determination of the validity of same.

47. Plaintiffs are entitled to injunctive relief because they have (1) a substantial likelihood of success on the merits; (2) the City of Kemah's conduct presents a substantial threat that Plaintiffs will suffer irreparable injury absent the requested injunction; (3) this threatened injury outweighs any harm the injunction might cause the City of Kemah; and (4) the injunction will not impair the public interest.

48. Plaintiffs have a strong likelihood of success on the merits. Plaintiffs have constitutionally protected property and liberty interests as set forth above. The risk of erroneous deprivation of such interests in violation of Plaintiffs' property and due process rights is certain to continue unless the Court grants a preliminary injunction. There is a strong interest in protecting Plaintiffs from further deprivations of their constitutional rights because the City of Kemah's conduct, if not abated, will cause Plaintiffs' loss of use of the Property and ongoing financial hardship, up to and including going out of business.

49. Absent an injunction, Plaintiffs will suffer irreparable injury. Businesses have the right to transact lawful business without fear of being shut down without warning or in derogation of equal protection of laws. The loss of constitutional freedoms for "even minimal periods of time, unquestionably constitutes irreparable

injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Particularly in the context of a pre-deprivation due process violation, “no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *see also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process”). Monetary relief is insufficient as a matter of law.

50. An injunction will not significantly burden any of the Defendant’s interests but will instead serve and enhance the public’s interests. Nothing in the requested injunction inhibits the City of Kemah’s legitimate regulatory enforcement functions vis-à-vis the City of Kemah’s Code of Ordinances and related laws. Indeed, the public interest favors the issuance of injunctive relief to protect the constitutional rights at stake in this case and to ensure that the City of Kemah does not exercise such unbridled authority without affording citizens due process of law in the course of enforcing city’s ordinances.

VII. **REQUEST FOR EXPEDITED HEARING ON PRELIMINARY INJUNCTION**

51. Pursuant to Federal Rules of Civil Procedure 6(c) and 65(a)(2), Plaintiffs will notify the City of Kemah of the filing of this lawsuit, provide them with a copy, and notify them that Plaintiffs seek a preliminary injunction hearing.

VIII.
REQUEST FOR EXPEDITED DISCOVERY

52. Pursuant to Federal Rule of Civil Procedure 26(d), Plaintiffs ask the Court to authorize expedited discovery in advance of the preliminary injunction hearing. Good cause exists to order expedited discovery because Plaintiffs are in need of discovery to prepare for the preliminary injunction hearing and to adduce evidence establishing Plaintiffs' right to a preliminary injunction. *See Dallas Buyers Club, LLC v. Ripple*, No. H-14339, 2015 WL 1346217 at *1 (S.D. Tex. Mar. 23, 2015).

IX.
DAMAGES AND LIABILITY

53. Plaintiffs repeat and incorporate by reference the paragraphs above and hereinafter. Plaintiffs seek damages within the jurisdictional limits of this Court.

A. Actual Damages

54. As a result of City of Kemah's actions described herein, Plaintiffs suffered actual damages, including, but not limited to, lost profits, diminution in value of the Property, out-of-pocket expenses, and attorneys' fees and costs.

B. Attorney's Fees and Costs

55. Plaintiffs request an award of reasonable attorneys' fees and costs. Plaintiffs are entitled to recover reasonable and necessary attorneys' fees and expert fees. 42 U.S.C. § 1988, TEX. CIV. PRAC. & REM. CODE § 37.009.

X.
JURY DEMAND

56. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial on all issues in this action.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendant be cited to appear and answer herein and that upon final hearing Plaintiff be awarded judgment as follows:

- a. Injunctive, declaratory, and monetary relief as set forth herein;
- b. Expert fees;
- c. Costs of suit;
- d. Reasonable and necessary attorney's fees and costs; and
- e. All such other and further relief, both at law and in equity, to which Plaintiffs are justly entitled.

Respectfully submitted,

WILSON, CRIBBS & GOREN, P.C.

By: /s/ Brian Kilpatrick

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