

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ANTHONY BARILLA,

Plaintiff,

V.

CITY OF HOUSTON, TEXAS,

Defendant.

Civil Action No. 4:20-CV-00145

Honorable Judge

Alfred H. Bennett

PLAINTIFF ANTHONY BARILLA’S MOTION FOR SUMMARY JUDGMENT

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiff Anthony Barilla moves this Court for Summary Judgment and an order declaring unconstitutional under the First Amendment to the U.S. Constitution Houston, Texas Code of Ordinances, ch. 28, art. I, § 28-6 and Houston, Texas Code of Ordinances, ch. 40, art. XI, div. 2, §§ 40-262–40-263(3) and enjoining enforcement thereof.

INTRODUCTION

Anthony Barilla wants to earn extra money and practice his accordion and performance skills by busking in his hometown of Houston. However, he’s deprived of his constitutional right to do so by a Houston law that bans busking throughout most of the city and imposes an onerous permit requirement where it is not banned. There is no dispute of any material fact here. Houston lacks any evidence that busking presents a threat to safety, and even if it possessed such evidence, its overly broad, burdensome busking restrictions are not narrowly tailored to any public safety end. Nor can the Houston Ordinance even satisfy intermediate scrutiny. Therefore, Barilla respectfully requests that this Court grant summary judgment in his favor.

STATEMENT OF FACTS

Anthony Barilla is a long-time Houston resident and professional musician. Exh. A (Barilla Decl.) ¶¶ 1, 2. He is the Executive Director of a chamber music ensemble in Houston, as well as an active freelance accordionist. Barilla Decl. ¶ 3. Mr. Barilla plays in several bands, one of which performs live shows in Houston; he records in studio with the others. Barilla Decl. ¶ 4. Some of his music contains a political component. Barilla Decl. ¶ 5. Barilla would like to busk in his hometown, but Houston bans busking in the majority of the City (“Busking Ban”). Exh. B (Houston, Tex. Code, ch. 28, art. I, § 28-6). It relegates busking to a relatively small area called the Theater/Entertainment District, where performers can play only after securing a permit

(“Permit Scheme”). *Id.*, ch. 40, art. XI, div. 2 § 40-262. To secure a permit and exercise their First Amendment rights, would-be buskers must provide: (1) a map showing the desired location(s) for 24-hour use, § 40-263; (2) “written permission of the abutting fee owner for the use of the site,” § 40-263(3); and (3) a description of the intended performance, § 40-263(5). Performer permit fees are \$50 for one spot for one year, § 40-264(3), or \$10 for one spot for one month. § 40-264(4). Permits can take up to ten days to issue. § 40-265(a). Each violation of either the Busking Ban or the permit restrictions is subject to a fine of up to \$500. Houston, Tex. Code, ch.1, § 1-6(a).

The Busking Ordinance applies specifically to those who perform in public places “with a view to taking up or having taken up” monetary donations. Houston, Tex. Code, ch. 28, art. I, § 28-6. It does not apply to one who performs without asking for money or who solicits donations without performing. Exh. C (Wallace-Brown Dep.) 50:22–51:16, 61:20–22.

In 2018, Mr. Barilla decided to try his hand at busking as a means of practicing his live performance and musicianship skills and earning extra money. Barilla Decl. ¶ 8. After researching, he learned that busking was illegal in all but Houston’s Theater/Entertainment District. Barilla Decl. ¶ 9. After making several attempts to locate the owners of the properties abutting his desired busking spot, he obtained their permission to busk. Barilla Decl. ¶ 10. In August 2019, Mr. Barilla obtained a one-year permit to busk at a single spot in the Theater/Entertainment District. Barilla Decl. ¶ 11.

Mr. Barilla’s chosen busking spot turned out to be not very lucrative since so few pedestrians passed through the Theater/Entertainment District. Barilla Decl. ¶ 13. Since the permit was for one specific spot, a new spot would require repeating the permit process. In his experience as a long-time Houston resident and patron of local culture and the arts scene, Mr. Barilla has observed that there are much better places to busk in Houston that are outside of the

Theater/Entertainment District. Barilla Decl. ¶¶ 14, 15. Once his permit expired in August 2019, Mr. Barilla decided not to renew it, in part because it didn't pay for itself and in part because he found it not only difficult but also uncomfortable to ask for permission to exercise his First Amendment rights from abutting property owners. Barilla Decl. ¶¶ 16, 17. However, if busking were legal throughout Houston without burdensome permit requirements, he would busk again. Barilla Decl. ¶ 19. As it stands, he does not want to risk breaking the law. Barilla Decl. ¶ 18.

SUMMARY OF ARGUMENT

Houston's broad Busking Ordinance violates the First Amendment. First, the Ordinance's restrictions constitute a content-based restriction on speech. The restrictions plainly apply based on the subject matter and purpose of a street performer's message, *i.e.*, whether they wish to receive gratuities or donations. Conversely, the restrictions do *not* apply to people who solicit tips but do not street perform. The Ordinance is therefore content-based and subject to strict scrutiny.

Second, the restrictions cannot meet that demanding standard. The City has put forward two justifications for its laws: (1) traffic and pedestrian safety and (2) the need to protect nearby businesses from unwanted sounds. Both justifications ring hollow, as the City has not come forward with any evidence to substantiate their asserted concerns.

Third, even if this Court deems the City's interests "compelling," the Ordinance still fails under strict scrutiny because neither the broad Busking Ban nor the Permit Scheme are narrowly tailored to serve those interests. This is revealed by the City's failure to produce *any* evidence that it has employed the least restrictive means to achieve its goals.

Even if the Court were to determine that the Ordinance is content-neutral and subject to intermediate scrutiny, the Ordinance still must fail because the City has proffered no evidence that

the law is narrowly tailored to serve significant government interests, and it leaves open no ample alternative channels of communication for buskers.

LEGAL STANDARDS

1. Summary Judgment

Under Fed. R. Civ. P. 56(a), summary judgment is appropriate where the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Wilson v. Tregre*, 787 F.3d 322, 325 (5th Cir. 2015) (quoting Rule 56(a)). Where the nonmoving party bears the burden of proof on an issue at trial, the movant need only point to the absence of evidence, shifting the burden to the nonmoving party to show why summary judgment should not be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Defendant has the burden of presenting specific evidence that a prior restraint on freedom of expression is constitutional. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

2. Standard of Review

The First Amendment protects expressive activity, such as busking, in public fora. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). Because it is a content-based restriction on speech, the challenged Busking Ordinance must be reviewed under strict scrutiny. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). A law is content-based when it applies to particular speech due to the idea or message expressed or the topic discussed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Courts determine whether a restriction is content-based by considering whether, on its face, it draws distinctions based on the message a speaker conveys. *Id.* (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 564–66 (2011)). Even facially neutral regulations of speech will be considered content-based if they cannot be applied without making reference to the content of the regulated speech. *Id.* at 164.

The Busking Ordinance here is content-based because it regulates the content of speech by both its subject matter and its purpose; in order to determine whether the Ordinance applies, the content of a person’s speech must be examined. The Ordinance applies to “performers,” defined as “musicians, singers, mimes, and other artists.” Houston, Tex. Code, ch. 40, art. XI § 40-261(b). It does not apply to street preachers holding religious services, for example. Houston, Tex. Code, ch. 28, art. I § 28-6. Nor does it apply to other First Amendment street activity, such as pamphleteering or protesting. Further, the Ordinance doesn’t even apply to all performers; it only applies to those who wish to receive gratuities. *Id.* (Ordinance regulates performers who perform “with a view to taking up gratuities or having taken up a collection from the bystanders”); *see also* Houston, Tex. Code, ch. 40, art. XI § 40-261(b) (referring to performers who “perform for gratuities on the sidewalk”). Defendant’s own admission confirms this. Wallace-Brown Dep. 38:23–25, 39:1–2 (“Q: Okay. Do you know if the busking ban applies to someone who performs on the public sidewalks in Houston if they don’t ask for or receive tips? A: I assume that it does not apply I think the key is asking for and receiving tips.”); *id.* at 50:22–51:16. Thus, the combination of street performance plus communicating a message that one is open to gratuities triggers the Ordinance.

Because the Ordinance “specifically restricts street performers from communicating a particular set of messages—[such as] requests for donations,” it is “content-based by its very terms.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). *See also Friedrich v. City of Chicago*, 619 F. Supp. 1129, 1142 (N.D. Ill. 1985) (“The restriction[] at issue . . . is not neutral with respect to the type of speaker, since it does not embrace many other classes of speakers and ‘performers’”); *Loper v. New York City Police Department*, 999 F.2d 699, 705 (2d Cir. 1993)

(holding that a city ordinance enacted a content-based restriction on speech because it prohibited speech related to begging).

In *Berger*, a street performer challenged rules restricting performances in a public park on the basis that they violated the First Amendment. *See* 569 F.3d at 1034. The city of Seattle had passed an ordinance that, among other restrictions, banned “active” solicitation of funds by street performers in the public park. *Id.* The court held that the ban on active solicitation was a content-based restriction on speech meriting strict scrutiny. *Id.* at 1051. It reasoned that the city’s rules specifically restricted street performers from communicating the particular message of a request for donations. *Id.* Here, the busking restrictions apply *only* when a street performer conveys the specific message of a desire for tips. Street performers are otherwise free to communicate their non-solicitation ideas. Thus, the Ordinance enacts a flagrant, content-based restriction on speech that should be reviewed under strict scrutiny. *See also Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017).

However, if this Court determines that the Ordinance is a content-neutral time, place, and manner restriction, it should apply intermediate scrutiny. *Ward*, 491 U.S. at 791. Under that standard, the City still carries the burden of presenting specific evidence that the restrictions are narrowly tailored to serve a significant government interest and that no ample alternative channels of communication are available. *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 460 U.S. 280, 293 (1984)). Even under intermediate scrutiny, Defendant cannot meet its burden, and summary judgment for Plaintiff must be granted.

ARGUMENT

I. THE BUSKING BAN CANNOT SURVIVE STRICT OR INTERMEDIATE SCRUTINY

A. The Government’s Interests Are Neither Compelling Nor Significant

Defendant has asserted only two concerns to justify banning busking throughout most of the City: (1) pedestrian and traffic safety and (2) protecting neighboring property owners from hearing things they might not want to hear. Wallace-Brown Dep. 21:23–25, 22:1–9, 29:7–18. Because Defendant has failed to substantiate either interest with evidence, both fail to rise to the level of a “compelling” or even “significant” government interest.

While in theory the safety of pedestrians and a community can serve as a compelling interest, *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 670 (E.D. La. 2017), the City has failed to substantiate its concern that busking presents a threat to public safety. While requested in discovery, Defendant has provided no responsive documents evidencing issues with traffic or pedestrian safety related to busking anywhere in Houston. Defendant’s 30(b)(6) representative confirmed that there is no evidence that banning busking for money outside of the Theater/Entertainment District contributes to pedestrian or traffic safety. Wallace-Brown Dep. 22:24–25, 23:1–6 (“Q: What facts do you rely on to support the idea that busking on public sidewalks so interferes with this interest in traffic and pedestrian safety that it must be banned entirely? A: I don’t have any facts associated with this”); *id.* at 26:16–22 (“Q: And do you have any evidence of buskers causing crashes more than anyone else or at all? A: I do not. . . . I’m not sure that even [something] you could analyze.”); *id.* at 37:8–11 (“Q: Are you aware of any facts or evidence that any busker by virtue of busking in a public place in Houston has presented a danger to self or others? A: I am not aware of any, no.”); *id.* at 37:12–15 (“Q: Are you aware of any facts or evidence that any busker by virtue of busking in a public place in Houston has presented a traffic problem or risk? A: I’m not aware of any.”). When asked if she had any specific evidence or factual support for a concern about busking’s effect on neighboring businesses, the City’s representative replied, “[T]here are no facts we are relying on today because we’re not doing

the analysis.” Wallace-Brown Dep. 29:21–25, 30:1–5. In sum, the City has presented precisely no evidence of buskers causing traffic incidents, drawing large and/or dangerous crowds, or otherwise creating any threat to the public or neighboring businesses.

Perhaps most telling is what the Ordinance does *not* ban: street performers who entertain for free. Defendant has provided no evidence that those who perform *gratis* present fewer safety concerns than those who solicit or accept tips, or that they are any less likely to draw crowds and create safety concerns. *See Pence v. City of St. Louis*, 958 F. Supp. 2d 1079, 1085 (E.D. Mo. 2013). Arguably, performers who don’t solicit tips might draw and keep *more* crowds around longer because observers may feel less pressure to donate money. That the Ordinance only bans the combination of street performance plus solicitation renders the City’s asserted “safety” concern hollow. As the Second Circuit observed with respect to a ban on asking for money on public streets, “[I]t does not seem to us that any compelling state interest is served by excluding those who beg in a peaceful manner from communicating with their fellow citizens.” *Loper*, 999 F.2d at 705. Likewise here, while Houston allows street performers who don’t express a desire for donations to perform in public areas, it cannot plausibly assert that a compelling interest arises when those same performers peacefully solicit donations.

The City lacks any evidence that traffic or pedestrian safety was *ever* a concern with regards to busking, including at the time the ordinances were enacted. Wallace-Brown Dep. 27:2–5, 22–25, 28:1–4. But *even if* it is true that the original busking ban was passed in response to a safety problem, it is no longer true, as Defendant’s failure to present evidence demonstrates. *See Friedrich*, 619 F. Supp. at 1147 (recognizing that a ban on street performances might have made sense during the heyday for breakdancing, but as that fad died, so did the city’s compelling interest in safety and crowd control for a particular area).

The City's other asserted interest, in protecting neighboring property owners, also rings hollow. First, the City acknowledges that it lacks evidence of any facts supporting its claim that it needs to protect property owners from noise. Wallace-Brown Dep. 29:21–30:5. When asked to substantiate concern that busking interferes with neighboring property owners, the City's 30(b)(6) representative replied, "I can't tell you what the people [who] wrote the ordinance . . . relied on and we're not reviewing or analyzing this ordinance[] currently so there are no facts we are relying on today" Second, this unsubstantiated interest assumes that all buskers will be loud and distracting to ongoing businesses. However, even where busking is permitted in a small area of the Theater/Entertainment District, a performer cannot use amplification. Houston, Tex. Code, ch. 40, art. XI, § 40-261(b). Even if an unamplified performer was too loud, the City has existing noise ordinances at its disposal to control disturbances such as high decibel levels, type and constancy of unwanted sounds, and other distractions. Houston, Tex. Code, ch. 30, § 30-2, *et seq.* (2022). At its core, the City's interest in "protecting" property owners from sounds they don't want to hear amounts to nothing more than giving private citizens the power to censor others' speech—something the First Amendment does not tolerate. *Goldstein v. Town of Nantucket*, 477 F. Supp. 606, 609 (D. Mass. 1979).

B. The Busking Ban Is Not Narrowly Tailored and Does Not Leave Open Ample Channels for Communication

1. The City has no evidence showing that the Busking Ban is narrowly tailored to achieve a compelling or significant government interest

Even assuming this Court finds the City's asserted interests are sufficiently compelling or significant, the Busking Ban still must fall because it is not narrowly tailored. Under strict scrutiny, a narrowly tailored restriction on free expression must be supported by specific evidence that it is the "least restrictive" means of achieving the compelling state interest. *McCullen v. Coakley*, 573

U.S. 464, 478 (2014); *Blitch*, 260 F. Supp. at 670. *See also Ass’n of Club Executives of Dallas, Inc. v. City of Dallas*, No. 22-0177, 2022 WL 1642470, *8 (N.D. Tex. May 24, 2022). Even under intermediate scrutiny, a law may not burden substantially more speech than is necessary to further the government’s interests. *McCullen*, 573 U.S. at 486. Both standards require the government to present “actual” non-speculative evidence that its restrictions are narrowly tailored to address its asserted interests. *Id.*; *Davenport v. City of Alexandria*, 710 F.2d 148, 152 n.8 (4th Cir. 1984) (“*Davenport I*”) (“We realize that the detailed proof required . . . saddles the City with a heavy burden, but where freedom of expression is at stake, a governmental entity must always be prepared to come forward with a strong factual justification for its action.”); *Martin v. City of Albuquerque*, 396 F. Supp. 3d 1008, 1029 (D.N.M. 2019) (“[T]he government must present case-specific evidence that the restriction actually serves the stated goal without burdening too much speech . . .”). The Busking Ban is not narrowly tailored to any compelling or significant interest.

The City has produced *no* evidence that busking poses, or ever posed, a problem to traffic and pedestrian safety in Houston. Wallace-Brown Dep. 26:10–28:4, 37:8–20, 38:12–22. Additionally, by declaring busking to be a nuisance *per se* outside the Theater/Entertainment District, *i.e.*, at all times and under all circumstances, *Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App. 1989), the Busking Ban paints with far too broad a brush. It does not, for example, merely impose a volume limit or restrict the use of amplification, or even restrict music beyond certain hours. By definition, labeling speech as a nuisance *per se* is not narrowly tailored because it is a prior restraint on activities that may or may not actually interfere with a government’s asserted interest in public health or safety. *See, e.g., Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978), *aff’d*, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down on First Amendment grounds a statute declaring all adult theaters a nuisance

and requiring them to shut down for a year, prior to an actual judicial determination of “obscenity”).

Further, the geographic reach of the busking ban is broader than necessary to promote any safety concerns. Where an ordinance “covers a broader geographical area than necessary to achieve the City’s compelling interest in safety,” it cannot be narrowly tailored. *Loper*, 999 F.2d at 705 (“[A] statute that totally prohibits begging in all places cannot be considered ‘narrowly tailored.’”).

In *Davenport I*, a street musician challenged a city ordinance prohibiting performances and exhibitions on the sidewalks, walkways, or other public property in the city’s central business district. 710 F.2d at 148. The ordinance confined street performances to eight plazas and parks in the district. *Id.* at 150. The 9,880 acres lying outside of the business district were not subject to the ordinance’s restrictions. *Id.* Although most of the city remained open to street performances, including parks and plazas *within* the district, the 4th Circuit affirmed the district court’s determination—which was based on actual evidence of pedestrian and vehicle traffic rates and volumes, incidences of congestion and various times, sidewalk measurements, and typical and historical patterns of street performance audiences, among other things—that the ordinance was much more broad than necessary to satisfy the city’s asserted interest in public safety. *Davenport v. City of Alexandria*, 748 F.2d 208, 210 (4th Cir. 1984) (“*Davenport II*”). Here, the Busking Ban is not only unsupported by evidence, but is also much more restrictive than the ordinance invalidated in the *Davenport* cases. In contrast to the vast areas left open for street performers to exercise their First Amendment rights, Houston’s Busking Ban completely prohibits busking across most of the city. Absent any evidence demonstrating such an extensive ban is necessary to serve the City’s alleged interests, the Ban cannot stand as the least restrictive means.

Several other circuits have struck down geographically smaller speech bans on more evidence than the City has proffered here. *See Reynolds v. Middleton*, 779 F.3d 222, 228–29 (4th Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940–41 (9th Cir. 2011) (striking down solicitation ban on any street or highway); *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (invalidating a vendor license law that served as *de facto* ban on displaying expressive works in a particular area); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015) (striking down a ban on walking or standing on traffic islands and roadways).

Even where courts have upheld geographic restrictions on free expression as sufficiently narrowly tailored, the challenged laws leave open vast swaths of public spaces. *See Horton v. City of St. Augustine*, 272 F.3d 1318, 1334 (11th Cir. 2001); *see also Young v. New York City Transit Auth.*, 903 F.2d 146, 160 (2d Cir. 1990) (upholding a prohibition on panhandling in the subway system because soliciting money could continue “throughout all of New York City”). In *Horton*, a street performer challenged the constitutionality of an ordinance prohibiting street performances in a four-block area of the city’s historic district. 272 F.3d at 1321. Applying intermediate scrutiny, the Eleventh Circuit upheld the restriction because the vast majority of the city’s public spaces remained open to street performances. *Id.* at 1334. Notably, the ban at issue in *Horton* constitutes a mirror image of Houston’s Ordinance here, where busking is banned everywhere *except for* the limited area in the Theater/Entertainment District. Unlike the ordinance in *Horton*, Houston’s Busking Ban sweeps across most of the City’s public spaces. “A complete ban can be narrowly tailored . . . only if each activity within the proscription’s scope is an appropriately targeted evil.” *Berger*, 569 F.3d at 1052 (cleaned up).

2. The Busking Ban does not leave open ample alternative channels of communication.

Ultimately, the Busking Ban cannot survive even intermediate scrutiny because it also fails to leave open ample alternative channels of communication. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 75–76 (1981). In order to satisfy this requirement, the challenged law must not obstruct access to a *public* forum for the protected activities. *Bery*, 97 F.3d at 698 (“The sidewalks of the City must be available for [artists] to reach their public audience.”); *Heffron v. Int’l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). Since the Busking Ban prohibits buskers from operating in the majority of Houston’s public fora, and where it does allow busking, it does so under an unconstitutionally burdensome permit scheme, the Ban fails to leave open ample alternative channels for Mr. Barilla and other buskers to communicate their messages.

II. THE PERMIT SCHEME CANNOT SURVIVE STRICT OR INTERMEDIATE SCRUTINY

A. The Permit Scheme Is Presumptively Unconstitutional

Like the Busking Ban, the Permit Scheme cannot stand because (1) Defendant has offered no evidence that its asserted interests in safety and protecting businesses from noise are viable concerns; and (2) the permit requirements are not narrowly tailored to any compelling or significant government interest.

As a prior restraint on protected speech, the Permit Scheme is presumptively unconstitutional. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002) (calling permit requirements “offensive” to a free society and to the values protected by the First Amendment). Additionally, permit requirements, like those here, that apply to small groups and individuals in public fora are particularly suspect. *See Knowles v. City of Waco*, 462 F.3d 430, 436

(5th Cir. 2006) (invalidating a speech permit scheme that applied to groups as small as two people); *Berger*, 569 F.3d at 1039 (“[W]e and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.”) (citing *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006); *Cox v. City of Charleston*, 416 F.3d 281 (4th Cir. 2005); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (expressing doubt that applying a permit requirement to a small group sufficiently served an interest in pedestrian safety or convenience)).

B. The Permit Scheme Fails Under Both Strict and Intermediate Scrutiny

1. The City has no evidence that the Permit Scheme is narrowly tailored to achieve a compelling or significant government interest

Beyond these initial hurdles, the permit requirements fail because they sweep too broadly while failing to advance the government’s interests. *See Berger*, 569 F.3d at 1039. In *Berger*, the Ninth Circuit struck down a permit scheme that required street performers to obtain a permit for “artistic performances” in a public park in one of sixteen designated spaces. *Id.* at 1036–37. The permit requirement did not limit the number of permits issued in a given year or assign particular performers to specific spaces or times. *Id.* at 1037. The court held that the permit requirements were not narrowly tailored because they were both overbroad and underinclusive. They were overbroad because they enveloped a large number of street performers who posed no real threat to the defendant’s traffic flow or space management concerns, just “to root out the occasional bad apple,” *id.* at 1045–46; they were underinclusive because the permit requirements allowed massive crowds to gather and express their views so long as they were not engaged in artistic performance, *id.* at 1043. The Ninth Circuit found that this wildly imperfect fit between the restrictions and the

city's asserted interest in public safety did not satisfy the narrow tailoring requirement even under intermediate scrutiny. *Id.*

Like the unconstitutional permit requirements in *Berger*, Houston's Permit Scheme sweeps too broadly while failing to advance the government's interests. It applies beyond those performers who seek to attract large crowds or who otherwise pose a danger to pedestrian or traffic safety. In fact, whether a permit is required hinges only on whether the performer expresses a desire for money. Houston, Tex. Code, ch. 28, art. I, § 28-6. Defendant has not shown how a performer's intent to collect money impacts traffic safety or sidewalk congestion. Like the ordinance in *Berger*, Houston's busking ordinance would allow a large group of performers to gather without first securing a permit so long as they don't ask for money. But a single performer, like Mr. Barilla, would be required to seek a permit simply because he plans to solicit tips. This disparity in treatment based on a performer's intent to communicate a wish for tips makes no sense if the City's primary interest in requiring a permit is to ensure traffic and pedestrian safety. 569 F.3d at 1043. The City has produced no factual support for the assertion that a street performer who asks for tips causes any more congestion or safety issues than one who does not. *See Pence*, 958 F. Supp. 2d at 1085; *see Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (requiring a direct nexus between the restriction and "the 'evil' it seeks to remedy"). Indeed, Defendant's witness acknowledged as much. Wallace-Brown Dep. 50:18–25, 51:1–16.

Under the guise of unsubstantiated interests in "safety" and "protecting nearby businesses," the Permit Scheme burdens more speech than necessary by subjecting all buskers to the permit restrictions. For example, while it may be true that a busker *might* cause traffic or safety problems or *might* play music so loudly that it disturbs a business owner, such speculation cannot support subjecting *all* buskers to a prior restraint on their expression (one that doesn't even account for the

size of the crowd or the volume that is played). Any concerns the City might have about safety or noise disturbances can be addressed without burdening protected speech by enforcing existing city ordinances dealing with noise (*e.g.*, Houston, Tex. Code, ch. 30 § 30-2), crowd control (*e.g.*, Houston, Tex. Code, ch. 34 § 34-21), and obstructions on the sidewalks and roadways (Houston, Tex. Code, ch. 40 § 40-27); *McCullen*, 573 U.S. at 490. Rather than screen potential speakers in advance, the City could simply “punish[] only actual wrongdoers” after the fact. *Berger*, 569 F.3d at 1044. *See also Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (striking down pamphleteering law aimed at preventing littering). As it is, however, the permit requirements serve as an “expansive, prophylactic prior restraint,” burdening far more speech than necessary. *Berger*, 569 F.3d at 1044.

While Defendant might argue that requiring a busker to obtain consent from a business owner creates a nexus to its interest in protecting the business owner, this argument withers on the vine. First, and most significantly, a law that allows one private citizen to determine whether another can exercise his First Amendment rights “is irreconcilable with freedom of expression. It is unqualified censorship and . . . just what the First Amendment forbids.” *Goldstein*, 477 F. Supp. at 609. Under the broad terms of the Ordinance, a business owner of an abutting property could deny permission to a busker for *any* reason including disagreement with the busker’s message or personal animus against the busker. These are intolerable bases for a restriction on free expression. In any event, as noted above, Defendant has come forth with *no evidence* that its “interest” in protecting business owners is a substantiated concern.

2. The Permit Scheme leaves open no ample alternative channels of communication

Like the Busking Ban, the City’s Permit Scheme leaves open no ample channels of communication because it obstructs access to a public forum to allow buskers like Mr. Barilla to

reach their intended audience. *Bery*, 97 F.3d at 698. In particular, the City's single-location requirement is even more restrictive than those struck down in *Berger*. A busking permit is good for only one designated spot in the eight-block area of the Theater/Entertainment District. If a busker wishes to change location for any reason, he would have to start the permit application process anew. This restriction to a single location in the relatively small Theater/Entertainment District is not necessary to serve any government interest. Here, buskers face a Hobson's choice: they can busk in the Theater/Entertainment District under an unconstitutional permit scheme, or not at all. Thus, the Ordinance leaves them with no ample alternative channels of communication.

CONCLUSION

Because Defendant City has failed to carry its burden of showing that the Busking Ordinance satisfies intermediate—much less strict—scrutiny, Plaintiff respectfully asks the Court to grant summary judgment in his favor.

DATED: June 21, 2022.

Respectfully submitted,

s/ Anastasia P. Boden

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Counsel for Plaintiff Anthony Barilla

* *Pro hac vice*

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served by electronic service through the Court's CM/ECF system on June 21, 2022, upon the following:

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s/ Anastasia P. Boden

ANASTASIA P. BODEN

Exhibit A

P. Mot. for Summ. J. / Decl. of Anthony Barilla

Court: U.S. S.D. Tex. Case No. 4:20cv145

Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ANTHONY BARILLA,

Plaintiff,

v.

CITY OF HOUSTON, TEXAS,

Defendant.

)
) **Civil Action No. 4:20-CV-00145**
)
) **Honorable Judge**
) **Alfred H. Bennett**
)
)
)
)
)
)
)

DECLARATION OF ANTHONY BARILLA

I, Anthony Barilla, declare:

1. I am the Plaintiff in this case, a resident of the City of Houston, Texas.
2. I am a writer and professional musician (accordionist) who wishes to busk (play music for tips/gratuities) in Houston.
3. I am the Executive Director of a chamber music ensemble in Houston, as well as an active freelance accordionist.
4. I am a member of several bands, one of which plays live shows in Houston. In my work with other bands, I record as a studio musician.
5. I also compose music, and I have written works for such organizations as National Public Radio. Sometimes my music contains a political component.
6. Music, whether I am directing, performing, or composing it, is a big part of my personal and professional life.
7. I believe that busking is important culturally as well as individually. Busking allows me to practice my music and performance skills while earning extra income.

8. In 2018, I decided to try my hand at busking in Houston. I learned that it was illegal in most of the City but allowed in the Theater/Entertainment District if I obtained a permit.

9. I made several inquiries with City employees before learning that before I could submit my application for a permit, I needed to get permission from the property owner(s) abutting the space where I wanted to busk.

10. I had to make several trips and phone calls to locate the property owners for the space where I wanted to busk. I did not like these interactions, especially when the person I approached was not the actual property owner and therefore couldn't consent and I had to continue to try to track down the property owner.

11. I paid \$50 for a year-long permit to busk in one spot.

12. In order to make busking worthwhile, a busker needs to make more money than he spends in permits and other expenses. This means he needs to be positioned in a spot with sufficient pedestrian traffic.

13. My busking spot turned out not to be very lucrative because of the lack of pedestrian traffic.

14. As a long-time Houston resident and patron of local culture and the arts, I have observed that there are much better places to busk than in the Theater/Entertainment District.

15. For example, Westheimer in Montrose or 19th Street in the Heights would be perfect spots because they draw a lot of foot traffic and busking would fit with the vibrant culture of the area.

16. I decided not to renew my busking permit when it expired in August 2019 because my experiences busking in one spot in the Theater/Entertainment District did not pay for the time, expense, and hassle of obtaining the permit.

17. I found it not only difficult, but uncomfortable, to ask adjacent property owners for permission to exercise my First Amendment rights by busking. I do not believe the permit requirements plus the available area in the Theater/Entertainment District make it worth my while.

18. I have foregone busking altogether since it would be illegal outside of the Theater/Entertainment District, and I do not want to risk fines of up to \$500 per event for violating the ordinance.

19. But for the busking restrictions—a ban on busking in most of Houston and permit requirements in the Theater/Entertainment District of Houston—I would busk again on the sidewalks of Houston.

I declare under penalty of perjury that the foregoing is true and correct and that, if called upon to do so, I can competently testify to my personal knowledge of the matters stated herein.

DATE: June 17, 2022.

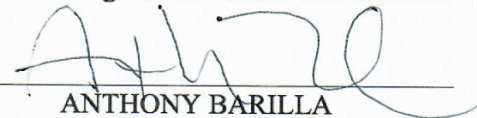

ANTHONY BARILLA

Exhibit B

P. Mot. for Summ. J. / Houston Code Sections

Court: U.S. S.D. Tex. Case No. 4:20cv145

Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814

Sec. 28-6. - Bands playing in public for contributions.

The playing of bands upon the streets or in other public places in the city, with a view to taking up a collection from the bystanders by someone, for the benefit of the members composing such band, shall be a nuisance and unlawful. Every member of such a band who plays with a view to taking up or having taken up a collection from the bystanders shall be guilty of committing a nuisance; provided, however, this section shall not be construed to apply to religious organizations that conduct their services in the streets or in other public places or to sidewalk performers performing within the "theater/entertainment district" defined in section 40-261 of this Code pursuant to a permit issued under article XI of chapter 40 of this Code.

(Code 1968, § 28-27; Ord. No. 91-1168, § 3, 8-14-91)

Cross reference— Noise, Ch. 30.

DIVISION 2. - PERMIT

Sec. 40-262. - Required.

It shall be unlawful for any person who is not a permittee to sell merchandise or food on the sidewalks in the theater/entertainment district or conduct sidewalk performances in the theater/entertainment district.

(Ord. No. 91-1168, § 1, 8-14-91)

Sec. 40-263. - Application and accompanying documents generally.

Any person desiring to obtain a permit to sell merchandise or food on the sidewalks in the theater/entertainment district or to conduct sidewalk performances in the theater/entertainment district shall file an application with the director on a form prescribed by the director for that purpose. The application shall set forth the following information and be accompanied by the following documents:

- (1) The name, mailing address, street address (if different), and telephone number of the applicant, together with a statement as to whether the applicant is an individual, a partnership, or a corporation, and if a partnership, the names of all general partners or if a corporation a copy of the articles of incorporation;
- (2) A map showing the proposed location of the specific site(s) desired. The applicant may either designate one site for twenty-four hour use or designate two sites, with one site designated as the daytime site with hours of operation between 7:00 a.m. until 5:00 p.m. and the other site designated as the night time site with hours of operation between 5:01 p.m. until 6:59 a.m.;
- (3) The written permission of the abutting fee owner for the use of the site(s);
- (4) A statement whether the applicant desires a permit as a food vendor, merchandise vendor, or as a performer.
- (5) If the applicant seeks a permit as a performer, then a description of the performances to be provided.
- (6) If the applicant seeks a permit as a food vendor or a merchandise vendor, then proof that the sales of merchandise or food will be covered by comprehensive general liability insurance with limits of not less than \$100,000.00 for death of or injury to one person and \$300,000.00 for death of or injury to more than one person and \$25,000.00 for property damage, per occurrence, which policy shall name the city as an additional insured, and shall provide that ten days' prior notice be given to the director in the event of

cancellation;

- (7) A description of the nature, size, and manner of construction of any carts or racks, other display equipment, musical instruments, or theatrical props to be utilized by the applicant which shall be subject to review to insure that the same will not pose a hazard to vehicular or pedestrian traffic;
- (8) A food vendor applicant shall provide proof that the mobile food unit has a current and valid mobile food service unit medallion issued under section 20-37 of this Code.
- (9) A food vendor applicant shall state whether his operations will be limited to "restricted operations" as defined in section 20-22 of the City Code. If not, then the applicant shall also provide proof that he holds a current and valid food dealer's permit issued under chapter 20 of this Code.
- (10) A food vendor applicant shall state whether the mobile food unit will be fueled by liquefied petroleum gas. If so, the applicant shall provide proof that he holds a current and valid permit for the use of liquefied petroleum gas on the mobile unit issued pursuant to Chapter 61 of the *Fire Code*.
- (10) A food vendor applicant shall state whether the mobile food unit will be fueled by liquefied petroleum gas. If so, the applicant shall provide proof that he holds a current and valid permit for the use of liquefied petroleum gas on the mobile unit issued pursuant to Chapter 61 of the *Fire Code*.
- (11) A food vendor applicant shall provide a photograph or graphic representation accurately depicting the unit and a general written description of the unit and shall demonstrate that the unit meets all of the same special requirements that are applicable to mobile food units used by licensed park vendors as specified in section 20-22 of this Code.

(Ord. No. 91-1168, § 4, 8-14-91; Ord. No. 95-279, § 12, 3-15-95; Ord. No. 2021-1037, § 20(Exh. I.43), 12-1-2021, eff. 4-1-2022)

Sec. 40-264. - Fees.

Each application shall be accompanied by the applicable nonrefundable fees stated for this provision in the city fee schedule.

(Ord. No. 91-1168, § 4, 8-14-91; Ord. No. 2011-1168, § 13, 12-14-2011)

Sec. 40-265. - Permit—Issuance or denial.

- (a) Within ten days of receipt of a permit application, the director shall grant or deny the requested permit and give written notice to the applicant of the decision.

- (b) The director shall issue a permit to the applicant on a first applied, first issued basis unless one or more of the following conditions exist:
 - (1) The applicant failed to supply all of the information requested on the application;
 - (2) The applicant gave materially false, fraudulent, or untruthful information on the application;
 - (3) The applicant has not fully complied with all state, federal, and local laws or regulations affecting the conduct of its businesses;
 - (4) Houston Public Works determines that the application should be denied on the basis of the review conducted under section 40-268 of this Code; or
 - (5) The application or the applicant does not meet any other requirement of this Code.
- (c) In the event that the director determines that an application should be denied, the applicant shall be given notice in writing of the reasons for the denial. An applicant may appeal the decision of the director regarding such denial by filing a written request for a hearing with the director within ten days after he is given notice of such denial. The director's decision on the application shall be final unless an appeal is timely filed. An appeal shall not stay the director's decision on the issuance of a permit. The applicant's written request for a hearing shall set forth the grounds on which the denial is challenged. The hearing shall be conducted by the city's director of administration and regulatory affairs or his designee who shall act as the hearing official under this article. The hearing official shall not have participated in any investigation or decision relating to the denial of the permit. At the hearing, the hearing official shall receive oral and written evidence regarding the application. Hearings shall be conducted under rules issued by the director of administration and regulatory affairs which shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses, and be represented by legal counsel.
- (d) The hearing official shall conduct the hearing within ten days after receipt of the applicant's written request for a hearing, unless the applicant requests an extension in writing. The hearing official shall render written decision and issue notice thereof, to the applicant within five days after the conclusion of the hearing. The written decision of the hearing official shall be final.
- (e) Failure of the director to give timely notice of his action on an application or failure of the hearing official to timely conduct or give notice of his decision on an appeal from the director's decision, shall entitle the applicant to the issuance of a temporary permit upon written demand therefor filed by the applicant with the director. Such a temporary permit shall only be valid until the third day after the director gives notice of his action on the application or the hearing official gives notice of his decision on the appeal, as applicable.

Exhibit C

P. Mot. for Summ. J. / Wallace-Brown Dep.

Court: U.S. S.D. Tex. Case No. 4:20cv145

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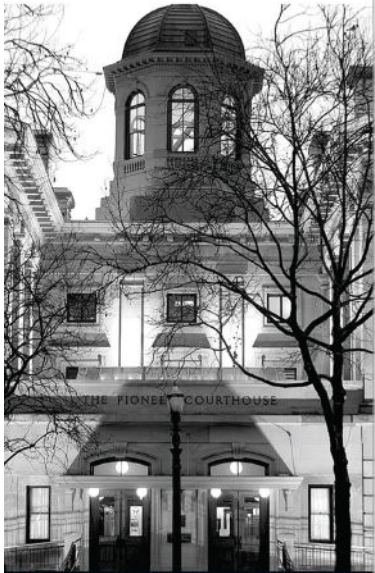
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONY BARILLA,

Plaintiff,

vs.

Civil Action No. 4:20-CV-00145

CITY OF HOUSTON, TEXAS,

Defendant.

REMOTE DEPOSITION BY VIDEOCONFERENCE

MARGARET WALLACE BROWN

TAKEN ON
WEDNESDAY, MAY 11, 2022
10:30 A.M.

611 WALKER STREET, SIXTH FLOOR
HOUSTON, TEXAS 77002

APPEARANCES**APPEARING ON BEHALF OF THE PLAINTIFF:****Anthony Barilla**

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REMOTE DEPOSITION BY VIDEOCONFERENCE**MARGARET WALLACE BROWN****TAKEN ON****WEDNESDAY, MAY 11, 2022****10:30 A.M.**

THE COURT REPORTER: And then I'd also like to stipulate for the record that the remote affirmation and remote testimony will be administered and recorded by myself, a professional digital recorder, and that all present agree.

The testimony will be transcribed and certified. Ms. Matias, on behalf Pacific Legal do you agree?

MS. MATIAS: Yes, I agree.

THE COURT REPORTER: All right. And then Mr. Amis, on behalf of the City of Houston, do you agree?

MR. AMIS: Yes.

THE COURT REPORTER: Okay. Fantastic. All right. The time is 10:33. Ms. Wallace Brown, would you please raise your right hand.

Do you affirm under the penalty of perjury that you are Margaret Wallace Brown and that the testimony you're about to give is the truth, the whole truth, and nothign but the truth?

THE WITNESS: Yes.

THE COURT REPORTER: All right. Counsel, for the

1 record, would you please state your name and whom you
2 represent.

3 **MS. MATIAS:** Dawna Matias, M-a-t-i-a-s, representing
4 plaintiff Anthony Barilla.

5 **MR. AMIS:** Brian Amis, representing the City of
6 Houston.

7 **THE COURT REPORTER:** All right. You may proceed.

8 **MARGARET WALLACE BROWN**, having been first duly sworn, was
9 examined, and testified as follows:

10 **EXAMINATION**

11 **BY MS. MATIAS:**

12 **Q** Good morning, Ms. Wallace Brown.

13 **A** Good morning.

14 **Q** My name is Dawna Matias, and I'm with colleagues
15 Anastasia Bowden and Joshua Polk, and we represent the
16 plaintiff Anthony Barilla in this case.

17 And, first, I'd like to go over just some preliminary
18 matters before we get started with more substantiate questions.
19 Okay?

20 **A** Yes.

21 **Q** Will you please state your name and spell it for the
22 record?

23 **A** Margaret Wallace Brown, M-a-r-g-a-r-e-t, W-a-l-l-a-c-
24 e, B-r-o-won.

25 **Q** Okay. Thank you. And are you familiar with this

1 lawsuit?

2 A Yes.

3 Q Okay. What is your general understanding of the
4 dispute in this lawsuit?

5 A My understanding is that Mr. Barilla is suing the
6 City for the busker ordinance that we put in place in the 90s.

7 Q Okay. And what -- have you ever been deposed before?

8 A Yes.

9 Q Okay. Do you understand the deposition process then?

10 A Yes.

11 Q Okay. So I'm going to ask you questions and you are
12 going to -- I'm going to ask that you answer truthfully just as
13 if you were testifying in court. Okay?

14 A Okay.

15 Q Okay. And is there any reason you cannot answer
16 truthfully today?

17 A No.

18 Q Okay. I'll do my best to ask clear questions --

19 A Okay.

20 Q -- but if you don't understand a question, please let
21 me -- ask me to rephrase or explain the question to you. Okay?

22 A Okay.

23 Q So don't try to guess at what I mean, please make
24 sure to ask for clarification. Okay?

25 A Okay.

1 Q Okay. If you answer a question, I will assume that
2 you understood it. Okay?

3 A Okay.

4 Q Okay. You may hear your attorney object to any of
5 the questions during the course of the deposition and he's
6 doing this to preserve the objection, okay, to make sure it's
7 on record.

8 A Okay.

9 Q Okay. So it doesn't mean that you don't answer the
10 question unless your attorney specifically instructs you not to
11 do so. Okay?

12 A Got it.

13 Q Okay. If you need to take a break at any point,
14 please just let me know and if there's a question pending I ask
15 that you answer the question first and then ask for a break.
16 Okay?

17 A Okay. Got it.

18 Q Okay. So when -- can we agree that when I say
19 plaintiff I'm referring to Anthony Barilla in this case?

20 A Sure.

21 Q Okay. Can we agree that when I say defendant I'm
22 referring to the City of Houston?

23 A Okay.

24 Q Okay. Have you ever heard the term busking, or busk,
25 or busker before?

1 A Yes.

2 Q Okay. Can we agree that when I see busking or busker
3 that I'm referring to street performers who are performing for
4 tips or gratuities?

5 A Yes.

6 Q Okay. And that's how this term will be used in this
7 deposition. Okay?

8 A Mm-hmm.

9 Q All right. I'd like to first introduce a document
10 entitled Street Performer Operational Boundary. I believe
11 everyone should have copies of that; do you see that document?

12 A It's the map?

13 Q Yes, produced by the defendant and it has the Bates
14 number COHE000370 at the bottom?

15 A So I don't believe I've got the Bates documents, but
16 I do have the map that I believe we're talking about.

17 Q Okay.

18 MR. AMIS: I'm sending it. The zip you sent over to
19 me the other day, or yesterday, I'm sending that to Margaret --

20 MS. MATIAS: Okay.

21 MR. AMIS: -- Brown right now.

22 MS. MATIAS: Okay.

23 BY MS. MATIAS:

24 Q And so we'll mark that as Exhibit A, and can you let
25 me know when you've received it?

1 A Sure.

2 Q Can you see it?

3 A It's only going to take a second for it to unzip.

4 Q Okay.

5 A Okay. No, yeah, it's scanning, give me just a
6 second, it's --

7 Q Okay.

8 A -- scanning the documents.

9 MR. AMIS: We have a security feature that scans
10 everything before it allows us access to it.

11 THE WITNESS: Okay. So I have all the documents now.
12 What was the number?

13 BY MS. MATIAS:

14 Q The Bates number at the bottom would be COHE000370.

15 A Got it.

16 Q Okay. So do you recognize this document, have you
17 seen it before?

18 A I've not seen this exact document, but I've -- yes,
19 sure --

20 Q Okay.

21 A -- yes.

22 Q And can you tell me what it is?

23 A It appears to be the boundaries of the area in which
24 the city allowed busking when it created the ordinance allowing
25 busking in the '90s.

1 Q Okay. Can we agree that when we say or refer to the
2 theater district that I'm talking about this boundaried space
3 on this document?

4 A Sure, but I'm -- so I don't know independently that
5 this is in fact the theater district boundary so if you're
6 telling me that it is, sure --

7 Q Okay. How -- so --

8 A -- I mean, I'm not intimately familiar with what the
9 theater district boundary itself is.

10 Q Okay. When I mention theater district, I will be
11 referring to this -- the boundaries on this map.

12 A Okay.

13 Q -- Okay? Okay. So I'd like to introduce then
14 another document for, I guess that would be Exhibit B, and this
15 was produced by the defendant with the Bates numbers
16 COHE000337633391, and it's titled -- the first page is a
17 signature page, a certification page, but the title of the
18 document itself is found on 0003377, City of Houston ordinance
19 number 91-1168 and let me know when you get access to that
20 document.

21 A It's not happening -- let me -- that was 16 -- okay.
22 I've got that. Yes, I'm good.

23 Q Have you ever seen this document before?

24 A Yes.

25 Q Okay. And can you tell me what it appears to be?

1 A It appears to be the ordinance that was approved by
2 city council in 1991 regarding the busking -- allowing busking
3 to take place in this area.

4 Q And -- okay. And by this area you mean --

5 A In the boundaries -- in the map that you've shown.

6 Q Okay. It -- this is the ordinance that applies to
7 more than just the theater district. If you read the title, an
8 ordinance providing for the issuance of permits to certain
9 vendors and performers in the certain portion of the downtown
10 Houston containing findings and other provisions --

11 A Yes.

12 Q -- relating to the forgoing subject providing for
13 severability and declaring an emergency.

14 Okay. So when I refer to -- can we agree that when I
15 refer to the busking restrictions or the busking ordinance I'm
16 specifically referring to this document?

17 A Sure. Yes.

18 Q Okay. Can you please read aloud section 3 of this
19 exhibit, which I believe is Exhibit B, which begins on COH
20 Bates number 000378 at the bottom and continues to the next
21 page, the top of 000379?

22 A Yes, I can.

23 Q Thank you.

24 A "The playing of bands upon the streets or in other
25 public spaces in the city with a view to taking up the

1 collection from the bystanders by someone for the benefit of
2 the member's composing such band shall be a nuisance and
3 unlawful.

4 Every member of such band who plays with the view to
5 taking up or having taken up a collection from the bystander
6 shall be guilty of committing a nuisance provided, however,
7 this section shall not be construed to apply to religious
8 organizations that conduct their services in the streets or in
9 other public places, which is side walk performers, performing
10 within the theater entertainment district," and that's in
11 quotations defined in section 40261 of this code pursuant to a
12 permit issue under article 9" -- I'm sorry, "article 11 of
13 chapter 40 of this code."

14 Q Okay. Thank you. Would you agree that that first
15 sentence that you read of section 3 makes busking in public
16 places illegal in the City of Houston?

17 A Yes.

18 Q Okay. Can we agree to call that part of it, the
19 busking ordinance, the busking ban when I refer to that?

20 A Yes.

21 Q Okay. Would you agree that the second sentence,
22 which is unfortunately very long, of section 3 what you just
23 read allows buskers to busk in public places in the theater
24 district so long as they have a permit?

25 A Yes.

1 Q Okay. And can we agree to call that part of the
2 busking ordinance the permit requirement?

3 A Yes.

4 Q Okay. Are you employed by the City of Houston,
5 defendant City of Houston?

6 A Yes.

7 Q In what department?

8 A Planning and development department.

9 Q Okay. And what does planning and development -- what
10 does the planning and development department do, what are their
11 responsibilities?

12 A Our responsibilities include managing the land
13 development ordinances for the city of Houston and our
14 extraterritorial jurisdiction, we manage the geographic
15 information system for the city of Houston, we do
16 transportation planning, neighborhood planning such as
17 character preservation tools, historic preservation, and we
18 manage the tower ordinance and a variety of other projects as
19 assigned by the mayor.

20 Q Okay. And what is your formal title or position?

21 A I'm director of the department.

22 Q Okay. Can you describe your duties in this position?

23 A I manage our team of approximately 90 people who the
24 -- to do all of the responsibilities that I mentioned earlier,
25 yeah, Lord knows --

1 **Q Okay.**

2 A -- just what it is. I mean, I manage the whole
3 operation so that includes, you know, day to day operations, as
4 well as speaking to city council and, you know, everything a
5 director does.

6 **Q Okay. Any other duties?**

7 A As part of my duties, and I am secretary to both the
8 Planning Commission and the Historic and Archaeological
9 Commission -- well, actually, all three, The Tower Commission
10 also.

11 **Q Okay. And how long have you held this position?**

12 A I was promoted interim director in 2018 and made
13 permanent director in 2019.

14 **Q Okay. Did you hold any other position in the**
15 **department prior to this?**

16 A Yes, I've been with the city for 35 years all in this
17 department starting as a project manager in 1986 and having
18 progressively advanced jobs until I received this one.

19 **Q Okay. And did you hold any other position in -- with**
20 **the city of Houston prior to your work in the planning**
21 **department -- planning and development?**

22 A So for a period of about six years -- six months in
23 1991, the department which used to include community
24 development, block current activities, when that was split from
25 the planning department I was temporarily -- so for a period of

1 about six months I worked for the community development
2 department that was split off from planning, but then very
3 quickly came back to planning --

4 **Q Okay. And what was your --**

5 A -- and nothing else besides that.

6 **Q Oh, okay. Sorry. I apologize, I talked over you.**

7 A That's okay.

8 **Q What was your job experience prior to employment with**
9 **the city of Houston?**

10 A I worked for a land developer here in Houston, Texas,
11 Intercooperation, I was the project architect for them for
12 interior remodels on one of their high rise residential towers.

13 **Q Okay. Anything else?**

14 A While I was in school I had a variety of secretarial
15 and other clerical jobs, but, no, that was my first post-
16 college professional job.

17 **Q And can you please describe your educational**
18 **experience?**

19 A Bachelor of Science in -- with a concentration in
20 Architecture from the University of Houston, and I have
21 approximately 12 hours towards a Master's in Business
22 Administration from the University of St. Thomas, and I have a
23 variety of certifications from -- professional certifications
24 for my area of expertise.

25 **Q Okay. Do you understand why you've been called to be**

1 **deposed today?**

2 A Yes.

3 **Q Okay. What is your understanding of that?**

4 A My understanding is that I am representing the city
5 of Houston as my position as director for the planning
6 department because some of this work originated from the
7 planning department.

8 **Q Okay. I'd like to introduce, as I guess it would be,**
9 **Exhibit C the notice of rule 30B6 deposition of the city of**
10 **Houston.**

11 A Okay.

12 **Q Take a look at that, please.**

13 A Okay.

14 **Q Do you see it -- do you --**

15 A Yes.

16 **Q -- see on the -- pages 1 it's a three page document**
17 **and there are a list of numbered topics on those three pages --**

18 A Mm-hmm.

19 **Q Do you understand that you've been designated by your**
20 **council to answer questions about the following topics, and I'm**
21 **going to list them and after each you can say either yes or no**
22 **that you understand --**

23 A Okay.

24 **Q -- you've been designated. So the first is number 3,**
25 **defendant's interpretation and application of the busking**

1 restrictions including but not limited to permanent
2 requirements, and procedures and the geographic restrictions on
3 busking?

4 A Yes, I understand that's what I'm being asked, yes.

5 Q Okay. Defendant number 4, defendant's interpretation
6 of the rationales and government purposes underlying the
7 busking restrictions?

8 A Mm-hmm. Yes.

9 Q Okay. Number 5, facts showing that the busking
10 restrictions actually achieved the rationales and government
11 purposes underlying the busking restrictions?

12 A Yes.

13 Q Number 6, alternative channels, excuse me, of
14 communication for someone who wishes to busk outside the
15 theater district and within the city of Houston?

16 A Yes.

17 Q Number 8, facts relating to the impact or potential
18 impact that buskers have had or might have on vehicle or
19 pedestrian traffic, safety, or congestion in the city of
20 Houston?

21 A Yes.

22 Q Number 12, reports, studies, or investigations
23 created prior to January 15th, 2020, that relate to a need or
24 justification for banning or restricting busking in the city of
25 Houston?

1 A Yes.

2 Q Number 13, reports, studies, or investigations
3 created prior to January 15th, 2020, that relate to a need or
4 justification for requiring buskers to obtain a permit to busk
5 in the theater district?

6 A Yes.

7 Q And number 14, the report referred to in the specific
8 explanation section of the request for council action Bates
9 stamp COHE003393 prepared by the Houston Department of Planning
10 and development and Central Houston Inc?

11 A Yes.

12 Q Okay. Do you understand that you're testifying on
13 behalf of defendant city of Houston today?

14 A Yes.

15 Q Do you understand that your answers will be taken as
16 answers of the defendant city of Houston?

17 A Yes.

18 Q Okay. Did you do anything to prepare for this
19 deposition today?

20 A Yes, I read through the documents that I have, and I
21 spoke with my attorneys, and I reached out to Central Houston
22 to see if they had the report in their files.

23 Q Okay. And when you say I -- you read the documents
24 that you have, which documents are you referring to?

25 A I'm referring to -- I think they're the same

1 documents that are in your package that I just received, but
2 particularly ordinance 911168 --

3 A Okay.

4 Q -- and chapter 40 of the code of ordinances that
5 pertains to 911168.

6 Q Okay. Any other documents that you are referring to?

7 A Yes, I read ordinance number 2011874.

8 Q Okay. And what is that?

9 A That is ordinance of a -- chapter 30 of the code of
10 ordinances relating to noise and sound level regulation
11 containing findings and provisions relating to the forgoing
12 subject declaring certain conduct to be unlawful blah blah blah
13 blah blah and declaring an emergency.

14 Q Okay. Any other documents?

15 A No.

16 Q Okay. And you mentioned that you reached out to
17 Central Houston; can you tell us who Central Houston is?

18 A Central Houston is the non-profit that manages the
19 theater district locations, they were our partner in creating
20 this ordinance back in the '90s and one of the documents says
21 that they -- that together with Central Houston we created a
22 report on the trial period. I saw the documents in our files,
23 they're so old, they're -- we don't have them, and I reached
24 out to Central Houston to see if they would still have them.

25 Q Okay. And did they have it?

1 A I have not heard back.

2 Q Okay. When did you reach out to them?

3 A Last week, made -- yeah.

4 Q Okay. And with whom did you speak to prepare for
5 your deposition today?

6 A My attorneys.

7 Q Okay. Anyone else?

8 A No --

9 Q Okay.

10 A -- well, the email that I sent to Central Houston,
11 but, yes -- no, just my attorneys.

12 Q Okay. Did you have a contact there at Central
13 Houston that you were reaching out to, a specific member?

14 A The existing President Kris Larson and it's Kris with
15 K.

16 Q Okay. All right. Thank you. Okay. A little while
17 ago I asked you to read from Exhibit, I guess it would be B or
18 2, the busking ordinance; do you recall that?

19 A Mm-hmm. Yes.

20 Q Okay. And do you recall that you agree that the
21 busking ordinance contains a busking ban in public places?

22 A Yes.

23 Q Okay. Can you please identify all the justifications
24 or government interests underlying a busking ban?

25 A I -- so I would think that the government interests

1 include traffic and administrative safety, the safety and
2 welfare of those traveling through and around downtown, that
3 would be our primary purpose.

4 **Q Okay. Anything else?**

5 **A** I would also think that we would be concerned about
6 the effect it would have neighboring properties and neighboring
7 commuters.

8 **Q Okay. Neighboring -- okay. Anything else?**

9 **A** That's -- those are the primary two I can think of.

10 **Q Okay. So with respect to -- you mentioned traffic**
11 **and pedestrian traffic --**

12 **A** Mm-hmm.

13 **Q -- can you clarify what you mean by that?**

14 **A** Well, I would think that the city would have a great
15 concern that if a busker created a crowd that it would cause
16 unsafe conditions for either pedestrians who were trying to
17 traverse over that portion of the sidewalk maybe forcing them
18 to walk onto the street in the line of automobiles and traffic,
19 it might also provide a safety hazard for drivers in the cars
20 or bicyclists in that area if the crowds were too big, and I
21 think that would be our primary concern. How do we protect our
22 residents and our -- and the people -- the other people who use
23 our downtowns.

24 **Q And what facts do you rely on to support the idea**
25 **that busking on public sidewalks so interferes with this**

1 interest in traffic and pedestrian safety that it must be
2 banned entirely?

3 A I don't personally have any facts associated with
4 this, I'm certain that the people who initiated this ordinance
5 in the beginning would have had facts, but I don't have any
6 knowledge of those.

7 Q And who are the people that initiated this ordinance
8 in the beginning?

9 A Well, my understanding is that busking had been
10 illegal in the city of Houston for quite a time prior to 1991.
11 I don't know who those people specifically would be.

12 Q Okay. But I'm asking what department or agency?

13 A Oh, I don't even have any idea about that. Our
14 departments, you know, change regularly -- not regularly, but I
15 don't know.

16 Q Does planning and development have any
17 responsibilities in the area of traffic in the neighborhoods
18 and in around the neighborhoods --

19 A The planning department --

20 Q --

21 A -- responsibility -- yeah. Planning's responsibility
22 --

23 THE COURT REPORTER: I'm sorry --

24 THE WITNESS: -- we're --

25 THE COURT REPORTER: -- Ms. Matias --

1 **THE WITNESS:** -- asked to --

2 **THE COURT REPORTER:** -- I missed the end of that
3 question. When you all speak at the same time it, like, cuts
4 the audio so --

5 **THE WITNESS:** I apologize. Go ahead and ask the
6 question again.

7 **BY MS. MATIAS:**

8 **Q** That's okay. I asked -- the question was -- and I
9 apologize because I tailed in after you started answering so
10 the question was with planning and development, do they have
11 responsibilities in the area of traffic and safety in the
12 neighborhoods and in the downtown area?

13 **A** Yeah. So currently the planning and development
14 department has -- we are where transportation planning happens,
15 our -- the city's chief transportation officer is located in
16 the planning department and his responsibility with his team is
17 to provide safe, and efficient, and effective mobility for
18 Houstonians in downtown, and neighborhoods, and commercial
19 corridors, anywhere used and that position actually didn't
20 exist prior to 2020, and so I don't know what the planning
21 department's role in transportation planning, or mobility, or
22 traffic management would have been at the time this busking was
23 created.

24 **Q** Right. So we don't need to talk about the time busk
25 was created, what we're talking about is currently and --

1 A Mm-hmm.

2 Q -- what I want to know is currently who is
3 responsible for the safety and the effective mobility of
4 pedestrians in the downtown area in the neighborhoods?

5 A So I guess I am as director of the planning and
6 development department. We have a chief transportation planner
7 who works closely with the operations side of mobility which
8 would be public works and engineering's -- I'm sorry.

9 It's called -- now called Houston Public works.
10 Houston Public works' transportation and drainage division,
11 they are the operations and so they make sure streetlights
12 work, and that roads are paved, and they do all of the tactical
13 work associated with providing safe mobility.

14 My department is the planning side of it and so we
15 are, you know, figuring out how do we develop a system that is
16 safe for both pedestrians, and automobile drivers, and
17 bicyclists, and transit riders and then Public works is who
18 implements that.

19 Q Okay. Thank you. So if you're trying to determine
20 how you're providing -- whether you're providing and how to
21 provide a safe area for these -- for pedestrians in the
22 neighborhoods and in the downtown, how do you know whether
23 you're -- what are you using to evaluate whether it's safe or
24 not?

25 A Learned a lot of metric that we use to evaluate; some

1 of the most obvious are crash statistics and we have a vision 0
2 action plan for the city of Houston where the city has
3 determined it wants to reduce -- it wants to eliminate deaths
4 and serious injuries by automobile crashes by the year 2030 and
5 there -- and that plan includes several sets of data that
6 indicate where high frequency -- indicate places where crashes
7 are more frequent than others and so forth, but that all takes
8 place in our transportation planning area. I don't know the
9 specific metrics if that's what you're asking me.

10 **Q No, I was asking more generally. So it sounds like**
11 **you -- one of the things that you keep track of is crash**
12 **statistics; is that correct?**

13 **A Yes.**

14 **Q Okay.**

15 **A Correct.**

16 **Q And do you have any evidence of buskers causing**
17 **crashes more than anyone else or at all?**

18 **A I do not. I don't know that that would be something**
19 **we could compile in Houston because the, you know, we have not**
20 **seen a lot of buskers, we have not seen many buskers at all**
21 **through these years and so I'm not sure that's even you could**
22 **analyze.**

23 **Q Okay. So if you haven't seen many buskers, how is it**
24 **that they can be the cause of the concern for, you know,**
25 **causing traffic and safety problems if you haven't seen a lot**

1 of them?

2 A Well, again, this -- the first ordinance which made
3 it illegal was done many years ago, and I don't know what they
4 had, or what they had seen, or what analysis they did at the
5 time.

6 Q I understand that, and again, I'm talking about
7 currently. What is the traffic and pedestrian concern or
8 interest that the city has that were -- such that we need to
9 ban buskers throughout the city of Houston? I'm not talking
10 about when the ordinance was passed. I understand that I'm
11 talking about now what is the current concern?

12 A I guess I'm having trouble answering the question
13 because I'm not sure -- because I'm having trouble putting it
14 into -- I mean, we're not doing the analysis now for that
15 because -- I'm trying to think about how to say what I'm trying
16 to say.

17 So we don't currently see a large number of buskers
18 in Houston, in downtown, and so therefore it is not top of mind
19 for my transportation planners to analyze the results of their
20 -- of them, and so we don't have any current data; does that --
21 I mean, I guess that's bottom line.

22 Q Okay. How specifically does banning buskers
23 everywhere outside the theater district further an interest in
24 traffic and pedestrian safety?

25 A I guess I'm going to go back to the same dilemma I

1 have. We -- this action was taken many years ago by people who
2 I don't know, and I don't what they used. There has been no
3 recommended change in it so there has been no current analysis
4 of it.

5 Q Okay. You mentioned also safety to people traveling
6 through the downtown area so aside from safety where you talked
7 about pedestrians going into traffic and then, obviously,
8 drivers their unsafety, you mentioned as a separate interest
9 safety traveling for people traveling through the downtown
10 area. Can you clarify what you mean by that, please?

11 A So safety for pedestrians and transit riders, bicycle
12 -- safety for Houstonians in and around the downtown area is in
13 fact a priority for our transportation planning efforts and for
14 Houston Public works' efforts.

15 It is an area that has a lot of pedestrians on the
16 street, and we work very closely with metro and other -- and
17 our partner agencies such as Central Houston to make sure that
18 the -- that everyone has access to, you know, safe ways of
19 getting around Houston and in order to, you know, continue this
20 as a vibrant economic area.

21 Q And what do you mean by safe, everyone has access to
22 safe, are you talking about crime, are you talking about
23 physical dangers, are you talking about -- what do you mean by
24 safety as --

25 A I'm really talking about the times that automobiles

1 and pedestrians interact with each other, physical safety from
2 automobile crashes.

3 Q Okay. So would you say then that that's the same
4 interest that you were talking about when you -- the first
5 thing you mentioned which was traffic and pedestrian safety?

6 A Yes.

7 Q Okay. And then you also mentioned the effect on
8 neighboring properties and property owners; can you clarify
9 what you mean by that, what is the effect that you're talking
10 about?

11 A You know, when there are large, loud events that take
12 place in public spaces or on sidewalks outside of a corporate
13 environment, outside of a building, it can be distracting.

14 And so I believe that one of the intents was to make
15 sure that the noise, the activity that was taking place on the
16 sidewalk outside of a private operation would not interfere
17 with the ongoing work operation that was going on in that
18 building or in that private space.

19 Q I'm sorry. I think I interrupted you. I'm sorry?

20 A Or in that private space.

21 Q Were in that private space. Okay. And so can you
22 tell me what facts you rely on to support the idea that busking
23 on public sidewalks so interferes with this concern for the
24 effect on neighboring properties and property owners that it
25 must be banned entirely in the city of Houston?

1 A Well, again, I can't tell you what the people who
2 wrote the ordinance what facts they relied on and we're not
3 reviewing or analyzing this ordinances currently so there are
4 no facts we are relying on today because we're not doing the
5 analysis.

6 Q Okay. And how specifically does banning buskers in
7 the entire city of Houston outside of the theater district
8 further an interest in protecting neighboring properties and
9 property owners?

10 A I think protects property owners from what we -- I
11 mean, it's -- the rule is established to, I'm assuming, to
12 limit the interferences to property owners and, you know, to
13 protect the health and safety of Houstonians, and it was put in
14 place for that.

15 Again, we're not analyzing this today to see whether
16 it should be continued or stopped, and so therefore I can't
17 really answer that question.

18 Q If there were a jackhammer outside of a property on a
19 public sidewalk --

20 A Mm-hmm.

21 Q -- is that -- is the owner of the abutting
22 properties, are they protected from jackhammer noise?

23 A No, they're probably not, but --

24 Q Should they be?

25 A I think if it went on for long periods of time either

1 the city or Central Houston might reach out to those property
2 owners and work out some sort of notification for, you know,
3 would notify the property owners, would do so me sort of --
4 have some sort of conversation with them if that was something
5 that were going to go on day after day after day.

6 I mean, we -- the city of Houston notifies property
7 owners adjacent to road construction all the time, it's
8 something that we do as a way of letting property owners know
9 that their life is going to be disrupted for some period of
10 time while we need to repaint, replace, repair, fix, do
11 whatever we do to the street. I think the same thing would be
12 said about jackhammers, I mean, that's part of that operation.

13 **Q If there was a private business owner that wanted to**
14 **do, say, a big remodel on a building, would it be required to**
15 **get the consent of the property owners on either side if it**
16 **were doing a remodeling that would cause a lot of distraction**
17 **and loud noise?**

18 A Well, so inside the building probably not, but
19 anytime they interrupt the street they are required to get
20 permits.

21 We require construction permits for business all the
22 time who want to potentially close off sidewalks or reroute
23 industry or automobile traffic while their cranes are out in
24 front of the building so, yes, we have ongoing relationships
25 and requirements about that.

1 Q So I'm speaking specifically about the noise because
2 you had mentioned an interest in protecting neighboring
3 property owners from large loud noises and distraction so I'm
4 only speaking about the noise factor if there were -- if a
5 neighboring private property owner of a business wanted to
6 remodel inside and there were going to be drills, and saws, and
7 whatever else going on in there, creating a lot of noise, would
8 that person have to get permission and written consent from all
9 of the abutting property owners that would be in hearing range
10 of that loud noise?

11 A No, but that person would have a building permit
12 where the property owners in the abutting businesses could call
13 -- use Public works' and get phone numbers and find out what
14 was going on.

15 Q Okay. So they'd be able to call, but the person
16 remodeling -- the company remodeling would not have to get a
17 permit in advance; is that correct?

18 A Well, they'd have to get a building permit in
19 advance, absolutely.

20 Q A permit that's going to say I'm going to be creating
21 a lot of noise and I need to get consent from all of the
22 businesses around me?

23 A So the city of -- I'm -- the city of Houston has a
24 noise ordinance on mechanical sounds. I don't -- I'm not
25 familiar with it, but that may come into play --

1 Q Okay.

2 A -- that way.

3 Q Are there any other -- you mentioned those three
4 rationales; are there any other rationales underlying the
5 busking restrictions?

6 A At this point, I've forgotten what the first there
7 mentioned were but --

8 Q Oh, Okay. I'll repeat them back to you.

9 A -- I doubt it.

10 Q The first was -- sorry. The first --

11 A No, go ahead.

12 Q -- traffic and pedestrian safety, the --

13 A Mm-hmm.

14 Q -- second was safety for people traveling through the
15 downtown realty, although, you later said that that's --
16 actually what you were talking about is traffic and pedestrian
17 safety so that's really effectively one interest, the other was
18 the effect on neighboring properties and property owners?

19 A Yeah. So I think I would -- and when you said three
20 it threw me for a loop, I characterize those as two; the
21 public's safety, and then the need of the property owner, and
22 then the effect on local property owners.

23 Q Okay. And are there any others that you can think
24 of?

25 A Not that I can think of no.

1 **Q Okay. Would you say that there is an esthetic**
2 **interest in anyway, you know what I mean by esthetic interest?**

3 A I think I know what you mean by that and is it -- are
4 you asking me do I think it's our -- in our interest whether or
5 not these are -- these leave -- I guess I would not call it
6 esthetic. I would call it maybe litter, you know, is that what
7 you're asking me?

8 **Q No, I'm just asking you if you think that there's any**
9 **esthetic concern, so litter of course is an esthetic concern,**
10 **but it wouldn't just be litter, it's -- I'm asking you if you**
11 **think that there is -- the city of Houston has some esthetic**
12 **interest in banning buskers throughout the city of Houston?**

13 A I think I'd have to ask you to give me a better
14 definition of what you mean by esthetic. Give me a list of some
15 of the things you mean by that.

16 **Q Well, let me ask you this; what is your understanding**
17 **of the word esthetic?**

18 A I'm an architect by training so --

19 **Q So you would know.**

20 A -- different definition than most people, but the
21 appearance, the, you know, the appearance of something, and I
22 think that my answer to you would be I think the city's
23 interest would be in cleanliness but not whether the, you know,
24 the colors are right or the customs are -- that, but there's a
25 range of things within my definition for esthetic, and I think

1 cleanliness, litter, that type of thing on that end of the
2 spectrum would be -- are something that the city cares deeply
3 about, we care about the way our streets look and whether
4 somebody's wearing a green outfit versus a red outfit doesn't
5 matter.

6 **Q Okay. And do you think then that there is -- that**
7 **having buskers in the city of Houston somehow interferes with**
8 **an esthetic concern?**

9 A No, I'm not sure I would say that.

10 **Q Okay. All right. Is there something about the**
11 **theater district that is particularly well suited for avoiding**
12 **traffic and pedestrian safety issues?**

13 A That is particularly suited -- well, in the theater -
14 - so the part of the rationale in creating the theater district
15 was to create a very walkable area where Houstonians could, you
16 know, enjoy the theater, enjoy a dinner before the theater,
17 enjoy a very vibrant part of Houston.

18 I mean, we're trying to encourage a vibrancy in the
19 theater district, and I think that lends itself well to a
20 busker, but I also think that there -- that it highlights the
21 need to be cautious about the safety of pedestrians and
22 automobile traffic throughout that area.

23 **Q So if you were creating an area of vibrancy --**

24 A Mm-hmm.

25 **Q -- would that raise more concerns about pedestrian**

1 safety than outside of the theater district; if the goal was to
2 create vibrancy within the theater district, wouldn't that
3 vibrancy create more safety and pedestrian issues rather than
4 fewer?

5 A Well, I think that vibrancy doesn't automatically
6 create safety and pedestrian issues, that if it's done right it
7 doesn't and that was the intent was to do this -- to create the
8 vibrancy but to create it in a safe manner. I don't think
9 safety -- I don't think when you have vibrancy you lose safety
10 if you --

11 Q And when you --

12 A -- know the line.

13 Q -- use -- sorry. When you say vibrancy, what are you
14 referring to?

15 A An active street life, you know, a walkable area, an
16 area where people want to be, an area where people want to
17 stroll, maybe linger --

18 Q Okay. And when you say active street life you mean
19 what light?

20 A I'm not sure how I could define that any better. I
21 honestly don't know how I define it differently, how I would
22 explain it even more --

23 Q Well -- go ahead.

24 A -- active street life, yeah, I mean, as opposed to
25 streets that don't encourage people at all, you know, at all as

1 opposed to streets that don't, you know, streets and
2 developments that don't encourage people to be in them.

3 Q Okay. So the goal in the theater district is to
4 encourage more people to be there?

5 A Yeah, I would -- to encourage people to want to be
6 there and to, you know, yes, and to linger and to feel
7 comfortable walking around, yes.

8 Q Okay. Thank you. Are you aware of any facts or
9 evidence that any busker by virtue of busking in a public place
10 in Houston has presented a danger to self or others?

11 A I am not aware of any, no.

12 Q Are you aware of any facts or evidence that any
13 busker by virtue of busking in a public place in Houston has
14 presented a traffic problem or risk?

15 A I'm not aware of any.

16 Q Okay. Sorry. You're breaking up a little. I don't
17 know if it's on my end on yours. I think you said you're not
18 aware of any?

19 A No. I'm not aware -- the answer to both of those
20 questions is no.

21 Q Okay. I don't know if the video is spotty for anyone
22 else, but I'm getting a delay.

23 THE COURT REPORTER: Yes, I'm getting a delay, as
24 well.

25 THE WITNESS: It's fine for -- well, yeah, I'm

1 getting a --

2 **THE COURT REPORTER:** Do you want to -- we can go off
3 record and switch her to phone audio?

4 **MS. MATIAS:** That might be -- yeah.

5 **THE COURT REPORTER:** Okay. Let's go off record at
6 11:21.

7 **(Recess.)**

8 **THE COURT REPORTER:** Okay. On record at 11:25.

9 **BY MS. MATIAS:**

10 **Q** Okay. Can you hear me, Ms. Wallace Brown?

11 **A** I can. Thank you.

12 **Q** Okay. I -- let's see, I believe I asked you if you
13 were aware of any facts or evidence that a busker busking in a
14 public place has a presented a traffic problem or risk, and I
15 believe you answered no; is that correct?

16 **A** That's correct. I answered no to both of those
17 questions.

18 **Q** Okay. Thank you. Are you aware of any facts or
19 evidence that any busker by virtue of busking in a public place
20 in Houston has caused any other kind of problem to others or to
21 oneself?

22 **A** I am not aware of any.

23 **Q** Okay. Do you know if the busking ban applies to the
24 someone who performs on the public sidewalks in Houston if they
25 don't ask for or receive tips?

1 A I assume that it does not apply. I thought -- I
2 think the key is asking for and receiving tips.

3 Q Okay. Do you know if the busking ban applies to
4 someone holding a sign asking for money on the public sidewalks
5 of Houston?

6 A No, I don't.

7 Q Okay. If a person is not performing but just holding
8 a sign asking for money, does the busking ban apply to them?

9 A I don't know.

10 Q Okay. Is it your understanding, as the director of
11 planning and development, would a permit be issued for someone
12 who just wanted to hold a sign and ask for money or tips in the
13 theater district?

14 A I don't know.

15 Q Okay. Do you know if the busking ban applies to
16 someone on a public sidewalk in Houston who sits quietly with
17 just a basket placed in front of them and a sign asking for
18 money?

19 A No, I'm not sure. I don't know.

20 Q Earlier when we talked about what I meant by the term
21 busk or busking, do you recall what that term -- what that
22 understanding was of the term?

23 A Yeah, I don't -- so I remember we agreed to a term.
24 I don't remember exactly what the words were. I know that
25 raising money was -- asking for tips was a portion of it,

1 performing for tips was a portion of that definition, yes.

2 **Q Okay. Let me --**

3 A Do you want to refresh my mind -- my memory?

4 **Q Yes, I'd like to, thank you.**

5 A Okay.

6 **Q Let me find that. Okay. The question was can we**
7 **agree that when I say busking or busker I'm referring to street**
8 **performers who perform for tips or gratuities?**

9 A Okay. And so I don't know whether someone just
10 sitting there is performing or not I guess is where I wasn't
11 clear --

12 **Q Okay.**

13 A -- I mean, my guess is an artist performance duty --
14 performance artist's a widely designed thing.

15 **Q Okay. How would you know if someone was performing,**
16 **how would you be able to determine that?**

17 A So I would interpret that it would be someone who is
18 actually had an act whether it was a mime, or musician, or an
19 artist of some other kind, but that doesn't mean that the
20 person who's doing that whose sitting there wouldn't also think
21 that was a performance.

22 **Q Okay. So is performance in the mind of the beholder?**

23 A I think what the performance is might be in the mind
24 of the beholder, but any type of performance would fall under,
25 you know, I think needing the permit so yes and no to that

1 question.

2 **Q When you say any type of performance would be -- lie**
3 **on needing the permit; what do you mean by that?**

4 A Well, buskers located in the theater districts are
5 required to get permits.

6 **Q Right. I understand that, but how -- I'm asking how**
7 **you would know whether or not someone was performing so that**
8 **they would be in need of a permit?**

9 A The part of my answer is that I don't review the
10 applications for permits, and so I don't know how those are
11 handled. I think that's, you know, I'm out of my area of
12 expertise when you ask that question.

13 **Q Okay. If -- and so who is responsible for enforcing**
14 **the busking restrictions?**

15 A I believe the permit comes either from the Public
16 works' department, or from the Administrative and Regulatory
17 Affairs department. I'm actually not sure which.

18 **Q Okay. Do you recall earlier that you read aloud from**
19 **the busking ordinance?**

20 A Mm-hmm.

21 **Q And I asked you to read from section 3 which began,**
22 **"The playing of bands upon the streets or in other public**
23 **places in the city with a view to taking up collection from**
24 **bystanders by someone for the benefit of the members composing**
25 **such band shall be a nuisance and unlawful." That was that**

1 first question; do you recall --

2 A Mm-hmm.

3 Q -- that?

4 A Mm-hmm. Yes.

5 Q Who would be in charge of determining whether or not
6 someone had violated that ordinance?

7 A I honestly don't know. It's not the planning and
8 development department --

9 Q Okay.

10 A -- I don't know. I am not familiar enough with
11 chapter 40 to know the answer to that question.

12 Q Okay. You don't know who's in charge of enforcing
13 that provision?

14 A No.

15 Q Okay. How would -- well, I'm going to move on to a
16 different question. I would like to direct your attention to
17 the busking ordinance, that exhibit B which I think you just
18 had in your hands --

19 A Mm-hmm.

20 Q -- and I'm going to ask you to take a look at this 4
21 and 5 of the ordinance which are Bates numbers COHE003380; do
22 you see that?

23 A Oh, I'm sorry, you said page 4 and 5?

24 Q Page 4 and 5 of the ordinance which, if you have the
25 Bates numbers do you see that 00 --

1 A Yeah, I don't have the Bates numbers on this document
2 that I'm looking at so is it division 2 --

3 Q Yes.

4 A -- permit? Okay.

5 Q Yeah.

6 A I'm there.

7 Q Exactly. Okay. I'm going to ask you to read aloud
8 beginning with division 2 permit all the way through to the
9 next page where it ends with paragraph 5?

10 A Okay. Section 4262 required, "it shall be unlawful
11 for any person who is not a permittee to sell merchandise or
12 food on the sidewalks in the theater entertainment district or
13 conduct sidewalk performances in the theater entertainment
14 district." Section 4263, applicable -- I'm sorry, application
15 in the accompanying documents generally, "any person desiring
16 to obtain a permit to sell merchandise or food on the sidewalks
17 in the theater entertainment district or to conduct sidewalk
18 performances in the theater entertainment district shall file
19 an application with the director on a form described by the
20 director for that purpose.

21 The application shall be set forth, the following
22 information would be accompanied by the following document.
23 The name, mailing address -- I'm sorry, "1) the name, mailing
24 address, street address, if different, and telephone number of
25 the applicants, together with a statement as to whether the

1 applicant is an individual, a partnership, or a corporation
2 and, if a partnership, the names of the all general partners
3 or, if a corporation, a copy of the Articles of Incorporation;
4 2) a map showing the proposed location, the specific sites
5 desired, the applicant may either designate one sit for 24
6 hours or use -- for 24 use or designate two sites with one site
7 designated as the daytime site with the hours of operation
8 between 7 o'clock a.m. until 5 o'clock p.m. and the other site
9 designated as the nighttime slot with hours of operation
10 between 5.01 -- 5:01 o'clock p.m. until 6:59 o'clock a.m.; 3)
11 the written permission of the abutting -- the owner for the use
12 of the site, 4) the statement whether the applicant desires the
13 permit as a food vendor, merchandise vendor or a performer, 5)
14 if the applicant seeks the permit as a performer then the
15 description of the performance to be provided." Keep going?

16 **Q** **Nope. We're good, thank you. Okay. So that was a**
17 **lot to read, and I appreciate your taking the time to do that.**
18 **Is it --**

19 **A** **No problem.**

20 **Q** **Is it accurate to say that these pages lay out**
21 **requirements for a busking permit application?**

22 **A** **Yes, it's accurate to say they lay out as the**
23 **operations of the city of Houston existed in 1921 -- I mean,**
24 **sorry, 1991, yeah.**

25 **Q** **Are these requirements still applicable today?**

1 A No, because this department -- so in this document it
2 defines director as the director of the city's department of
3 planning and development and the planning and development
4 department does -- no longer manages this process.

5 Q Okay. But is it accurate to say that that's a
6 reflection of what this ordinance says that it lays out --

7 A Yes.

8 Q Okay. Do you have any experience with or knowledge
9 of the permit application process?

10 A I do not.

11 Q Okay. Who is responsible for overseeing the permit
12 application process referred to in the busking ordinance?

13 A Referred to in this ordinance, the director of
14 planning and development is.

15 Q Okay. And that ordinance -- and you are director of
16 planning and development?

17 A Yes.

18 Q Okay. I want to talk about the permit process with
19 you. Do you know what the application fee is?

20 A It's on page six, yes.

21 Q Can you read that, please?

22 A "The -- each application should be accompanied by a
23 non-refundable fee as follows: 1) the fee for food vendor
24 permits shall be \$100 for a permit valid for one year, 2) the
25 fee for a food vendor permit shall be \$30 for a permit valid

1 for one month, 3) the fee for the merchandise vendor or
2 performance permits shall be \$50 for a permit value for one
3 year and 4) the fee for a merchandise vendor or performer
4 permit shall be \$10 for permit value -- valid for one month."

5 **Q Okay. Thank you. I'd like to introduce another**
6 **document. I think we are now on Exhibit D if that's correct,**
7 **and this is entitled City of Houston, Houston Public works**
8 **Traffic and Drainage Operations Street Performer Permit Bates**
9 **number COHE-000369; do you see that document?**

10 A Yes. I -- let me open it.

11 **Q Okay.**

12 A Okay.

13 **Q Okay.**

14 A Got it.

15 **Q Can you tell me what this document is?**

16 A This appears to be the permit that exists for these
17 type of operations -- for these busking operations that has
18 been issued -- that are issued. This is the application for a
19 permit for these busking operations to be issued by the city
20 through the public works department.

21 **Q Okay. And have you ever seen this before?**

22 A Yes, I think so.

23 **Q In what context?**

24 A I think my attorneys provided it to me last week or
25 the week before.

1 Q Okay. To whom would one submit this application; do
2 you know?

3 A Either the Houston Public Works Department, Traffic
4 and Drainage Operations Division.

5 Q And do you know who reviews this application?

6 A I do not. I mean, people's names I do not, but the
7 traffic and drainage operations division would review those.

8 Q Okay. Is there anyone else who would review this
9 application or give input on it?

10 A I don't know.

11 Q Okay. Do you know if an applicant is required to
12 submit any additional information that does not appear on this
13 form?

14 A I would not think so, but I don't know.

15 Q Okay. Do you know that if an applicant answers all
16 the questions on this form what their permit will be
17 automatically granted?

18 A I do not know.

19 Q Do you know if an applicant fails to answer all of
20 the questions on this form will she be denied of permit?

21 A I do not know.

22 Q Okay. Do you know under what circumstances a permit
23 might be denied?

24 A No.

25 Q Okay. Are you --

1 A Well, I mean, it's -- I'm sorry. Let me answer that
2 a little more fully. So there is a list of permit conditions,
3 I would suspect that if A through I permit conditions were not
4 met the application would be denied.

5 Q Okay. Are you aware of any written guidelines, or
6 rules, or standards for accepting or denying a busker permit
7 application?

8 A I am not aware of any.

9 Q Okay. A little while ago I asked you to read from
10 the busking ordinance, and I appreciate your patience with that
11 because it was a lot, and it contained -- and you agreed that
12 the busking ordinance contained a permit requirement for
13 buskers earlier?

14 A Correct.

15 Q Can you identify all of the justifications or
16 government interests underlying a permit requirement for
17 buskers in the theater district?

18 A I think it would go back to the primary two that I
19 talked about earlier which would be to ensure that the safety
20 of Houstonians who were either watching and paying attention to
21 the busker or not would be paramount. Those would be -- that
22 would be the primary consideration.

23 Q So that -- you mentioned when the safety of
24 Houstonians watching --

25 A The safety --

1 Q -- the --

2 A -- of people in the area, the safety of people on the
3 sidewalks, or driving through, or driving past. Did I
4 misunderstand your question?

5 Q No, that's --

6 A Okay.

7 Q It's --

8 A Okay.

9 Q Am I accurate in saying that you're essentially
10 saying it's the same interest that you identified that were
11 necessary for the busking ban?

12 A Yeah, well, I think those interests are paramount to
13 the city of Houston in whether it allows or disallows something
14 so, yes, I think they would be the same.

15 Q Okay. And can you tell me what facts you rely on to
16 support the idea that busking without a permit interferes with
17 the safety of Houstonians?

18 A I have no facts on which to allow that -- I mean, to
19 rely on that statement.

20 Q Okay. Do you have any evidence or knowledge of
21 studies, or reports, or investigations that would support that
22 claim that permit -- a permit is necessary for a busker in
23 order to protect the safety of Houstonians?

24 A I know that the city of Houston in cooperation with
25 Central Houston conducted a study for the trial period and read

1 the report which led us to instituting this on a permanent
2 basis. I have not read that report in 20 -- since 1991, and I
3 don't know what it says, but I would suspect that there was
4 information in that.

5 **Q Okay. How specifically does requiring a permit**
6 **further an interest in safety?**

7 A So my -- I would think that it would allow the city
8 to manage the number of buskers, the location of buskers and
9 would give us more ability to allow this activity while still
10 protecting the safety of Houstonians that are in the area.

11 **Q So in what way would providing a slip of paper allow**
12 **the city to manage the safety of Houstonians?**

13 A 1) we would know where the buskers and would be able
14 to when one applies for a permit we would be able to say there
15 are already, you know, X number in that neighborhood on that
16 block and be able to identify what safety implications there
17 might be so without knowing we would have no idea.

18 **Q Okay. And if you mentioned earlier that the key to**
19 **the busking ordinance was the asking for tips or asking for**
20 **gratuities; do you recall that?**

21 A Mm-hmm.

22 **Q Okay. If there were someone who wanted to tap dance**
23 **in the theater district, and there was someone else who wanted**
24 **to play guitar in the theater district, and neither of them**
25 **wanted to ask for tips, would they have to have a permit?**

1 A My understanding is they would not.

2 Q Okay. And what if there were a lot of people like
3 that who said I just want to go out and practice, I don't
4 really care about the tips, let's all gather in the theater
5 district and do our thing; would the city of Houston have a
6 need for -- to protect the safety there?

7 A So without permits I think the city of Houston would
8 still be interested in protecting the safety and would probably
9 still deploy some, you know, some methods to -- well, we would
10 probably want to talk with those people who are doing that and
11 make sure that they are, you know, not causing a disruption of
12 traffic or pedestrian access and, yeah, I think we still have
13 the interest of safety for Houstonians.

14 Q So the interest would be there, but the permit would
15 not be required; is that correct?

16 A That's the way I understand it, yes.

17 Q Okay. Thank you. A little earlier I asked you to
18 read aloud from that Exhibit B under the division 2 heading and
19 through to the next page up to and including paragraph 5, that
20 was that very long passage; do you recall that?

21 A Mm-hmm.

22 Q Okay.

23 A Yes.

24 Q And I also introduced the application which I believe
25 is our Exhibit D; do you recall that?

1 A Mm-hmm.

2 Q Okay.

3 A Yep.

4 Q Can you take a look at that Exhibit D, the street
5 performer permit, for me, please?

6 A I am, yes.

7 Q Okay. About a third of the way down do you see where
8 it begins please attach the following?

9 A Yes.

10 Q Okay. Could you please read from there until you
11 reach the two black lines?

12 A Okay. "So please attach the following documentation,
13 permit will not be approved without the following
14 documentation; 1) map sharing the proposed location of
15 performance, the applicant may either designate one site for 24
16 hours or use the -- for 24 hour use or designate two sites with
17 one site designated as a daytime site with hours of operation
18 between 7 a.m. until 5 p.m. and the other site designated as
19 the nighttime site with hours of operation between 5:01 p.m.
20 until 6:59 a.m." in parentheses," location may only include the
21 midpoint of and bounded by Preston Street on the north, Dallas
22 Street on the south, Milam Street on the east, and Interstate
23 Highway 45 on the west, number 2) written permission from the
24 abutting property owner or owners, description of the
25 performance and type of instrument to be used."

1 Q Okay. Based on that reading, can we agree that the
2 paragraph numbered 1 requires an applicant to choose between
3 either one space for 24 hours or two spaces broken into two --
4 broken up, excuse me, into 12 hour increments?

5 A Yes.

6 Q Okay. And based on that reading, do you understand
7 that to mean that those spots are the only places a busker
8 would be permitted?

9 A Yes.

10 Q Okay. And based on your reading, does the paragraph
11 numbered 2 require an applicant to obtain written permission
12 from property owners abutting the space or spaces that the
13 applicant chooses?

14 A Yes.

15 Q Okay. And then based on your reading, do you
16 understand the line below paragraph 2 to require an applicant
17 to describe in advance their performance including any
18 instruments they will use?

19 A Yes.

20 Q Okay. A little while ago, we've talked about
21 different interests that the city has in the busking ban and in
22 the permit regime generally and now I'd like to ask do you
23 recall those interests?

24 A I'm sorry. Ask it again one more time, I --

25 Q Yes.

1 A -- missed that.

2 Q Okay. A little while ago I asked about the
3 government interest in the busking ban and then the general
4 permit scheme; do you recall that?

5 A Yes.

6 Q Okay. And we talked about traffic and pedestrian
7 safety and the effect on neighboring properties and property
8 owners protecting them from loud noises; is that correct?

9 A Correct.

10 Q Okay. Are there any others that you can think of
11 that might have come to mind since we first went down that
12 road?

13 A No.

14 Q Okay. With respect to the traffic, and pedestrian,
15 and the safety of Houstonians generally, can you describe how
16 requiring a busker to choose and remain in one spot, or two
17 spots if they choose to be there for 24 hours, serves the
18 interest in pedestrian safety?

19 A Well, I would say that part of it is about making
20 sure that there aren't too many buskers in one location which
21 could cause, you know, huge crowds and, again, jeopardize
22 pedestrian and traffic safety.

23 Q Earlier I gave you an example of a lot of street
24 performers who didn't care about the money, didn't ask for
25 tips, and they also could draw large crowds; could they not?

1 A I guess they could.

2 Q Okay. Do you have any evidence to support the idea
3 that requiring a busker to remain in one spot serves a public
4 safety interest?

5 A I do not.

6 Q Okay. And how does requiring a busker to obtain
7 written permission from abutting property owners serve the
8 interest of traffic and pedestrian safety?

9 A Well, I think it serves the interest of the second
10 interest that the city has, and that is supporting property
11 owners, and making sure that the busking activity is not
12 detrimental to adjacent property owners.

13 Q Okay. But the question was does it serve an interest
14 in traffic or pedestrian safety to require a busker to get
15 permission from the abutting property owners?

16 A Probably less so, no.

17 Q Less so but it in some way?

18 A You know, I can't -- I mean, yes, I think it's some
19 way -- it's possible, yes. I can't imagine all the scenarios,
20 but I wouldn't say absolutely no.

21 Q Because -- why would you not say absolutely no?

22 A Because I'm not fully aware of all of the
23 implications of having a busker on a sidewalk in front of a
24 piece of property. I don't know what all the implications
25 might be, and I would not say that definitely there is no

1 implication because I don't know what the universe of
2 implications are.

3 Q I'm actually not asking you to imagine everything in
4 the world, I'm asking just within your own awareness, and
5 knowledge, and experience can you think of a way in which
6 requiring a busker to get permission from abutting property
7 owners serves some interest in traffic or pedestrian safety or
8 the safety of all Houstonians?

9 A No.

10 Q Okay. Do you have any evidence to support the idea
11 that requiring a busker to obtain written permission from
12 abutting property owners serves an interest in protecting those
13 neighboring property owners and properties from loud noises and
14 distractions?

15 A Yes --

16 Q Okay.

17 A -- no, I'm sorry. Do I have any evidence, no --

18 Q Yeah.

19 A -- I do not have evidence.

20 Q Okay.

21 A -- on that point.

22 Q On what basis do you make that claim then that it
23 serves the interest of -- sorry, of property owners --

24 A So I mean, I think that I -- so I think your question
25 was -- and maybe I misunderstood. I think your question was do

1 I have any evidence that -- documents that -- and the answer is
2 no, but I would say that it's the city of Houston's interest
3 to, you know, protect our property owners and provide service
4 to everyone and -- no. I mean, I guess -- okay. So ask the
5 question again. I think I'm getting way off track --

6 **Q Okay.**

7 **A -- looking for circles and there aren't any.**

8 **Q Okay.**

9 **A So just ask the question again.**

10 **Q Okay. Let me try again. What evidence do you have**
11 **to support the idea that requiring a busker to obtain written**
12 **permission from an abutting property owner serves the interest**
13 **of protecting neighboring property owners from loud noises and**
14 **distractions?**

15 **A No, I don't have any evidence that it does that.**

16 **Q Okay. Thank you. And then on what basis do you make**
17 **the claim that there is an interest in protecting the effects**
18 **on neighboring properties and property owners?**

19 **A I think this is a little bit longer answer than what**
20 **you want, but I do know that when -- so I work in an office**
21 **building and there are often times events in the streets around**
22 **me. I'm adjacent to a couple city parks, and it can be very**
23 **disruptive to operations when there is this type of noise going**
24 **on constantly.**

25 **Luckily, I'm only close to it on periodic basis's,**

1 but if there were a busker who were in front of my office
2 everyday I think it could be disruptive to my operation, and I
3 think when the city of Houston and Central Houston initiated
4 this effort, you know, we were stepping into unknown, you know,
5 going into -- we didn't have -- we were stepping into the
6 unknown, we didn't know, you know, what would -- how many
7 hundreds of people might come out or not and so there was a
8 concern that if we do this we need to be more protective about
9 the adjacent property owners.

10 We need to have a consideration for them as well and
11 so it was, you know, an effort for the city to recognize that
12 there might be some challenges for property owners created by
13 this effort knowing how we dealt with it.

14 **Q Okay. And would it be equally disruptive then if**
15 **there were just a loud street performer out there, but they**
16 **weren't asking for tips?**

17 **A** Well, probably yes.

18 **Q Is there a noise ordinance in place in the city of**
19 **Houston?**

20 **A** There is.

21 **Q Does it apply also to the theater district?**

22 **A** Yes.

23 **Q Okay. Describe how requiring a busker to describe**
24 **their performance in advance serves the interest of traffic or**
25 **pedestrian safety?**

1 A Knowing what and what is included in the buskers I
2 think provides decent -- the ability to be proactive if
3 something that the busker is doing would be detrimental to
4 traffic safety so, and I'm just making this up, if it were a
5 50-person band maybe we would need to do some -- maybe we would
6 need to consider routing safety, routing pedestrians into
7 traffic another way or something like that.

8 **Q Okay. If it were not a 50-person band but it were,**
9 **say, a one-man band, would the city have an interest in traffic**
10 **and pedestrian -- protecting traffic and pedestrian safety and**
11 **being proactive in that situation?**

12 A Well, we've always had the interest, whether we would
13 need to be proactive is the question and I would suspect no, we
14 would not need to be proactive.

15 **Q Okay. What about -- so you mentioned a 50-person**
16 **band which is a big crowd obviously; what else about a**
17 **performance -- what else about just telling what the**
18 **performance is in advance and getting a permit for it serves an**
19 **interest in traffic and pedestrian safety?**

20 A I think being able to know -- so it's a number of
21 things. I would say that part of it is venues got an idea of
22 what's going on on the street and so you know who's permitted
23 and that helps, again, it could give us the ability to be
24 proactive on -- if there were too many buskers or too many
25 people on the street or something else is happening on that

1 street we have a way of knowing what to look out for. I think
2 the other thing we were looking for in '91 just to kind of
3 expand a little bit is, again, this was new to us, we weren't
4 sure who was going to be interested.

5 We didn't know -- we didn't have any ideas on what we
6 were going to get from this, from increasing this opportunity,
7 and so it was also another way for us to, you know, kind of
8 keep track of who was interested in doing this and so it gave
9 us data so that we would have evidence in the future if there
10 were challenges, or if there were problems, or if something
11 happened we would be able to start collecting much of this
12 evidence that you're asking me about --

13 Q Okay.

14 A -- by knowing what the buskers were doing.

15 Q Okay. And I understand the need to want to know if
16 you're talking about a lot of people who will be performing as
17 a band, it's a large band, or whatever, a school chorus,
18 something with a lot of people and my question is more about
19 the description of the performance itself.

20 Why is that necessary to know, not the number of
21 people involved in the performance but the description of the
22 performance itself, why would it be necessary for the city to
23 know whether someone would be tap dancing or painting
24 landscapes, what does that have to do with traffic and safety?

25 A Yes. I don't know. I can't answer that.

1 Q Okay. And do you have any evidence that requiring a
2 busker to describe their performance in advance serves the
3 interest in traffic or safety?

4 A No, I do not.

5 Q Do you have any evidence that requiring a busker to
6 describe their performance in advance somehow serves the
7 interest of protecting neighboring properties?

8 A No.

9 Q Okay. Are you aware of certain performances or types
10 of performances that would be prohibited, in other words,
11 denied an application?

12 A No, I'm not.

13 Q Okay.

14 A No.

15 Q But would there be certain instruments that would be
16 denied an application?

17 A I'm not aware of any --

18 Q Okay.

19 A -- in other words, if there are any.

20 Q Okay. If someone was performing on a public sidewalk
21 in the theater district without seeking gratuities, do the
22 permit requirements apply to them?

23 A No, I don't think so.

24 Q Okay. If someone was standing on --

25 A I'm sorry. If they were doing what on a sidewalk?

1 Q They were performing.

2 A Oh, yeah, no, I don't think so.

3 Q Okay. If someone was standing on a public sidewalk
4 in the theater district and they held a sign up asking for
5 money would the permit requirements apply to them?

6 A Haven't we already answered -- asked and answered
7 these questions?

8 Q No. We asked and -- we asked about the band, I meant
9 now asking about the permits --

10 A Okay.

11 Q -- so now we're just talking about within the theater
12 district.

13 A Yeah, I don't know. I mean, we've talked about the
14 fact that standing there doesn't seem to be a performance, but
15 I'm not sure that it's not --

16 Q Okay.

17 A -- so --

18 Q And how would one know?

19 A Yeah, I don't know, but I wouldn't -- but I'm not the
20 person who would know so it would be the folks in the public
21 works that are issuing the permit. Probably not is my -- would
22 be my answer.

23 Q Okay. But you say that someone from public works
24 would have to go out and make that determination?

25 A Yeah, I would think so. I mean, yes.

1 Q And how would they make that determination?

2 A I don't know.

3 MR. AMIS: Objection. Speculation.

4 BY MS. MATIAS:

5 Q Okay. If that same person in the theater district
6 started tap dancing as they held up the sign, would the permit
7 requirements apply to them?

8 A I would think it would, but -- yeah, I would think it
9 would.

10 Q Okay. If -- okay. Let's see.

11 A While you're doing that, can we take like a five-
12 minute break?

13 Q Sure.

14 THE COURT REPORTER: Okay.

15 MS. MATIAS: We're off record to take five minutes.

16 THE COURT REPORTER: Off record at 12:04.

17 (Recess.)

18 THE COURT REPORTER: Okay. On record at 12:12.

19 BY MS. MATIAS:

20 Q Hello again, Ms. Wallace Brown.

21 A Hi there.

22 Q You'll be happy to know perhaps that I'm almost done.
23 I just have a few --

24 A Okay.

25 Q -- more questions, probably about ten more minutes or

1 so.

2 A Okay.

3 Q Okay. So I'd like to turn now to complaints about
4 buskers and whether you are aware of any complaints written or
5 otherwise that have been made against buskers in the theater
6 district in the last five years?

7 A I am not aware of any.

8 Q Okay. Do you -- are you aware of any complaints
9 written, or oral, or otherwise that have been made against
10 buskers outside the theater district so in the rest of Houston
11 in the last five years?

12 A I'm not -- yeah, I'm not aware of any.

13 Q Okay. I'd like to introduce a document produced by
14 defendant, and that is called the Request for Council Action,
15 Bates number E003393; do you see that document?

16 A No, I don't, but I have several requests for council
17 actions in front of me.

18 Q It's -- at the very bottom -- the Bates number is at
19 the very bottom, but I don't know if it appears. It's -- so
20 the top -- the title of the top says Request for Council Action
21 and then it says under the to mayor via city secretary; do you
22 see that?

23 A Yeah. So it would be helpful if under the subject
24 there's probably a stamped date.

25 Q Oh, yes. July 31st, 1991.

1 A Okay. I have that --

2 Q You got it?

3 A -- one in front of me.

4 Q Okay. And down the second half of it there is a
5 section entitled specific explanation; do you see that?

6 A Mm-hmm. Yes.

7 Q Okay. Could you read aloud please that first
8 paragraph?

9 A "In June 1990, Council approved an ordinance
10 authorizing the issuance of permits to certain vendors and
11 performers in a specific area of downtown for a 45-day trial
12 period. Only while five permits -- while only five permits
13 were issued under the trial ordinance, the Department of
14 Planning and Development Department and Central Houston Inc
15 received numerous inquiries about the program.

16 At the termination of the trial program, Central
17 Houston and the department reviewed the comments received from
18 potential permittees, permitted vendors and pedestrians, and
19 prepared a report for Council's review. The report outlines
20 several recommendations to the establishment of the program on
21 a permanent basis. This ordinance incorporates recommendations
22 made in that report."

23 Q Okay. Thank you. I think that might be the last
24 long stretch of reading I'm going to give you today so --

25 A That's okay.

1 Q -- you're welcome.

2 A Look at my terrible punctuation, how does this ever
3 get past me?

4 Q Okay. So let's see; in that paragraph that you just
5 read there is a reference to comments received from potential
6 permittees, permitted vendors and pedestrians; do you see that?

7 A Yes.

8 Q Are you aware or have you ever seen those comments
9 received from potential permittees, permitted vendors and
10 pedestrians?

11 A I'm sure I saw them. I don't remember what they
12 were, and I don't have any copies of them at this point.

13 Q Do you know where they would have been kept?

14 A It would have been kept in the planning department
15 file, but we would have archived these, and it is beyond our
16 document retention dates and so we would have destroyed them by
17 now.

18 Q Okay. So let's see; so earlier in the deposition
19 when we talked about the notice of deposition, and I asked if
20 you were prepared to testify about the report and you said.
21 yes; is that correct?

22 A Yes.

23 Q And did you -- so in preparing for this deposition,
24 you -- are you -- is it your testimony that you did not review
25 any of those comments or the report?

1 A Yes. So I looked for all of those comments in the
2 report in our files. I went to our archive system, and they
3 weren't here, they're older than the retention schedule that we
4 have and so they would probably have been destroyed. I also
5 called Chris Larson to see if he had copies of any of them,
6 sent him an email last week and he has not returned my call --
7 or my email.

8 **Q Okay. Do you have an idea, any idea, about what is**
9 **in that report?**

10 A No, I really don't. I was hoping I could see the
11 report to refresh my memory, but I don't.

12 **Q Okay. Are you aware of any studies or reports**
13 **created prior to January 15th, 2020, for the city of Houston**
14 **relating specifically to the need to ban busking in public**
15 **places in the city?**

16 A I'm not aware of any.

17 **Q Okay. Are you aware of any studies or reports**
18 **created prior to January 15th, 2020, for the city of Houston**
19 **regarding or relating specifically to the need to establish a**
20 **permit system for buskers in the theater district?**

21 A No.

22 **Q Okay. Has the city of Houston ever considered**
23 **modifying the busking ordinance?**

24 A I -- so I'm not certain. I do know that I have not
25 been part of any discussion modifying it, but I don't know if

1 other departments or other mayor's offices or something like
2 that may have had discussed it.

3 **MS. MATIAS:** Okay. I think that's all the questions
4 I have for now. Counsel, if you --

5 **THE WITNESS:** Okay.

6 **MS. MATIAS:** -- have any questions for your witness.

7 **MR. AMIS:** City, we'll reserve for trial.

8 **MS. MATIAS:** Okay.

9 **THE COURT REPORTER:** Okay. Are we ready to go --

10 **THE WITNESS:** I'm sorry. I didn't hear that?

11 **MR. AMIS:** Margaret, you are excused.

12 **THE WITNESS:** Okay.

13 **MR. AMIS:** That's what you want to know.

14 **MS. MATIAS:** That's the best thing she's heard all
15 day.

16 **THE WITNESS:** That's all I want to know.

17 **THE COURT REPORTER:** Are you ready to --

18 **THE WITNESS:** Okay.

19 **THE COURT REPORTER:** -- go off --

20 **THE WITNESS:** Do I --

21 **THE COURT REPORTER:** -- record?

22 **THE WITNESS:** -- log off now?

23 **MR. AMIS:** Yes.

24 **MS. MATIAS:** Yes.

25 **MR. AMIS:** Certainly, now.

1 **THE COURT REPORTER:** Okay. Off record at 12:18.

2 **(Whereupon, the deposition of Margaret Brown Wallace**
3 **was concluded at 12:18 p.m.)**

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1 IN THE UNITED STATES
2 DISTRICT COURT FOR THE
3 SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION)

4
5 ANTHONY BARILLA
6 VERSUS CASE NO.: 4:20-CV-00145
7 CITY OF HOUSTON, TEXAS
8
9

10 REPORTER'S CERTIFICATION
11 DEPOSITION OF MARGARET WALLACE BROWN
12 MAY 11, 2022
13

14 I, ARIA MENDOZA, Court Reporter, hereby certify to the
15 following:

16 That the witness, MARGARET WALLACE BROWN, was duly sworn by the
17 officer and that the transcript of the oral deposition is a
18 true record of the testimony given by the witness;

19 That the deposition transcript was submitted on 26th day of May
20 2022, to the witness or to the attorney for the witness for
21 examination, signature and return to NAEGELI DEPOSITION AND
22 TRIAL by June 15, 2022;

23 That the amount of time used by each party at the deposition is
24 as follows:

25 Anastasia P. Boden, Esquire - 0 hr 00 min

1 Joshua W. Polk, Esquire - 0 hr 00 min

2 Donna G. Matias, Esquire - 1 hr 32 min

3 Brian A. Amis, Esquire - 0 hr 00 min

4 Daniel Oliver, Esquire - 0 hr 00 min

5 That pursuant to information given to the deposition officer at
6 the time said testimony was taken, the following includes
7 counsel for all parties of record:

8
9 Anastasia P. Boden, Esquire - ATTORNEY FOR PLAINTIFF

10 Joshua W. Polk, Esquire - ATTORNEY FOR PLAINTIFF

11 Donna G. Matias, Esquire - ATTORNEY FOR PLAINTIFF

12 Brian A. Amis, Esquire - ATTORNEY FOR DEFENDANT

13 Daniel Oliver, Esquire - ATTORNEY FOR DEFENDANT

14 I further certify that I am neither counsel for, related
15 to, nor employed by any of the parties or attorneys in the
16 action in which this proceeding was taken, and further that I
17 am not financially or otherwise interested in the outcome of
18 the action.

19 Certified to by me this 26th day of May 2022.

20
21
22 

23 _____
24 Aria Mendoza, No. 818
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IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION)

ANTHONY BARILLA

VERSUS CASE NO.: 4:20-CV-00145

CITY OF HOUSTON, TEXAS

FURTHER CERTIFICATION UNDER RULE 203 TRCP

The original deposition MARGARET WALLACE BROWN ____ was ____

was not returned to the deposition officer.

If returned, the attached Changes and Signature page contains

any charges and the reasons therefor;

If returned, the original deposition was delivered to

_____, custodial attorney;

That _____ is the deposition officer's charges to

_____, attorney for the

_____, for preparing the original deposition

transcript and any copies of exhibits;

That the deposition was delivered in accordance with Rule

203.3, and that a copy of this certificate was served on all

parties shown herein on and filed with the Clerk.

Certified to by me this ____ day of _____, 2022.

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(Insert Reporter Name), No. 818

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STREET PERFORMER OPERATIONAL BOUNDARY



EXHIBIT

A

DEPONENT NAME:


Brown, Margaret

DATE:

05/11/22

I, PAT J. DANIEL, City Secretary of the City of Houston, Texas, do hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 1991-1168 passed and adopted by the City Council of said City on the 14th day of August, 1991, as the same appears in the records in my office.

WITNESS my hand and the Seal of said City this 5th day of October, 2021.



Pat J. Daniel
City Secretary

COH e-003376

EXHIBIT B	DATE:	05/11/22
	DEPONENT NAME:	Brown, Margaret

JCW570

City of Houston Ordinance No. 91-1168

AN ORDINANCE PROVIDING FOR THE ISSUANCE OF PERMITS TO CERTAIN VENDORS AND PERFORMERS IN A CERTAIN PORTION OF DOWNTOWN HOUSTON; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.

* * * * *

WHEREAS, the City of Houston wishes to make its Theater/Entertainment District a vital core of community activity to further the economic and cultural health and welfare of this City; and

WHEREAS, the City of Houston wishes to provide an enhanced program of pedestrian level activities to promote a vibrant, hospitable, secure and enjoyable atmosphere to attract Houstonians downtown; and

WHEREAS, hosting visitors and conventioners is of increasing importance in the downtown area since the opening of the George R. Brown Convention Center; and

WHEREAS, the Code of Ordinances of the City prohibits the sale of most forms of food items and merchandise in street rights-of-way and also prohibits the practice of conducting sidewalk performances for contributions from bystanders; and

WHEREAS, many other cities allow these activities on a regulated basis in order to promote the use of their downtown areas for tourism and cultural events; and

JCW570

WHEREAS, the City Council desires to allow certain sales of food and merchandise and sidewalk performances within a portion of the downtown area that is associated with the Theater/Entertainment District; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings contained in the preamble to this Ordinance are determined to be true and correct and are hereby adopted as part of this Ordinance.

Section 2. That subsection (b) of Section 40-8 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"(b) This section shall not apply to persons selling frozen desserts from sanitary vehicles in full compliance with the ordinances and statutes regulating such, to persons selling newspapers in full compliance with the ordinances permitting the sale of newspapers on public property, to sidewalk cafes operated under a permit issued pursuant to section 40-10.1 of the Code, to any person who is acting in compliance with a franchise granted by the city, to transactions in public buildings or on public property in which transactions the city is a party or to any person selling food or non-food merchandise within the 'theater/entertainment district' defined in section 40-261 of this Code pursuant to a permit issued under article XI of chapter 40 of this Code."

Section 3. That Section 28-6 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"The playing of bands upon the streets or in other public places in the city, with a view to taking up a collection from the bystanders by someone, for the benefit of the members composing such band shall be a nuisance and unlawful. Every member of such

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a band who plays with a view to taking up or having taken up a collection from the bystanders shall be guilty of committing a nuisance; provided, however, this section shall not be construed to apply to religious organizations that conduct their services in the streets or in other public places or to sidewalk performers performing within the 'theater/entertainment district' defined in section 40-261 of this Code pursuant to a permit issued under article XI of chapter 40 of this Code."

Section 4. That Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Article XI which reads as follows:

"ARTICLE XI. SIDEWALK SALES AND PERFORMANCES.

DIVISION 1. GENERALLY

Sec. 40-261. Scope of article; definitions.

(a) This article shall control and govern certain sales of merchandise and sidewalk performances within a portion of the downtown area that is associated with the Theater/Entertainment District.

(b) The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, unless the context of their usage clearly indicates another meaning:

Director shall mean the director of the city's department of planning and development and shall include the said director's designees.

Fee owner shall mean the holder of the fee title or other person having the present right of possession and control of the real property abutting the sidewalks. In those instances where the city is the fee owner, then it shall mean the department head of the city department responsible for maintenance and control of the property. No provision herein shall be construed to require any city department head to grant permission for the use of any city property or to waive the payment of any applicable concession or use fee.

Food shall have the meaning ascribed in Section 20-18 of this Code.

Food vendor shall mean a person who sells food from a mobile food unit.

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Merchandise vendor shall mean a person engaged in the sale of artwork, souvenirs, or fresh flowers, or any combination thereof.

Mobile food unit or unit shall mean a food service establishment, mounted on wheels, designed to be readily movable, and propelled solely by human power.

Performers shall mean and include bands, musicians, singers, mimes and other artists who perform for gratuities on the sidewalk without the use of any electronically amplified instruments and without electronic amplification of sound produced.

Permit shall mean a current, valid permit issued by the director pursuant to the terms of this article to a function as either a vendor or a performer.

Permittee shall mean the holder of a permit as either a vendor or a performer issued by the director under this article and includes the permit holder's agents, employees and subcontractors.

Sidewalk shall mean that portion of the street right-of-way that is improved for pedestrian use.

Theater/Entertainment District shall mean the area including to the mid-point of and bounded by Preston Street on the north, Dallas Street on the south, Milam Street on the east and Interstate Highway 45 on the west.

Vendor shall mean a person engaged in the sale of food or non-food merchandise on the sidewalk.

DIVISION 2. PERMIT

Sec. 40-262. Required.

It shall be unlawful for any person who is not a permittee to sell merchandise or food on the sidewalks in the theater/entertainment district or conduct sidewalk performances in the theater/entertainment district.

Sec. 40-263. Application and accompanying documents generally.

Any person desiring to obtain a permit to sell merchandise or food on the sidewalks in the theater/entertainment district or to conduct sidewalk performances in the theater/entertainment

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district shall file an application with the director on a form prescribed by the director for that purpose. The application shall set forth the following information and be accompanied by the following documents:

- (1) The name, mailing address, street address (if different) and telephone number of the applicant, together with a statement as to whether the applicant is an individual, a partnership or a corporation, and if a partnership, the names of all general partners or if a corporation a copy of the articles of incorporation;
- (2) A map showing the proposed location of the specific site(s) desired. The applicant may either designate one (1) site for twenty-four hour use or designate two (2) sites, with one site designated as the daytime site with hours of operation between 7:00 o'clock a.m. until 5:00 o'clock p.m. and the other site designated as the night time site with hours of operation between 5:01 o'clock p.m. until 6:59 o'clock a.m.;
- (3) The written permission of the abutting fee owner for the use of the site(s);
- (4) A statement whether the applicant desires a permit as a food vendor, merchandise vendor, or as a performer.
- (5) If the applicant seeks a permit as a performer, then a description of the performances to be provided.
- (6) If the applicant seeks a permit as a food vendor or a merchandise vendor, then proof that the sales of merchandise or food will be covered by comprehensive general liability insurance with limits of not less than \$100,000 for death of or injury to one person and \$300,000 for death of or injury to more than one person and \$25,000 for property damage, per occurrence, which policy shall name the City as an additional insured, and shall provide that ten (10) days prior notice be given to the director in the event of cancellation;
- (7) A description of the nature, size and manner of construction of any carts or racks, other display equipment, musical instruments, or theatrical props to be utilized by the applicant which shall be subject to review to insure that the same will not pose a hazard to vehicular or pedestrian traffic;

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- (8) A food vendor applicant shall provide proof that the mobile food unit has a current and valid mobile food service unit medallion issued under Section 20-37 of this Code.
- (9) A food vendor applicant shall state whether his operations will be limited to 'restricted operations' as defined in Section 20-22 of the City Code. If not, then the applicant shall also provide proof that he holds a current and valid food dealer's permit issued under chapter 20 of this Code.
- (10) A food vendor applicant shall state whether the mobile food unit will be fueled by liquefied petroleum gas. If so, the applicant shall provide proof that he holds a current and valid permit issued by the fire marshal for the use of the L.P.G. on the mobile food unit pursuant to Section 20-17 of the City of Houston Fire Code.
- (11) A food vendor applicant shall provide a photograph or graphic representation accurately depicting the unit and a general written description of the unit and shall demonstrate that the unit meets all of the same special requirements that are applicable to mobile food units used by licensed park vendors as specified in Section 20-22 of this Code.

Sec. 40-264. Fees.

Each application shall be accompanied by a nonrefundable fee, as follows:

- (1) The fee for a food vendor permit shall be \$100.00 for a permit valid for one (1) year.
- (2) The fee for a food vendor permit shall be \$30.00 for a permit valid for one (1) month.
- (3) The fee for a merchandise vendor or performer permit shall be \$50.00 for a permit valid for one (1) year.
- (4) The fee for a merchandise vendor or performer permit shall be \$10.00 for a permit valid for one (1) month.

Sec. 40-265. Permit -- Issuance or denial.

(a) Within ten (10) days of receipt of a permit application, the director shall grant or deny the requested permit and give written notice to the applicant of the decision.

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(b) The director shall issue a permit to the applicant on a first applied, first issued basis unless one (1) or more of the following conditions exist:

- (1) The applicant failed to supply all of the information requested on the application;
- (2) The applicant gave materially false, fraudulent or untruthful information on the application;
- (3) The applicant has not fully complied with all state, federal and local laws or regulations affecting the conduct of its businesses; or
- (4) The public works department determines that the application should be denied on the basis of the review conducted under section 40-268 of this Code; or
- (5) The application or the applicant does not meet any other requirement of this Code.

(c) In the event that the director determines that an application should be denied, the applicant shall be given notice in writing of the reasons for the denial. An applicant may appeal the decision of the director regarding such denial by filing a written request for a hearing with the director within ten (10) days after he is given notice of such denial. The director's decision on the application shall be final unless an appeal is timely filed. An appeal shall not stay the director's decision on the issuance of a permit. The applicant's written request for a hearing shall set forth the grounds on which the denial is challenged. The hearing shall be conducted by the City's Director of Finance and Administration or his designee who shall act as the hearing official under this article. The hearing official shall not have participated in any investigation or decision relating to the denial of the permit. At the hearing, the hearing official shall receive oral and written evidence regarding the application. Hearings shall be conducted under rules issued by the Director of Finance and Administration which shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses and be represented by legal counsel.

(d) The hearing official shall conduct the hearing within ten (10) days after receipt of the applicant's written request for a hearing, unless the applicant requests an extension in writing. The hearing official shall render written decision and issue notice thereof, to the applicant within five (5) days after the conclusion of the hearing. The written decision of the hearing official shall be final.

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(e) Failure of the director to give timely notice of his action on an application or failure of the hearing official to timely conduct or give notice of his decision on an appeal from the director's decision, shall entitle the applicant to the issuance of a temporary permit upon written demand therefor filed by the applicant with the director. Such a temporary permit shall only be valid until the third day after the director gives notice of his action on the application or the hearing official gives notice of his decision on the appeal, as applicable.

Sec. 40-266. Permit -- Revocation.

(a) The director shall have the authority to revoke a permit for any one (1) or more of the following reasons:

- (1) The permittee gave materially false, fraudulent or untruthful information on the application;
- (2) The permittee failed to fully comply with all state, federal and local laws or regulations affecting the conduct of its business;
- (3) The permit was issued in error;
- (4) The permittee has failed to follow the direction of the director or any peace officer of the city to temporarily vacate a site until any undue vehicular and pedestrian traffic congestion or any other unsafe condition was abated; or
- (5) The permittee has violated any other provision of this article;
- (6) The activities of the permittee are not being conducted in the manner described in the application;
- (7) For food vendors and merchandise vendors, that the insurance required in section 40-263 has expired or been cancelled without renewal or replacement; or
- (8) The written permission of the abutting fee owner for the use of the site(s) has been revoked.

(b) Prior to revocation of a permit, the director shall investigate the grounds alleged to determine whether probable cause for revocation may exist and, if so, shall notify the permittee in writing of reasons for the proposed revocation and grant such permittee the opportunity to appear before a hearing official to be designated by the Director of Finance and Administration at a time and place specified within such notice.

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The hearing official designated shall not have participated in any investigation of the alleged grounds for the revocation. Such hearing shall be held not less than ten (10) days after the notice is given. Hearings shall be conducted under rules issued by the Director of Finance and Administration. Such rules shall be consistent with the nature of the proceedings and shall ensure that each party may present evidence, cross-examine witnesses and be represented by legal counsel. If, after the hearing, the hearing official finds that the permit should be revoked, he shall issue a written order revoking such permit which shall be effective on the third day after notice thereof is given to the permittee. The written decision of the hearing official shall be final.

Sec. 40-267. Other permit provisions.

(a) A permit shall be valid only for the use of the site(s) stated thereon and must be maintained and prominently displayed at the site(s) at all times while in use.

(b) All activities by performers, food and merchandise vendors will be conducted upon the designated site(s); provided however, that if the Director of Parks and Recreation grants approval for a special event in a city park that is located within the Theater/Entertainment District and a food or merchandise vendor has selected a site(s) in or within one hundred (100) feet of the boundaries of that park, then the vendor applicant agrees that upon notice by an employee of the Parks and Recreation Department of that park event, for the duration of that park event, he shall suspend his operations at that site(s) during the time that the park event is occurring and select an alternative site(s) subject to any approval herein required and located outside of one hundred (100) feet of the boundaries of that park.

(c) The permittee shall not install, erect or maintain any signs on the sidewalk except in the case of food vendors, those permitted on the unit itself.

(d) Sites for mobile food units and merchandise vendors shall be at least 20 feet apart.

(e) Sites for performers shall be at least 130 feet apart.

(f) The size and location of sites must be such that they will not pose a hazard to vehicular or pedestrian traffic.

(g) The permittee shall not install any permanent improvement on the sidewalk.

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(h) In the event that activities at any site should cause undue vehicular and pedestrian traffic congestion or any other unsafe condition, then the director or any peace officer of the city may direct the permittee to temporarily vacate the site until the situation has abated, and the permittee shall comply.

(i) All equipment and materials shall be removed from the site at any time that the permittee is not physically present upon the site. If equipment and materials are left unattended, they may be removed. The permittee shall then be liable for all reasonable removal and storage charges.

(j) Sales of food or merchandise shall be made only to pedestrians. No food or merchandise shall be offered or sold to any occupant of any vehicle.

(k) Permittees shall remain within their sites and shall not hawk their merchandise or services in any manner, but may respond to inquiries about their merchandise or services.

(l) The permittee shall maintain records of daily gross sales, purchases, and expenses of or from the unit and those records shall be available for inspection by the director upon request. These records need not be available on the unit itself.

(m) The permittee shall be responsible for supervising the conduct of its patrons and employees.

(n) The permittee and his employees shall wear clean outer garments and shall refrain from smoking and eating during working hours.

(o) A permit shall only be valid for the purpose described in the application; a permit issued to a food vendor or merchandise vendor shall not authorize the vendor to act as a sidewalk performer and a permit issued to a sidewalk performer shall not authorize the sidewalk performer to act as a food vendor or merchandise vendor.

(p) A permit may be canceled upon written request of the permittee and surrender of the permit itself to the director. The surrender of a permit shall be effective upon its filing in the office of the director.

(q) A permit shall be personal to the permittee and may not be transferred or assigned.

(r) The permittee shall update and supplement the information provided as a part of his application to ensure that it remains true and correct at all times.

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Sec. 40-268. Referral to other departments.

Each application shall be referred by the director to the Public Works Department for review under the criteria of subsections (c), (d), (e) and (f) of Sec. 40-267 of this Code and item (7) of Sec. 40-263 of this Code; to the Department of Parks and Recreation for review under the criterion of subsection (b) of Section 40-267 of this Code and to the Department of Health and Human Services for review under the criteria of items (8), (9), (10) and (11) of Sec. 40-263 of this Code and subsection (d) of Sec. 40-269 of this Code.

Sec. 40-269. Food vendors' permits -- additional conditions.

A food vendor's permit shall be further subject to the following conditions and may be suspended or revoked for failure to comply with any one (1) of them:

(a) The permittee shall maintain the unit in good repair and keep it free from defects that may present a hazard to life or property.

(b) The permittee shall make the unit available for inspection by the director or the health officer or their representatives at any time while the unit is in operation. No notice prior to such an inspection shall be required.

(c) The permittee shall thoroughly clean the unit and drain and flush the liquid waste tanks each day the unit is operated.

(d) A food vendor applicant shall provide a description of all foods to be sold and the proposed hours of operation.

(e) The permittee must comply with all other applicable state and city rules and regulations specifically including all food or health-related ordinances of the city and all state and federal food labelling laws. The unit itself and the permittee must meet all applicable requirements for the operation of mobile food units and food establishments as set out in Chapter 20 of the City Code at all times.

(f) In addition to the marking requirements of Chapter 20 of the City Code, each unit shall be clearly marked with the name and phone number of the permittee and the phone number of the City's Department of Health and Human Services.

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(g) The permittee shall serve, store and display his food on or in the unit itself and shall not use, set up or attach any crate, carton, rack, table or other device to increase the selling or display capacity of his unit.

(h) The permittee shall not leave the unit unattended. If the unit is left unattended, it may be towed. The permittee shall then be liable for all reasonable towing and storage charges.

(i) The permittee shall not use the unit or allow anyone else to use the unit to sell, distribute or give away any foods other than those stated in the application for the permit. The permittee is not authorized to and shall not sell any non-food items.

(j) The permittee shall keep the area within twenty-five (25) feet of the unit clean and free of litter at all times. The litter receptacle on the unit shall be emptied regularly in other than a public receptacle. The litter receptacle shall be kept covered with a tight fitting lid when not in continuous use.

(k) The permittee shall not make any structural alteration of the unit without giving thirty (30) days' advance written notice to the city.

Sec. 40-270. Food vendors -- Unsafe or unhealthful conditions.

Notwithstanding the other provisions of this article, whenever the director or the health officer finds an unsanitary or other unhealthful or unsafe condition in the operation of a unit, he may issue a written notice to the permittee citing such condition, specifying the corrective action to be taken, and specifying the time period within which such action shall be taken; and, if deemed necessary, such order shall state that the permit is immediately suspended, and all food service operations are to be immediately discontinued. Any person to whom such an order is issued shall comply immediately therewith, but upon written petition to the director, shall be afforded a hearing within three (3) business days after the issuance of that order.

Sec. 40-271. Automatic suspension.

Suspension, revocation, or expiration of a permittee's food dealer's permit, mobile food service unit medallion or required insurance coverage shall result in the automatic suspension of the permit granted hereunder without further action on the part of the city. Such suspension shall remain in effect until the permittee's food dealer's permit, mobile food service unit medallion or insurance, as applicable are restored.

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Sec. 40-272. Regulations -- Issuance.

Consistent with the provisions of this Code, the director may issue regulations pertaining to the administration of this article, including but not limited to the submission of applications. A copy of such regulations shall be maintained on file for inspection at the office of the director. Copies of such regulations may be obtained upon payment of the copying fees prescribed by law.

Sec. 40-273. Notices.

(a) Any notice required or permitted to be given by the director or any other city office, division, department or other agency under this article to any applicant or permittee may be given either by personal delivery or by certified United States mail, postage prepaid, return receipt requested, addressed to the most recent address as specified in the application for the permit or permit renewal which has been received by the director, or any notice of address change which has been received by the director. Notices mailed as above shall be deemed given upon their deposit in the United States mail.

(b) Any notice required or permitted to be given to the director by any person under this article shall not be deemed given until and unless it is received in the office of the director at the time and in the manner provided for filing applications in section 40-263 of this Code.

(c) It shall be the duty of each applicant and permittee to furnish notice to the director in writing of any change of residence or mailing address."

Section 5. If any provision, section, subsection, sentence, clause, or phrase of this ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this ordinance that no portion hereof or provision or regulation contained herein shall

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become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this ordinance are declared to be severable for that purpose.

Section 6. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor; however, in the event that the Mayor fails to sign this ordinance within five days after its passage and adoption, it shall take effect in accordance with Article VI, Section 6, Houston City Charter.

PASSED AND ADOPTED this 14th day of August, 1991.

APPROVED this _____ day of _____, 19____.

Mayor of the City of Houston

Pursuant to Article VI, Section 6, Houston City Charter, the effective date of the foregoing Ordinance is Aug. 20, 1991.

[Signature]
City Secretary

(Prepared by Legal Dept.
(JCD/ps 08/09/91
(Requested by Planning and Development Department)
(L.D. File No. 21-90004)

[Signature] Assistant City Attorney

MOTION NO. 91 2274

MOTION by Council Member Reyes that prior to further consideration of Item 103, proposed ordinance providing for the issuance of permits to certain vendors and performers in a certain portion of Downtown Houston, a revised ordinance which contains revisions to Section 40-267 and distributed to members of Council, be substituted for the ordinance previously distributed.

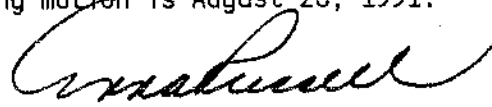
Seconded by Council Member Clark and carried.

Mayor Whitmire, Council Members McKaskle,
McGowen, Ryan, Calloway, Mancuso, Goodner,
Gorczynski, Reyes, Clark, Tinsley, Greenwood,
Lee and Robinson voting aye
Nays none

Council Member Hartung absent due to being ill

PASSED AND ADOPTED this 14th day of August, 1991.

Pursuant to Article VI, Section 6 of the City Charter, the effective date of the foregoing motion is August 20, 1991.


City Secretary

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

- 3) Defendant's interpretation and application of the Busking Restrictions, including but not limited to permit requirements and procedures and the geographic restrictions on busking.
- 4) Defendant's interpretation of the rationales and government purposes underlying the Busking Restrictions;
- 5) facts showing that the Busking Restrictions actually achieve the rationales and government purposes underlying the Busking Restrictions;
- 6) alternative channels of communication for someone who wishes to busk outside the Theater District and within the City of Houston;
- 7) foot traffic patterns and vehicular traffic patterns in and around the City of Houston, including but not limited to in the Theater District;
- 8) facts relating to the impact or potential impact that buskers have had or might have on vehicle or pedestrian traffic, safety, or congestion in the City of Houston;
- 9) enforcement of the Busking Restrictions over the last ten years, including but not limited to any complaints filed and/or actions taken against buskers in the City of Houston;
- 10) inquiries from the public regarding busking permits over the last ten years;
- 11) the issuance, denial, or revocation of busking permits over the last five years;
- 12) reports, studies, or investigations created prior to January 15, 2020 that relate to a need or justification for banning or restricting busking in the city of Houston;
- 13) reports, studies, or investigations created prior to January 15, 2020 that relate to a need or justification for requiring buskers to obtain a permit to busk in the Theater District;

- 14) the report referred to in the Specific Explanation section of the Request for Council Action, Bates stamp COH e-003393, prepared by the Houston Department of Planning & Development and Central Houston, Inc.

DATED: April 29, 2022.

Respectfully submitted,

s/ Anastasia P. Boden

ANASTASIA P. BODEN (*Attorney in Charge*)

Cal. Bar No. 281911

Southern District of Texas No. 3495077

JOSHUA W. POLK (*of Counsel*) *

Cal. Bar No. 329205

DONNA G. MATIAS (*of Counsel*) *

Cal. Bar No. 154268

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Email: DMatias@pacificlegal.org

Counsel for Plaintiff Anthony Barilla

** Pro hac vice*

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that, on April 29 2022, a copy of the foregoing document is being sent via electronic mail to the following persons:

Patricia L. Casey
pat.casey@houstontx.gov
Brian A. Amis
brian.amis@houstontx.gov
Suzanne R. Chauvin
suzanne.chauvin@houstontx.gov
Lori Yount
lori.yount@houstontx.gov

CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby Street, 4th Floor
Houston, Texas 77002
Telephone: (832) 393-6466
Facsimile: (832) 393-6259

Attorneys for Defendant, City of Houston

s/ Anastasia P. Boden
ANASTASIA P. BODEN (*Attorney in Charge*)



**CITY OF HOUSTON
HOUSTON PUBLIC WORKS
TRAFFIC & DRAINAGE OPERATIONS
STREET PERFORMER PERMIT**



Check one: ☐ 30 day permit (\$10.00) ☐ 1 year permit (\$50.00)

(payment to be made by cashiers check or money order to: City of Houston Traffic & Drainage Operations)

Applicant's Name: _____

Address: _____ **City:** _____ **State:** _____ **Zip:** _____

Phone No: _____ **Fax No:** _____ **Alt. No:** _____

E-Mail Address: _____

Applicant is: ☐ Individual ☐ Corporation ☐ Partnership

Please attach the following documentation: (permit will not be approved without the following documentation)

1. Map showing the proposed location of performance. The applicant may either designate one site for twenty-four hour use or designate two sites, with one site designated as the daytime site with hours of operation between 7:00 a.m. until 5:00 p.m. and the other site designated as the night time site with hours of operation between 5:01 p.m. until 6:59 a.m. (location may only include the mid-point of and bounded by Preston Street on the north, Dallas Street on the south, Milam Street on the east, and Interstate Highway 45 on the west.)
2. Written permission from the abutting property owner(s)

Description of the performance and type of instrument used:

Permit Conditions

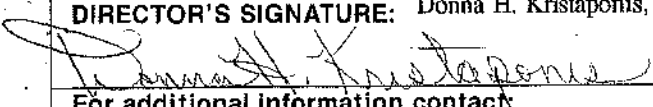
- (a) A permit shall be valid only for the use of the site(s) stated thereon and must be maintained and prominently displayed at the site(s) at all times while in use.
- (b) The permittee shall not install, erect, or maintain any signs on the sidewalk.
- (c) Sites for performers shall be at least 130 feet apart.
- (d) The size and location of sites must be such that they will not pose a hazard to vehicular or pedestrian traffic.
- (e) In the event that activities at any site should cause undue vehicular and pedestrian traffic congestion or any other unsafe condition, then the director or any peace officer of the city may direct the permittee to temporarily vacate the site until the situation has abated, and the permittee shall comply.
- (f) All equipment and materials shall be removed from the site at any time that the permittee is not physically present upon the site. If equipment and materials are left unattended, they may be removed. The permittee shall then be liable for all reasonable removal and storage charges.
- (g) A permit shall be personal to the permittee and may not be transferred or assigned.
- (h) The permittee shall update and supplement the information provided as a part of his application to ensure that it remains true and correct at all times.
- (i) All activities by performers, food, and merchandise vendors will be conducted upon the designated site(s); provided however, that if the director of parks and recreation grants approval for a special event in a city park that is located within the theater/entertainment district and a food or merchandise vendor has selected a site(s) in or within 100 feet of the boundaries of that park, then the vendor applicant agrees that upon notice by an employee of the parks and recreation department of that park event, for the duration of that park event, he shall suspend his operations at that site(s) during the time that the park event is occurring and select an alternative site(s) subject to any approval herein required and located outside of 100 feet of the boundaries of that park.

APPLICANT SIGNATURE

DATE

EXHIBIT	
D	
DEPONENT NAME: Brown, Margaret	DATE: 05/11/22

REQUEST FOR COUNCIL ACTION

TO: Mayor via City Secretary		Agenda Item # <u>34</u>	
SUBJECT: An Ordinance providing for the issuance of permits for certain vendors and performers within a certain area of downtown Houston		Category # 9	Page 1 of 2
FROM (Department or other point of origin): Planning & Development		Origination Date 07/11/91	Agenda Date <u>JUL 12 1991</u>
DIRECTOR'S SIGNATURE: Donna H. Kristaponis, Director 		Council District affected: 1	
For additional information contact: M. Wallace Phone: 247-1217		Date and Identification of prior authorizing Council action: #90-677 06/13/90	
RECOMMENDATION: (Summary) Approval of an Ordinance providing for the issuance of permits for certain vendors and performers within a certain area of downtown Houston			
Amount and Source of Funding: NONE			
SPECIFIC EXPLANATION: In June, 1990 Council approved an ordinance authorizing the issuance of permits to certain vendors and performers in a specific area of downtown for a 45 day trial period. While only five permits were issued under the trial Ordinance, the Department of Planning & Development (Department) and Central Houston, Inc. received numerous inquiries about the program. At the termination of the trial program, Central Houston and the Department reviewed the comments received from potential permittees, permitted vendors and pedestrians and prepared a report for Council's review. The report outlined several recommendations for the establishment of the program on a permanent basis. This Ordinance incorporates recommendations made in that report. The proposed Ordinance allows for-profit vendors and street performers to operate on the sidewalks in an area of downtown bound by Preston Street, Dallas Street, Milam Street and Interstate 45. Permits may be issued to food vendors for a maximum of two sites and will be valid for either one year at a cost of \$100.00, or one month at a cost of \$30.00. Permits for merchandise vendors and performers will cost \$50.00 for one year or \$10 for one month. Non-food merchandise shall be limited to artwork, souvenirs and/or fresh flowers. The permit application must include specific information on the applicant, a map indicating requested locations, written permission of the abutting property owner, information on the merchandise to be sold or the performances to be provided, verification of insurance, and the description of any cart or display equipment to be used.			
REQUIRED AUTHORIZATION			
F & A Director:	GSD Director:	Other Authorization: COH e-003393	

EXHIBIT

DATE: 05/11/91

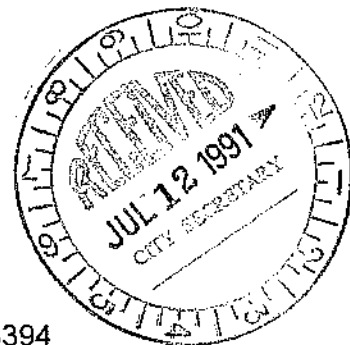
DEPONENT NAME: Donna H. Kristaponis

Date 06/11/91	Subject: An Ordinance providing for the issuance of permits for certain vendors and performers	Originator's Initials SJK	Pt. 2 o:
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Each application will be referred to the Public Works Department/Traffic Division for review of potential traffic hazards. The Department of Planning & Development/Development Services Division will be designated to issue the permits.

Approval is recommended.

cc: Dan Jones
Richard Lewis
Clarence West
Patsy Kallman
Mary Martinez
Hal Caton



COH e-003394

Kiren Mathews

From: DCECF_LiveDB@txs.uscourts.gov
Sent: Tuesday, June 21, 2022 2:12 PM
To: DC_Notices@txsd.uscourts.gov
Subject: Activity in Case 4:20-cv-00145 Barilla v. City of Houston Motion for Summary Judgment

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U.S. District Court

SOUTHERN DISTRICT OF TEXAS

Notice of Electronic Filing

The following transaction was entered by Boden, Anastasia on 6/21/2022 at 4:12 PM CDT and filed on 6/21/2022

Case Name: Barilla v. City of Houston
Case Number: [4:20-cv-00145](#)
Filer: Anthony Barilla
Document Number: [47](#)

Docket Text:

MOTION for Summary Judgment by Anthony Barilla, filed. Motion Docket Date 7/12/2022.
(Attachments: # (1) Exhibit A - Declaration of A. Barilla, # (2) Exhibit B - Houston Ordinances, # (3) Exhibit C - Wallace-Brown Dep.)(Boden, Anastasia)

4:20-cv-00145 Notice has been electronically mailed to:

Anastasia Paulinna Boden aboden@pacificlegal.org, BBartels@pacificlegal.org, incominglit@pacificlegal.org

Brian Anthony Amis brian.amis@houstontx.gov, amis29@hotmail.com, Suzanne.Chauvin@houstontx.gov

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Patricia Lynn Casey pat.casey@houstontx.gov, leslie.sears@houstontx.gov, PLCTexasAttorney@me.com

4:20-cv-00145 Notice has not been electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=6/21/2022] [FileNumber=37853349-0] [83a2d92bfd636a79d1e25a37d1aa8a1a8c83a2e65f496249891faa78d4e9e7df7a a7fded982f304cd6b12d5c020b4841d61d19c82be456fad3137f2379c80022]]

Document description:Exhibit A - Declaration of A. Barilla

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=6/21/2022] [FileNumber=37853349-1] [93297be5454590f03d11348e2751e3f5986c789fc7d51f70829cf0e87d99bcd0e ee49d68bea708efdb2b8c3ac8442500fc22923a498fdb27efe2602eaba8cb]]

Document description:Exhibit B - Houston Ordinances

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=6/21/2022] [FileNumber=37853349-2] [ae2e54898112c0d5f506292f9a0b1f0f9b2dab7691446058b712569e9eed4999c4 c85db2efdaf2b50851818a162fbb6a51b670091deca85f3058d5825b175202]]

Document description:Exhibit C - Wallace-Brown Dep.

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1045387613 [Date=6/21/2022] [FileNumber=37853349-3] [42048fd17203d7c07373f2439298572599984cb2813afdc2227023f392104b2091 d09d00c7d19227207e3c7c6baf80a6fd54d26332e6763eb2a04705260ac4c9]]