

CAUSE NO. D-1-GN-06-001212

THE HERITAGE NEIGHBORHOOD ASSOCIATION and Simon Atkinson, et al Plaintiffs	§ § § § § § §	IN THE DISTRICT COURT
BUCKINGHAM INVESTMENTS, LTD., and CITY OF AUSTIN, Defendants	§ §	TRAVIS COUNTY, TEXAS
		53rd JUDICIAL DISTRICT

PLAINTIFFS' THIRD AMENDED PETITION

Now come Plaintiffs and show the Court as follows:

I. Parties

- A.** Plaintiff, The Heritage Neighborhood Association, is a Texas non-profit corporation, representing property owners in the Heritage Neighborhood, a neighborhood in Austin, Travis County, Texas, bordered by 29th Street on the South, Lamar Street on the West, Guadalupe Street on the East, and 38th Street on the North. All of such property owners own property within a short distance of the Defendant's property.
- B.** Plaintiff, Simon Atkinson, is an individual who owns and lives in the residence located at 3112 West Avenue, Austin, Travis County, Texas, directly across the street from Defendant Buckingham's apartment project site.
- C.** Plaintiffs Andrew Malof, Brenda Bell, Kisla Jimenez, Jonathan Williams, John Cogdell, Ann Cogdell, Jolene Kiolbassa, Daniel Heinzen, Lindsay Crow, Steve Crow, Marc McDaniel, Robin Abrams, Wade Odell, Betsy Greenberg, Mikal Grimes, and John Boardman, are individuals who are residents of the Heritage Neighborhood and live in close proximity to Buckingham Square.
- D.** Defendant, Buckingham Investments, Ltd. has been served and has answered.

E. Defendant, City of Austin, has been served and has answered.

II. Relief Sought

Plaintiffs seek a declaratory judgment that Defendant, Buckingham Investments, Ltd., must comply with the current "MF-3 CO" or, alternatively MF-4 zoning, applicable to the subject property. Alternatively, Plaintiffs seek declaratory relief that Buckingham must be limited to a restoration of its pre-fire condition, and that such construction not exacerbate any existing noncompliance with current zoning. Plaintiffs further seek a final permanent injunction, along with attorneys' fees under the Declaratory Judgment Act.

III. Background and Procedural Posture

A. In 1967, what is now known as the Buckingham Square Apartments was constructed as a 76 unit "Apartment/Hotel," an eyesore in the middle of the Heritage Neighborhood, a residential neighborhood with a number of historic homes. The "Apartment Hotel" designation enabled the developer to circumvent the applicable zoning's 50 unit limit on "apartment houses." The project had 68 one-bedroom units, and eight two-bedroom units, was essentially two stories, and, with the addition of a gabled roof in 1975, 34 feet 6 inches high. By at least 1984, Buckingham Square did not comply with the existing Austin zoning ordinance in at least three respects: (1) it was no longer (if it ever was) operated as an apartment/hotel and exceeded the 50 unit limit on apartment houses in the then applicable "B" second height and area zoning; (2) it had inadequate parking in that it had 107 spaces when 118 were required; and (3) it had no handicapped parking.

B. On March 31, 2004, Buckingham Square Apartments were substantially destroyed by fire. By then, the project had been rezoned to MF 4 zoning and there is no dispute that the project did not comply with MF 4 zoning in a number of respects, including that it (1) had excess

density (only 58 one bedroom units or 48 two bedroom units were then allowed); (2) had head-in, back-out parking onto the street; (3) exceeded impervious cover requirements; (4) had no handicapped parking; and (5) had otherwise insufficient parking. By September 2, 2004, the zoning on the tract had been rolled back to MF3 CO, in accordance with the city's comprehensive neighborhood plan, which further exacerbated the above noncompliance.

C. Nevertheless, Buckingham sought to construct a 52–54 two-bedroom and five one-bedroom project that was three floors and 38 feet 6 inches in height, admittedly on the existing “footprint,” even though the new structure would also increase the number of bedrooms from 85 to at least 109, and the square footage would increase from about 43,000 heated and cooled square feet to over 61,000 heated and cooled square feet. Buckingham sought a site plan exemption from the city to do so. On November 17, 2004, the city issued a site plan exemption, subsequently reissued another on July 28, 2005, and finally, without informing HNA (which admittedly was not required), issued a building permit on September 20, 2005. All of this was done with little or no consultation with the Heritage Neighborhood Association.

D. In January of 2005, HNA learned of the issuance of the building permit and first obtained the plans showing three floors and a height and density increase. HNA then began seeking to resolve differences over the size of the development with the city and Buckingham to no avail. Upon learning that Buckingham was about to start construction, HNA filed suit on April 7, 2006 and obtained a TRO prohibiting construction, whereupon on April 14, the city rescinded the site plan exemptions and suspended Buckingham's building permit. Buckingham appealed and lost. After Buckingham extensively lobbied the city and agreed to limit the height to 35 feet, the city reversed its suspension/rescission on June 2, 2006, enabling Buckingham to begin construction.

IV. Harm to the Neighborhood and Plaintiffs

A. Plaintiffs allege that construction of the proposed Buckingham project will adversely affect the individual plaintiffs and the Heritage Neighborhood. By increasing the floor-to-area ratio, density (number of bedrooms), height, and adding a third floor, the proposed project will increase noise, traffic, and garbage. Further, because the volume of the building is increased and will rise straight-up 35 or more feet near the curb, the project presents an additional intrusion on the neighborhood light and air.

B. Further, the Buckingham project sets a precedent that would permit any non-complying project that pre-exists March 1, 1984 to be rebuilt in a way that could be far more non-compliant than the pre-existing structure. For example, under the city's theory, Buckingham could build a 60 foot high building—because that would have been allowed under the ordinance that was in effect in 1984—notwithstanding the fact that no such building ever existed on the site. There are many properties in the Heritage Neighborhood that pre-existed and were complying as of March 1, 1984, and on which zoning was rolled back under the Heritage Neighborhood Plan, that could be so rebuilt under the Buckingham precedent. Such a precedent will destroy the effect of the Heritage Neighborhood Plan adopted by the Austin City Council, destabilize the neighborhood, and adversely affect neighborhood property values.

V. Grounds for Declaratory Judgment

A. HNA seeks a declaratory judgment that Defendant must comply with MF3-CO zoning, or alternatively, MF 4 zoning. As a matter of law, Buckingham's proposed structure fails to comply with such existing requirements, especially in that MF 3 permits no more than 38 one-bedroom units or 32 two-bedroom units, and MF 4 permits no more than 58 one bedroom units or 48 two-bedroom units. Buckingham's proposed structure also fails to comply in that it

violates the floor-to-area ratio of .75 to 1, has head-in back-out parking, and has excessive impervious cover, among other noncompliances.

B. To build a structure that does not comply with existing zoning, Buckingham must meet its burden to show it comes under an exception to these existing requirements. *See City of Pharr v. Pena*, 853 S.W. 2d 56, 62,63 (Tex. App.—Corpus Christi 1993). For Buckingham to be entitled to such an exception, it must meet the requirement of Section 25-2-962 requiring that properties “comply” with the zoning ordinances as of March 1, 1984. Buckingham did not comply with the ordinances existing as of March 1, 1984, in that (1) although originally permitted as an apartment/hotel, Buckingham was operating in 1984 solely as an apartment house with more units than allowed under the existing zoning; (2) although permitted for and requiring at least 118 spaces, Buckingham was operating in 1984 with 107 spaces; and (3) although it was required to have four handicapped spaces, it had none.

C. Given that Buckingham was non-complying at the time a permit was sought and noncomplying in March of 1984, Buckingham could only avoid MF3-CO zoning by meeting the terms of Section 25-2-964 by beginning “restoration” within 12 months. Buckingham planned a completely new project rather than a restoration and therefore did not meet the requirements of Section 25-2-964.

D. Even if, for argument’s sake, Buckingham complied on March 1, 1984, Buckingham has waived its rights under, and is estopped from relying on Section 25-2-962 in that at no time in the two-and-a-half years since the fire has Buckingham sought to rebuild the structure that was designated as complying as of March 1, 1984.

E. Even if, for argument’s sake, Buckingham complied on March 1, 1984, and did not waive, and is not estopped from relying on, section 25-2-962, such section would only permit

rebuilding of the structure that had existed in a way that does not exacerbate non-compliance with current MF3-CO zoning. Buckingham's proposed and permitted structure indisputably exacerbates such non-compliance in at least three respects: (1) it exceeds the density requirements of Section 25-2-562; (2) it exceeds the floor-to-area requirements of Section 25-2-492; and (3) it exceeds the height limit of 35 feet of the conditional overlay applying to the Heritage Neighborhood.

VI.

Attorney's Fees

Plaintiffs seek reasonable and necessary attorney's fees under the declaratory judgment act.

Conclusion and Prayer

For the foregoing reasons, Plaintiffs pray for judgment declaring that Defendant must comply with MF-3 Conditional Overlay Zoning, or alternatively MF-4. In the event such relief is denied, Plaintiffs seek declaratory relief that Buckingham's plans to build a 52 two-bedroom unit and five one-bedroom unit project are not permitted by Section 25-2-962 or 25-2-964, that the site plan exemption permitting such construction is void, and that no structure may be built on the property that exacerbates a non-compliance with current zoning. Plaintiffs further seek a permanent injunction prohibiting construction inconsistent with such zoning, requiring the removal of any construction inconsistent with such zoning, precluding and voiding the issuance of any permits and/or exemptions that would permit construction that would not so comply, for attorneys' fees, and for general relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify by my signature above that a true and correct copy of the above and foregoing document has been forwarded to all parties pursuant to T.R.C.P. 21a on the 14th day of September, 2006, addressed as follows:

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