

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

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

**PLAINTIFFS' NO EVIDENCE AND TRADITIONAL
MOTION FOR SUMMARY JUDGMENT**

Now come Plaintiffs and move the Court as follows:

I. Relief Requested

Plaintiffs seek a declaratory summary judgment that Defendant, Buckingham Investments, Ltd., must comply with the current “MF-3 CO” or, alternatively MF-4 zoning, applicable to the subject property. Plaintiffs further seek a summary judgment and final permanent injunction, along with attorneys’ fees under the Declaratory Judgment Act.

II. Background and Procedural Posture

A. In 1967, what is now known as the Buckingham square apartments were 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. *See* Ex. 6 The “Apartment Hotel” designation enabled the developer to circumvent the applicable zoning’s 50 unit limit on “apartment houses.” *See* Ex. 3, Sections 45-18(b), 45-19 (a)(b). The project had 68 one-bedroom units (69 by 2004) and eight two-bedroom units, was essentially two stories, and, with the addition of a gabled roof in 1975, 34 feet 6 inches high. *See* Ex. 5, Attachment A, pp. 15, 16, 37 and attached site plan exemption request; Ex. 5, Attachment B, p. 6. By at least 1984,

Buckingham Square violated the existing Austin zoning ordinance in at least three respects: (1) it was no longer (if it ever was) operated as an apartment/hotel (*See* Exhibit 3, Section 45-1, definition of “Apartment Hotel; Exhibit 7, Affidavit of Jay Trachtenberg); (2) it had inadequate parking in that it had 107 spaces when 118 were required (*See* Exhibit 3, Section 45-30©)(2), Exhibit 4); and (3) had no handicapped parking (*See* Exhibit 3, Section 45-30(e)(5); Exhibit 4).

B. On March 31, 2004, Buckingham Square burned beyond repair. *See* Ex. 5, Attachment A, p. 17. By then, the project had been rezoned to MF 4 zoning and there is no dispute that the project violated MF 4 zoning. *See* Exhibit 5, Attachment B, pp. 8-9; Exhibit 1, Sections 25-2-64, 25-2-65, 25-2-562, 25-2-563. By September 2, 2005, the zoning on the tract had been rolled back to MF3 CO, in accordance with the city’s comprehensive neighborhood plan. *See* Exhibit 8.

C. Nevertheless, Buckingham sought to construct a 52-54 two-bedroom, 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 increase the number of bedrooms from 85 to at least 109. *See Exhibit 5*, Attachment A, p. 33. 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 a height increase in the 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 2004, and obtained a TRO prohibiting construction, whereupon on April 14, the city rescinded the site plan exemptions and suspended Buckingham's building permit. *See* Exhibit 10. Buckingham appealed and lost. *See* Exhibit 11. 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. *See* Exhibit 9.

II. Grounds for Summary Judgment

A. HNA seeks a declaratory summary 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 or conform to such existing requirements, especially in that, MF 3 permits no more than 35 one-bedroom units or 30 two-bedroom units, and MF 4 permits no more than 58 one bedroom units or 48 two-bedroom units. *See* Exhibit 1, Sections 25-2-562, 25-2-563; Exhibit 5, Attachment B, p. 6; Exhibit 8.

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 requirements of both of two provisions that grandfather properties meeting zoning requirements as of March 1, 1984: Sections 25-2-942, requiring that properties "conform" as of that date with *use* restrictions, and 25-2-962 requiring that properties "comply" with *site development* restrictions as of that date. The evidence is conclusive that Buckingham neither complied nor conformed 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; (2) although permitted for 118 spaces, Buckingham was operating in 1984 with 107 spaces; and (3) although it was required to have four handicapped spaces, it had none. *Supra*. Par. IIB.

C. Moreover, there is no evidence that Buckingham complied or conformed with the zoning ordinances in effect as of March 1, 1984.

D. Given that Buckingham was not conforming in 1984 and is not conforming now, the city must require it to comply with Section 25-2-944 (proof that cost of reconstruction would not exceed 90% of the pre-destruction value) to avoid complying with MF-3 CO zoning . There is no evidence that Buckingham can comply with Section 25-2-944. *See* Exhibit 1.

E. 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. The evidence is undisputed that Buckingham planned a completely new project “from the beginning” rather than a restoration and therefore did not meet the requirements of Section 25-2-964. *See* Exhibit 5, Attachment A, p. 33.

F. Moreover, there is no evidence that Buckingham complies with section 25-2-964 in that there is no evidence that Buckingham “began restoration” within 12 months of March 31, 2004, as required by section 25-2-964.

II. Summary Judgment Evidence

In support of its Motion for Summary Judgment, Plaintiffs rely on the following summary judgment evidence attached as Exhibits numbered respectively as follows:

1. Current Austin Zoning Ordinances, Revised as of March 2006, as to which

Plaintiffs request that the Court take judicial notice;

2. Austin Zoning Ordinances, Revised as of February, 1987, as to which Plaintiffs request that the Court take judicial notice;
3. Austin Zoning Ordinance, Revised as of December, 1981, as to which Plaintiffs request that the Court take judicial notice;
4. Affidavit of Simon Atkinson;
5. *The Affidavit of Mark Perlmutter*; containing admissions of Buckingham's counsel that in 1984, the property contained 69 one-bedroom units and 8 two-bedroom units, and excerpts from the deposition of Chris May, and testimony on attorney's fees;
6. Original Building Permit for what is now Buckingham Square;
7. Affidavit of Jay Trachtenberg, showing property was not operating as apartment hotel in March 1984;
8. Austin Zoning Ordinance Approval Dated September 2, 2004, showing zoning on Buckingham tract as MF4 rolled back to MF3 CO NP, as to which plaintiff requests the court to take judicial notice.
9. City's Letter of June 2, 2006 reversing itself and permitting construction to begin.
10. City's Letter of April 14, 2006 suspending Buckingham's building permit and rescinding site plan exemption.
11. City's denial of Buckingham's appeal of building permit suspension.

IV.

Attorneys' Fees

Attached is the *Affidavit of Mark Perlmutter*, Exhibit 5, reflecting the attorneys' fees reasonably and necessarily incurred in connection with this declaratory judgment action, and on appeal if necessary.

Conclusion and Prayer

For the foregoing reasons, Plaintiffs pray for a summary judgment declaring that Defendant must comply with MF-3 Conditional Overlay Zoning or alternatively MF-4, an injunction prohibiting 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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ATTORNEYS FOR PLAINTIFF

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 5th day of June, 2006, addressed as follows:

Via Hand Delivery

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