

Heritage Neighborhood
v.
Buckingham Inv. and City of Austin

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

**HISTORY OF DENSITY ZONING
VIOLATIONS**

Ordinance Allowed:	Actual/Proposed Bldg.
1967 (B), original building: 76 Unit Apt. Hotel	Permit says 76 unit Apt. Hotel
1983 (B), Apt. Hotel use elim: 50 Unit Apt. Hse.	76 Units: Apt. or Apt. Hotel?
3/1/1984 (B), "safe harbor" date: 50 Unit Apt. Hse.	76 Unit Apt. House
3/31/2004 (MF-4), date of fire: 52/1br or 44 2/br	69 1 br, +8 2br units
11/17/04 (MF-3): site p. exemp. 35/1 br or 29 2/br	52+ 2br, 5 1br units (prop'd)

How could this happen?

How could a project that (1) violated the zoning laws even before the alleged safe harbor date, (2) violates current zoning laws and (3) is over 25% more dense than even the former structure, be allowed exemption from regulation?

Does this result pass the smell test?



**City admits it happened
because the city failed
to follow the law. See
*HNA ex. 9***

Procedural Chronology

- March 31, 2004, Buckingham burns.
- September 13, 2004, MF-3CO rollback takes effect
- November 11, 2004, Buckingham first applies for site plan exemption, granted on Nov. 17, then reissued on July 28, 2005 with height restrictions
- September 20, 2005, City issues building permit
- January, 2006, HNA first learns of plans to build 100+ bedroom, 38'6" high, three story project.
- April 7, 2006, HNA obtains TRO before construction starts.
- April 14, 2006, City rescinds site plan exemption, suspends building permit.
- April 26, 2006, Buckingham loses appeal.
- June 2, 2006, City reverses itself yet again and reinstates exemption and permit
- June 5, 2006, HNA files MSJ

At stake for HNA neighbors is...

- Ensuring access to the process that vitally affects the neighborhood
- Preventing the exacerbation of a project out of character with the neighborhood
- Preventing violation of neighborhood plan
- Reducing excess density, traffic, noise, garbage.

HNA supports density consistent with neighborhood plan...

- On the thoroughfares surrounding the neighborhood
- Supported the Lamy project at 31st and Guadalupe, dense 3 story apartment building on HNA side of Guadalupe

Summary of Argument

- MF-3CO (not MF-4) applies because Buckingham's application was filed after Sept. 13, 2004 MF-3CO rollback.
- Proposed structure violates current ordinance (MF-3) (and even MF-4)
- Buckingham can't meet Burden under any "non-complying" structure test:
 - Regarding 25-2-962, it had more than 50 units and did not comply on 3/1/84
 - Regarding 25-2-964, The proposed structure is materially different and more non-complying than the former structure. Therefore, Buckingham Did not "begin restoration within 12 months."
Result: **Must comply with MF-3**
- Even if Buckingham Complied in 1984, its planned development was not a "restoration."
Result: **Limited to two floors and 84 bedrooms.**

Relief Sought

- Buckingham must comply with MF-3CO zoning (or alternatively MF-4)
- At worst, Buckingham may only build up to 84 bedrooms and two floors.

MF-3CO (not MF-4) applies because Buckingham's application was filed after Sept. 13, 2004 MF-3 rollback.

- MF-3CO Zoning, Effective Date: September 13, 2004. (HNA Ex. 8)
- S. 245.002 Tex. Loc. Gov't Code:
- (a) Each...agency shall consider the approval...of an application for a permit solely on the basis of any... regulations, ordinances...in effect at the time:
 - (1) the original **application** for a permit is filed for review for any purpose, including review of administrative completeness;
 - (2) a plan for development of real property or plat **application** is filed with a regulatory agency.
- (a-1) Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original **application** or plan for development...that gives the ...agency fair notice of the project and the nature of the permit sought. [*emphasis added*]

Buckingham Ex's. B & C are all that Buckingham claims to have filed as an "application before September 13, 2004.

Buckingham Ex's B & C do not constitute an "application" within the meaning of 245.002.

Buckingham's first application was its November 11, 2004 site plan exemption rq. [HNA ex. 5a]

Therefore, MF-3CO applies to the site.

Buckingham's Proposed Structure Violates MF-3CO zoning.

MF-3 allows at most 35 1 br units, or 29 2 br units:

- Tract is 58,145 square feet [HNA ex. 5b,p.9]
- MF-3 requires 1500 sq.ft/1 br, 1800 sq.ft/2 br, plus 150 sq.ft open space for each unit. [25-2-562, HNA ex. 1, p. 65]
- Buckingham proposes 52 2 br units (requiring $[1800 + 150] \times 52 = 101,400$ sq.ft.) and 5 1br units ($[1500 + 150] \times 5 = 8250$ sq.ft.), far in excess of 25-2-562 limits.
- Therefore, Buckingham's proposed project violates MF-3 zoning.

To circumvent MF-3 CO zoning, burden is on Buckingham to qualify for exception.

- See City of Pharr v. Pena, 853 S.W.2d 56, 62-3 (CC, 1993):
- "It is the landowner's duty to assert before the proper local official and to prove his entitlement to continue a nonconforming use of the land by showing that his business actually existed and was in lawful use on the effective that the zoning ordinance went into effect."

General Policy Considerations

City of Austin Zoning Ordinance, Effective January, 1985 **5800 NONCONFORMING DEVELOPMENT**

5805 TITLE AND PURPOSE

Sections 5800 through 5899 shall be known as the Nonconforming Development Provisions. [Included "non-complying" provisions.]The purposes of these provisions are:

- b. To assure reasonable opportunity for use, maintenance, and improvement of legally constructed buildings, structures, and site development features which do not comply with current minimum requirements for the district in which they are located.
- c. To assure reasonable opportunity for continuation of legally established uses which do not conform to current use regulations for the district in which they are located.
- d. To limit continuation and expansion and encourage eventual replacement of nonconforming uses having potentially undesirable impacts on surrounding conforming uses.

**Buckingham is not
entitled to the benefits
of 25-2-962**

Current City of Austin Zoning Ordinance

§ 25-2-962 STRUCTURE COMPLYING ON MARCH 1, 1984.

- (A) A structure that complied with the site development regulations in effect on March 1, 1984, is a complying structure notwithstanding the requirements of this chapter.**

Buckingham violated the March 1, 1984 “B” zoning limiting Apartments to 50 units.

City of Austin Zoning Ordinance, Effective as of March 1, 1984

Sec. 45-19 “B” RESIDENCE DISTRICTS

In a “B” residence district no building or land shall be used and no building shall be erected or structurally altered, unless otherwise provided in this chapter, except for one or more of the following uses:

- (a) Any Use permitted in a “BB” residence district....*

Sec. 45-18. “BB” RESIDENCE DISTRICTS.

In a “BB” residence district no building or land shall be used and no building shall be erected or structurally alerted, unless otherwise provided in this chapter, except for one or more of the following uses:

- (a) Any use permitted in an “A” residence district.
(b) Apartment houses containing fifty units or less.

* “Apartment hotels” no longer permitted. See City’s Response, Ex. C.

Whether the 50 unit limit was a “site development regulation” or a “use regulation” or both, Buckingham is not entitled to 25-2-962 protection.

The 50-unit limit is a site development regulation

- It says “no building shall be erected.” Focus is on structure, not use.
- Currently, would be considered site development reg; pre-'84 ordinance didn't explicitly make distinction.
- City Admits it's a site development regulation:
 - “On January 27, 1983 the apartment hotel use was deleted from city of Austin regulations as a permitted use in a B residential district. Once a use is deleted, the activity associated with the deleted use is reclassified as the next closest use. In the case of Buckingham, then new use was an apartment house use. Buckingham's use was a conforming use. Therefore as of March 1, 1984, Buckingham was a conforming use.”City Ex. C, Affidavit of Jerry Rusthoven
 - **If the project was a conforming “use” notwithstanding the 50 unit limit violation, the 50 unit limit violation had to be a “non-compliance, i.e. site plan regulation violation.”**

If a “use regulation,” a nonconforming use is not entitled to be rebuilt as a “complying” structure, as a matter of law.

- 25-2-962 is not self-executing
- The non-conforming building could have not been rebuilt, notwithstanding “complying.”

The proposed structure is materially different and more non-complying than the former structure. Therefore, Buckingham did not “begin restoration within 12 months,” --and is not entitled to 25-2-964 protection.

Current City of Austin Zoning Ordinance

**§ 25-2-964 RESTORATION AND USE OF
DAMAGED OR DESTROYED
CONCOMPLYING STRUCTURES**

A person may restore a damaged or destroyed noncomplying structure if the restoration begins not later than 12 months after the date the damage or destruction occurs.

The proposed structure is materially different and more noncomplying than the former structure.

Pre-existing structure: 84 bedrooms

Oral Deposition of Christopher May, Monday, May 22, 2006
Page 14

Lines 5-15

Q: When you bought the apartments in 1995, are you aware of how many units were in the apartment project?

A: Yes.

Q: Okay. How many were there?

A: There were 68 one-bedrooms and eight two-bedroom units.

Q: And did that configuration of 68 one-bedroom units and eight two-bedroom units prevail until the apartment project burned down?

A: Yes.

Pre-existing structure, cont'd: 2 floors

Oral Deposition of Christopher May, Monday, May 22, 2006

Page 16, Lines 16-19

Q: As far as the apartment units themselves, did the apartment units occupy two floors throughout the project.

A: That's correct.

Proposed Structure: 109-113 bedrooms

Oral Deposition of Christopher May, Monday, May 22, 2006

Page 33, Lines 4-13

Q: ...from the time you first began— you and the architect first began designing the reconstruction of the Buckingham Square project, you contemplated somewhere between 52 and 54 two-bedroom units and five one-bedroom units?

A: Yes.

Q: ...And to your knowledge, the submissions that were made to the city were consistent and reflected those designs?

A: Yes.

Proposed Structure: 3 floors, 4 feet higher

- HNA ex. 5a: “4’ height increase to 38’6”.”
- HNA ex. 5a: See May Depo. at 30, discusses changes to 3d floor units.

- Buckingham did not “begin restoration” within 12 months within the meaning of 25-2-964 because the proposed structure was a new project and not a restoration of the existing project.
- Therefore, Buckingham is not entitled to the protection of 25-2-964.

Plaintiffs’ action is timely because there is no administrative remedy for challenging a site plan exemption.

S. 25-1-181 Standing to Appeal

- A person has standing to appeal a decision if:
 - (1) the person is an interested party: and
 - (2) a provision of this title identifies the decision as one that may be appealed by that person.

Only the applicant has standing to appeal a site plan exemption decision

- **§ 25-5-112 DIRECTOR'S APPROVAL**
- (C) If the director disapproves a site plan, the applicant may appeal the director's interpretation or application of a requirement of this title to the Land Use Commission by filing a written objection with the director. The applicant may appeal the Land Use Commission's decision on an appeal under this subsection to the council.

Therefore, Plaintiffs had no standing to administratively appeal the site plan exemption and may sue to enforce the City's Zoning Laws.

•The End