

**THOMAS E. SHEFFIELD**

LAWYER

609 BRADFORD AVENUE, STE. 101  
KEMAH, TEXAS 77565  
(281) 549-4732 • FAX (281) 549-4735  
E-MAIL: TOM@THOMASSHEFFIELD.COM

February 11, 2010

**VIA HAND DELIVERY**

Beverly Kaufman  
Harris County Clerk  
201 Caroline  
Houston, Texas 77002

Re: Cause No. \_\_\_\_\_; *Maryland Manor Associates and Buckhead Investment Partners, Inc. v. City of Houston, Texas*; In the County Civil Court at Law No. \_\_\_\_\_ of Harris County, Texas.

Dear Clerk:

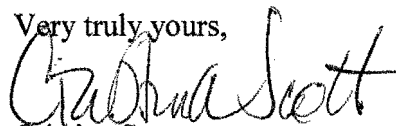
Enclosed for filing in the above-referenced matter please find one original and two copies of Plaintiffs' Original Petition.

Please find our firm check in the amount of \$273.00 for the filing, issuance of citation, service of process by certified mail and jury fees. Please issue a citation and serve the citation by certified mail for the following:

City of Houston  
Anna Russell  
City Secretary  
901 Bagby  
Houston, Texas 77002

Please file stamp the enclosed extra copy and return it in the enclosed self-addressed stamped envelope. Thank you for your assistance with this matter.

Very truly yours,



Cristina Scott

Paralegal to Thomas E. Sheffield

/cas  
Encl.

CAUSE NO. \_\_\_\_\_

MARYLAND MANOR ASSOCIATES, and, BUCKHEAD INVESTMENT PARTNERS, INC.	§ § §	IN THE COUNTY CIVIL COURT
v.	§ § §	AT LAW NO. _____ OF
CITY OF HOUSTON, TEXAS	§	HARRIS COUNTY, TEXAS

**PLAINTIFFS' ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW MARYLAND MANOR ASSOCIATES and BUCKHEAD INVESTMENT PARTNERS, INC. (together hereinafter referred to as "Plaintiff") complaining of the City of Houston, Texas, and would show the Honorable Court the following.

**I. PARTIES**

Maryland Manor Associates, is a Texas General Partnership qualified to conduct business in the State of Texas. Buckhead Investment Partners, Inc., is a Texas corporation qualified to conduct business in the State of Texas. Defendant, the City of Houston, Texas (the "City"), is a home-rule municipality of the State of Texas under TEX. LOC. GOV'T CODE ANN. §5.004.

**II. JURISDICTION AND VENUE**

This Honorable Court has jurisdiction over the parties and jurisdiction over the dispute pursuant to TEX. LOC. GOV'T CODE ANN. §25.1032. Venue is proper in Harris County, Texas as the property which is the subject matter of this lawsuit is located in Harris County, Texas. TEX. CIV. PRAC. & REM CODE ANN. §15.011.

### III. SERVICE OF PROCESS

The Defendant, City of Houston, Texas, may be served with process by and through its City Secretary, Anna Russell, at the following:

City of Houston  
Anna Russell, City Secretary  
901 Bagby  
Houston, Texas 77002

### IV. DISCOVERY

This case is a Level 2 case for purposes of discovery.

### V. CONDITIONS PRECEDENT

All conditions precedent to the Plaintiff's recovery in this matter have been performed or have occurred including, particularly, the exhaustion of recourse through all available administrative remedies.

### VI. BACKGROUND

The City, in refusing to grant a foundation and site work permit to Plaintiff for which it was entitled for a proposed multi-story mixed use building in Houston, Texas, has taken and damaged Plaintiff's valuable and vested property rights for a public use without payment of compensation, has denied Plaintiff the same protections under the laws as applied to similarly situated parties, has acted arbitrarily and capriciously, abused its discretion, has denied reasonable access to Plaintiff's property, and has required of Plaintiff an illegal exaction not roughly proportional to any burden Plaintiff's proposed development might impose.

The City's reliance on Section 40-86 of its Code of Ordinances, to restrict development of the Plaintiff's property, is wrongful and improper, violative of law, unreasonable, and bears no rational relationship to a conceivable and legitimate governmental objective.

1. Regulation by the City of Houston

The City of Houston denied Plaintiff's permit in order to limit the density of the proposed project. However, the City does not have the legal authority to regulate density. The City does not have zoning or other ordinances which directly allow it to do so. Not having a proper legal tool, the City, in its attempt to regulate the project's density, misused and misapplied a driveway location ordinance in its denial of Plaintiff's proposed project. This ordinance has never before been applied in this manner or for this purpose. The City's determination that Plaintiff's proposed project violates this ordinance was mere pretext to regulate and control that which the City did not and does not have the legal authority to control.

2. The Property and Project

Plaintiff owns a 1.6-acre tract of land located at 1717 Bissonnet, in the City of Houston. The property is currently improved with a 67-unit 2-story residential apartment complex called the "Maryland Manor".

Prior to initially submitting its foundation and site work permit application, Plaintiff platted the property, secured utility capacity reservations from the City for amounts exceeding those required by the proposed project, constructed a new over-sized public sanitary sewer as required by the City in the capacity reservation letter, paid all utility impact fees by the City-imposed due date and obtained site plan approval for the proposed project, including original driveway locations. The City has also provided water and sewer connection approvals, as well

as all other planning and design approvals required for issuance of the foundation and site work permit, except what if anything further might properly be required pursuant to Section 40-86.

On July 30, 2007, Plaintiff submitted a complete application for a foundation and site work permit with the City and, as part of the application, voluntarily submitted (since there is no legal authority for the City to request one) a voluntary Traffic Impact Analysis (“TIA”). The TIA was approved by the City on September 4, 2007, confirming that the Plaintiff’s proposed project did not create any adverse traffic impact. Subsequently, that approval was rescinded on September 28, 2007. The reason the TIA approval was rescinded had nothing to do with what properly might be regulated by Section 40-86, but rather neighborhood opposition to the project and consequent pressure placed on City elected officials based ostensibly on its height. Thus, Plaintiff’s foundation and site work permit became stalled.

Plaintiff’s plans include razing the Maryland Manor Apartments and redeveloping the property with a multi-use development consisting of a 23-story building, a 5-level parking garage, an amenity plaza level with exercise room, a day spa and executive suite offices, along with 17 floors of apartments or condominiums. The TIA initially approved as a condition to receiving the permit showed, consistent with sound and unimpeachable analysis, that the development would generate a total of 184 P.M. peak hour automobile trips to and from the Bissonnet right-of-way and would not have any adverse traffic impact on the surrounding street system.

### 3. The Permitting Process

Plaintiff, as a result of submitting its foundation permit on July 30, 2007, is entitled to “vested rights” and is entitled to having its permit application considered solely on the basis of

any “orders, regulations, ordinances, rules...” which were in effect at the City of Houston as of that date. TEX. LOC. GOV'T CODE ANN §245.002(a).

Subsequent to the approval of its TIA and then rescission of that approval, Plaintiff continued to resubmit its permit application and did so a total of ten (10) different times to the City Planning Department, each time receiving pretextual reasons for the continued and serial denial of its foundation permit.

After first attempting to develop and pass a new City ordinance selectively aimed at the Plaintiff's project, then apparently recognizing that Plaintiff had secured vested rights which would preclude application of any such new ordinance or regulation to the project, and then further recognizing that the City did not have an existing legal basis to regulate height or density, the City nevertheless embarked upon a new interpretation of Section 40-86 of its Code of Ordinances, maintaining that this driveway ordinance would allow it to regulate the project indirectly, by conditioning permit approval on an analysis of automobile traffic impacts. This new and unprecedented interpretation and application of this old (last revised in 1968) and historically overlooked driveway ordinance effectively works as an attempt to adopt a new resolution or ordinance that did not otherwise have that effect as of the date of the permit application. In fact, in order to provide cover in its attempt to use the existing driveway ordinance as a traffic impact ordinance to regulate the density of Plaintiff's project and to quickly facilitate this attempt without requiring City Council action, the City, while abandoning its pursuit of a new ordinance, published new guidelines in its Infrastructure Design Manual that parrot certain provisions of Section 40-86.

Eventually, in August 2009, the City approved Plaintiff's revised permit application after finding that all of the earlier permit applications would create an "extraordinary traffic hazard" and would "excessively interfere with the normal use of the [Bissonnet] street right-of-way." The new permit application was based on a mix of uses which would generate only a net 120 P.M. peak hour automobile trips onto and off of the Bissonnet right-of-way. This revised application by Plaintiff, dated August 4, 2009, was submitted under protest and subject to this challenge of the proposed project's denial.

The originally submitted application, the denial of which Plaintiff complains, would have generated a total 184 P.M. peak hour trips onto and off of the Bissonnet right-of-way. While modifications to the submitted application were made during the application process, this aspect of the originally submitted application stayed the same up to the submittal of the April 7, 2009, submission. Plaintiff complains of the denial of this April 7, 2009 permit submission to the City. By April 2009, Plaintiff had eliminated any reasonable basis for the City to deny the application, having met every other potentially reasonable objection to the issuance of the permit. The City's sole alleged basis for denying this permit was based on whatever regulatory control it had pursuant to Section 40-86 and the impact on traffic the development would purportedly generate.

During the first few permit application submittals and re-submittals, Plaintiff received every necessary approval related to, among others, site plan, water/sewer, electrical, plumbing, storm drainage and structural. Only the Section 40-86 related approval was withheld. And that approval was withheld originally on no basis whatsoever until new guidelines providing for its new interpretation were adopted and then used to arbitrarily continue to deny Plaintiff's permit. Withholding of that approval based on that ordinance, and for the stated reason, cannot withstand scrutiny on the many bases set forth above.

4. Section 40-86

After giving up its attempt to pass a new ordinance, the City then relied upon subsection (c)(3) of Section 40-86 to deny Plaintiff's permit application:

Permit for construction of driveways.

(a) No person shall construct, or cause to be constructed, any driveway connecting private property with a public street without first obtaining a written permit therefor from the city engineer.

(b) Upon receipt of an application for a driveway permit, the city engineer shall make a determination as to whether the driveway applied for *is necessary to provide reasonable access to the private property* consistent with the safety and convenience of the public, taking into account the following matters:

(1) The nature and volume of traffic on the street on which the private property abuts.

(2) The dimensions and type of construction of the street on which the private property abuts.

(3) The effect that the passage of vehicles to and from the private property will have on the safety of the traveling public *and on the movement of traffic in the street to which the driveway connects.*

(4) The use to be made of the private property.

(5) The dimensions of the private property, and the type and location of improvements thereon or to be placed thereon.

(6) The extent of the access which the private property has or will have to other public streets, if any.

(c) *After making such determination,* the city engineer shall grant or refuse the application in accordance with the following rules:

(1) *He shall refuse to issue a permit for a single driveway opening unless it shall have been found to be necessary for reasonable access.*

(2) If the application is for more than one driveway opening into the same premises, he shall allow no more such openings than the minimum number necessary to provide reasonable access.

(3) He shall refuse to issue a permit for any driveway opening as to which it has been found that the proposed use of the driveway would create *an extraordinary traffic hazard or would excessively interfere with the normal use of the street right-of-way.*

(4) Every permit issued shall specify the maximum width of the driveway opening for which the permit is granted and such width shall be no greater than the minimum necessary to provide reasonable access.

(5) If a permit is granted for more than one driveway opening into the same premises, it shall specify that each such opening shall be separated from the others by a distance of not less than 20 feet, and that an upright curb must be constructed along the edge of the area of separation next to the improved portion of the street.

(emphasis supplied).

The driveway ordinance, as re-interpreted via new guidelines and applied by the City nearly seven months after the date of Plaintiff's initial application, does not apply to the proposed project for which Plaintiff has been seeking a permit because the ordinance as then interpreted was not in effect as of the date of the original application. The City, without any reasonable basis, has re-interpreted this driveway location ordinance in order to selectively apply new and arbitrary conditions of approval only to Plaintiff, to no others similarly situated, and only in order, without legitimate purpose, to frustrate the redevelopment goals of Plaintiff based on its vested rights as of July 2007.

Alternatively, if Section 40-86, as reinterpreted by the City, could be said to apply to the project it nevertheless does not apply to the aspects of the project as asserted by the City because:

(a) the section asserted by the City (subsection c(3)) to deny the permit does not apply unless the City Engineer has first determined the single Bissonnet drive serving the Project is not necessary to provide reasonable access to the Project (which was not the City Engineer's holding), and

(b) the Driveway Ordinance only regulates driveways by their impact on the immediate street right-of-way to which the new drive connects, not intersections with other streets.

Further, even if the ordinance could be applied to this project, even as subsequently interpreted and applied by the City, the traffic analysis demonstrates that the project does not violate the ordinance and any interpretation of the actual traffic numbers by the City is an abuse of discretion.

The City's application of this ordinance to Plaintiff's project cannot stand because it cannot and does not apply to the grandfathered and vested project, and because the application of the ordinance to this project has no rational relationship to a conceivable legitimate governmental objective. The ordinance has been wrongfully and arbitrarily applied to Plaintiff. It has never been applied in this manner to similarly situated developers. And no rational basis exists for the disparate treatment of Plaintiff. The City's application of the ordinance to the project at issue also substantially denies Plaintiff access to the property. And finally, the illegitimate and mandated reduction in density of the residential project constitutes an illegal exaction as it is not roughly proportional to any burden the project might impose.

#### 5. General Appeals Board and City Council Action

On October 22, 2009 Plaintiff appealed the denial of its building permit to the City of Houston's General Appeals Board. The General Appeals Board rejected the appeal by a 3-2 vote and in turn, on December 9, 2009, the City of Houston's City Council considered an appeal from the General Appeals Board ruling. The City Council upheld the decision of the General Appeals Board. Thus, Plaintiff has exhausted all of its available administrative remedies.

Following the City Council denial, Plaintiff gave the Mayor and council members notice, as required by the City Charter, of this claim.

## VII. CAUSES OF ACTION

The City's action, in re-interpreting Section 40-86 to allow regulation of density, constitutes a violation of the just compensation clause of the Article I, §17 of the Texas Constitution, which provides that:

no person's property shall be taken, damaged, destroyed for or applied to public use without adequate compensation being made...

The application of Section 40-86 to Plaintiff and its property denies Plaintiff of the lawful and proper use and enjoyment of its property and its vested rights and thus takes or damages its property.

The application of Section 40-86 to Plaintiff and its property does not substantially advance a legitimate state interest and as such, Plaintiff has sustained a compensable regulatory taking.

Additionally, the arbitrary decision to limit the density and traffic impact of the project constitutes an exaction or dedication of valuable property and the imposition of this density restriction is neither roughly proportional to the burden created by the proposed redevelopment of the property, nor is it reasonably related to that burden.

The novel use of Section 40-86 as applied to Plaintiff has never been similarly applied to a similarly situated applicant and there is no rational basis for the City's unique interpretation

and application to Plaintiff of §40-86. Treating Plaintiff in a disparate manner without a rational basis entitles it to relief.

The City's re-interpretation of Section 40-86, and its denial of the permit based on a finding of excessive traffic constitutes arbitrary and capricious official conduct and an abuse of governmental discretion and its interpretation of the ordinance is without any legitimate governmental purpose and results in an unjust and inconsistent enforcement of the law.

The City's actions in re-interpreting Section 40-86 and arbitrarily applying it to the Plaintiff project effectively deny all reasonable access to the property for Plaintiff's redevelopment of that property consistent with its April 7, 2009 permit application. Plaintiff's application included provision for only one driveway to Bissonnet (with emergency-only access to Ashby Street). Denying the only driveway to the property necessarily denies Plaintiff access. In connection with its denial of access, the City acted knowingly and intentionally. This conduct is compensable and constitutes a taking.

#### VIII. DAMAGES

Plaintiff has suffered damages within the jurisdiction limits of the Court and such damages include the diminution in value of Plaintiff's investment in the proposed improvements, the diminution in the value of its tract as unimproved, and its out-of-pocket costs in connection with design, engineering, permitting fees and monies spent on infrastructure development, impact fees and other professional fees.

IX. DECLARATORY JUDGMENT

In addition to its monetary damages, Plaintiff respectfully requests that the Court declare the rights, status, and other legal relations as between The City of Houston and Plaintiff. Pursuant to Texas Civil Practice and Remedies Code §37.004 it requests the Court to determine questions of construction concerning immediate municipal ordinance at issue and declare that the City has no basis to deny the foundation and site work permit to Plaintiff for the April 2009 project submission. Plaintiff also respectfully requests that the Court award to it its incurred costs and reasonable and necessary attorneys' fees as are equitable and just. TEX. CIV. PRAC. & REM CODE ANN. §37.009.

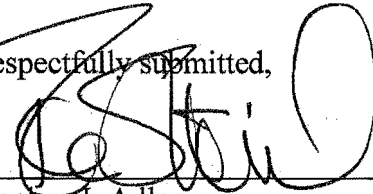
X. JURY DEMAND

Demand is hereby made for a trial to a jury. The appropriate fee accompanies this filing.

XI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Court grant it the relief sought above and that it be awarded its damages within the jurisdictional limits of the Court.

Respectfully submitted,



Stephen I. Adler  
Texas Bar No. 00927700  
BARRON & ADLER, L.L.P.  
808 Nueces Street  
Austin, Texas 78701-2216  
512-478-4995  
Fax 512-478-6022

Thomas E. Sheffield  
State Bar No. 18185400  
609 Bradford Ave., Suite 101  
Kemah, Texas 77584  
(281) 549-4732  
(281) 549-4735 Fax

ATTORNEYS FOR PLAINTIFFS  
MARYLAND MANOR ASSOCIATES  
AND BUCKHEAD INVESTMENT  
PARTNERS, INC.