

RIVER OAKS PROPERTIES, LTD.,
408 ESPITA, LLC, 201 STANTON, LLC,
HASIERAN, LLC, HUNT OREGON, LLC,
RED BALLOON, LP, YELLOW BALLOON,
LP, THE CLEAN GROUP, LP, and SOTOAK
REALTY, LLC,

Plaintiffs,

v.

TEXAS HISTORICAL COMMISSION,

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

COME NOW River Oaks Properties, Ltd., 408 Espita, LLC, 201 Stanton, LLC, Hasieran, LLC, Hunt Oregon, LLC, Red Balloon, LP, Yellow Balloon, LP, The Clean Group, LP, and Sotoak Realty, LLC (“Plaintiffs”) and by and through their counsel of record, and file this Plaintiffs’ Original Petition, and would respectfully show the Court the following:

I. SUMMARY OF ACTION

1.1 Plaintiffs’ concerns, as raised in this lawsuit and as summarized below, could potentially be addressed if the Texas Historical Commission postponed the State Board of Review’s currently scheduled January 16, 2021 consideration of the nomination of the “El Paso Downtown Historic District” until a subsequent meeting of the State Board of Review, giving Plaintiffs, and all other affected private property owners, an opportunity to present their concerns to the Texas Historical Commission and to work with the Texas Historical Commission toward a resolution of those concerns. Plaintiffs own real property in El Paso, Texas, within the area proposed to be included in the National Register of Historic Places (“National Register”) as the

“El Paso Downtown Historic District.” Under the El Paso City Code, significant legal restrictions apply to all real property listed on the National Register. The Texas Historical Commission has proposed to approve the area identified as the “El Paso Downtown Historic District” for inclusion in the National Register and is scheduled to consider this listing at the meeting of its State Board of Review on January 16, 2021. Plaintiffs were never notified by the Texas Historical Commission of the negative impact on their property of the proposed listing of the area. As a result, Plaintiffs have not had adequate opportunity to respond to the proposed listing. Action by the State Board of Review and the Texas Historical Commission to include the area identified as the “El Paso Downtown Historic District” on the National Register will take, damage or destroy Plaintiffs’ right to use and enjoy their private property. In addition, the failure of the Texas Historical Commission to provide Plaintiffs with adequate notice and opportunity to be heard violates procedural due process.

II. PARTIES AND OTHER MATTERS

2.1 Plaintiffs affirmatively plead that discovery is intended to be conducted under Level 3 of Texas Rule of Civil Procedure 190.

2.2 Pursuant to Texas Rule of Civil Procedure 47, Plaintiffs seek to recover monetary relief over \$1,000,000, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney’s fees in this matter.

2.3 Plaintiff River Oaks Properties, Ltd. is a Texas limited partnership that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.4 Plaintiff 408 Espita, LLC is a Texas limited liability company that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.5 Plaintiff 201 Stanton, LLC is a Texas limited liability company that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.6 Plaintiff Hasieran, LLC is a Texas limited liability company that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.7 Plaintiff Hunt Oregon, LLC is a Delaware limited liability company that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.8 Plaintiff Red Balloon, LP is a Texas limited partnership that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.9 Plaintiff Yellow Balloon, LP is a Texas limited partnership that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.10 Plaintiff The Clean Group, LP is a Texas limited partnership that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.11 Plaintiff Sotoak Realty, LLC is a Texas limited liability company that owns property in El Paso County, Texas within the area referred to as the “El Paso Downtown Historic District.”

2.12 Plaintiffs own real property in El Paso, Texas, within the area to be nominated or nominated by the Texas Historical Commission to be included in the National Register as the “El Paso Downtown Historic District.”

2.13 Defendant Texas Historical Commission is an agency of the State of Texas (“THC” or “State”) and may be served with process through service on Mark Wolfe, the Executive Director, at 1511 Colorado Street, Austin, Texas 78701.

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction over the subject matter of this suit because the amount in controversy exceeds the minimum jurisdictional limits of the Court.

3.2 The Court has jurisdiction over this suit because it alleges that the THC has committed an unconstitutional taking of property, violated Plaintiffs’ right to procedural due process, and Plaintiffs seek declaratory relief.

3.3 Venue is proper in Travis County Section 15.002 of the Texas Civil Practice & Remedies Code because all or a substantial part of the acts or omissions giving rise to the claims brought herein occurred in Travis County.

IV. FACTUAL BACKGROUND

4.1 The THC has been designated the authority to administer the National Historic Preservation Act of 1966 and amendments thereto (“National Historic Preservation Act”), 54 U.S.C. §§ 300101-307108. 15 Tex. Admin. Code § 15.1(a). The THC’s Executive Director serves as the “State Historic Preservation Officer.” 15 Tex. Admin. Code § 15.1(b). The THC’s Executive Director has the responsibility pursuant to the National Historic Preservation Act and state law to, among other things, “identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the national register.” 36 C.F.R. § 60.6(a); 15 Tex. Admin. Code § 15.1(c)(2). In order to administer its obligations under the

National Historic Preservation Act, the THC has adopted as its own the relevant provisions of federal statutes and rules governing the National Register. 15 Tex. Admin. Code § 15.2(a).

4.2 The State Board of Review for the National Register of Historic Places, Texas (“State Board of Review”) is appointed by the THC and reviews and makes recommendations to the State Historic Preservation Officer on nominations from Texas to the National Register. 15 Tex. Admin. Code § 15.3(a), (b), (d). The THC provides the State Board of Review with information regarding nominations and schedules nominations for consideration by the State Board of Review. 36 C.F.R. § 60.6(j). *See also* <https://www.thc.texas.gov/preserve/nrhp-process>. The State Board of Review then makes a recommendation to the State Historic Preservation Officer to approve or disprove the nomination. 36 C.F.R. § 60.6(j).

4.3 The State Historic Preservation Officer reviews nominations approved by the State Board of Review, along with comments received, and submits them to the Keeper of the National Register. 36 C.F.R. § 60.6(k).

4.4 In considering eligible properties to the National Register, the State is required to consult with local authorities and provide notice of its intent to nominate a property and to solicit written comments in connection therewith. 36 C.F.R. § 60.6(b). The State is also required to give owners of private property an opportunity to concur or object to the listing. 36 C.F.R. § 60.6(b). This notice must inform property owners of the State’s intent to bring a nomination before the State Board of Review. 36 C.F.R. § 60.6(c). Written notification to property owners shall be sent at least 30 days but not more than 75 days before the State Board of Review meeting. *Id.* The notice shall inform property owners of the opportunity to concur in or object in writing to the nomination of the property. *Id.* Furthermore, where there is a nomination with more than 50

property owners, the State is required to provide written notice to the chief elected officials of the county and the city in which the property is located and to publish a general notice at least 30 days but not more than 75 days before the State Board of Review meeting. 36 C.F.R. § 60.6(d).

4.5 Under the El Paso City Code, significant legal restrictions apply to all real property listed on the National Register. Section 20.20.080 of the El Paso City Code provides, in relevant part, as follows:

A. No person or entity shall construct, reconstruct, alter, change, remove, demolish or fail to maintain, any of the following, unless a certificate of appropriateness or a certificate of demolition has been approved by the HLC [El Paso Historic Landmark Commission] or approval granted through administrative review:

1. Any permanent feature on a property listed as a Texas Antiquities Landmark or on the National Register of Historic Places; . . .

B. No building permit shall be issued for such proposed work until a certificate of appropriateness has first been issued by the historic landmark commission or approval granted through administrative review. The certificate of appropriateness or administrative review approval shall be in addition to and not in lieu of any building permit that may otherwise be required.

C. Certificates of appropriateness, certificates of demolition and applications for administrative review shall be granted, granted with modifications, or denied based on the following criteria:

1. When city council has adopted architectural and design guidelines for a particular district, those guidelines shall control provided they are not in conflict with other requirements of the city code, except that the HLC may approve exceptions to the guidelines in an effort to maintain the historic integrity of an H-overlay property, in which case the exception shall control in that particular case;

2. When no guidelines have been adopted for a particular district, the guidelines from the district most similar in character, design, materials, workmanship, time of construction shall apply; or as identified in the "Guide to the Identification and Preservation of El Paso's Cultural, Historic and Architectural Resources";

3. When the preceding does not provide guidelines applicable to the project, then the secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings shall apply (36 CFR Part 68) (U.S. Department of the Interior, National Park Service, Preservation Assistance Division. U.S. Government Printing Office Document Number: 19940 - 160-280 QL 3, Washington, D.C., or most current revision). . . .

El Paso City Code § 20.20.080.

4.6 Plaintiffs are the owners of real property in El Paso, Texas, within the area nominated to be included in the National Register as the "El Paso Downtown Historic District."

4.7 The THC has proposed to approve the area identified as the "El Paso Downtown Historic District" for inclusion in the National Register and is scheduled to consider this listing at the meeting of its State Board of Review on January 16, 2021.

4.8 Plaintiffs were never notified by the THC of the negative impact on their property of the proposed listing of the area identified as the "El Paso Downtown Historic District." Plaintiffs did not become aware of the impact on their property until the last two weeks of 2020 or the first two weeks of 2021 when they first received communications about the impact from third parties. They learned of this impact over the winter holidays and as a result of that late notice and the impacts of the Covid-19 pandemic on the City of El Paso, Plaintiffs have not had an adequate opportunity to respond to the proposed listing. Moreover, the notice that was published by the THC failed to advise Plaintiffs of the application of the requirements of the El Paso City Code to properties included in the National Register, and the resulting significant detrimental economic impacts to Plaintiffs.

4.9 Inclusion of the area identified as the "El Paso Downtown Historic District" would have significant detrimental economic impacts on Plaintiffs' real property, significantly impacting

their use and enjoyment of their property and greatly reducing the value of their property. Action taken by the State Board of Review and the THC will immediately subject Plaintiffs to the requirements of the El Paso City Code applicable to properties included in the National Register.

4.10 Plaintiffs have learned that the City of El Paso has objected to the nomination of the “El Paso Downtown Historic District” and has requested that the consideration of the nomination be postponed to a later date that would give the City sufficient time to provide the State Board of Review and the THC with additional information regarding the nomination.

4.11 Plaintiffs’ concerns, as raised in this lawsuit, could potentially be addressed if the THC postponed consideration of the nomination of the “El Paso Downtown Historic District” until a subsequent meeting of the State Board of Review, giving Plaintiffs, and all other affected private property owners, an opportunity to present their concerns to the THC and to work with the THC toward a resolution of those concerns. However, in the absence of such accommodation by the THC, the actions of the THC give rise to the following causes of action.

V. CAUSES OF ACTION

5.1 Plaintiffs incorporate by reference the above paragraphs as if expressly stated herein.

VI. UNCONSTITUTIONAL TAKING, DAMAGING OR DESTRUCTION OF PRIVATE PROPERTY

6.1 Plaintiffs own real property and have the right to use and enjoy their property for its highest and best use.

6.2 Plaintiffs have made substantial and reasonable investments in the use and enjoyment of their property for its highest and best use.

6.3 Action by the State Board of Review and the THC to include the area identified as the “El Paso Downtown Historic District” on the National Register will take, damage or destroy Plaintiffs’ right to use and enjoy their private property.

6.4 Pursuant to TEX. CONST. art. I, § 17, Plaintiffs are entitled to adequate compensation for the actions of the THC for the unconstitutional taking of their real property. Plaintiffs seek the recovery of such adequate compensation in this suit.

VII. DEPRIVATION OF PROCEDURAL DUE PROCESS

7.1 The failure of the THC to provide Plaintiffs with adequate notice and opportunity to be heard regarding the proposed action to include the area identified as the “El Paso Downtown Historic District” on the National Register, including the significantly negative impacts this action will have on Plaintiffs’ real property, violates procedural due process.

7.2 Pursuant to TEX. CONST. art. I, § 19, Plaintiffs are entitled to adequate notice and an opportunity to be heard prior to the THC taking action that will negatively impact Plaintiffs’ real property.

VIII. ACTION TO DECLARE THAT THE APPROVAL OF THE EL PASO DOWNTOWN HISTORIC DISTRICT IS UNLAWFUL

8.1 Plaintiffs request a declaratory judgment that the State Board of Review and THC’s proposed designation of the area identified as the “El Paso Downtown Historic District” on the National Register under THC’s rules is unlawful because the THC has not complied with due process requirements to property owners and because the THC has failed to provide Plaintiffs with adequate notice and thereafter an opportunity to be heard.

IX. ATTORNEYS FEES

9.1 Pursuant to Texas Civil Practice and Remedies Code Section 37.009, Plaintiffs are entitled to recover the costs of litigation and reasonable attorneys fees incurred in bringing this suit.

X. JURY DEMAND

10.1 Plaintiffs demand a trial by jury on all issues.

XI. PRAYER

11.1 WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendant be cited to appear and answer and respectfully request the following relief:

- (a) That the State Board of Review and the THC postpone consideration of the proposal to include the area identified as the “El Paso Downtown Historic District” on the National Register until Plaintiffs have had an opportunity to review and respond to the proposal;
- (b) That the Court enter a declaratory judgment that the State Board of Review and THC may not take action on the proposed designation of the area identified as the “El Paso Downtown Historic District” on the National Register because the THC has not complied with due process requirements to provide adequate notice to property owners and because the THC has failed to provide Plaintiffs with adequate notice and thereafter an opportunity to be heard;
- (c) That Plaintiffs have judgment against Defendant that Defendant’s action has taken, damaged or destroyed Plaintiffs’ property;
- (d) That Plaintiffs have judgment against the Defendants for adequate compensation

- for Defendant's actions that have taken, damaged or destroyed Plaintiffs' property;
- (e) That Plaintiffs be awarded their attorneys fees through trial and all appeals and pre-judgment and post-judgment interest as provided by law; and
 - (f) That Plaintiffs be awarded all other relief appropriate in law or equity.

Respectfully submitted,

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