CAUSE NO. 2013-26155

Penelope Loughhead, et al.	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, T E X A S
	§	
1717 Bissonnet, LLC	§	157th JUDICIAL DISTRICT

Brief of Hugh Rice Kelly, *Amicus Curiæ*, *in Support of Plaintiffs' Motion for Permanent Injunction*

I am filing this amicus curiæ brief on my own behalf and at my own expense. This brief was not solicited by plaintiffs, nor was it written or reviewed by them or their trial counsel. The arguments and authorities cited represent only my views and not those of any party.

My interest in this case goes to its value as a precedent and as a check on abusive property development, as found by the jury in this case. By "abusive development" I mean circumstances in which one property owner seeks to enrich himself by appropriating the property rights of adjacent landowners and degrading both the subjective enjoyment and the market values of their property.

This is not a case of developers being deprived of their property rights; it is a case of developers trying to take away the property rights of others.

1. Interest of *Amicus Curiæ* and Summary of Argument.

I have lived at 1936 Rice Boulevard, a distance of seven blocks from the proposed Ashby project, for 32 years. My previous three residences since 1947 have been within a mile of where I live now. I attended neighborhood schools through graduation from Rice University in 1965. After service in the Army, I graduated from the University of Texas law school in 1972. I am an active member of the state bar but limit my practice to unpaid legal work in matters I believe to be in the public interest. This case is one such matter.

Counsel for Plaintiffs have ably served the Court through argument and authorities on all matters necessary for the Court to permanently enjoin defendant and its successors from developing their property abusively. However, I will address two points that have attracted public comment: (a) the claim that issuance of building permits precludes the jurisdiction of a court to hear a cause of action and grant relief preventing the construction of a private nuisance; and (b) the claim that there is no clear, readily administered standard under which this Court could enjoin the current high-rise structure while allowing construction of a profitable but non-abusive scaled-back project.

2. The Grant of Building Permits Does Not Preclude a Citizen's Right to Bring Suit Alleging a Nuisance Cause of Action.

It is difficult to take seriously the claim that issuance of building permits precludes a citizen's cause of action for nuisance. This is because anyone who suffers a legal wrong is entitled to whatever legal remedy the law provides. The law of nuisance has a long history in English common law, which Texas formally adopted in 1840. Except as later modified or repealed, the common law continues to provide "the rule of decision in this state" pursuant to Section 5.001, Texas Civil Practice & Remedies Code.

Given the existence of a legal wrong, the common law provides a remedy. That being the case, there is only one way for defendants to claim preclusion—by showing that the matter has already been litigated. This seems to be the point defendant is making—that the City of Houston's grant of building permits satisfies this legal requirement. Unfortunately for their argument, that process fails to a single point necessary to preclusion.

The obvious first stop is the Restatement of Judgments, Section 1, which states that preclusion comes about only when the first alleged decision-maker—here, the City of Houston's building permit authorities—has authority to render judgment on the matter in controversy, jurisdiction over the subject matter of the action, and personal jurisdiction over the parties. To quote from the Restatement reporter's notes to Section 1: "A fundamental element of procedural fairness is that a tribunal presuming to adjudicate a controversy have legal authority to do so. One aspect of the question of authority is whether the tribunal is empowered to adjudicate the type of controversy that is presented. This is conventionally referred to, and is referred to herein, as the question of subject matter jurisdiction."

"Just adjudication requires not only that the tribunal have authority in the matter but also that the parties have opportunity to offer proof and legal arguments in support of a claim or defense."

Exactly where defendant's preclusion claims fit this framework is nowhere apparent. The building officials of the City have jurisdiction only over permit applicants, but have no jurisdiction to hold hearings, compel the appearance of witnesses, entertain testimony and cross-examination under oath, or issue rulings on any tort law subject. No doubt these officials would be astonished were anyone to suggest they do so.

In this case, there is no claim that anyone other than the developers was involved in the permitting process. Certainly there was no notice given that the rights of persons living nearby were going to be adjudicated, or that those persons could appear and present arguments, or that the building approval officials had any jurisdiction to decide whether or not the project would amount to a legal nuisance. With no notice, no hearing, no cross examination of witnesses, no tribunal having authority to decide questions of tort law, it is extremely hard to take seriously the claim that the issuance of building permits precludes tort actions by persons adversely affected by the construction.

Any number of hypotheticals could illustrate the point. For example, if a company was granted a building permit to construct a factory within a short distance of a residential area, and the factory used two potent carcinogens, benzene and vinyl chloride, in its processes, would anyone take seriously the claim that issuance of the building permit precluded a nuisance claim based on chronic release of these chemicals? The building officials, of course, would never consider adjudicating things of this sort. Going from carcinogenic chemicals drifting over the factory fence to other kinds of nuisances doesn't change the basic principles. Building officials do not act as tribunals in any sense of the word.

Not only is the preclusive effect nonsensical from the standpoint of the law of judgments, it is nonsensical from a due process point of view. The Texas Constitution provides that "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Due course of law is the equivalent of the phrase "due process" in federal constitutional law. The claim that the building permit issuance process affords adjacent landowners their "due course of law" is not only wrong on its face; it would be unconstitutional.

3. There Is a Clear Guideline Available to Allow Issuance of a Permanent Injuction That Protects Plaintiffs Without Impairing a Prudent Developer's Ability to Profitably Use His Land

One need only get in an automobile and spend two hours touring the immediate competitive area of the Ashby Project to identify the right yardstick for a permanent injunction: the City of Houston's building code for apartment buildings constructed of wooden framing. Of a dozen freshly-minted projects, or projects still under construction, all but one are wood frame with concrete garaging and fire escapes—a formula that basically limits buildings to a fixed density and maximum height of around five to six stories. The following eleven are five to six stories tall. Most were constructed on the site of demolished garden apartments forty or more years old. And all were presumably constructed by developers who had profits in mind.[1]

- Allusion at West University, Auden at Bissonnet, 5/6 stories, began leasing 2014 (Bissonnet is four lanes here).
- The Hanover on Dinkins at Bissonnet, 5/6 stories, advanced construction stage. One block west of Kirby, a six lane major street. Bissonnet 4 lanes here.
- The Hanover at Rice Village, 5/6 stories. Mostly finished 2012, leasing 2013. Resident entry on Kelvin, 1 block north of Rice Blvd, 1 block east of Kirby, which is 5 lanes at this location.
- The Fairmont at Museum District, new section currently under construction duplicating original development completed several years ago. Dunlavy at Richmond, 5/6 stories. Dunlavy is a 2 lane minor street, but Richmond is a major four lane street, as it is at other projects on Richmond in this list.

[1] Some of the precise details of these projects may be off to an immaterial degree due to the need for haste, but the information will be supplemented if necessary.

- Post 50, 500 Richmond Avenue at the Southwest Freeway, 5/6 stories, Completed in 2014 and now leasing.
- 1300 Richmond Avenue, 5/6 stories, construction near completion (on Richmond at Graustark)
- La Maison Luxury Apartments, 2800 Revere at Rosamond, 5/6 stories, construction completed 2010 (2 blocks west of Kirby, 6 lanes at this point)
- The Gables, 3100 Revere and 2300-2400 Branard (2 blocks east of Kirby Drive, adjacent to single family residential, two blocks from intersection of Greenbriar, a three-lane street). About a third finished and leasing, the balance in advanced construction stage.
- Broadstone 3800, Main at Alabama, currently under construction, 5/6 stories.
- The District at Greenbriar, 5/6 stories, completed 2013.
- The Hanover on West Gray at Waugh, 5/6 stories, completed 2013.

Rounding out the dozen, and similar to these midrise buildings, is the slightly taller Susanna apartments, Alabama at Dunlavy. This midrise is 8 stories, currently under construction. This building uses steel rather than wooden stud construction, which probably explains its greater permitted height. There is also one taller building under construction, reportedly 12 stories but on a compact footprint, across from the Hanover Rice Village. This will be a conventional fireproof building due to its height. There is also a high rise underway on Montrose, the Chelsea Tower, site now being cleared, one block from the 20 story Museum Tower and another few blocks from 5000 Montrose at the Museum, also a 20 story building. These high rises join similar properties that began with construction of the 12 story (a high rise for the time) Warwick Hotel on Main at Montrose in the 1920's. Another still-extant 1920's high rise is the former Plaza Hotel, near the Museum of Fine Arts on Montrose, also 12 stories. Another relatively tall apartment house, demolished decades ago, once occupied the present site of the Museum's outdoor garden. These established high rise areas lining Main and Montrose have remained stable from the 1920's to the present.

The plain fact is that the marketplace has done a fairly good job of determining where high rise buildings belong: on or very near major thoroughfares, in this area Main Street, Montrose and Kirby Drive. The farthest away from this standard is the second Hanover Rice Village building, not an especially large project at 12 stories on a small footprint which is a block and a half east of Kirby Drive. Otherwise, no high rises have been built by private enterprise in the roughly two-mile radius of the Ashby project.

The market is supplying all of the practical information this Court needs to enter a permanent injunction that is fair both to the property owner plaintiffs and to the developers of the Ashby project, notwithstanding the developers' self-interested claims to the contrary. It would compel the developers to drop their high rise ambitions and adopt a form of development that is financially rewarding enough to attract a host of developers to the area. The Court would not need to design anything, or specify anything. Rather, I believe the Court could simply limit the developers to a project that

meets the City of Houston building code for wood framed buildings of a type similar to those in the above list, whose fundamental designs are remarkably uniform.

Building codes have often had the effect of shaping the buildings constructed under their jurisdiction, as they are doing today in Houston with wood-framed midrise buildings. The famous "wedding cake" apartment structures erected for many years to maximize floor space in New York City are a classic example. More celebrated have been the successive building codes of the Paris which gave the boulevards of that city much of the its world-renowned esthetic value, prestige, not to mention immense market values.

4. Postscript Concerning Houstonians for Responsible Growth's Position Regarding Issuance of a Permanent Injunction

I believe the foregoing argument adequately addresses HRG's claim that the issuance of building permits should preclude claims for nuisance. As to the debates over authorities, I submit that very nearly all of he cases cited are, at best, analogous authority. In truth, questions like this are argued throughout Texas on a regular basis, but they are argued before zoning authorities, whose jurisdiction has effectively preempted the field. This is the basic reason why the actual relevant case law is no more voluminous than it is.

I do not favor zoning in Houston, but HRG's invocation of zoning as the key to Houston's strong growth has little substance. The many cities of the Dallas-Fort Worth metroplex are heavily zoned, and their growth rate has easily matched that of Houston. Moreover, a much faster growing city in Texas is Austin, widely recognized as having the most toxic zoning in the state. Finally, of course, a claim of nuisance has virtually no legal similarity to the concept of zoning.

HRG's last straw man is the claim that plaintiffs are attempting to block all development of the Ashby site. This absurd claim has never been the position of the plaintiffs. It certainly is nothing I would support: defendant, despite its record of bad conduct, still has the right to develop its land profitably. I suggest a very practical way this can be done, but would in no event support any injunction that did not permit reasonable and profitable use of their land