CAUSE NO. 2013-26155

Penelope Loughhead, et al.	§	**In the District Court of**
	§	
v.	§	**Harris County, Texas**
	§	
1717 Bissonnet, L.L.C.	§	**157th Judicial District**

Opinion and Order

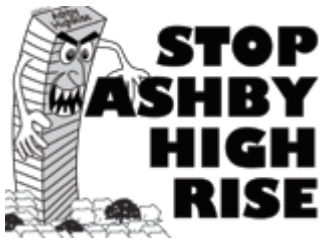
In November and December 2013, this case was tried to a jury. That jury found that a proposed high rise development at 1717 Bissonnet would constitute a nuisance if built to 20 of 30 plaintiff homeowners who lived near the proposed project. That same jury awarded damages to those 20 prevailing plaintiffs. The 20 prevailing plaintiffs have now moved this Court for a permanent injunction enjoining the defendant from constructing the project rather than awarding damages. For the reasons stated here and in defendant's opposition briefs, plaintiffs' request for a permanent injunction is denied. The Court instead enters judgment awarding partial damages to the prevailing plaintiffs and a take nothing judgment to the 10 plaintiffs who did not prevail.

I. Factual Background

This case involves a 1.6 acre tract located at 1717 Bissonnet (the "Property"). Since the early 1960's, Maryland Manor Apartments occupied the Property, ultimately growing to 67 units. In 2007, Buckhead Investment Partners acquired Maryland Manor and began plans to construct a 23 story multi-use development consisting of a five-level parking garage and 18 floors of apartments. On July 30, 2007, Buckhead filed its foundation and site work permit application with the City of Houston and on August 28, 2007, Buckhead advised the neighborhood association of its plans.[1] The neighborhood opposition was rapid and intense. A

[1] Defendant's Ex. 104.

neighborhood group called Stop Ashby High Rise was created and signs in opposition to the Project appeared throughout the neighborhood.



The City of Houston initially approved the developer's Traffic Impact Analysis on September 4, 2007. However, on September 28, 2007, in response to neighborhood opposition, that approval was rescinded. Over the next several years, Buckhead revised its applications ten times; each time the application was rejected. In August 2009, Buckhead submitted a revised application under protest and subject to challenge of the project's previous denials.[2] On August 25, 2009, the City of Houston approved the revised project. Although the revised application was approved by the city, Buckhead continued to press for approval of the original application. In October 2009, Buckhead appealed the denial of its building permit to the City of Houston's General Appeals Board. The Appeals Board rejected the appeal and in December 2009, the Houston City Council upheld the decision of the Appeals Board. On April 9, 2010, Buckhead and Maryland Manor Associates filed suit against the city in federal court[3] complaining that Buckhead's previous applications were wrongfully denied. In February 2012, the City of Houston and Buckhead settled the federal action. In return for dismissing the lawsuit, the City of Houston agreed to approve the project provided the following changes were made:

- The project would be a 21 (rather than 23 as requested by Buckhead) story residential or mixed-use residential and commercial development on the Property with 228 residential high-rise units, 10,075 square feet of restaurant use, and four residential townhouses (the "Project");

[2] The revised project application called for a project that would generate only 120 p.m. peak hour automobile trips onto and off of Bissonnet. The original application, the denial of which Buckhead complained, would have generated a total of 184 p.m. peak hour trips.

[3] The action was originally filed in the 151st Dist. Court of Harris County, but was subsequently removed to federal court by the City of Houston.

- A pedestrian plaza must exist in the front of the Project with specified curb cuts on Ashby and Bissonnet;

- Traffic mitigation measures must be implemented including shuttle service and making bicycles available;

- Green wall screening must be constructed along the south and east walls of the parking garage;

- Lighting must be hooded or directed away from adjacent residences; and

- Noise mitigation must be implemented.[4]

This settlement agreement was publically announced on March 1, 2012.

II. Procedural Background

On January 14, 2013, Penelope Loughhead filed an action under Rule 202 of the Texas Rules of Civil Procedure to obtain pre-suit discovery about the construction plans for the Project. On March 4, 2013, this Court ordered defendant to provide certain construction information to plaintiff.

On May 1, 2013, six plaintiffs filed suit seeking damages and a permanent injunction to stop the Project.[5] Because of the previous Rule 202 suit, this action was transferred to this Court.[6]

Trial commenced on November 19, 2013[7] and ended with a jury verdict on December 17, 2013. The jury determined that the Project, if built, would constitute a nuisance to the owners of 20 of the 30 homes, but did not constitute a nuisance to owners of 10 homes. The jury awarded

[4] Defendant's Ex. 9.
[5] Over the next several months, many plaintiffs joined and exited the suit. At one point, there were more than 140 plaintiffs. However, many of those plaintiffs voluntarily withdrew their action. Ultimately, 45 plaintiffs representing 30 homes went to trial.
[6] Transferred by the Administrative Judge of the Civil Division pursuant to Harris County Local Rule 3.2.2.
[7] Because this controversy had lingered for six years, this Court placed the matter on an accelerated trial schedule in order to achieve a rapid resolution.

damages to the homeowners of the twenty prevailing homes. A hearing was held on March 31, 2014 and April 21, 2014 to determine whether and what type of judgment should be entered.[8]

There are several motions pending before this Court. Defendant has filed a motion for entry of judgment, for judgment NOV and to disregard jury findings. Specifically, defendant requests that a take nothing judgment be entered against the homeowners of the ten homes who lost at trial and that the court enter a judgment notwithstanding the verdict with respect to the homeowners of the twenty homes who prevailed ("20 Prevailing Plaintiffs").

Similarly, plaintiffs have filed an application for permanent injunction. Plaintiffs are not seeking damages in the event the Project is built. Rather, plaintiffs seek an injunction enjoining construction of the Project as it is currently planned and permitted.

III. The Jury Verdict

Initial examination needs to be given to the jury verdict. The jury was asked whether the Project, if constructed, would constitute a nuisance to each plaintiff. Plaintiffs were numbered 1-30. (list attached as Ex. A) Generally speaking, plaintiffs immediately adjacent to the Project prevailed and those living farther away or to the north lost. As this graphic demonstrates, plaintiffs in black (19, 21-23; and 25-30) lost at trial. Plaintiffs in yellow prevailed to varying degrees.

[8] That hearing was originally scheduled for January 23, 2014, but at the request of the parties was moved to March 31, 2014.

Additionally, the jury was asked to assess damages to the prevailing plaintiffs in two categories: (1) diminution of market value to plaintiffs' homes if the Project is built; and (2) loss of use and enjoyment of their property if the Project is built. The jury awarded the 20 Prevailing Plaintiffs approximately $1.2 million for diminution of property value and over $400,000 for loss of use and enjoyment of their property.

IV. Defendant's Motion for Judgment

As a threshold matter, defendant's motion for judgment against the plaintiffs in the ten homes who lost at trial is an easy and straightforward motion. That motion is granted. A take nothing judgment is entered against those plaintiffs.

V. Defendant's Motion for Judgment Notwithstanding the Verdict

A trial court may grant a motion for judgment notwithstanding the verdict if the evidence is legally insufficient to support the jury's findings. *Rocor Int'l, Inc. v. National Union Fire Ins. Co.*, 77 S.W.3d 253, 268 (Tex. 2002). Courts must view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.* at 807.

The jury was asked the following question:

Question No. 1:

> Is 1717 Bissonnet's proposed Project abnormal and out of place in its surroundings such that it will constitute a private nuisance if built?
>
> 1717 Bissonnet creates a "private nuisance" if its Project substantially interferes with Plaintiffs' use and enjoyment of their land.
>
> "Substantial interference" means that the Project must cause unreasonable discomfort or unreasonable annoyance to a person of ordinary sensibilities attempting to use and enjoy the person's land. It is more than a slight inconvenience or petty annoyance.

> A nuisance, if it exists, is not excused by the fact that it arises from an operation that is in itself lawful or useful.

Thus, to prove that the Project was a private nuisance, plaintiffs had to show that it would be "abnormal and out of place in its surroundings," and that it substantially interferes with Plaintiffs' use and enjoyment of their land. In support of this proposition, plaintiffs argued that the following factors constituted a nuisance:

- Increased traffic;
- Loss of privacy;
- Foundation damage to adjacent landowners due to settlement;
- Increased light to adjacent landowners;
- Construction annoyances; and
- Shadow cast by the Project with resulting vegetation damage.

The question of whether a lawful structure can constitute a nuisance is not a new or novel issue to jurisprudence. Texas courts have long grappled with landowners complaining that proposed structures on adjacent land would constitute a nuisance. For example, our supreme court observed that "there is no question that foul odors, dust, noise, and bright lights—if sufficiently extreme—may constitute a nuisance." *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004). *See also Bay Petroleum Corp. v. Crumpler*, 272 S.W.2d 318, 318-20 (Tex. 1963)(affirming jury verdict finding no nuisance since wind did not carry "obnoxious gases, fumes, odors and stenches" from gas-storage operations to plaintiffs' land in substantial quantities); *Parsons v. Uvalde Elec. Light Co.*, 106 Tex. 212, 163 S.W. 1, 1-2 (1914)(affirming jury verdict based on smoke, dust, and cinders from electric power plant); *Rosenthal v. Taylor, B. & H. Ry. Co.*, 79 Tex. 325, 15 S.W. 268, 269 (1891)(remanding nuisance claim base on stagnant water, noise, dust, smoke, and cinders caused by railroad operations).

In this case, defendant analyzes each of the complained of activities and argues that each of them, standing alone, is insufficient to constitute a nuisance. Plaintiffs characterize this as a divide and conquer argument. The court agrees with plaintiffs. The nuisance cases in Texas demonstrate that all evidence, taken together, is to be considered in determining whether a nuisance exists. *See Freedman v. Briarcroft Property Owners, Inc*., 776 S.W.2d 212, 270 (Tex. App.—Houston [14th Dist.] 1989, writ denied)("whether a nuisance exists is a question to be determined not merely by a consideration of the thing itself, but with respect to all attendant circumstances"); *Schneider, supra at 269 (*foul odors, dust, noise and bright lights—if sufficiently extreme—may constitute a nuisance"); *GTE Mobilnet of South Texas, Ltd. v. Pascouet*, 61 S.W.3d 599, 615 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)(combination of noise and light constituted nuisance); *Lamesa Co-op Gin v. Peltier*, 342 S.W.2d 613, 616 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.)(loud noises, glaring lights, dust, odors, smoke and cotton lint combined to support nuisance finding).

The jury determined that the various complained of activities constituted a nuisance. There is sufficient evidence to support that finding. For the reasons stated in plaintiffs' response to defendant's motion for entry of judgment, for judgment NOV and to disregard jury findings, the jury's finding of nuisance will not be overturned.

VI. Damages v. Injunction

Affirming the jury's finding of nuisance is by no means the end of the inquiry. The court has, in effect, two options: permit the construction of the Project and award damages, or halt the Project and award no damages. Damages and an injunction are mutually exclusive. If an injunction is entered halting the Project, plaintiffs will suffer no damages. "Awarding both an injunction and damages as to future effects would constitute a double recovery." *Schneider,*

supra at 284. Plaintiffs have made it clear that they want an injunction rather than damages. For the reasons stated in defendant's trial brief on balancing the equities and defendant's other briefs, plaintiffs' application for injunction is denied. Some of the reasons to deny the application are discussed here.

Standards for Issuing an Injunction. Even when a nuisance is established, a permanent injunction is not automatic. In *Story*, our supreme court stated:

> Petitioners take the position that the jury having found the facts constituting the nuisance, they were entitled to the injunction abating the plant as a matter of right. We do not agree. We think that there should have been a balancing of equities in order to determine if an injunction should have been granted.

Storey v. Central Hide & Rendering Co., 226 S.W.2d 615, 618 (Tex. 1950). Rather, a permanent injunction can only be issued when plaintiffs establish:

(a) The existence of a wrongful act;

(b) The threat of imminent harm;

(c) The existence of irreparable injury; and

(d) The absence of an adequate remedy at law.

GTE Mobilnet of S. Tex. Ltd. v. Pascouet, 61 S.W.3d 599, 620 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Thus, the trial court must weigh "the respective conveniences and hardships of the parties and balance the equities." *Webb v. Glenbrook Owners Ass'n, Inc*., 298 S.W.3d 374, 384 (Tex. App.—Dallas 2009, no pet.). If they are issued, injunctions must be narrowly drawn and precise; injunctions cannot be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of rights. *Holubec v. Brandenberger*, 111 S.W.3d 32, 39-40 (Tex. 2003).

While the jury determines fact questions, the trial judge must balance the equities in the role of chancellor to determine whether to issue an injunction. As one court stated:

> It is not within the jury's province to pass upon the issue of whether or not the private nuisance which would result from the [proposed use of the defendant's property] will be outweighed by the public welfare. This is not a fact issue, but one to be determined by the chancellor in accordance with established equitable principles.

Georg v. Animal Defense League, 231 S.W.2d 807, 811 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.). The balancing of the equities lies within the trial court's sound discretion. *Lee v. Bowles,* 397 S.W.2d 923, 926 (Tex. Civ. App.—San Antonio 1965, no writ). In short, Texas law places the responsibility on the trial court.

Finding of Nuisance was Very Localized. As noted earlier, only some of the plaintiffs prevailed at trial. Generally speaking, only those plaintiffs immediately adjacent to the project or in close proximity won. All plaintiffs north of the Project lost. The Project was not deemed a nuisance to any plaintiff more than approximately 200 feet from the Project.

While it's not possible to know precisely what the jury was thinking, even plaintiffs' counsel at closing arguments conceded that this finding suggests that the jury rejected the traffic and shadow concerns raised by plaintiffs. At the minimum, the jury's finding makes clear that the Project is a nuisance to only a small band of plaintiffs and does not extend to the entire community.

Difficulty in Enforcing an Injunction. Plaintiffs request an injunction precluding defendant from constructing the Project as permitted by the City. Thus, the injunction would preclude a mixed use 21 story building consisting of retail on the ground floor, a five story parking garage, and 16 floors of apartments. This Project and only this Project was found to be a nuisance to 20 homeowners. If defendant sought to construct a 20 story project, there would be no finding that such a building would be a nuisance. A new trial would have to be conducted to determine if such a building would be a nuisance. Similarly, suppose defendant desired to erect

a mid-rise six story structure that spanned property line to property line and had more units than the currently permitted Project? Would such a project be a nuisance? Such a mid-rise would solve the height concerns of the neighborhood, but might have worse privacy and traffic concerns.

Plaintiffs suggest that this Court should enjoin the Project as permitted and then, if defendant tries to skirt the injunction by building a slightly smaller building, conduct a contempt hearing to see if defendant is complying with the injunction. Unfortunately, plaintiffs' suggestion is no solution. If defendant reduced the size of the building just slightly, defendant would clearly not be violating plaintiffs' proposed injunction since defendant would not be constructing the project as permitted.

In short, an order enjoining the construction of the Project as permitted would not resolve this controversy. Rather, the Court would be faced with a potentially endless series of lawsuits or contempt motions testing whether various tweaks and revisions of the Project would be a nuisance or a violation of the injunction.

Some amicus briefs have suggested that the court should enter an injunction precluding defendant from building anything more than 6 or 7 stories in height. Unfortunately, there's absolutely no evidence from which this court can determine what height is appropriate and what height is inappropriate. The jury (at plaintiffs' request) was simply asked whether the Project as permitted was a nuisance. The jury was not asked and the plaintiffs did not request a finding of what height or number of units would be permissible. As a result, any attempt to issue an injunction restricting the building to a certain number of floors would be sheer guesswork. This Court is faced with an all or nothing proposition—either completely enjoin the building as permitted or not. Unfortunately, as previously noted, a complete ban doesn't solve the

controversy. Defendant can comply with the injunction by simply shaving one floor off of the project.

Far from resolving this controversy, plaintiffs concede a permanent injunction would result in more suits and motions, including possible contempt motions and new suits. The Texas Supreme Court stated that "judges may hesitate to issue discretionary orders that require extensive oversight." *Schneider, supra*, 147 S.W.3d at 287. "Difficulties in drafting or enforcing an injunction may discourage the trial judge from considering the imposition of an equitable remedy." *Id*. at 289.

In the end, this Project is a residential development in a residential neighborhood. Plaintiffs' opposition is primarily scale—plaintiffs argue the project is simply too big. It is not as if the court could enter an injunction ordering defendant not to build a certain type of business, e.g., racetrack or hide tanning facility. Courts can and have entered injunctions in the past against such facilities. This case is different. A two story residential development was on the Property for decades. Maryland Manor was of no concern to the neighbors but a two story structure too small for the developer. A 21 story residential development is believed by the neighbors (and the jury) to be too big. However, this Court has zero evidence with which to find what size is just right.

Harm to the Defendant.

The defendant has fought for seven years to construct this Project. Neighborhood opposition slowed the City of Houston permitting process. Ultimately, after being faced with litigation, the City of Houston approved the Project with certain agreed modifications in order to help alleviate neighborhood concerns. During all of this time, defendant spent millions of dollars planning and designing the project. Indeed, while the neighbors fought and organized against the

Project, no suit was filed. Even after the City approved the developers contested application, no suit was filed. More importantly, even after the City and the developers entered into a settlement agreement to permit the project to go forward, no suit was filed against the Project for over a year. Meanwhile, defendant continued to expend money and energy to go forward with the Project. Suit was not filed until May of 2013 against the Project. The delay in filing suit while defendant continued to spend money and, indeed, raze the Maryland Manor Apartments which generated cash flow, cannot be ignored.

One of the factors that must be considered by this Court is balancing the equities. To be sure, construction of the Project will cause some hardship and disruption to the plaintiffs. Enjoining the Project, however, will cause considerable hardship to defendant. While the defendant could sell the Property and recoup some of its losses, in no way could defendant come out whole. Defendant has considerable sunk costs in design and engineering fees. This effort and work cannot simply be picked up and moved to a new location. The injunction requested by plaintiffs would cause considerable hardship on defendant.

Harm to the Community.

One of the factors that this Court must consider in determining whether to grant an injunction is harm to the public or community. As stated by our supreme court, the law of nuisance grew out of localized issues, such as a hog farm or tannery, "small-scale operations that like most others in pre-industrial England had little economic impact on anyone other than the parties." *Schneider, supra* at 287. Now, however,

> [i]ndustries and nuisances often come in much larger packages, with effects on the public, the economy, and the environment far beyond the neighborhood. A court sitting in equity today must consider those effects by balancing the equities before issuing any injunction. *Id.*

If an injunction is granted, there is no question but that it will have a chilling effect on other development in Houston. For better or worse, the City of Houston has repeatedly opted against zoning. Houston's lack of zoning is often touted as part of the DNA of the city.

However, while there is not technically zoning, one witness testified that the City of Houston vigorously enforces its ordinances and codes. Obtaining a building permit is by no means a given. In this case, the defendant went through years of considerable effort to obtain approval for the Project. Ten different applications were made to the City. One project alternative was approved, litigation filed, and ultimately the 21 story Project was approved by the City.

If an injunction was issued, then a judge can become a one man zoning board with little criteria. Two different courts could examine two similar projects and reach contrary conclusions. Even after developers obtained a building permit, developers would have no idea whether a proposed project would pass judicial scrutiny. Moreover, while building codes and ordinances are quite detailed, the criteria of what constitutes a nuisance is considerably less specific. Here, the definition of nuisance is simply whether a project, if built, would be abnormal and out of place in its surroundings.

Currently, developers are faced with a lengthy permitting process where the rules are defined. If developers are confronted with a second step—a possibility of an injunction—developers might think twice about whether to proceed. This is particularly true since this second step, litigation and resulting appeals, would take years to complete.

As Houston becomes more and more urbanized and denser, perhaps Houston should reconsider whether zoning is appropriate for this City. That is not for this Court to decide.

Rather, this Court must simply balance the equities. On balance, the Court concludes that an injunction should not be issued.

Does this mean that an injunction can never be issued to stop a proposed project? Of course not. But in weighing the equities in this case, the equities weigh toward no injunction.

Finally, the Project will provide benefits to the city as a whole. The Project will generate millions in tax revenues and provide housing for the medical center, Rice, and other urban destinations. While the Project might increase traffic along Bissonnet, it will contribute toward reduction in urban sprawl and congestion on freeways feeding the city center.

City Approval.

Similarly, it must be remembered that the City of Houston approved this project and extracted concessions from the defendant in the process. As part of the settlement of the federal lawsuit, the city agreed to issue a permit for the project so long as defendant made certain design changes, including (a) reducing the height of the building from 23 to 21 stories; (b) imposing traffic, light and noise mitigation measures; and (c) green wall screening on the parking garage. While this procedure was not the same as zoning, this Court cannot ignore the fact that the city (a) approved the project; and (b) extracted concessions to help ameliorate many of the neighborhood concerns.

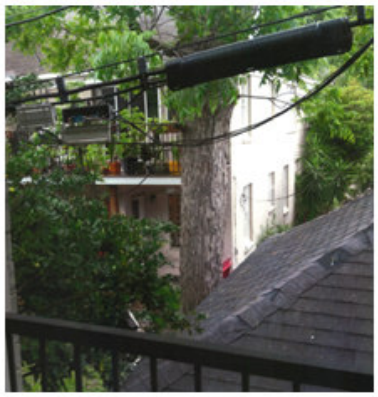
Defendant followed all of the rules required of the City.

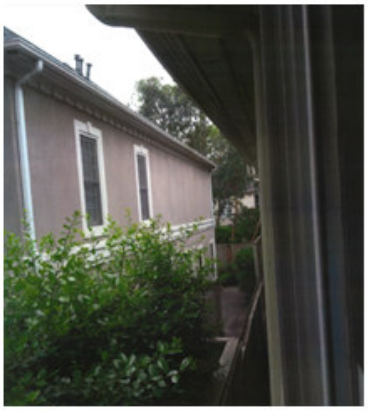
Other Projects Nearby.

Mid-rise buildings are sprouting up throughout the inner city. Indeed, two blocks from the proposed Project is a six story residential development at the corner of Ashby and Sunset and several four story residential developments are across the street on Sunset. Moreover, a six story

medical office building is 2-3 blocks away on Sunset. Thus, this neighborhood is becoming dense even without this Project.

Privacy Concerns Pre-dated the Project. One of plaintiffs' concerns is that the Project, if it went forward, would permit an invasion of privacy into the plaintiffs' homes and back yards. This is a fact of life in urban settings. Any time a two story home is erected next door, the new neighbors will have an opportunity to peer into your back yard. Indeed, plaintiffs were subjected to such an invasion of privacy when Maryland Manor Apartments occupied the Property. Maryland Manor was razed in May 2013. However, prior to demolition, defendant took pictures from second story apartments overlooking plaintiffs' property.[9] While plaintiffs testified that they had no privacy concerns with Maryland Manor, the pictures introduced at trial unquestionably show that Maryland Manor residents could look down into plaintiffs' property. If anything, privacy concerns from Maryland Manor could have been worse than potential privacy concerns from the Project. Maryland Manor was literally inches from the property line, whereas the Project will be set back 10 feet. Maryland Manor had second story





[9] Defendant Ex. 2.

apartments overlooking plaintiffs' back yards, whereas the Project will have a parking garage occupying the first five floors. Additionally, the Project's apartments will be located in a tower set back even farther. The potential nuisance concerns from the Project are not enough to justify an injunction stopping the Project.

Adequate Remedy at Law.

One of the factors to be considered in deciding whether to grant an injunction is whether the plaintiffs have an adequate remedy at law, i.e., whether they can be compensated in damages.[10] The jury has weighed in on this issue and awarded damages to the plaintiffs. The jury determined that the prevailing plaintiffs' homes would be diminished in value by ranges of 3-15%.[11] One of plaintiffs' principal arguments at trial was that the Project would cause settlement and foundation damage to adjacent properties. Even if such foundation damage occurred, this is precisely the type of injury for which courts routinely award damages. Plaintiffs clearly have an adequate remedy at law.

Other Factors to be Considered.

There are a couple of other factors that need to be identified, although they are of lesser importance.

A. Some Plaintiffs Chose to Buy Homes in the Neighborhood Despite the Possibility of the Project being Built. Several plaintiffs bought their homes during the pendency of the controversy from 2007 to the present. While the law is clear that this does not disqualify a plaintiff from obtaining damages for a proposed nuisance, *See, e.g., Galveston, H. & S.A. Ry. Co. v. Miller*, 93 S.W. 177, 179 (Tex. Civ. App. 1906, writ ref'd), it is a factor that cannot be

[10] Although §65.001 of the Texas Civil Practice and Remedies Code appears to abolish the requirement of showing irreparable injury, subsequent decisions hold that the irreparable injury requirement still exists. *See* Sonwalkar v. St. Luke's Sugar Land Partnership, LLP, 374 S.W.3d 186 (Tex. App.—Houston [1st Dist.] 2012, no pet.).
[11] Defendant's Ex. 166.

ignored in determining whether to enjoin the Project. Even in the face of this project, some plaintiffs chose to move into the neighborhood.

B. He who seeks equity must do equity. An injunction is an equitable remedy. Courts have long held that he who seeks equity must do equity. *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988). While most of the plaintiffs' conduct has been perfectly proper, there is no question but that many neighbors and some plaintiffs aggressively fought the project. Threats were made against the developers. Petitions were circulated that threatened to picket the homes of investors, appear at businesses and homes of contractors and service providers who work on the project, confront tenants in the neighborhood and let them know they are not welcome, boycott and demonstrate against any restaurant at the project as well as any other location of the same restaurant. In short, "we will appear at the homes of the owners, investors, and chef of your restaurant tenant and demonstrate our opposition to their presence in our neighborhood."[12]

Conclusion on Injunction.

For the reasons stated here, and for the reasons stated in Defendant's briefing, the application for injunction is denied.

VII. Damages

If an injunction is denied, and if the plaintiffs do indeed have an adequate remedy at law, then the final question for the court is what amount of damages to award. The jury was asked to determine what sum of money, if paid now in cash, would fairly and reasonably compensate plaintiffs for their damages in two areas: (a) loss of market value; and (b) loss of use and enjoyment of their property.

[12] Defendant Ex. 36.

Defendant argues that the jury findings on both elements of damages should be disregarded because, among other reasons, the damages are not yet ripe and are speculative. The Court agrees in part and disagrees in part. Because the Project has not yet been constructed, the Court agrees that damages for loss of use and enjoyment should not be awarded at this time. Determination of the extent to which the Project may interfere with plaintiffs' use and enjoyment of their property is speculative until the project is constructed. *See Allen v. City of Texas City*, 775 S.W.2d 863 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

With respect to lost market value damages, however, the Court agrees with Plaintiffs that these damages have already occurred. Evidence was presented at trial that plaintiffs have already incurred lost market value damages as a result of the planned Project.

VIII. Conclusion

This Court finds and orders as follows:

1. Defendant's Motion for Entry of Judgment with respect to the ten plaintiffs who lost at trial is granted;
2. Defendant's Motion for Judgment Notwithstanding the Verdict is Denied;
3. Defendant's Motion to Disregard Jury Findings is Granted with respect to loss of use and enjoyment damages and denied with respect to loss of market value damages;
4. Plaintiffs' Application for Permanent Injunction is denied.
5. The parties are to prepare a judgment consistent with this opinion.

Signed May 1, 2014.

_____

Hon. Randy Wilson
Judge 157th Dist. Court

Ex. A

1. Luong Nguyen, 1750 Wroxton Ct.
2. Lam Nguyen & Katherine Hoang, 1801 Bissonnet
3. Jamie Flatt, 1740 Wroxton Ct.
4. Penelope Loughhead, 1736 Wroxton Ct.
5. Donald Verplancken, 1734 Wroxton Ct.
6. Norman & Suannah Rund, 1726 Wroxton Ct.
7. Achim & Diana Bell, 5300 Southhampton Estates
8. Jeanne Meis, 5302 Southhampton Estates
9. Mary Van Dyke, 5304 Southhampton Estates
10. Ralph & Leslie Miller, 5306 Southhampton Estates
11. Yin & Surong Zhang, 5310 Southhampton Estates
12. Martha Gariepy, 5308 Southhampton Estates
13. Stephen Roberts, 1804 Wroxton Rd.
14. Suzanne Powell, 5305 Southhampton Estates
15. Michelle Jennings & Dr. Michael Tetzlaff, 5309 Southhampton Estates
16. James & Allison Clifton, 1714 Wroxton Ct.
17. Kimberley Bell, 1729 Wroxton Ct.
18. Richard & Mary Baraniuk, 1731 Wroxton Ct.
19. Dinzel Graves, 5219 Dunlavy
20. Kenneth Reusser & Xanthi Couroucli, 1801 Wroxton Rd.
21. Sarah Morian & Michael Clark, 1810 Bissonnet
22. Marc Favre-Massartic, 1812 Bissonnet
23. Raja Gupta, 1808 Wroxton Rd.
24. Earle Martin, 1811 Wroxton Rd.
25. Laura Lee & Dico Hassid, 1731 South Blvd.
26. Peter & Adriana Oliver, 5219 Woodhead
27. Ed Follis, 1823 Bissonnet
28. Frank & Jeanette Stokes, 1826 Wroxton Rd.
29. Steven Lin & Dr. Yi-Wen Michelle Pu, 1710 South Blvd.
30. Howard & Phyllis Epps, 1936 Wroxton Rd.