

CAUSE NO. D-1-GN-11- 001063

DOMINIC CHAVEZ, ALFRED STANLEY, §
and MICHAEL LEVY §

Plaintiffs, §

v. §

CITY OF AUSTIN and AUSTIN CITY §
COUNCIL MEMBERS, §
LEE LEFFINGWELL, MAYOR, §
CHRIS RILEY, PLACE 1, §
MIKE MARTINEZ, PLACE 2 and §
MAYOR PRO TEM, §
RANDI SHADE, PLACE 3, §
LAURA MORRISON, PLACE 4, §
BILL SPELMAN, PLACE 5, and §
SHERYL COLE, PLACE 6, §

Defendants. §

IN THE DISTRICT COURT

419th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

PLAINTIFFS' ORIGINAL PETITION

COME NOW, Plaintiffs, Dominic Chavez, Alfred Stanley, and Michael Levy, who file this Original Petition, and in support thereof would show as follows:

SUMMARY OF THE CASE

1. a. Plaintiffs ask the Court to stop the Defendants from giving tax breaks on allegedly "historic" properties without first making a finding that there is a "need" for the tax relief to encourage the preservation of each "historic" site. Texas Tax Code § 11.24 permits such tax breaks only when they are *needed*. In clear conflict with state law, the Defendants have diverted \$4.2 million of local revenue to reduce property taxes for a small, privileged class of residents that own allegedly "historic" properties, many of whom do not require such relief for the purposes stated. The ultimate effect is a combination of reduced revenues for the City or higher taxes for ordinary homeowners—both equally unacceptable outcomes during a fiscal and

economic crisis. The Defendants' suspect practice for designating "historic" sites has been frivolous, arbitrary, and excessive, with little discernible evidence that it has been properly designed to meet the true intent of "historic" preservation. But poor practice becomes illegal action when the Defendants openly ignore the Tax Code and arbitrarily provide tax breaks to owners of "historic" property with no consideration or evidence that the benefit is truly "needed" to preserve history. As a consequence, many of these tax breaks are reserved for homeowners who do not "need" them and could "preserve" their "historic" homes without such a benefit. Plaintiffs ask the Court to enjoin the Defendants from exceeding their authority under Tax Code § 11.24.

- b. Discovery in this case should be conducted under Level 3, TRCP 190.3.

PARTIES

2. Plaintiffs:

- a. Dominic Chavez is a resident and property owner in Austin, Travis County, Texas.
- b. Alfred Stanley is a resident and property owner in Austin, Travis County.
- c. Michael Levy is a resident and property owner in Austin, Travis County.

3. Defendants:

- a. The City of Austin is a municipality and is sued because Plaintiffs challenge the validity and constitutionality of Austin's historic tax exemption ordinance, City Code Title 11, Article 2. The City of Austin can be served by delivering a copy of citation and this Petition to the Mayor, The Honorable Lee Leffingwell, at Austin City Hall, 301 West 2nd Street, Austin, Texas 78701.

b. The Austin City Council members are sued in their official capacities for prospective injunctive relief to prohibit the Council from granting future historic tax exemptions without complying with Tax Code section 11.24:

(1) Lee Leffingwell is sued in his official capacity as Mayor for the City of Austin. Mayor Leffingwell can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(2) Chris Riley is sued in his official capacity as Austin Council Member Place 1. Council Member Riley can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(3) Mike Martinez is sued in his official capacity as Austin Council Member Place 2. Mayor Pro Tem Martinez can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(4) Randi Shade is sued in her official capacity as Austin Council Member Place 3. Council Member Shade can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(5) Laura Morrison is sued in her official capacity as Austin Council Member Place 4. Council Member Morrison can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(6) Bill Spelman is sued in his official capacity as Austin Council Member Place 5. Council Member Spelman can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

(7) Sheryl Cole is sued in her official capacity as Austin Council Member Place 6. Council Member Cole can be served at City Hall, 301 W. 2nd Street, Austin, Texas 78701.

JURISDICTION & VENUE

4. a. As a court of equity, this Court has jurisdiction to issue the requested injunction to enjoin the granting of illegal tax exemptions by Defendants. TEX. CIV. PRAC. & REM. CODE §65.001 et seq. (Vernon 2008). This Court has jurisdiction to issue the requested injunctive relief pursuant to Tex. Civ. Prac. & Rem Code § 65.021.

b. Venue is proper in Travis County, the location of the City of Austin's principal office, and the county in which all or a substantial part of the events or omissions giving rise to the claims occurred. Tex. Civ. Prac. & Rem. Code § 15.002 (Vernon 2002).

FACTS

Limited Authority for Tax Relief only to “Preserve” (not Reward) Historic Property

5. Since 1845, the Texas Constitution has required that taxation be “equal and uniform” and that taxes be “for public purposes only.” Tex. Const. art. VIII, §§ 1, 3.

6. Because of these provisions, it took a constitutional amendment to permit tax breaks for historic properties. In 1977, the people of Texas amended the Texas Constitution to permit tax relief for the limited purpose of “*the preservation of*” historic properties. Tex. Const. art. VIII §§ 1-f. (emphasis added). For the first time, the Legislature could authorize political subdivisions, like the City of Austin, to enact ordinances to grant exemptions or other relief from ad valorem taxes “on *appropriate* property.” *Id.* That 1977 amendment said:

TEXAS CONSTITUTION, art VIII

Sec. 1-f. CULTURAL, HISTORICAL, OR NATURAL HISTORY PRESERVATION; AD VALOREM TAX RELIEF. The legislature by law may provide for *the preservation of* cultural, historical, or natural history resources *by*:

(1) granting exemptions or other relief from state ad valorem taxes on appropriate property so designated in the manner prescribed by law; and

(2) authorizing political subdivisions to grant exemptions or other relief from ad valorem taxes on appropriate property so designated by the political subdivision in the manner prescribed by general law.

Const. art. VIII § 1-f (emphasis added).

7. To implement this new authority to preserve historic sites through tax relief, in 1977 the Legislature adopted Texas Tax Code section 11.24, authorizing tax breaks only if the historic property is “in need of tax relief to encourage its preservation.”

Sec. 11.24. HISTORIC SITES. The governing body of a taxing unit by official action of the body adopted in the manner required by law for official actions may exempt from taxation part or all of the assessed value of a structure or archeological site and the land necessary for access to and use of the structure or archeological site, if the structure or archeological site is:

(1) designated as a Recorded Texas Historic Landmark under Chapter 442, Government Code, or a state archeological landmark under Chapter 191, Natural Resources Code, by the Texas Historical Commission; or

(2) designated as a historically or archeologically significant site in need of tax relief to encourage its preservation pursuant to an ordinance or other law adopted by the governing body of the unit.

Tex. Tax. Code § 11.24 (emphasis added).

8. Consistent with the plain wording of the constitutional amendment (tax breaks only “for preservation”) and the tax statute (property “in need” of the tax relief for preservation), the Texas Senate sponsor of the legislation, then-Senator Lloyd Doggett, said on the floor of the Senate:

The basic concept behind this bill is that it frequently is *not economically feasible to preserve* the heritage of the state; that some of these structures are very important, they will be torn down—as they *are* being torn down—unless we permit local governments to make a determination as to whether they want to preserve some of these structures.

Sen. Lloyd Doggett, Senate floor debate, SB 595, 65th Leg. (1977) (emphasis added).

The City of Austin Code – Exemption for Historic Landmarks

9. The only authority the City of Austin has to grant a historic property tax exemption comes from Texas Tax Code section 11.24, which requires a determination of “need” for the exemption. But, the City of Austin’s ordinance makes no mention of any requirement that an

exemption only be granted if the property is “in need of tax relief to encourage its preservation.” In fact, the wording of the ordinance makes it mandatory that if a property is approved as a historic landmark, then it automatically gets the property tax exemption without having to meet the “need” requirement:

Concurrent with the annual tax levy, the city council shall, by ordinance, approve historic landmark properties recommended by the Historic Landmark Commission for partial exemption from ad valorem taxes under this article.

Austin City Code § 11-1-21 (emphasis added).

Harm to Plaintiffs and Other Taxpayers by Unlawful Tax Exemptions

10. Plaintiffs are property owners and property taxpayers within the corporate limits of the City of Austin. Plaintiffs own property that is subject to property taxation by the City of Austin but have not been granted an historic tax exemption.

11. When historic tax exemptions are granted to owners of “historic” property that would otherwise—but for the tax exemption—be taxed like other property, the actual mathematical effect is to increase taxes on the rest of the property taxpayers ... including Plaintiffs. *See City of Wichita Falls v. Cooper*, 170 S.W.2d 777, 779 (Tex. Civ. App.—Ft. Worth 1943, writ ref’d) (finding Plaintiff taxpayers challenging an illegal city tax exemption had standing because, with a property tax exemption on certain properties, “sufficient taxes must be levied and collected from that part not exempt to defray the governmental expense [], it is obvious that the [] taxes lost to the city by virtue of the exemptions must be added to and obtained from taxes on the remainder.”)

12. The City of Austin has reported that the total annual loss of revenue (county, school, and city) from the 500 historic tax exemptions it granted last year is \$4.2 million, which is more than the historic tax exemption revenue loss in any other large Texas city. To compound the problem,

as the *Austin American-Statesman* editorial of April 1, 2011 noted, some of Austin's designations of historic properties "strained the imagination of what it means to be historic."

13. Austin grants the tax breaks without any demonstration of need and then repeats the exemption year after year virtually automatically, without regard to any relationship between the tax break and a need to preserve of the "historic" property or that any effort has been made to preserve the property. In stark contrast other large Texas cities require tax exemption applicants to demonstrate a relationship (a need) between the work and expense that needs to be done to preserve the property, and the amount and longevity of the exemptions. These Texas cities typically limit the size and longevity of the exemption in approximate relationship to the cost of the construction work "needed" to preserve the historic property. One way to see how the "need" criteria is used in other cities and is ignored by Austin is by noting that, in Austin, virtually every property designated by the Council as "historic" gets the tax exemption. But, in Fort Worth, for example, there are 7,000 historic properties of which only 349 receive tax incentives; in Dallas there are 4,000 historic properties of which only 274 receive tax incentives; in Houston there are 294 historic properties of which only 72 receive tax incentives; and in San Antonio, there are 1,500 historic properties of which only 814 receive tax incentives.

14. The inequity of ignoring the "need" requirement is compounded because City of Austin does not routinely inspect historic properties to determine if historic preservation work was either needed on the one hand or accomplished on the other hand. A few real examples also demonstrate that the City does not use the tax exemption strategically to preserve historic structures:

a. House "A" is a house in central Austin built over 125 years ago. The City has, for years, given thousands of dollars of historic tax breaks to the owner of this house. But this truly

“historic” structure is in disrepair, suffering from obvious wood rot, shutters and roofs in disrepair, and in need of painting. The historic tax break is given without any requirement that the house actually be “preserved” as required by the law. Thus, the City of Austin is deriving no benefit from granting these tax breaks. Photos of the house are attached as Exhibit A.

b. House “B” is a West Austin multi-million dollar mansion built less than 100 years ago. Years ago, the owner did extensive remodeling, added out-buildings, added vegetation that conceals the property, and made changes not at all in keeping with the historic character of the property. This remodeling was done *before* any application for a historic landmark zoning and tax exemption was made (City records show no building permits for the added and remodeled and re-purposed out-buildings). *After* this work was done, the City of Austin granted a historic tax exemption worth almost \$20,000 per year. The exemption was granted despite the fact that the remodeling had already been done, indicating no “need” for the exemption. Photos of the house are attached as Exhibit B.

c. House “C” is also a West Austin multi-million dollar mansion that was extensively remodeled before it received historic landmark zoning and tax exemption. This property received a tax exemption in excess of \$45,000 last year. Photos of the house are attached as Exhibit C.

15. The arbitrary and tax-shifting impact on other taxpayers was matter-of-factly admitted very recently by Defendant Council member Randi Shade:

There was a level of subjectivity that was making it hard for the public at large to see how they were benefiting (from the Historic Landmark program). Every time you take a house off the tax roll, every one of us is paying for it.

Council Member Randi Shade, *In Fact Daily*, April 4, 2011.

16. Problems with the City's historic tax exemption program have long been known. The City's historic preservation officer, Steve Sadowsky, noted in November 2010 that there was "a large spike in the number of applications [for the historic tax exemption] received by the City from upscale West Austin." *Community Impact Newspaper*, November 23, 2010. How to obtain these tax exemptions has become a hot topic on the cocktail party circuit in West Austin. Mr. Sadowski said the amount of the property tax breaks "worried the Council." "I think people were very much in fear that we were losing a lot of necessary tax revenues by granting houses landmark status," Sadowski was quoted as saying. *Id.*

17. In response to the problems, all the City Council has done to date is merely to limit how many new applications for the exemption they would process each year, while ignoring whether *any* of the 500 current or new exemptions were actually "needed," in first place, in order "to preserve" the properties. The process for 2011 exemptions has already begun, and the City has not changed its application form to require applicants to demonstrate "need" for the tax exemption. The City Council's strategy appears to be to limit the size of its illegal program, not to make the program comply with the Constitution and the Tax Code.

18. Very recently, a City committee made recommendations for capping the tax exemption amounts, but recommended that the changes not take place until 2013. None of the new recommendations would limit exemptions to those properties with a demonstrated "need" for the exemption "to preserve" the property. As Senator Doggett's remarks indicate, it was that "need" that was the entire purpose for allowing the tax break in the first place. Without the "need," this program is nothing but a give-away to the wealthy.

The Rotten Core That Spreads to Other Taxing Entities

19. The City's unlawful conduct does not just affect the taxes paid to the City, but can affect

taxes paid to Travis County, Travis County Health District, Austin Independent School District, and the Austin Community College, all of which have at some time “piggybacked” on the City Council’s decisions about which properties qualified for the historic tax exemption. Plaintiffs are paying taxes to these entities. The *Austin American-Statesman* has referred to Austin as “the gatekeeper” for these other taxing entities. An editorial said, “As the gatekeeper of the [historic tax exemption] program, the city must fix it. Until then, other local taxing entities that are forfeiting revenue for the flawed program are justified in suspending those tax breaks.” Editorial, *Austin American-Statesman*, September 4, 2010 (also saying, “Consider that Austin’s permanent tax breaks are going largely to wealthy homeowners on properties that in many cases are of questionable historic value”).

20. Plaintiffs pay taxes to Travis County, AISD, and these other overlapping taxing entities. The effect on Plaintiffs of Austin’s exemption decisions are multiplied by these other taxing entities piggybacking on the City Council’s decisions.

CAUSE OF ACTION

Request for Permanent Injunction to Prevent Implementation of Unlawful Exemptions

21. The Defendants unlawfully give tax breaks merely because they think the property is “historic” *not* because the tax break “is needed” in order “to preserve” the historic property. By failing to consider “need” for each exemption, the City Council members commit an *ultra vires* act, not permitted by their statutory authority to grant such a tax exemption. Neither the Constitution (art. VIII) nor the Tax Code § 11.24 give the Defendants authority to give tax breaks to “historic” property without finding that each tax break on each designated property is needed in order to preserve the property. When public officials commit acts that are not lawfully authorized, suit cannot be brought against the state (or city), but must be brought against the

public officials in their official capacity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009).

22. The unlawful granting of the historic tax exemptions by the Defendants will taint the City's entire tax levy. Not only will the Defendants members have committed an unlawful or unauthorized act—granting the tax exemptions without a finding of need for the exemptions—but Plaintiffs will be saddled with an additional tax burden for which Plaintiffs have no legal remedy, before or after the tax levy, except for prospective injunctive relief to enjoin enforcement of the unlawful act.

23. Plaintiffs are entitled to sue in equity to enjoin the implementation of an illegal tax exemption pursuant to Tex. Civ. Prac. & Rem. Code §§ 65.011 and 65.021 (Vernon 2008). *See also Bland I.S.D. v. Blue*, 34 S.W.3d 547, 555-56 (Tex. 2000) (recognizing a cause of action in equity to enjoin the illegal expenditure of public funds). The Defendants will likely soon grant historic tax exemptions, setting in motion the establishment of the property tax appraisal roll, which becomes the basis for assessing taxes against Plaintiffs' property. The Defendants will take such unlawful action without having amended its unconstitutional City ordinance or revising its decision process to conform to the "need" requirements of Tax Code § 11.24. The Defendants' unlawful action will set in motion a series of events that make it impossible, or impractical, to undo the unlawful tax exemptions. Plaintiffs seek to enjoin enforcement of Austin City Code Title 11, Article 2 because it is not a valid legal basis, pursuant to Texas Tax Code § 11.24, on which the Defendants could grant a historic tax exemption because the ordinance does not require a determination of need for the tax exemption in order to preserve the "historic" property.

24. Therefore, Plaintiffs ask the Court to enjoin *the enforcement* of any City Code provision

by the Defendants to grant such tax exemptions without finding the requisite “need” for each exemption. Plaintiffs also ask the Court to enjoin the Defendants from imposing or attempting to collect any tax on Plaintiffs based on a tax levy including the unlawful historic exemptions. *See City of Monahans v. State*, 348 S.W.2d 176, 179 (Tex. Civ. App.—El Paso 1961, writ ref’d n.r.e.) (“There is no doubt that the courts, pursuant to their judicial power, can give relief from an arbitrary, oppressive, or unconstitutional ordinance through an action in quo warranto brought for the purpose of enjoining the enforcement of such ordinance. This would constitute a legitimate exercise of judicial power; but the restraining of the passage of an ordinance is a legislative act, and such restraint cannot be exercised by the courts”).

25. The Injunction Statute says, in relevant part:

Sec. 65.011. GROUNDS GENERALLY. A writ of injunction may be granted if:

- (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;
- (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;
- (3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions

Tex. Civ. Prac. & Rem. Code § 65.011 (Vernon 2008).

26. While Courts generally do not have authority to enjoin a legislative act, an exception, recognized in *Bland*, permits the Court to enjoin such illegal expenditures of public funds and may enjoin enforcement of the invalid legislative act.

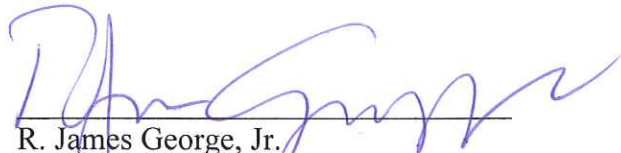
PRAYER

For these reasons, Plaintiffs, Dominic Chavez, Alfred Stanley and Michael Levy, requests that the Defendants be cited to appear and answer and that the Court:

- a. enjoin the Defendant Austin City Council members from implementing a historic tax relief on any property without first determining that there is a need for the tax relief to encourage preservation of that historic property and that the relief will be used for preservation;
- b. enjoin the Defendants and their employees and agents from notifying the Chief Appraiser of the Travis Central Appraisal District to record in the appraisal record any historic tax relief on any property unless the Defendants first determined, as a matter of public record, that there is a need for the tax relief to encourage preservation of that historic property; and
- c. enjoin enforcement of Austin City Code, Title 11, Article 2;
- d. to grant to Plaintiffs such other and further relief, at law and in equity, to which it shows themselves to be justly entitled.

Respectfully submitted,

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