

TO: Mayor and Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: October 12, 2005
SUBJECT: Gerback, as Member of 300 Park Venture, LLC v Troy

The City and the Troy City Council have been sued in a second lawsuit filed by James Gerback. The lawsuit was filed on August 25, 2005, but not served on the City for approximately one month. In this second lawsuit, Gerback challenges the City Council's postponement on his request to rezone the 0.892 acres of residential property that is located on northwest corner of Rochester Road and Marengo. Plaintiff is seeking B-1 zoning, which would permit him to construct a Binson's Home Health Care Center on the property.

In the lawsuit, Gerback alleges that the City Council has breached a clear legal duty by failing to act on Plaintiff's rezoning request within 21 days. The public hearing was scheduled for August 1, 2005, after the Planning Commission recommended a denial of the requested rezoning. The public hearing was postponed until the first meeting in March 2006, which would allow for the completion of the Planning Commission's Future Land Use Plan for the Rochester Road corridor. Under the new state law, the process for making changes to the Master Land Use Plan has been extended, and could not feasibly be completed until early 2006.

In Count I of the Complaint, the Plaintiff seeks an order mandating an immediate decision by the Troy City Council on Plaintiff's rezoning request. Counts II and III allege the City Council has effectively denied the rezoning request, and therefore argue that this constructive denial constitutes a violation of Plaintiff's right to substantive due process (Count II) and the right to equal protection under the law (Count III). In both Counts II and III, Plaintiff seeks an injunction that prevents Troy, "from interfering with Plaintiff's proposed use of the property."

Our office will assume the defense of this case, absent objections from City Council. If you have any questions, please let us know.

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JAMES L. GERBACK, as a member of
300 PARK VENTURE, LLC,

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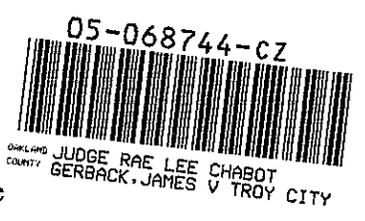
Plaintiff,

v.

THE CITY OF TROY and THE CITY OF TROY
CITY COUNCIL, jointly
and severally,

Defendants.

Case No.



31
DEPUTY COUNTY CLERK

Honorable

Ernest J. Essad, Jr., (P32572)
David E. Plunkett (P66696)
Attorneys for Plaintiff
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**COMPLAINT FOR INJUNCTIVE RELIEF
AND WRIT OF MANDAMUS**

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this Complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a Judge in this Court.

Plaintiff James L. Gerback, as a member of 300 Park Venture, LLC, by his attorneys, states as follows for his Complaint for Injunctive Relief and Writ of Mandamus against the City of Troy and the City of Troy City Council:

PARTIES AND PROPERTY

1. Plaintiff James L. Gerback ("Gerback") is a member of 300 Park Venture, LLC ("300 Park"). Gerback's address is 300 Park Street, Suite 375, Birmingham, Michigan 48009.
2. 300 Park has entered into a contract to purchase the subject property from the owner of the property, Fred Flaim ("Flaim"). Flaim and 300 Park executed a Purchase Agreement and Rider on September 22, 2004, as amended by a certain Extension Agreement dated March 15, 2005 (collectively, the "Purchase Agreement"). Flaim has authorized Gerback and 300 Park to commence and pursue litigation to rezone the Property from residential to commercial zoning.
3. Defendant City of Troy is a Michigan municipal body, located in Oakland County, Michigan ("Troy").
4. Defendant City of Troy City Council is a Michigan municipal administrative board ("City Council").
5. The subject property is vacant land consisting of .892 acres located in Troy on the northwest corner of Rochester Road and Marengo Avenue.

JURISDICTION AND VENUE

6. This Court has jurisdiction over Troy and the City Council because they are both located in Oakland County, and this Complaint seeks equitable relief and a writ of mandamus, which are within the jurisdictional limits of the Court.
7. This matter arises from the City Council's effective denial of Plaintiff's rezoning Request by refusing to approve or deny the Request, and the refusal by the Troy Board of Zoning Appeals to hear an appeal of the denial.
8. Venue is proper in this Court.

FACTUAL ALLEGATIONS

9. The Property is zoned R-1B One Family Residential.

10. The Property is vacant land consisting of .892 acres located on the northwest corner of Rochester Road and Marengo Avenue. The Property is approximately 300 feet wide along Rochester Road by only 130 feet deep.

11. On or about March 23, 2005, Plaintiff filed a Rezoning Request with the Troy Planning Commission to rezone the Property to B-1 for the purpose of developing a Binson's Home Health Care Center on the Property (the "Rezoning Request"). (Ex. A.)

12. Plaintiff's support for the Rezoning Request included, but was not limited to, the following:

1. The property immediately to the south of the Property is zoned B-1 (local business), and is used as a multi-tenant commercial building;
2. The property immediately to the north of the Property is used as a law office, despite being zoned R-1B (one family residential);
3. The property to the east across Rochester Road is used as a large religious complex and multi-family housing;
4. The heavy traffic flow on Rochester Road is not conducive to residential use;
5. The shallow dimensions of the Property do not allow for adequate buffering for residential use;
6. The only potential purchasers who have contacted the owner are interested in the Property for commercial use, not residential; and

7. An Opinion and Order by this Court in another matter involving similarly situated property on Rochester Road near the Property where the Court found that the R-1B zoning was unreasonable, basing its finding on the heavy traffic on Rochester Road and the surrounding business development. (Ex. B.)

13. On June 14, 2005, the Troy Planning Commission voted 5-4 to recommend that the City Council deny the Rezoning Request. (Ex. C, relevant meeting minutes).

14. On August 1, 2005, the Council refused to approve or deny the Rezoning Request.

15. Instead, the Council tabled the decision on the Rezoning Request until March 1, 2006, and requested that the Planning Commission review the Master Plan regarding the Rochester Road corridor.

16. The Council's refusal to act on the Rezoning Request until at the earliest March 1, 2006, is effectively a denial of the Rezoning Request because it prevents Plaintiff from making economic use of the Property for seven months.

17. Plaintiff has attempted to obtain a use variance from the City, but has been informed by the Troy City Attorney the Troy Zoning Ordinance does not give the Troy Board of Zoning Appeals jurisdiction to grant use variances or otherwise hear an appeal from Plaintiff.

18. Defendant City Council acted arbitrarily and capriciously in effectively denying Plaintiff's Rezoning Request by tabling the Request. B-1 is the appropriate zoning for the Property, given the surrounding development and the location on Rochester Road. Defendant City Council failed to advance a legitimate governmental interest in effectively denying the Rezoning Request.

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COUNT I
Mandamus

19. Plaintiff hereby incorporates by reference Paragraphs 1 through 18 as though fully set forth here.

20. This Court has the power to issue a writ of mandamus where a party has breached a clear legal duty.

21. Troy and the City Council have breached a clear legal duty by refusing to act on Plaintiff's Rezoning Request.

22. Tabling Plaintiff's Rezoning Request for seven months without taking action on the Request is an unreasonable violation of Plaintiff's right to due process under the Michigan Constitution, and such action is without rational basis, is unreasonable, arbitrary and capricious, and fails to advance any governmental interest.

WHEREFORE, Plaintiff respectfully requests that the Court enter a Writ of Mandamus ordering the City of Troy and the Troy City Council to act on Plaintiff's Rezoning Request within a reasonable time period, not to exceed twenty-one (21) days.

COUNT II
Denial of Substantive Due Process

23. Plaintiff hereby incorporates by reference Paragraphs 1 through 22 as though fully set forth here.

24. The actions of the City Council in effectively denying Plaintiff's Rezoning Request constitute an unreasonable violation of Plaintiff's constitutional right to substantive due process under the Michigan Constitution for the reason for that such action is without rational basis, is unreasonable, arbitrary and capricious, and fails to advance any governmental interest.

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25. The actions of the City Council in denying Plaintiff's Request bear no reasonable relationship to the health, safety and welfare of the public of Troy.

WHEREFORE, Plaintiff respectfully requests that the Court enter an appropriate injunction preventing the City of Troy and the Troy City Council from interfering with Plaintiff's proposed use of the Property.

COUNT III
Denial of Equal Protection

26. Plaintiff hereby incorporates by reference Paragraphs 1 through 25 as though fully set forth here.

27. Plaintiff, Troy and the City Council are subject to the Constitution of the State of Michigan.

28. The Constitution of the State of Michigan requires that all persons be afforded equal protection under the law.

29. Defendants have approved zoning of B-1 for similarly situated parcels in the area of Troy surrounding the Property.

30. The effective denial of Plaintiff's Rezoning Request was arbitrary and capricious and denied it equal protection under the law.

31. Said actions by the Troy and City Council are in violation of the Constitution of the State of Michigan.

32. In its effective denial of Plaintiff's Rezoning Request, the City Council has not cited any health, safety or welfare concern relative to the variance request to distinguish it from any other similar B-1 zoning previously approved by the City Council.

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WHEREFORE, Plaintiff respectfully requests that the Court enter an appropriate injunction preventing the City of Troy and the Troy City Council from interfering with Plaintiff's proposed use of the Property.

Jury Demand

Plaintiff hereby requests a trial by jury on all issues so triable.

Respectfully submitted,

WILLIAMS, WILLIAMS, RUBY & PLUNKETT, P.C.

By: 

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Dated: August 25, 2005