

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

KRISTY KAY MONEY and ROLF §
JACOB SRAUBHAAR §
Plaintiffs, §

v. §

Civil Action No. 1:23-cv-718

CITY OF SAN MARCOS, AND §
DIRECTOR OF PLANNING §
AND DEVELOPMENT SERVICES §
AMANDA HERNANDEZ in her official §
capacity, §
Defendants. §

COMPLAINT

1. This civil rights lawsuit challenges a local ordinance that requires private property owners to keep unwanted objects on their property for purely aesthetic purposes.

2. Plaintiffs own a home in San Marcos, Texas. On the front of that home is a small metal decoration bearing the initial of a previous homeowner with historical ties to the Ku Klux Klan. Because this association clashes with Plaintiffs’ values and their aesthetic preferences, they would like to remove it.

3. Unfortunately, under a local ordinance, any aesthetic change to the front of Plaintiffs’ home must receive approval by the City—which the City refuses to grant. As a result, Plaintiffs are forced to maintain an unwanted object on their home that is contrary to their values in order to appease the aesthetic sense of the City.

4. This is unconstitutional. The takings clause of the United States Constitution prohibits cities from mandating that private property owners maintain objects on their property for the public benefit without compensation. And the Texas Constitution prohibits cities from regulating private property for purely aesthetic reasons. Plaintiffs therefore seek relief in this Court.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) because this action arises under the Fifth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. § 1343(a)(3), because it is brought to redress deprivations, under color of state law, or rights, privileges, and immunities secured by the United States Constitution; and 28 U.S.C. § 1343(a)(4), because it seeks to secure equitable relief under an Act of Congress, specifically 42 U.S.C. § 1983, which provides a cause of action for the protection of civil and constitutional rights.

6. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction) over state law claims raised. This Court has subject matter jurisdiction pursuant to the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001 *et seq.*, because Plaintiffs' rights, legal status, and other legal relations are affected by a law that is constitutionally invalid. This Court has jurisdiction over the requested injunctive relief pursuant to Tex. Civ. Prac. & Rem. Code Ann. §§ 37.011, 65.011.

7. This Court has the authority to grant declaratory relief under 28 U.S.C. § 2201; permanent injunctive relief under 28 U.S.C. § 2202; and attorneys' fees under 42 U.S.C. § 1988.

8. Venue is proper within this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because all the claims asserted by Plaintiffs arose within this judicial district. Venue is proper within the Austin Division pursuant to 28 U.S.C. § 124(d).

PARTIES

9. Plaintiffs Dr. Kristy Kay Money and Dr. Rolf Jacob Straubhaar are a married couple that co-own the property made the basis of this lawsuit.

10. Dr. Money is a licensed psychologist with specialized training/experience in neuropsychology and trauma. She earned her doctoral degree in Counseling Psychology from Brigham Young University,

11. Dr. Straubhaar is an Assistant Professor of Educational Leadership at Texas State University. He received his doctorate in Social Science and Comparative Education from the University of California, Los Angeles.

12. Plaintiffs purchased the home at issue in this case in May of 2017 as a place to raise their five children.

13. Defendants are the City of San Marcos and Director of Planning and Development Services Amanda Hernandez, in her official capacity.

14. Defendant City of San Marcos is a home rule municipality headquartered in Hays County, Texas. San Marcos is the political entity that enacted and enforces the historic preservation ordinances.

15. Defendant Amanda Hernandez is sued in her official capacity as Director of Planning and Development Services of the City of San Marcos. The Director of Planning and Development Services is the responsible official for certificates of appropriateness. Defendant Hernandez therefore oversees and directs the certificate of appropriateness process.

STATEMENT OF FACTS

16. This case involves a home within the Burleson Historic District in San Marcos, Texas.

17. While the home is in the historic district, the home itself is not a designated historic home and the Texas Historical Commission has rejected an application to have the home designated as historic, which would provide benefits to the homeowners.

18. Plaintiffs purchased the home in 2017.

19. At the time, the home had been vacant for multiple years and needed repairs.

20. The condition of the home, as well as its location, made it an affordable option for Plaintiffs who needed extra room for their five children.

21. Plaintiffs soon discovered, however, the significant burdens the City places on homes in the historic district.

22. Under the San Marcos Development Code, a property owner may not, among other things, alter, relocate, or demolish any visible portion of a property within a historic district without first receiving a “certificate of appropriateness” (hereafter, “Certificate”) from the Historic Preservation Commission (the “Commission”). Dev. Code § 2.5.5.1(B).

23. To receive a Certificate, the property owner must pay \$165 and submit an application to the City.

24. Consideration of that application is not based on public health or safety concerns.

25. Rather, the Commission will deny the application if it deems the proposed changes are incompatible with broad aesthetic concerns, such as “architectural or cultural character” of the district, or the other guidelines cited in § 4.5.2.1 of the development code. Dev. Code § 2.5.5.4.

26. The guidelines in § 4.5.2.1 are likewise based solely on aesthetics and “visual compatibility.” Dev. Code § 4.5.2.1(I)(1).

27. The Commission may also deny the application if it deems the proposed change to conflict with the “Historic District Guidelines located in Appendix C of the San Marcos Design Manual,” or “the current Standards for Historic Preservation Projects issued by the United States Secretary of the Interior”—both of which uniformly turn on visual appearance and aesthetic considerations. Dev. Code § 4.5.2.1(I)(2).

28. If the application is denied, then the homeowner cannot make the requested changes.

29. If a homeowner removes objects from the visible façade of the property without the approval of the Commission, they can be subject to criminal penalties and fines. Dev. Code § 2.3.7.4.

30. While a denial can be appealed to the Zoning Board of Adjustment (ZBOA), the jurisdiction of the ZBOA is limited to claims where “the record reflects the lack of substantial evidence in support of the decision of the Historic Preservation Commission.” Dev. Code § 2.5.5.5(C)(3)

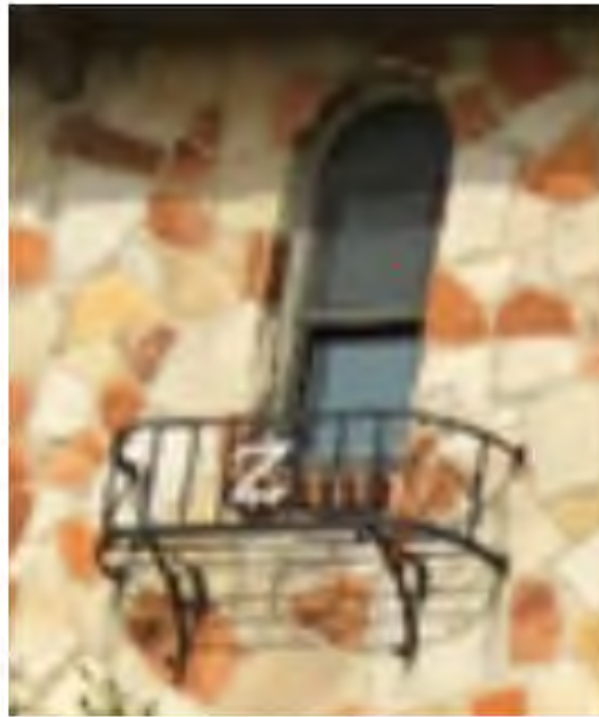
31. The ZBOA “may not substitute its judgment for the judgment of the Historic Preservation Commission on the weight of the evidence,” nor is the ZBOA permitted to consider the constitutionality of the Development Code or the Commission — either under the Texas or United States Constitutions. Dev. Code § 2.5.5.5.

32. As such, any appeal to the ZBOA on the legal issues present in this case is futile.

33. The Ordinance provides no mechanism to compensate property owners for this occupation of their property.

34. In March of 2023, Plaintiffs decided that they wanted to remove a metal decoration from the façade of their home.

35. The decoration displays a large letter “Z.”



36. The Z is significant because it was installed by a previous owner, Frank Zimmerman, and reflects his initial.

37. Mr. Zimmerman was a prior owner of a local theatre known for, among other things, hosting Ku Klux Klan Day in the 1920s.

38. Plaintiffs do not think the decoration reflects their family’s values or their aesthetic preferences, and therefore filed an application for a Certificate so that they could have the decoration removed.

39. On May 4, 2023, that application was denied.

40. At the hearing denying the application, the Commission was clear that the application was denied due to the effect of removal on the aesthetic of the property.

41. The written notice of denial likewise made clear that the application was denied for aesthetic reasons.

42. Under the Development Code, the Commission’s decision is final as to the application of Dev. Code § 2.5.5.1 *et seq* (the “Ordinance”) to Plaintiffs’ property.

43. Plaintiffs are therefore required to keep the unwanted decoration on their home for a public benefit—namely the City’s aesthetic preferences—without compensation.

COUNT I

Unconstitutional taking in violation of Fifth and Fourteenth Amendments to the Constitution

44. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

45. Under the United States Constitution, an ordinance that mandates a physical occupation of property by unwanted objects for a public benefit without compensation is a *per se* taking, regardless of the public purpose served.

46. The Ordinance, both on its face and as applied to Plaintiffs, requires that they keep objects on their property for a public benefit without compensation.

47. In particular, Plaintiffs are required to keep the unwanted decoration, described *supra*, attached to the front of their home.

48. This government-mandated occupation of the Plaintiffs’ property by unwanted objects is an unconstitutional *per se* taking.

COUNT II

Unconstitutional Exercise of the Police Power under Article I Section 19 of the Texas Constitution

49. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

50. Under the Texas Constitution restrictions on private property rights must be based on nuisance or incompatibility.

51. Texas cities lack authority to regulate private property for aesthetic purposes.

52. The Ordinance restricts Plaintiffs' traditional right to use their home based on the aesthetic preferences of the Commission.

53. In particular, the Ordinance requires that Plaintiffs seek permission from the Commission before making any aesthetic changes to the visible portions of their home.

54. That permission can be denied solely based on the aesthetic judgments of the Commission.

55. Indeed, the only factors that the Commission can consider when reviewing an application for a Certificate concern the appearance of property, not the safety of the property or any nuisance caused by the property. Dev. Code § 2.5.5.4.

56. Therefore, the Ordinance (both on its face and as applied) grants the Commission authority that exceeds the municipal police power.

57. Application of the Ordinance therefore arbitrarily restricts Plaintiffs' property rights in violation of Article 1 Section 19 of the Texas Constitution.

DECLARATORY RELIEF ALLEGATIONS

58. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

59. An actual and substantial controversy exists between Plaintiffs and Defendants as to their legal rights and duties with respect to whether the Ordinance violates either the United States Constitution or the Texas Constitution on its face.

60. An actual and substantial controversy exists between Plaintiffs and Defendants as to their legal rights and duties with respect to whether the Ordinance violates either the United States Constitution or the Texas Constitution as applied to the Plaintiffs.

61. This case is presently justiciable because the Ordinance applies to Plaintiffs on its face, and has been applied against the Plaintiffs because Defendants have denied the Plaintiffs' application for a certificate of appropriateness and, if they remove the decoration, they are subject to civil and criminal sanctions.

62. Pursuant to 28 U.S.C. § 2201, Tex. Civ. Prac. & Rem. Code Ann. §37.003, and Fed. R. Civ. P. 57, it is appropriate and proper that a declaratory judgment be issued by this Court.

INJUNCTIVE RELIEF ALLEGATIONS

63. Plaintiffs reallege and incorporate by reference the preceding paragraphs.

64. Plaintiffs allege that both on its face and as applied, the Ordinance violates their constitutional rights.

65. Without an injunction enjoining Defendants from enforcing the Ordinance, Plaintiffs will be irreparably harmed.

66. Plaintiffs have no plain, speedy, and adequate remedy at law to prevent the Defendants from enforcing the Ordinance.

67. If not enjoined by this Court, Defendants will continue to enforce the Ordinance in violation of Plaintiffs' rights.

68. Accordingly, pursuant to 28 U.S.C. § 2202, Tex. Civ. Prac. & Rem. Code Ann. § 37.011, and Fed. R. Civ. P. 65, it is appropriate and proper that a permanent injunction be issued by this Court.

PRAYER FOR RELIEF

As remedies for the constitutional violations set forth herein, Plaintiff respectfully requests the following relief:

- A. Entry of judgement declaring the certificate of appropriateness requirement in Section 2.5.5 of the San Marcos Development Code constitutes an unconstitutional taking, on its face and as applied, in

violation of the Fifth and Fourteenth Amendments to the United States Constitution;

- B. Entry of judgement declaring the certificate of appropriateness requirement in Section 2.5.5 of the San Marcos Development Code is an unlawful action, on its face and as applied, in violation of Article I Section 19 of the Texas Constitution;
- C. Entry of a permanent injunction prohibiting San Marcos from enforcing Section 2.5.5 of the San Marcos Development Code against Plaintiffs;
- D. An award of nominal damages for the invasion of Plaintiffs' property in violation of the Fifth and Fourteenth Amendments;
- E. An award of attorneys' fees, costs, and expenses, in this action pursuant to the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988;
- F. Such further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted,

/s/Chance Weldon

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Kristy Kay Money and Rolf Jacob Sraubhaar

(b) County of Residence of First Listed Plaintiff Hays Co. (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Texas Public Policy Foundation (512) 472-2700 901 Congress Avenue, Austin, TX 78701

DEFENDANTS

City of San Marcos, and Director of Planning and Development Services Amanda Hernandez, in her official capacity

County of Residence of First Listed Defendant Hays Co. (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. § 1983

Brief description of cause: Plaintiffs challenge the constitutionality of a city ordinance

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

6/23/23 /s/Chance Weldon

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE