

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISON**

EL PASO APARTMENT ASSOCIATION, EPT §
APACHE ARMS LP, EPT CORTESIA §
DEL REY APARTMENTS LP, EPT SANTA §
FE VILLAGE APARTMENTS LP, EPT DESERT §
TREE APARTMENTS LP, EPT DOS SANTOS §
APARTMENTS LP, EPT HIGH VISTA §
APARTMENTS LP, EPT LA ESTANCIAS §
APARTMENT LLC, EPT LA MIRADA §
APARTMENTS LP, EPT LAKESIDE §
APARMENTS LP, PADRES VILLAGE LIMITED, §
415 REDD ROAD LP, EPT SAN MARCOS §
APARTMENTS LP, SAN MARIN §
APARTMENTS LP, EPT SAN MATEO §
APARTMENTS LP, EPT SAN MIGUEL §
APARTMENTS LLC, MISSION TRAIL LTD, §
EPT SAN PEDRO APARTMENTS LP, §
EPT SAND PEBBLE APARTMENTS LP, EPT §
SEDONA PEAK, APARTMENTS LP, EPT CORTE §
BELLA, APARTMENTS LP, DT BELLA PALMS §
APARTMENTS LP, RA THE MASTERS §
COMMUNITY LLC, EPT TRES VISTAS §
APARTMENTS LLC, EPT TREVINO §
PLACE APARTMENTS LP, EPT VALLEY §
RIDGE APARTMENTS LP, MAJESTIC §
EMPLOYEES LTD, DT BELLA PALMS §
APARTMENTS LP, COOPERTOWN LTD, §
SOUTH COOPERTOWN LTD, SUNSET §
PALMS LTD, BURGUNDY PALMS LTD, §
CASTNER PALMS LTD, PUEBLO MONTANA §
APARTMENTS LTD, CAPISTRANO PALMS, LTD, §
TROPICANA PALMS LTD, AMERICAS PALMS §
LTD, DIANA PALMS LTD, DEER PALMS LTD, §
PATRIOT PALMS LTD, PASEO PALMS LTD, §
EDGEMERE LTD, and NORTON MANOR LTD, §

Plaintiffs, §

v. §

CITY OF EL PASO, and EDMUND G. ARCHULETA §
IN HIS OFFICIAL CAPACITY AS PRESIDENT AND §
CHIEF EXECUTIVE OFFICER OF THE EL PASO §
WATER UTILITIES PUBLIC SERVICE BOARD, §

Defendant. §

Cause No. _____



PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Plaintiffs and file this Original Complaint against the City of El Paso and Edmund G. Archuleta (collectively, "Defendant") in his official capacity and in support thereof say:

PARTIES

1. Plaintiff El Paso Apartment Association ("EPAA") is a nonprofit Texas Corporation and trade industry group representing apartment owners and managers in El Paso County, Texas. It brings this action on behalf of itself and its members.
2. EPAA members own or manage over 34,000 multi-family housing rental units in El Paso County.
3. EPAA is an affiliate of the Texas Apartment Association.
4. The other Plaintiffs are limited partnerships, limited liability companies and/or limited liability partnerships that own or manage apartment complexes in El Paso, Texas.
5. Exhibit A to this Complaint identifies the addresses of the rental properties owned or managed by each Plaintiff other than EPAA.
6. Plaintiffs conduct business in El Paso County, Texas.
7. Defendant City of El Paso is a Texas home rule City that may be served with process by serving its Mayor, John Cook, at 2 Civic Center Plaza, 10th Floor, El Paso, Texas 79901, or wherever he may be found.
8. Defendant Edmund G. "Ed" Archuleta is an individual believed to reside in El Paso County, Texas, who is sued only in his official capacity as president/chief executive officer of the El Paso Water Utilities Public Service Board. He may be served with process at his regular place of business, 1154 Hawkins, El Paso, Texas, or wherever he may be found.

JURISDICTION

9. Plaintiffs bring this cause of action pursuant to Title VIII of the Civil Rights Act of 1968 (sometimes referred to as “The Fair Housing Act” or the “Act”), the Fourteenth Amendment to the United States Constitution and 28 U.S.C. §§ 2201 and 2202.
10. The Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. §1331.
11. Plaintiffs also bring this cause of action pursuant to the statutes and Constitution of the State of Texas.
12. The Court has supplemental jurisdiction over Plaintiffs’ State law claims pursuant to 28 U.S.C. §1367.

FACTUAL BACKGROUND

13. On or about June 19, 2007, Defendant the City of El Paso implemented Ordinance 16668 for the purpose of imposing a purported stormwater drainage fee on property owners and occupiers in El Paso, Texas.
14. The City of El Paso, by and through its Public Service Board, implemented PSB Rule and Regulation Number 3 as part of the ordinance identified above.
15. Edmund G. Archuleta is an employee of the City of El Paso and is charged with enforcing Ordinance 16668.
16. Defendant’s ordinance and Rule and Regulation Number 3 impose certain stormwater charges on Plaintiffs’ properties based on Defendant’s assessment of the impervious surface area that exists at the properties, including all parking areas, driveways, walkways, and other paved areas.
17. Racial and ethnic minorities constitute a larger percentage of Plaintiffs’ tenants than the percentage of the population that lives in individual homes. Defendant’s stormwater fee has a disparate impact on these tenants because it imposes a higher charge on these tenants than it does for similarly situated owners or residents of single-family homes. Because of this disparate impact,

Defendant's charges impermissibly discriminate against minorities who reside in apartments in El Paso.

18. There is no rational basis for the distinction drawn by Defendants between Plaintiffs' property and individual houses, duplexes, and triplexes, because all categories of paved surfaces are used for the same purpose and create the same amount of stormwater drainage on a per square foot basis.

19. Defendant has simply chosen to impose a greater burden on the residents and owners of multi-family residential structures than on the residents and owners of single-family residential structures.

20. Defendant has attempted to justify the higher fees imposed on multi-family residential housing by classifying these properties and the water meters that serve them as commercial. Defendants' decision to create this classification is not a rational basis for the distinction drawn by Defendants, and does not justify the disparate impact on persons of racial and ethnic minorities.

21. The primary purpose of the fee assessed by Defendant is the raising of revenue. However, the revenue which Defendant seeks to raise by the imposition of the fee is not reasonably related to nor proportionate to the expenses it incurs or will incur or benefits conferred on behalf of the Plaintiffs or because of or in connection with Plaintiffs' property; nor is it reasonably related to or proportionate to the expenses it incurs or will incur or benefits conferred on their behalf or because of or in relation to their property as compared with single-family residential structures.

22. Instead, Defendant's charge is in effect a tax on the occupation of renting residential apartments.

23. Plaintiffs are forced to pay the fees charged by Defendant, under penalty of having the water service discontinued to the tenants residing in the apartments if those fees are not paid.

24. Plaintiffs have been forced to retain counsel in order to enforce their rights, and are incurring reasonable and necessary attorneys' fees in pursuing this action.

FIRST CAUSE OF ACTION: FAIR HOUSING ACT OF 1968

25. The Fair Housing Act of 1968 prohibits discrimination on the basis of race, color, or nation origin in the terms, privileges or conditions of the sale or rental of a dwelling, and in the provision of services of facilities in connection therewith.
26. The Act applies to municipalities such as Defendant the City of El Paso.
27. The Act prohibits enactment of a facially neutral ordinance or policy that has a disparate impact on the basis of race, color, or national origin.
28. United States Census Data for 2006 demonstrates that racial and ethnic minorities constitute a greater percentage of apartment dwellers than of the population as a whole.
29. Plaintiffs attach to this instrument an Exhibit B a true and correct copy of diagram that reflects homeownership rates among racial and ethnic groups in the State of Texas for 2006.
30. Defendant's stormwater drainage fee has a disparate impact on minorities because the imposition of fees naturally results in increased charged to apartment tenants; and because minorities constitute a greater percentage of apartment tenants than of the population as a whole.
31. Defendant's attempt to categorize multi-family housing as commercial property contradicts the plain language of the Fair Housing Act.
32. Defendant's attempt to categorize multi-family housing as commercial property violates the Fair Housing Act and the Fourteenth Amendment to the United States Constitution because it has a racially discriminatory impact.

SECOND CAUSE OF ACTION: CONSTITUTIONALLY EXCESSIVE FEE

33. Pleading in the alternative, as permitted by law, Plaintiffs would show Defendant's stormwater fee is prohibited by the Constitution of the State of Texas because rather than being a legitimate fee, it is, in fact, a tax.
34. The Texas Constitution and principles of representative government place limits on the amount of a fee a municipality can impose on its citizens.
35. The amount of a fee must reflect the actual cost a municipality incurs to provide the service for which the fee is charged.

36. If the amount of the fee exceeds the municipality's cost, it is not a fee, but rather is an impermissible tax.

37. A tax cannot be imposed in the same manner as a fee because taxes are subject to other legal requirements such as publication of proposed rate and rollback elections. The City has not complied with legal requirements to impose such a tax.

38. Under Article VIII, §1 of the Texas Constitution, a tax cannot be imposed by a city on a person or corporation pursuing a profession or business in an amount greater than one-half of the occupation tax levied by the State on that profession or business.

39. In the instant case, the amount of the fee and the manner in which it is imposed on citizens do not, in fact, reflect the City's actual cost to provide the service for which the fee is being charged.

40. Among other things, a square foot of paved parking area at a single-family residence creates the same amount of water runoff, and therefore generates the same costs for Defendant, as a square foot of paved parking area at an apartment complex.

41. Defendant has chosen to impose a fee on the latter and not the former.

42. There exists no rational basis for this difference.

43. This means the City has not imposed the fee in a manner that reflects any reasonable relationship to the actual costs the City incurs or benefits conferred on Plaintiffs.

44. Defendant has not even attempted to determine the actual costs that the impervious area at any given property imposes on it.

45. Instead, Defendant has simply calculated the amount of revenue it wishes to collect for City-wide drainage improvements and then allocated that amount unevenly and arbitrarily among various property owners; and has arbitrarily allocated a disproportionately large amount to apartment complexes.

46. As evidence of the foregoing, Plaintiffs would show the Mayor of the City of El Paso is quoted in the April 25, 2008, edition of the El Paso Times as saying that "We believe it prudent for us to wait until we have gone through the appeals process so we can reasonably predict the income that will be derived from the fee structure before we make any adjustments." *See* Exhibit C.

47. This methodology reveals Defendant's stormwater fee is not actually a fee, but an impermissible general revenue tax or occupation tax.

THIRD CAUSE OF ACTION: DENIAL OF EQUAL PROTECTION

48. Pleading in the further alternative, as permitted by law, Plaintiffs would show they are entitled to equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution.

49. When governmental entities enact regulations that distinguish between different groups of landowners, the constitution requires that there be a rational basis for the distinction, based on distinguishing characteristics which are relevant to the interests that the governmental body has authority to implement.

50. A classification violates the Equal Protection clause of the constitution unless there is a rational relationship between the disparity of treatment and a legitimate public purpose.

51. There is no rational basis for the distinction drawn by Defendant between owners and residents of apartment complexes, and owners and residents of single-family residences, duplexes, and triplexes in determination of its fee.

52. Any possible basis of Defendant's distinction between owners and resident of apartment complexes, and owners and managers of single-family residences, duplexes, and triplexes is not based on distinguishing characteristics which are relevant to the interest that Defendant has authority to implement.

53. Defendant's distinction between owners and residents of apartment complexes, and owners and residents of single-family residences, duplexes, and triplexes is not rationally related to any legitimate public purpose.

54. The classification made by Defendant is not rationally related to the purpose of the rule imposed by Defendant.

55. For all these reasons, Defendants' ordinance and rule are contrary to the Plaintiffs' constitutional guarantee of equal protection of the laws.

REMEDIES

56. Pursuant to 42 U.S.C. §3613 and 28 U.S.C. §2201, Plaintiffs seek a finding and judicial declaration that the stormwater fee ordinance violates the Fair Housing Act of 1968, the Fourteenth Amendment to the United States Constitution and the Article VIII, section 1 of the Constitution of the State of Texas.

57. Pursuant to 42 U.S.C. §3613 and Federal Rule of Civil Procedure 65, Plaintiffs seek an injunction to prohibit Defendant the City of El Paso from imposing and/or collecting its stormwater fee on the properties owned or managed by Plaintiffs; and to prohibit Defendant Edmund Archuleta from enforcing Defendant's ordinance and Rule which violate the Fair Housing Act and the Fourteenth Amendment to the United States Constitution.

58. Pursuant to 42 U.S.C. §3613, Plaintiffs pray for restitution of any unlawful stormwater drainage fees that they may be forced to pay before the Court determines such fees to be illegal.

59. Plaintiffs would show Defendant's improper and illegal fee has made it necessary for them to engage attorneys. Pursuant to 42 U.S.C. §3631 and 28 U.C.S. §2202, Plaintiffs seek an award of reasonable and necessary attorneys fees.

60. Plaintiffs further request that they be awarded their costs of court, and such other relief to which they may be justly entitled.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray Defendant be cited to appear and answer herein, for judgment over and against Defendant as described above, for a judicial declaration that Defendant's stormwater fee is illegal, for injunctive relief as described above, for attorneys fees, restitution, costs of court, and for such other and further relief, general or special, legal or equitable, to which they may be justly entitled.

Respectfully submitted,

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