

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

EI 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 §  
APARTMENTS 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. \_\_\_\_\_



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**PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER  
AND FOR PRELIMINARY INJUNCTION**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW the Plaintiffs (hereafter "Applicants") identified in Exhibit A to this application, which is incorporated by reference herein as if set forth at length, and file this Application for Temporary Restraining Order pursuant to Federal Rule of Civil Procedure 65 and the Fair Housing Act, 42 U.S.C. section 3613, and in support thereof say:

**I. FACTS**

1. Plaintiffs are the owners or managers of the properties identified in Exhibit A to Plaintiffs' Original Complaint. Collectively, Applicants own or manage nearly 6,000 multi-family housing rental units in El Paso County.
2. Applicants attach to this instrument as Exhibits B, C and D the affidavits of Melanie Bailey, D. M. Jimenez and Gordon E. Welch, and incorporate same by reference herein as if set forth at length.
3. Applicants incorporate Plaintiffs' Original Complaint by reference herein as if set forth at length.
4. The attached evidence demonstrates the rental properties Applicants own and manage have been assessed a storm water drainage fee by the City of El Paso.
5. Defendant Edmund G. Archuleta is an employee of the City of El Paso and is charged with enforcing and collecting the City's storm water drainage fee. (Plaintiffs refer to the City and Archuleta collectively as "Defendant").
6. This storm water drainage fee was calculated for each property based on Defendant's assessment of the square footage of impervious area present at the properties.
7. Paved walkways, driveways and sidewalks at Applicants' properties were included in Defendant's calculation of impervious area that controls the amount of the fee.

8. For reasons unknown, similarly paved walkways, driveways and sidewalks were not included in the calculation of impervious surface area that controls the amount of the fee for single-family residential homes, including rental homes, and for duplexes and triplexes.

9. The evidence therefore establishes the City of El Paso is charging a drainage fee for paved sidewalks, driveways and walkways at apartment complexes but not charging a fee for those same paved areas at single-family homes, including rental homes, and for duplexes and triplexes.

10. There exists no rational basis for this difference.

11. Some or all of the bills for storm water drainage fees Applicants have received from Defendant's water utility (the Public Service Board) are now due and owing.

12. Applicants seek a Temporary Restraining Order, followed by a Preliminary Injunction, to prevent Defendant from imposing its storm water drainage fee and/or collecting that fee from them in order to avoid irreparable injury to Applicants and preserve the status quo until an evidentiary hearing on a permanent injunction and/or a trial on the merits can be had.

## **II. STANDARDS FOR TEMPORARY RESTRAINING ORDER**

### **AND PRELIMINARY INJUNCTION**

13. Whether to grant a temporary restraining order or preliminary injunction lies within the Court's discretion. A temporary restraining order is proper to preserve the status quo and prevent irreparable harm until a hearing can be held on the preliminary injunction. The purpose of the preliminary injunction is to preserve the status quo pending trial on the merits.

14. Generally, the elements for a temporary restraining order or for preliminary injunction require a showing that there is a substantial likelihood that the applicant will prevail on the merits of the claim, but that the applicant will suffer imminent and irreparable injury for which it has no legal remedy if the restraining order or injunction is not granted. Further, the applicant should show that the threatened injury outweighs any harm to the defendant in the issuance of the injunctive relief, and that issuing the restraining order or injunction will not disserve the public interest.

15. An exception exists when a governing statute authorizes injunctive relief. In such a case, the applicant need not establish specific irreparable injury to obtain a preliminary injunction. See

*EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5<sup>th</sup> Cir. 1987). When injunctive relief is authorized by statute, particularly in the civil rights context, the district court may presume irreparable injury from the very fact that the statute has been violated. *Id.* “When an injunction is expressly authorized by statute and the statutory conditions are satisfied, the movant need not establish specific irreparable injury to obtain a preliminary injunction.” *Id.*, citing *Murry v. American Standard, Inc.*, 488 F.2d 529, 531 (5<sup>th</sup> Cir.1973).

### **III. APPLICANTS WILL PREVAIL ON THE MERITS**

16. Injunctive relief requires a showing of a substantial likelihood that the applicant will prevail on the merits of its claim. As detailed below, the City’s imposition of its storm water fee is unlawful as a violation of the Fair Housing Act, a tax which violates the Texas constitution, and a denial of equal protection. The evidence in support of this application establishes a substantial likelihood that Applicants will prevail on each of these claims.

#### **A. FAIR HOUSING ACT**

17. Applicants would show Defendant’s calculation and assessment of the storm water drainage fee violates Title VIII of the Civil Rights Act of 1968 (also referred to as “The Fair Housing Act” or the “Act”). The Act prohibits discrimination on the basis of race, color, or national origin, in the terms, privileges or conditions of the sale or rental of a dwelling, and in the provision of services or facilities in connection therewith. 42 U.S.C. sec. 3604. The Act applies to municipalities including Defendant the City of El Paso. *Keith v. Volpe*, 858 F.2d 467 (9<sup>th</sup> Cir. 1988), *cert. denied*, 493 U.S. 813 (1988); *United States v. City of Parma*, 661 F.2d 552 (6<sup>th</sup> Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). The Act prohibits facially neutral policies, practices and laws that have a disparate impact on the basis of race, color, or national origin. *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5<sup>th</sup> Cir. 1996).

18. United States Census Data demonstrates racial and ethnic minorities have a lower percentage of homeownership than the population as a whole. Conversely, minorities constitute a higher percentage of apartment tenants than the population as a whole.

19. Because Defendant's fee imposes a greater burden on apartment tenants than on owners or residents of single-family homes that create similar amounts of drainage, it has a disparate impact on racial and ethnic minorities, in violation of the Fair Housing Act.

**B. UNCONSTITUTIONALLY EXCESSIVE FEE**

20. Pleading in the alternative, as permitted by law, Applicants would show Defendant's storm water drainage fee and the method in which it has been implemented violates the Texas Constitution.

21. Where a municipality charges a fee for a service, the amount of the fee must reflect the actual costs the municipality incurs to provide a service. If a fee exceeds the amount of the City's actual costs, it is not a fee but is rather a tax. *See generally Lowenberg v. City of Dallas*, \_\_\_ S.W.3d \_\_\_, 2008 WL 821040 (Tex. 2008) (holding that a City's building registration and fire registration fees were impermissible taxes, where the revenue they generated greatly exceeded the regulatory cost for which the fees were imposed).

22. Applicants would show Defendant's storm water fee, as assessed to them, cannot possibly reflect the City's actual costs because the City is treating equal amounts of identical surfaces very differently. A square foot of paved parking area, driveway or walkway at an apartment complex generates the same amount of storm water runoff as a square foot of paved parking area, driveway or walkway at a single-family residence, duplex, or triplex. The cost each area imposes on the City of El Paso in terms of necessary drainage facilities is therefore identical.

23. The primary purpose of the fee assessed by Defendants is the raising of revenue. However, the revenue which Defendants seek 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.

24. The City is charging for the drainage created by a square foot of paved parking surface at an apartment complex but not charging for that same square foot of paved parking surface in front of a

single-family home, duplex, or triplex. This is conclusive proof that the City's storm water drainage fee structure is really an impermissible tax and does not reflect the actual costs Applicants' properties impose on the City.

25. Taxes can be imposed on the general population, but they are subject to other legal requirements such as publication of proposed rate and rollback elections. The City has not complied with these requirements, preferring to characterize its charge as a fee. Further, the Texas Constitution prohibits a tax on any profession or occupation in an amount greater than one-half of the occupation tax imposed by the State on that occupation. Tex.Const. art. VIII, sec. 1.

26. The City's fee is an unlawful tax imposed without satisfaction of the legal requirements imposed on a municipality before new taxes may be imposed, and an impermissible tax on the occupation of renting residential apartments, all in violation of the Texas Constitution.

### **C. DENIAL OF EQUAL PROTECTION**

27. In addition and in the alternative, Applicants would show that the classifications drawn by Defendants violate their constitutional right to equal protection. Plaintiffs are entitled to equal protection of the laws pursuant to the Fourteenth Amendment to the United States Constitution.

28. 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. See generally City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

29. 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. See Board of Trustees, Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

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

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31. Any possible basis for Defendants' distinction between owners and residents 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 Defendants have authority to implement.

32. Defendants' 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.

33. The classifications made by Defendants are not rationally related to the purpose of the rule imposed by Defendants.

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

#### **IV. IMMINENT INJURY AND IRREPARABLE HARM**

35. A showing of imminent, irreparable harm is not required as a predicate to a temporary restraining order or preliminary injunction when suit is brought under a statute expressly permitting injunctive relief. *Cosmair, Inc.*, 821 F.2d at 1090-91 (no such showing was required before issuance of preliminary injunction in age discrimination case); *Murry*, 488 F.2d at 531 (no showing of imminent irreparable harm required to issue preliminary injunction in Title VII case). The Fair Housing Act specifically permits the Court to issue any temporary restraining order, temporary injunction, or other appropriate relief if the Court finds that a discriminatory housing practice "has occurred or is about to occur." 42 U.S.C. sec. 3613(c). The evidence establishing Defendants' assessment of a fee in the provision of services or facilities in connection with rentals of apartment dwellings which has a discriminatory impact on minority persons permits the Court to issue an injunction without further evidence of an imminent or irreparable injury to Applicants.

36. Although not a necessary element to the issuance of this relief, Applicants would show they will suffer imminent and irreparable harm from Defendants' discriminatory imposition of the storm water drainage fee unless the court issues a Temporary Restraining Order and Preliminary Injunction. Defendants have already sent bills assessing those fees, which are incorporated into the

water bills issued by the El Paso Water Utilities Public Service Board. Applicants now have the choice of either paying those fees, or falling into arrears on their water utility bills, possibly resulting in harm to their credit or even disconnection of water service to their tenants.

37. If Applicants pay the fee, then they will have suffered a denial of their constitutional right to equal protection of the laws, an intangible loss which is not readily remediable. This loss of constitutional rights is itself an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347 (1976) (loss of constitutional right to free speech is itself irreparable injury). Furthermore, Applicants may never be able to recover the fee even if it is later deemed illegal. *See Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5<sup>th</sup> Cir. 1985) (absence of available remedy to recover money damages shows irreparable injury).

38. If Applicants do not pay the fee, they risk the shut off of their tenants' water service and other legal action being taken against them by the City of El Paso. This will inevitably result in the loss of tenants and subjects Applicants to potential liability to their tenants, resulting in catastrophic economic losses in amounts which can not readily be determined. *See Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956 (5<sup>th</sup> Cir. 1981) (recognizing that loss of customers due to inability to provide service is irreparable injury because of inability to calculate loss of goodwill); *Bellsouth Communications, Inc. v. Mississippi Public Service Comm'n*, 368 F.Supp.2d 557 (S.D. Miss. 2005) (same). If nothing else, Applicants will be deemed in arrears on their water bill. This can result in damages to their credit reputation, again resulting in losses in amounts which can not readily be measured.

39. Applicants therefore seek an immediate Temporary Restraining Order, and upon hearing, a Preliminary Injunction, to prevent the City of El Paso from imposing or collecting a storm water drainage fee for any of the properties identified in their Original Complaint pending the trial on the merits of this matter.

40. Applicants are ready and willing to post a bond.

41. This imminent and irreparable injury to Applicants outweighs any potential harm to Defendants which could arise from the issuance of the temporary restraining order or preliminary

injunction. If the fee is found to be lawful, then Defendants can recoup those fees from Applicants; it will not be difficult for Defendants to force Applicants to pay those amounts, since they have the power to discontinue water service to Applicants' apartment complexes if those amounts are not paid. There is no public interest in demanding that the fees be paid immediately rather than after a trial on the merits of Applicants' claims.

42. Applicants request this Court issue a Temporary Restraining Order without notice to the City of El Paso. Applicants have already sought relief from the City of El Paso without success. If this matter is delayed so Defendants' attorneys can attend a hearing, Applicants will be forced to either pay the fee or risk having their water service terminated.

43. Applicants' attorney would state he has sent written notice to Defendant the City of El Paso that Applicants will seek the relief described above. Defendant has not responded.

WHEREFORE, PREMISES CONSIDERED, Applicants pray the Court grant this application, issue a Temporary Restraining Order preventing the City of El Paso from imposing or collecting the storm water drainage fee on the properties identified in their Original Complaint, and upon further hearing, issue a Preliminary Injunction preventing the City of El Paso from imposing or collecting the storm water drainage fee on the properties identified in their Original Complaint, 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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