

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT

DIVISION 8th

CIVIL ACTION NO. 09-CI-3038

SOUTH LIMESTONE BUSINESS OWNERS
ASSOCIATION, SOUNDBAR, JJ2007, LLC,
BETH HANNA, FAILTE IRISH IMPORTS,
BOBBY ENTERPRISES, INC., JG4819, INC.,
MASHNI TAILOR SHOP, NORMAN MASHNI,
BOMBAY BRAZIER,

PLAINTIFFS

v.

COMPLAINT

JIM NEWBERRY, MAYOR, LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT,

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT COUNCIL
JIM NEWBERRY, MAYOR
MEMBERS: JIM GRAY, VICE MAYOR,
All in their capacity as members of the
Lexington-Fayette Urban County Government Council

SERVE: JIM NEWBERRY, MAYOR
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
12TH FLOOR, GOVERNMENT CENTER
200 EAST MAIN STREET
LEXINGTON, KY 40507

JIM GRAY, VICE MAYOR
LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
5TH FLOOR, GOVERNMENT CENTER
200 EAST MAIN STREET
LEXINGTON, KY 40507

AND

ATS CONSTRUCTION
3009 Atkinson Ave., Suite 400
Lexington, KY 40509

SERVE: GARY R. WEITKAMP
500 WEST JEFFERSON STREET
SUITE 2400
LOUISVILLE, KY 40202

DEFENDANTS

* * * * *

Come the Plaintiffs, SOUTH LIMESTONE BUSINESS OWNER ASSOCIATION, SOUNDBAR, JJ2007, LLC, BETH HANNA, FAILTE IRISH IMPORTS, BOBBY ENTERPRISES, INC., JG4819, INC., MASHNI TAILOR SHOP, NORMAN MASHNI, and BOMBAY BRAZIER, by and through counsel, and for their Complaint state as follows:

JURISDICTION

1. This proceeding involves action by the Lexington-Fayette Urban County Government Mayor and Council (hereinafter "LFUCG Mayor" and "LFUCG Council") prior to and on July 22, 2009, to close the city street, South Limestone, Lexington, Fayette County from the Avenue of Champions to Vine Street. This proceeding involves the temporary taking of multiple interests in private property located in Fayette County. This proceeding involves arbitrary action by the LFUCG Mayor and LFUCG Council and a violation of the civil rights of the Plaintiffs by the LFUCG Mayor and LFUCG Council. This proceeding is an action for declaration of rights brought pursuant to the Kentucky Declaratory Judgment Act, KRS 418.040 et seq. The Fayette Circuit Court has jurisdiction and venue to hear and decide this matter.

PARTIES

2. Plaintiff, South Limestone Business Owners Association, P.O. Box 8265, Lexington, KY, 40533, is an unincorporated association of businesses and property owners along South Limestone, from the Avenue of Champions to Vine Street, with David Jones, Jones Management Group, LLC, 1328 Versailles Road, Lexington, KY, 40504, serving as Chairman.

3. Plaintiff, Soundbar, is a business located at 208 South Limestone, which business is owned by Small Plates, LLC, David Jones, Member. Small Plates, LLC doing business as Soundbar, has been and will be adversely affected by the actions of the Defendants. Plaintiff, Soundbar does business at 208 South Limestone in the property owned by Plaintiff, JJ2007, LLC, David Jones, Member. Plaintiff, JJ2007, LLC has been and will be adversely affected by the actions of the Defendants.

4. Plaintiff, Beth Hanna, is owner of Hanna's on Lime, located at 214 South Limestone Street, Lexington, Kentucky 40508. Plaintiff Beth Hanna has been and will be adversely affected by the actions of the Defendants.

5. Plaintiff, Failte Irish Imports is located at 203 South Limestone Street, Lexington, Kentucky 40508. Plaintiff Failte Irish Imports has been and will be adversely affected by the actions of the Defendants.

6. Plaintiff, Bobby Enterprises, Inc., doing business as Subway 5932, is located at 325 South Limestone Street, Lexington, Kentucky 40508. Plaintiff Bobby Enterprises, Inc. has been and will be adversely affected by the actions of the Defendants.

7. Plaintiff, JG4819, Inc. owns and operates the McDonalds Restaurant that is located at 355 South Limestone Street, Lexington, Kentucky 40508. Plaintiff JG4819, Inc. has been and will be adversely affected by the actions of the Defendants.

8. Plaintiff, Mashni Tailor Shop, is located at 205 South Limestone Street, Lexington, Kentucky 40508. Plaintiff Mashni Tailor Shop has been and will be adversely affected by the actions of the Defendants.

9. Plaintiff, Norman Mashni, is the owner of property located at 203 South Limestone Street, 205 South Limestone Street, and 102 High Street, Lexington, Kentucky

40508. Plaintiff Norman Mashni has been and will be adversely affected by the actions of the Defendants.

10. Plaintiff, Bombay Brazier, operates a business at 102 West High Street, at the intersection with South Limestone, which business has been and will be adversely affected by the actions of the Defendants.

11. Defendant LFUCG Mayor is Jim Newberry, who is sued in his official capacity. Defendant LFUCG Council is the Lexington-Fayette Urban County Government Council for Fayette County and the members of the LFUCG Council are sued in their official capacity.

12. Defendant ATS CONSTRUCTION was awarded a contract by the LFUCG Council, upon the recommendation of the LFUCG Mayor, to perform certain construction activities along South Limestone, and, in the initial steps to perform said contract, has, on July 22, 2009, closed South Limestone from the Avenue of Champions to Vine Street, and has described the work plan to include closing South Limestone from July 22, 2009 to November 15, 2009 and from March 31 to July 1, 2010.

FACTS COMMON TO ALL COUNTS

13. On August 26, 2008, the LFUCG approved the Downtown Streetscape Master Plan ("Plan") for Lexington, Kentucky. This Plan includes proposed improvements to South Limestone at a cost of \$5,240,000. The Plan includes a section on priorities including formation of a Design Review Committee or Oversight Committee, and calls for traffic studies and design studies before commencing street improvements. The Plan does not state that South Limestone will need to be closed for any period of time.

14.(a) On information and belief, on May 12, 2009, Mike Webb, LFUCG Commissioner of Public Works and Development, wrote to "Property Owners" to advise that the LFUCG was "in the process of completing a Streetscape design for the South Limestone Corridor from Euclid to Vine Street." This letter invited persons to attend an "Open House" on Monday, May 18 [six days notice] to meet with the utility companies and the consultant and the LFUCG "regarding your property and the relocation of the utility lines." There was no mention that South Limestone was going to be closed. See Exhibit 1.

14.(b). On information and belief, on May 22, 2009, Mike Webb, Commissioner, again wrote to "Property/Business Owner" to invite persons to another opportunity for dialogue on June 3, 2009, in "order for the utility companies to have a complete understanding of the current utility needs at each property. . ." There was no mention in this letter that South Limestone was going to be closed. See Exhibit 2.

15(a). On July 7, 2009, the LFUCG Council approved the \$13.1 million dollar contract with ATS Construction for the project.

15(b) On July 22, 2009, *The Lexington Herald* described the project as costing \$17 million.

16.(a) Based upon the attached affidavit: David Jones owns Small Plates, LLC and in that capacity he leased and took possession of the building he owns at 208 South Limestone (through JJ2007, LLC) for the purposes of opening the business, Soundbar, on February 16, 2009. In March 2009, David Jones received a building permit and began demolition and construction work on 208 South Limestone. On May 6, 2009, he received final certificate of occupancy. On May 8, 2009, he opened for business after receiving a

liquor license from State Government. During the week of May 25, 2009, David Jones received the letter from Commissioner Mike Webb, dated 5-22-09 from the LFUCG (Exhibit 2) (hand delivered to 208 S. Limestone) inviting David Jones to a meeting to discuss utility needs on June 3, 2009, but was going to miss this meeting because David Jones believed he had nothing to suggest to the utility companies, based upon the wording of the letter. However, on June 2, 2009, David Jones heard a rumor that LFUCG planned to close the street from Euclid (Avenue of Champions) down to High or Vine for one (1) year. On June 3, 2009, David Jones attending the meeting based upon the June 2, 2009 rumor and learned it was true. Present at the meeting were Mike Webb, Commissioner of Public Works and Development, and several utility and engineer representatives. For the remainder of the month of June, David Jones spent time in communication with LFUCG Council members who expressed sympathy but did little concretely to help. On June 16, 2009, David Jones attended the LFUCG Council work session and spoke to LFUCG Council in opposition to any plan that would close South Limestone for such an extended period of time. On July 10, 2009, David Jones attended another meeting at the LFUCG Council building, and was advised that LFUCG would be starting work July 22, 2009, but would start at Euclid/Avenue of Champions intersection with South Limestone and only close the section to Maxwell Street, and the South Limestone from Maxwell to Vine would be remain open. However, on July 21, 2009, David Jones learned from reading the newspaper article in *The Lexington Herald* that the plans had changed and that LFUCG and the Defendant ATS Construction were shutting down South Limestone from Euclid/Avenue of Champions to Vine Street on July 22, 2009. On July 21, 2009, David Jones attended another meeting with LFUCG Mayor Jim

Newberry and other LFUCG representatives, with the gist of the meeting appearing to be that neither LFUCG nor ATS Construction really knows a lot yet about what they are getting into and will not until they dig up the street and determine what they are going to do. On July 22, 2009, two deliveries to the Soundbar, for supplies and electronic repair, were denied access by the Defendant, ATS Construction. David Jones was denied access.

16.(b) On July 22, 2009, Bombay Brazier was to receive a regular weekly delivery from one of four food vendors. However, this crucial delivery that supplies Bombay Brazier for the entire week was denied access on South Limestone Street. Instead, the food vendor was forced to park on High Street, causing grid lock on High Street while the truck was parked. To deliver the goods to Bombay Brazier, the delivery person had to make eight to ten trips across High Street to the restaurant. After the delivery, the delivery person informed Bombay Brazier that he is not allowed to drive on smaller streets for liability and safety reasons and the next time he will not be able to deliver if such maneuvering is necessary.

17. Per the attached affidavit, David Jones paid \$500,000 for the building in June 2009 and invested approximately \$140,000 in renovations. He has invested \$81,000 in inventory, equipment, furnishings, other materials, and construction. The business has been doing very well and has averaged over \$1,500 per day revenues since opening. The loss of access from the closure of South Limestone and the loss of parking caused by the street closing will probably destroy this business at this location, and reduce the value this property.

18. Per the attached affidavit, there is compelling evidence that the Defendants LFUCG Mayor and LFUCG Council and ATS Construction are rushing into a very large and disruptive construction project without proper investigation of the magnitude of the project, without participation of impacted property owners, without segmenting the project so as to minimize the period of disruption for the impacted property owners, and without affording David Jones and the other Plaintiffs due process and reasonable notice and without affording David Jones and the other Plaintiffs with protection against arbitrary action by the government, all of which are irreparable injuries, warranting injunctive relief from the Court.

COUNT I

19. Plaintiffs repeat the above allegations as if set forth fully herein.

20. The LFUCG Mayor and LFUCG Council actions prior to July 22, 2009 to contract with ATS Construction and to close South Limestone on July 22, 2009, constitutes a partial, temporary taking of the interest in real property of each of the Plaintiffs without just compensation

21. The Fifth Amendment of the United States Constitution describes fundamental liberties guaranteed to every American citizen, with the last of the enumerated liberties, the Takings Clause, requiring that, "*nor shall private property be taken for public use, without just compensation.*" See also, Kentucky Constitution, Bill of Rights, Section 1, including the fifth inherent and inalienable right, the right of acquiring and protecting property; Section 2, prohibiting the government from arbitrary action, "not even in the largest majority"; Section 13, "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just

compensation.”; and Section 242 “Just compensation to be made in condemning private property – Right of appeal – Jury trial.”

22. Where the actions of the LFUCG Mayor and LFUCG Council constitute an inverse condemnation and a temporary taking of the property of these Plaintiffs, these Plaintiffs are each entitled to just compensation for such taking for the duration thereof. Plaintiffs are entitled to injunctive relief and to recover from Defendants damages as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney’s fees incurred in this action.

COUNT II

23. Plaintiffs repeat the above allegations as if set forth fully herein.

24. The LFUCG Mayor and LFUCG Council action on July 22, 2009 to close South Limestone, has subjected the Plaintiffs to disparate and discriminatory treatment and have denied the Plaintiffs due process of the law and the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, and Articles 1 and 3 of the Kentucky Constitution, all to the Plaintiffs damage in an amount in excess of the jurisdictional threshold of this Court.

25. In taking the actions described hereinabove, Defendants LFUCG Mayor and LFUCG Council and its members acted under the color of state and local law to deprive Plaintiffs/Appellants of rights and privileges guaranteed under Federal law, in

violation of 42 U.S.C. §1983. Further, Defendants LFUCG Mayor and LFUCG Council and its members acted with reckless and callous indifference to the rights of Plaintiffs with respect to the matters set forth above.

26. As a result, Plaintiffs are entitled to injunctive relief and to recover from Defendants damages as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney's fees incurred in this action.

COUNT III

27. Plaintiffs repeat the above allegations as if set forth fully herein.

28. The action of the LFUCG Mayor and LFUCG Council to close South Limestone without adequate notice to Plaintiffs, and without the consent of the Plaintiffs and without good faith consideration of the needs and rights of the Plaintiffs constitutes arbitrary action by the government in violation of Kentucky Constitution, Article 2.

29. As a result, Plaintiffs are entitled to injunctive relief and to recover from Defendants damages as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney's fees incurred in this action.

COUNT IV

30. Plaintiffs repeat the above allegations as if set forth fully herein.

31. Plaintiffs seek a declaration of rights that the actions of the LFUCG Mayor and LFUCG Council to close South Limestone was improperly enacted and improperly implemented, where such actions denied the Plaintiffs the statutory protections at KRS 67A.050, KRS 67.080, KRS 67.083, KRS 178.070, KRS 179.370, and KRS 82.405, and the LFUCG Ordinance protections at Ordinance Section 17-22, Section 17-52, Section 17C-2, Section 17C-7, and other applicable statutes and ordinances enacted for the purpose of protecting a property owner's access to the public right of way, and that the contract awarded to the Defendant ATS Construction be declared void or that it be suspended until the above constitutional and statutory and ordinance violations are cured or compensated for.

WHEREFORE, Plaintiffs, SOUTH LIMESTONE BUSINESS OWNERS ASSOCIATION, SOUNDBAR, JJ2007, LLC, BETH HANNA, FAILTE IRISH IMPORTS, BOBBY ENTERPRISES, INC., JG4819, INC., MASHNI TAILOR SHOP, NORMAN MASHNI and BOMBAY BRAZIER, demand JUDGMENT against the Defendants, LFUCG Mayor, LFUCG Council and ATS Construction, as follows:

1. The Court should Find and Conclude that the Lexington-Fayette Urban County Government Mayor and Council acted in violation of the above-referenced constitutional requirements, statutory requirements, and ordinance requirements, and

2. The Court should Find and Conclude that the actions of the LFUCG Mayor and Council constitute a partial temporary taking of land and an injury to the land

of Plaintiffs and that Plaintiffs are entitled to recover just compensation from the LFUCG Mayor and Council, and injunctive relief as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney's fees and litigation expenses incurred in this action.
- (d) Trial by jury on all matters properly to be tried by a jury.
- (e) Such other relief as the Plaintiffs may be entitled to recover.

3. That the Court Find and Conclude that the LFUCG Mayor and Council acted to discriminate against Plaintiffs and to provide disparate treatment of Plaintiffs, and denied Plaintiffs due process while acting under color of law thereby denying Plaintiffs their civil rights, and Plaintiffs should be awarded injunctive and compensatory relief, as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney's fees and litigation expenses incurred in this action.
- (d) Trial by jury on all matters properly to be tried by a jury.
- (e) Such other relief as the Plaintiffs may be entitled to recover.

4. That the Court Find and Conclude that the LFUCG Mayor and Council action to close South Limestone without adequate notice and without good faith effort to

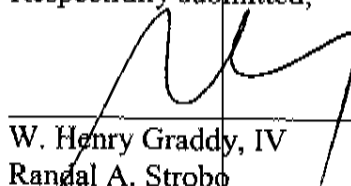
seek the consent of Plaintiffs shall be found to be arbitrary action in violation of Kentucky Constitution, Article 2, and Plaintiffs should be awarded injunctive and compensatory relief, as follows:

- (a) A temporary injunction to immediately reopen South Limestone, and to suspend the effect of the contract with ATS Construction, pending further orders from the Court.
- (b) Consequential damages;
- (c) Attorney's fees and litigation expenses incurred in this action.
- (d) Trial by jury on all matters properly to be tried by a jury.
- (e) Such other relief as the Plaintiffs may be entitled to recover.

5. That the Court Declare the Rights of the Parties and Find and Conclude that the LFUCG Mayor and Council acted illegally when it acted to close South Limestone and awarded a contract to ATS Construction to the injury of Plaintiffs, and that such contract be declared void and *ultra vires*, or that it be ordered suspended until such time as the constitutional and statutory violations have been fully cured or compensated.

6. Plaintiffs be awarded costs herein expended, including reasonable attorneys' fees, expert witness fees, other related costs and expenses, and all other relief to which these Plaintiffs may appear entitled.

Respectfully submitted,



W. Henry Graddy, IV
Randal A. Strobo
W. H. GRADDY & ASSOCIATES
103 Main Street

P.O. Box 4307
Midway, KY 40347
(859) 846-4905
COUNSEL FOR PLAINTIFFS

\\Pc-main\wp\LITIGATION\South Limestone Business Owners\05 Word Processing Docs\5thDraftComplaint7 22 09.doc