

DISTRICT COURT  
**IN THE DISTRICT COURT FOR THE FOURTEENTH JUDICIAL DISTRICT**  
**TULSA COUNTY, STATE OF OKLAHOMA**

MAR 31 2005

SALLY HOWE SMITH, COURT CLERK  
 STATE OF OKLA. TULSA COUNTY

THE F&M BANK & TRUST COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE CITY OF TULSA, a municipal corporation; )  
 JACK HENDERSON, CHRIS MEDLOCK, )  
 ROSCOE TURNER, TOM BAKER, JIM MAUTINO, )  
 RANDY SULLIVAN, BILL CHRISTIANSEN, and )  
 SUSAN NEAL members of the Tulsa City Council, )  
 )  
 Defendants. )

Case No. \_\_\_\_\_

CJ 2005 01952

**VERIFIED PETITION FOR WRIT OF MANDAMUS AND DAMAGES**

Plaintiff, The F&M Bank & Trust Company ("F&M"), respectfully petitions this Court to: (i) issue a peremptory writ of mandamus pursuant to 12 *Okla. Stat.* §1454 directing Defendants to approve the final plat for the Guierwood Office Park (the "Final Plat") as required by 11 *Okla. Stat.* § 41-106; and (ii) pursuant to 42 U.S.C. § 1983, award actual damages, punitive damages, attorney fees and costs against Defendants Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino and Bill Christiansen.

**PARTIES, JURISDICTION AND VENUE**

1. Plaintiff, The F&M Bank & Trust Company, is an Oklahoma corporation, with its principal place of business in Tulsa, Oklahoma.
2. Defendant, the City of Tulsa, is a municipal corporation organized under the laws of Oklahoma.
3. The individual Defendants, Jack Henderson, Chris Medlock, Roscoe Turner, Tom Baker, Jim Mautino, Randy Sullivan, Bill Christiansen and Susan Neal are members of the Tulsa City

Council.

4. This Petition for Mandamus has been filed against all Defendants. However, the Plaintiff seeks no damages, fees or costs against Councilors Tom Baker, Randy Sullivan or Susan Neal.

5. This Court has jurisdiction to consider this Petition for Writ of Mandamus pursuant to 12 *Okla. Stat.* §1451, and has subject matter and personal jurisdiction of all Defendants for all claims, and venue is proper in Tulsa County, Oklahoma.

### **BACKGROUND AND GENERAL ALLEGATIONS**

#### **F&M's Rezoning Applications**

6. F&M is the owner of 3.39 acres of land located at the southwest corner of 71<sup>st</sup> Street and Harvard in the City of Tulsa, Oklahoma (the "F&M Property").

7. On June 26, 2003 F&M filed an application to rezone the F&M Property from an RS-1 Single Family Residential District to an OL Office Low Intensity District (Z-6902) and concurrently filed an application (PUD No. 687, herein the "PUD") to zone the F&M Property as a planned unit development for construction of a one story bank facility and two one story professional office buildings in a campus setting. (The rezoning application and the PUD application shall be collectively referred to as the "Rezoning Applications").

8. The text of the proposed PUD, which accompanied the PUD application, described the proposed development in detail, and included numerous exhibits depicting the bank facility and two office buildings, including a site plan, and an aerial photograph of the property with a footprint of the three buildings superimposed.

#### **TMAPC Recommendation of Approval of the Rezoning Applications**

9. On August 22, 2003 counsel to various protesting homeowners filed documents

expressing their objections to the Rezoning Applications (the "Protest Petitions") and asserted that the protest was sufficient to require a 3/4 vote of the City Council to approve the Rezoning Applications.

10. In advance of the August 27, 2003 public hearing on the merits of the Rezoning Applications, the proposed development was reviewed by the Tulsa Metropolitan Area Planning Commission ("TMAPC") Staff, and the Staff distributed its written recommendation of approval to the TMAPC (the "Staff Recommendation") together with the F&M site plan. The Staff Recommendation is incorporated in its entirety in the minutes of the August 27 TMAPC public hearing and describes the proposed development as a bank facility and two office buildings.

Illustrative language from the Staff Recommendation portion of the minutes follows:

The PUD proposes uses permitted by right in an OL district *and* drive-in banking facilities on 3.39 acres located at the southwest corner of East 71<sup>st</sup> Street and South Harvard Avenue. . .

. . . As now proposed, *the F&M Bank facility would be adjoined by two office buildings, each one story in height.* The floor area of the buildings (10,000 SF and 10,189 SF) is less than the previous design with a resulting increase in landscaped area and a decrease in required parking area.

Therefore, staff recommends APPROVAL of PUD-687 subject to the following conditions:

1. The applicant's Outline Development Plan and Text be made a condition of approval, unless modified herein.
2. Development Standards: . . .

Permitted Uses:

*Drive-in banking facilities as permitted by right within an OL district* except the following uses shall be prohibited: Funeral Home, Drive-in ATM Facility, Broadcast or Recording Studio, Prescription Pharmacy, Studio or School for Teaching Ballet,

Dance, Drama, Fine Arts, Music, Language, Business or Modeling, and Union Hall.

Building Design:

All buildings shall be constructed in substantial accordance with the concepts depicted within the submitted building elevations (Exhibit E-7, E-8 and E-9) . . .

(Emphasis added)

11. The first sentence of the “Permitted Uses” section in the Staff Recommendation contains a scrivener’s error. As shown by the other references to the development within the Staff Recommendation and by the balance of the record of the Rezoning Applications, this sentence should have read “Drive-in banking facilities *and* as permitted by right within an OL district. . .” or “Drive-in banking facilities *and uses* as permitted by right within an OL district. . .” Drive-in banking facilities are not permitted by right within an OL district. Without the addition of the words “and” or “and uses”, the language makes no sense and effectively precludes any development of the F&M Property.

12. The TMAPC conducted the public hearing on the Rezoning Applications on August 27, 2003, and the protesting homeowners and their attorneys participated extensively in the debate. The minutes of that meeting show that what was being debated, and what was eventually recommended by the TMAPC for approval, was a drive-in bank facility and two office buildings.

13. At the conclusion of the extensive debate at the public hearing on August 27, 2003, the TMAPC voted 7-1 to approve the Rezoning Applications “as submitted and as recommended by staff. . .”

**City Council Approval of the Rezoning Applications**

14. The TMAPC recommendation was submitted to the City Council, along with a packet

entitled "Request for Action: Ordinance", and the matter was set for consideration. The "Request for Action" packet for the Rezoning Applications included the minutes of the August 27, 2003 meeting of the TMAPC (which incorporated the TMAPC Staff Recommendation) and a summary of PUD 687 that states in part, "As now proposed, *the F&M Bank facility would be adjoined by two office buildings, each one story in height.*" (Emphasis added).

15. The Rezoning Applications were scheduled for consideration by the City Council at its regular meeting of October 9, 2003. On October 7, 2003, at a meeting of the Council's Urban and Economic Development Committee, the TMAPC Staff informed the Committee that the Staff Recommendation included in the TMAPC Minutes contained a scrivener's error in the Permitted Uses section of the Recommendation ("drive-in banking facilities as permitted by right within an OL district"), and that the Recommendation should have read "Permitted Uses . . . drive-in banking facilities *and* as permitted by right within an OL district." The TMAPC subsequently corrected the "Permitted Uses" portion of the August 27, 2003 minutes to read in pertinent part as follows: "Drive-in banking facilities and uses as permitted by right within an OL district".

16. On October 9, 2003 the City Council heard arguments on the merits of the Rezoning Applications. The TMAPC Staff informed the Council of the scrivener's error in the Staff Recommendation portion of the TMAPC Minutes, and the Council proceeded on the Rezoning Applications as presented. The Rezoning Applications were presented as a bank facility and two office buildings and acted on by the City Council without objection by any of the protesting homeowners or their representatives to this procedure. The record includes the City Council meeting, the "Request for Action" packet, the TMAPC Minutes, the exhibits (elevation and site plan) distributed by F&M's attorney to the Council members and shown on the projection screen at the

meeting, the videotape of the Council meeting, and the minutes of the Council meeting. The record shows that F&M proposed, and protesting homeowners objected to, construction of a bank facility and two office buildings.

17. At the same City Council meeting (October 9, 2003), protesting homeowners and their attorneys also argued that the Protest Petitions were sufficient to require a greater than majority vote of the City Council to approve the Rezoning Applications. At the conclusion of the debate, the City Council continued the matter until such time as the TMAPC Staff completed a review of the Protest Petitions.

18. On October 30, 2003, at its regularly scheduled meeting, the City Council determined by a vote of 6 to 3 that the protest was not sufficient to require a 3/4 vote of the City Council. On the merits of the Rezoning Applications, the City Council voted 5 to 4 to approve the rezoning "as recommended by TMAPC with the added condition that any minor or major change to the PUD be considered as a major amendment and is required to come before the Council."

19. On November 6, 2003 the City Council adopted, by a vote of 5 to 4, Ordinance No. 20726 implementing the approval of the Rezoning Applications subject to the development standards and conditions recommended by the TMAPC "as set forth within the minutes of the Commission meeting of August 27, 2003, and approved by the City Council on October 30, 2003."

#### **The Lawsuit Challenging the Rezoning**

20. On December 18, 2003 the case of *Homeowners for Fair Zoning et al. v. City of Tulsa et al.*, Tulsa County Case No. CJ-2003-7885 was filed in this Court challenging the approval of the Rezoning Applications. Plaintiffs in that case (protesting homeowners) contended that their Protest Petitions were sufficient to require a 3/4 vote of the City Council for approval of the

Rezoning Applications. The Tulsa County District Court entered Final Judgment in the case on September 7, 2004, holding that the Tulsa Zoning Code requirement of a greater than majority vote was in conflict with the City Charter and therefore invalid.

21. Plaintiffs in the *Homeowners for Fair Zoning* case appealed the Final Judgment in an accelerated appeal (Appeal Case No. SD-101404). The Final Judgment of the District Court has not been stayed.

#### **TMAPC Approval of the Plat**

22. Section 1107(F) of the Tulsa Zoning Code provides that a Planned Unit Development subdivision plat must be filed with the TMAPC and processed in accordance with the Subdivision Regulations (adopted by the TMAPC) and shall include "such covenants as will reasonably insure the continued compliance with the approved development plan".

23. Pursuant to the above requirement and pursuant to the Subdivision Regulations for the Tulsa Metropolitan Area, F&M submitted the Final Plat to the TMAPC for approval. The restrictive covenants accompanying the Final Plat incorporated the PUD conditions, correctly setting forth the permitted uses approved by the TMAPC and City Council as follows:

The use of Lot 1, Block 1 shall be limited to *drive-in banking facilities, and uses permitted by right within an OL District*, provided however, funeral home, drive-in atm facility, broadcast or recording studio, prescription pharmacy, studio or school for teaching ballet, dance, drama, fine arts, music language, business or modeling, and union hall shall be prohibited. (Emphasis added).

24. The Final Plat was processed by the TMAPC in the normal course, and the application for approval of the Final Plat was set for hearing by the TMAPC at its regular meeting on January 5, 2005 where the TMAPC Staff recommended approval as the plat met the requirements of the

Subdivision Regulations. Counsel to protesting homeowners objected to approval of the Final Plat contending that the wording of the covenants pertaining to permitted uses constituted an amendment of the PUD. Counsel to protesting homeowners also contended that the Final Plat should not be approved while the lawsuit over the Protest Petitions was on appeal. No other objections to the Final Plat were made.

25. Senior Assistant City Attorney Pat Boulden advised the TMAPC at the January 5, 2005 meeting that the wording in the TMAPC August 27, 2003 minutes contained a scrivener's error and that the restrictive covenants accompanying the Final Plat (permitting a bank facility and two office buildings) correctly reflected the approved Rezoning Applications. Individual members of the TMAPC stated that the Final Plat represented what they had originally approved (a bank facility and two office buildings). At the conclusion of the January 5, 2005 meeting, the TMAPC approved the Final Plat by a vote of 6-0.

#### **City Council Failure to Approve the Plat**

26. After approval by the TMAPC, the usual and customary procedure for processing the Final Plat was followed. This included obtaining the approval of the City Attorney and the City of Tulsa Public Works Department as to all of the technical elements of the Final Plat and the Subdivision Regulations. In that process, F&M incurred substantial sums to meet these requirements and created covenants as will reasonably insure the continued compliance with the approved development plan as required by the planned unit development provisions of the Tulsa Zoning Code. After the approval of the Final Plat by the TMAPC, the City Attorney and the City Public Works Department, the approval of the Final Plat was set for consideration by the City Council at its regular meeting of February 24, 2005.



27. At the February 24, 2005 meeting of the City Council, the approval of the Final Plat was continued at the request of certain Councilors and was referred to the City Council Public Works Committee. The Committee took up the matter in its regular meeting of March 8, 2005, where Acting City Attorney Alan Jackere advised the Councilors that the TMAPC Staff Recommendation incorporated in the minutes of the August 27, 2003 TMAPC hearing contained a scrivener's error in the "Permitted Uses" portion of the minutes. Mr. Jackere further advised that the Final Plat met the Subdivision Regulations and properly set forth what was approved by the City Council in considering the Rezoning Applications in 2003 and that if the Councilors failed to approve the plat, they risked legal liability.

28. The Acting City Attorney and a member of the TMAPC Staff had previously advised the Councilors, at a January 25, 2005 Public Works Committee meeting where the January 5, 2005 action of the TMAPC was discussed, that the Staff Recommendation incorporated in the August 27, 2003 minutes contained a scrivener's error and that the minutes had been corrected.

29. The City Council considered F&M's Final Plat at its regularly scheduled meeting of March 10, 2005. At the meeting Assistant City Attorney Drew Rees advised that the Staff Recommendation contained a scrivener's error, and that the development approved by the TMAPC and the City Council was for a bank facility and two office buildings. Councilor Sullivan, a member of the City Council that approved the Rezoning Applications, stated that he was aware at the time of the approval of the Rezoning Applications that the proposed development was a bank facility and two office buildings. Nevertheless, certain Councilors (Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino, and Bill Christiansen), in derogation of their ministerial duty, voted to deny the Final Plat. The vote of the City Council was three (3) to five (5) against approval of the Final Plat and five

(5) to three (3) for denial of the Final Plat.

30. No Councilor contended that the Final Plat did not meet the Subdivision Regulations. Nor did any Councilor contend that the dedications to the City of Tulsa in the Final Plat were inappropriate or not in compliance with the Subdivision Regulations or the City Attorney or City Public Works Department requirements. The only dedications contained within the Final Plat are those required under the Subdivision Regulations and, in the particular instance, by the City of Tulsa Public Works Department.

31. The only reasons given for denial of the Final Plat were: (a) that consideration of the Final Plat should be postponed pending the resolution of the homeowners' case on appeal; (b) that the neighbors were treated "unfairly" in the evaluation of the Protest Petitions by the TMAPC and the City Council in 2003; and (c) that the correction of the scrivener's error in the restrictive covenants constituted a major amendment of the PUD. Reasons (a) and (b) are clearly irrelevant. The third reason is an incorrect conclusion and not a valid basis for denial of the Final Plat, and Assistant City Attorney Drew Rees so advised the City Council. The "permitted uses" portion of the restrictive covenants did not amend or in any way change the action taken by the TMAPC and the City Council with respect to the Rezoning Applications. On the contrary, it implemented and carried out the action taken in approving the Rezoning Applications.

32. Although F&M was afforded the opportunity to speak at the March 10 meeting, it was not a meaningful opportunity to be heard as it was apparent that the City Council members had already determined the manner in which they would vote prior to allowing F&M the opportunity to speak.

33. Councilor Christiansen, who voted to deny the Final Plat on March 10, moved to

rescind the vote in a meeting of the City Council held March 17, 2005, but the Motion to Rescind failed in a 4 to 4 vote of the Council.

## **CLAIMS FOR RELIEF**

### **First Claim** **(Writ of Mandamus)**

34. F&M realleges paragraphs 1 through 33 set forth above and incorporates the same herein by reference.

35. This claim for a peremptory writ of mandamus is asserted against all Defendants.

36. Title 19 *Okla Stat.* §863.9 governs regulation and approval of subdivision plats by the TMAPC. The statute empowers the TMAPC to adopt subdivision regulations and to approve or refuse all subdivision plats within its jurisdiction.

37. Under the provisions of Title 11 *Okla Stat.* §41-106, no subdivision plat may be filed of record with the County Clerk until it has been approved by the governing body of the municipality, in this case, the City Council. However, this statute does not permit the City Council to reject a final plat on an irrelevant or meritless basis. As established by Oklahoma case law, the approval of a plat by the governing body is ministerial in nature with the exception of acceptance of dedications within a final plat.

38. There was no suggestion at any of the City Council Committee meetings or at any of the City Council meetings at which the Final Plat was considered, by any Councilor or any other person, that the dedications within the Final Plat should be rejected. F&M made dedications in accordance with the requirements of the Subdivision Regulations and the Department of Public Works of the City of Tulsa. F&M also incurred substantial sums to comply with the Subdivision

Regulations and meet the requirements of the City Public Works Department.

39. The Final Plat met the Subdivision Regulations and was approved by the TMAPC, and no objection was made to the dedications included within the Final Plat. Under these circumstances, the City Council had a duty to approve the Final Plat. The City Council's failure to approve was a failure to perform a ministerial function required of it, and the Court should issue a peremptory writ of mandamus directing the City Council to perform its ministerial duty by approving the Final Plat.

**Second Claim**  
**(Substantive Due Process of Law- 42 U.S.C. § 1983)**

40. F&M realleges paragraphs 1 through 39 set forth above and incorporates same herein by reference.

41. This claim for relief based upon the violation of F&M's right to substantive due process of law is asserted against Defendants Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino and Bill Christiansen.

42. F&M had a legitimate claim of entitlement to approval of the Final Plat because the City Council was without discretion to deny F&M's Final Plat, which was in compliance with the Subdivision Regulations and the approved Planned Unit Development and no objection was made as to the dedications contained within in the final plat.

43. The denial of F&M's Final Plat by the City Council members constituted arbitrary, unreasonable, irrational and capricious governmental action and violated F&M's right to due process of law, in violation of the Due Process Clause of the Fourteenth Amended to the United States Constitution and Article 2, Section 7, of the Oklahoma Constitution.

44. The denial of the Final Plat was contrary to legal advice duly given to the members of

the City Council by Alan L. Jackere, the Acting City Attorney.

45. F&M has suffered, and will continue to suffer, substantial actual damages as a direct result of the actions of these Defendants in an amount to be determined at trial. The amount of actual damages is in excess of \$10,000.00.

46. F&M is entitled to punitive damages against these Defendants because of their decision to deny approval of F&M's Final Plat constituting gross negligence, motivated by malicious intent, and involved reckless and callous disregard for F&M's federally protected rights.

**Third Claim**  
**(Procedural Due Process of Law- 42 U.S.C. § 1983)**

47. F&M realleges paragraphs 1 through 46 set forth above and incorporates same herein by reference.

48. This claim for relief based upon the violation of F&M's right to procedural due process is asserted against Defendants Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino and Bill Christiansen.

49. The City Council members denied F&M's Final Plat without providing the process which was due under the circumstances.

50. The City Council members failed to afford F&M due process of law, in violation of the Due Process Clause of the Fourteenth Amended to the United States Constitution and Article 2, Section 7, of the Oklahoma Constitution.

51. F&M has suffered, and will continue to suffer, substantial actual damages as a direct result of the actions of these Defendants in an amount to be determined at trial. The amount of actual damages is in excess of \$10,000.00.

52. F&M is entitled to punitive damages against these Defendants because of their decisions to deny approval of F&M's Final Plat constituting gross negligence, motivated by malicious intent, and involved reckless and callous disregard for F&M's federally protected rights.

**PRAYER FOR RELIEF**

**WHEREFORE**, the Plaintiff, The F&M Bank and Trust Company, respectfully requests that this Court:

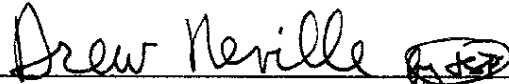
A. Issue a peremptory writ of mandamus pursuant to 12 *Okla. Stat.* §1454 requiring the Defendants to perform their duties under 11 *Okla. Stat.* §41-106 and approve F&M's Final Plat immediately upon receipt of the writ;

B. Award F&M actual damages, attorney fees and costs against Defendants Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino and Bill Christiansen in excess of \$10,000.00;

C. Award F&M punitive damages against Defendants Jack Henderson, Chris Medlock, Roscoe Turner, Jim Mautino and Bill Christiansen, individually, pursuant to 42 U.S.C. § 1983, *et seq.*, because their decisions to deny approval of F&M's Final Plat constituted gross negligence, was motivated by malicious intent, and involved reckless and callous disregard for the federally protected rights of F&M; and

D. Grant F&M such other and further relief as may be just and proper.

Respectfully submitted,

A handwritten signature in cursive that reads "Drew Neville". To the right of the signature, there is a small, circled handwritten mark that appears to be "JLN".

**Jack L. (Drew) Neville, Jr., OBA #6641**

**J. Christian Guzy, OBA #17042**

**Lincoln C. McElroy, OBA #2027**

**HARTZOG CONGER CASON & NEVILLE, P.C.**

201 Robert S. Kerr, Suite 1600

Oklahoma City OK 73102

(405) 235-7000

(405) 996-3403 (facsimile)

**J. Schaad Titus, OBA #9034**

**Barry G. Reynolds, OBA #13202**

**TITUS HILLIS & REYNOLDS**

First Place Tower

15 East Fifth Street, Suite 2750

Tulsa OK 74103-4334

(918) 587-6800

(918) 587-6822 (facsimile)

**ATTORNEYS FOR PLAINTIFF THE F&M BANK  
& TRUST COMPANY**

**AFFIDAVIT AND VERIFICATION OF ANTHONY B. DAVIS**

STATE OF OKLAHOMA    )  
                                  )  
COUNTY OF TULSA     )        ss.

I, Anthony B. Davis, after first being duly sworn, hereby depose and state:

1. I am the Chairman of the Board of F&M Bank and Trust Company of Tulsa, the Plaintiff in this litigation.

2. This Affidavit is respectfully submitted pursuant to 12 *Okla. Stat.* § 1455, in support of the Verified Petition for Writ of Mandamus and Damages (the "Verified Petition").

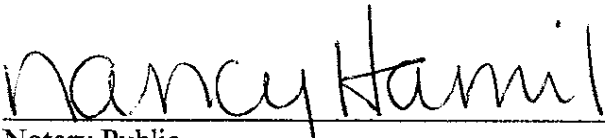
3. I have read and approved the Verified Petition. The contents of the Verified Petition are true and correct to the best of my knowledge and belief.

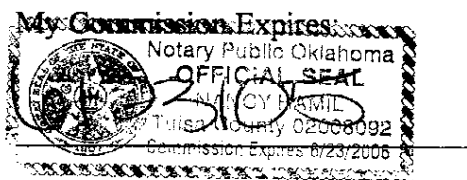
4. For the reasons stated in the Verified Petition, F&M Bank and Trust Company of Tulsa is entitled to a writ of mandamus requiring the Tulsa City Council to approve the Final Plat.

**FURTHER AFFIANT SAYETH NOT.**

  
\_\_\_\_\_  
Anthony B. Davis

Subscribed and sworn to before me this 31 day of March, 2005.

  
\_\_\_\_\_  
Notary Public



[SEAL]