

VIRGINIA:

2021 NOV -5 PM 4: 24  
IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH  
CLERK OF COURT  
CITY OF PORTSMOUTH  
COUNTY CLERK

NEW BETHEL DEVELOPMENT, LLC.  
NEW BETHEL BAPTIST CHURCH

Plaintiffs,

v.

Case No.

CITY OF PORTSMOUTH  
CITY COUNCIL,

PLAINTIFFS DEMAND TRIAL BY JURY

Defendant.

COMPLAINT

NOW COME, NEW BETHEL DEVELOPMENT, LLC. (“Development Company or Plaintiff”) and NEW BETHEL BAPTIST CHURCH, (“the Church”) (“collectively Plaintiffs”), by counsel, and file this Complaint and move this Court for judgement against Defendant, CITY OF PORTSMOUTH CITY COUNCIL. For their grounds thereof, Plaintiffs state as follows:

NATURE OF THE CASE

1. This matter involves common law claims relating to the condemnation and use of land, and exercising arbitrary and capricious actions by Defendant, City of Portsmouth, Virginia. Plaintiffs seek monetary damages.

## PARTIES

2. New Bethel Development, LLC, (hereinafter "Plaintiff or Development Company") is a Limited Liability Company, authorized to transact business in the Commonwealth of Virginia.
3. New Bethel Development, LLC was at all relevant times, the owner of land located at 4358 Greenwood Drive, Portsmouth Virginia, Map and Parcel 0559-0010.
4. New Bethel Baptist Church is the guarantor on the loan for the property located at 4358 Greenwood Drive, Portsmouth, Virginia, Map and Parcel 0559-0010.
5. The City Council of Portsmouth is legislative and governing body for the City of Portsmouth, a political subdivision of the Commonwealth of Virginia, with condemnation powers pursuant to the Constitution of Virginia and the Code of Virginia.

## JURISDICTION AND VENUE

6. This court has subject matter jurisdiction over this dispute as the events complained of herein occurred in the Commonwealth of Virginia and the parties reside and conduct business in the Commonwealth of Virginia and in the City of Portsmouth, Virginia.
7. The alleged conduct and accusation against the Defendant took place in the City of Portsmouth.
8. Venue is properly set in this matter pursuant to Va. Code §§ 8.01-262(3) & (4) & 8.01-263.

## FACTS

### BACKGROUND

9. New Bethel Development, LLC purchased land located at 4358 Greenwood Drive, Portsmouth Virginia, Map and Parcel 0559-0010, from Tazewell, L.L.C. by deed dated February 4, 2005. The land is more specifically described as:

ALL THAT certain tract, piece or parcel of land, with the  
Improvements thereon and the appurtenances thereto, situate,  
Lying and being in the City of Portsmouth (formerly in the Deep Creek  
Magisterial District of Norfolk County), Virginia, as shown on a certain  
Plat entitled: "Subdivision of Cavalier Manor-Section Ten, Deep Creek  
Magisterial District, Norfolk County, Virginia, dated March 1959, made by  
Frank D. Terrall, Jr. and Associates, Surveyors and Engineers", which  
Said plat is duly of record in the Clerk's Office of the Circuit Court of the  
City of Chesapeake, Virginia, in Map book 41, at page 42, and which  
Said reference to said plat is more particularly bounded and described as follows:  
**BEGINNING** at the Northwest corner of Langley Blvd., and Tazewell  
Street a steel pin, and from thence running along the West side of Tazewell

Street North 6 degrees 21' East 393.94 feet; thence along the arc of a curve to the right, having a radius of 1932.56 feet, 182.70 feet; thence North 11 degrees 46' East 102.3 feet; thence along the arc of a curve to the right, having a radius of 2479.85 feet, 571.32 feet; thence South 65 degrees 02' East 150.07 feet; thence North 42 degrees 13' East 90.92 feet to monument 5; thence, North 68 degrees 36' 53" East 319.50 feet to monument 4; thence; North 20 degrees 26' 56" East 625.41 feet to monument 3; thence North 33 degrees 47' 30" East 78.21 feet to monument 2; thence North 33 degrees 47' 30" East 365.48 feet to monument 1-A; thence North 33 degrees 07' 52" East 55.554 feet to the North side of Langley Blvd; and thence along the North side of Langley Blvd. South 82 degrees 54' East 719.47 feet to Tazewell Street, the point of Beginning.

10. On September 4, 2003, the director for the Department of Economic Development sent an email to the mayor that no developer would be interested in developing the property as single family.
11. The property at 4358 Greenwood Drive is in the Cavalier Manor neighborhood in the City of Portsmouth with an active civic league, United Civic League of Cavalier Manor.
12. The property was zoned for residential use under Multi-Family Urban Residential (UR-M).
13. The Multi-Family Urban Residential (UR-M) district allows a diverse range of residential development as a principal use, along with mixed-use, neighborhood-

servicing commercial development, institutional uses to encourage diverse development.

14. These districts are high density, urban core settings.
15. When the property was purchased by New Bethel Development, LLC, an entity created by New Bethel Baptist Church, the site was a rental complex, Tazewell Park Apartments.
16. The apartments were also known as Bonneville Apartments, built in 1960.
17. It had 103 dwelling units and was located next door to New Bethel Baptist Church.
18. The area was crime ridden and blighted.
19. It is contiguous to Charles Town Apartments.
20. The property was purchased for redevelopment.
21. New Bethel Development LLC financed the purchase of the property through Bank of America in the amount of One Million Eight Hundred Thousand (\$1,800,000.) and 00/00 Dollars.
22. New Bethel Baptist Church was the guarantor of the loan.
23. The loan was subsequently refinanced with Bank of the Commonwealth in the amount of Two Million Six Hundred Thousand (\$2 600,000) and 00/00 Dollars.

24. In 2009, economic and real estate market crisis and marginal neighborhood conditions, random and illegal dumping posed a challenge to maintain and develop the property.

25. In 2010, the property was considered derelict by the City of Portsmouth department of codes compliance and was ordered demolished by the city in 2013.

#### **HOUSING USE PERMIT**

26. In 2009, New Bethel Development LLC submitted a HOUSING USE PERMIT APPLICATION (HP-09-02) at 4358 Greenwood Drive to construct six three-story apartment buildings to be named “The Evergreens of Bethel” with 234 units for a density of approximately 16.9 dwelling units per acre to the City of Portsmouth Planning Commission.

27. The proposal included 498 parking spaces and 7000 square foot community club house and fitness center, theater, game room, business center, conference room, swimming pool and offices.

28. The Zoning Ordinance required a Use Permit to develop multi-family residential dwellings in the Multi-Family Urban Residential Zoning District (UR-M).

29. The maximum density in UR-M is 25 dwelling units.

30. The conceptual development plan complied with density and other standards of the zoning.

31. The City Planning Commission provided the following assessment of project compatibility in support of its recommendation: “the proposed project is compatible with

surrounding land uses; density of the project does not exceed maximum allowable for the district; the project complies with the standards for approval of a housing use permit set forth in Section 40-116 of the City Code.”

32. The City Planning Commission and staff supported the application with conditional Approval of application pursuant to Section 40-115 of the city code.
33. The development plans and elevations submitted by New Bethel Development LLC were completed in 2009.
34. The Planning Commissions’ recommendation was forwarded to Portsmouth City Council for action.
35. On March 24, 2009, the Portsmouth City Council granted the Housing Permit for the construction of 234 Dwelling Units residential apartments subject to the terms and conditions.
36. The term of the Housing Use Permit as approved by City Council: “Unless extended as provided under Section 40-115 of the Code of the City of Portsmouth, Virginia (2006), the housing use permit shall expire for any portion of the approved project for which building permits have not been issued if the applicant fails to apply for all building permits for the entire project within two years of the adoption of this resolution”.
37. The Housing Use Permit was scheduled to expire on March 24, 2011.

38. On March 27, 2009, pursuant to Virginia Code Section 15.2-2209.1 the General Assembly provided an extension of Housing Use Permits approvals to address Housing Crisis to July 1, 2014.
39. Beginning November 26, 2008, New Bethel Development LLC worked on a loan application. See Attachment, Exhibit (A).
40. On May 15, 2009, Grand bridge Real Estate Capital LLC (“Lender”) and New Bethel Development, LLC (“Borrower”) entered into a Loan Application Agreement (“Agreement”).
41. The Agreement provided that the Lender would undertake to process a HUD-insured loan for the construction of The Evergreens of Bethel in Portsmouth, Virginia under Section 221(d)(4).
42. On May 5, 2010, the Agreement was terminated. See Attachment Exhibit B.
43. On April 4, 2012, the General Assembly granted extensions of HOUSING USE PERMITS to address the Housing Crisis to July 1, 2017, pursuant to Virginia Code Section 15.2-2209.1.
44. On January 23, 2013, a letter was sent by Douglas Smith, Building Official Director of Permits & Inspections stating “[w]e are in favor of the development of this site and look forward to working with you in this effort.” See Exhibit # C.
45. On April 26, 2013, Dominion Realty Advisors, Inc./ Construction Development Services, Inc. performed an As-Is Appraisal and Prospective Value “upon completion” and stabilization” of the fee simple estate. (MULTI-FAMILY).

46. The As-Is Appraisal was Four Million Six Hundred Eighty Thousand (\$4,680,000) and 00/00 Dollars.
47. The Prospective Value was Thirty-Three Million, Six Hundred Seventy-Five Thousand (\$33,675,000) and 00/00 Dollars. (At completion).
48. The As-Is Appraisal was Thirty-Six Million One Hundred Twenty-Five (\$36,125,000) and 00/00 Dollars (At stabilization).
49. On September 24, 2016, the City of Portsmouth Planning Director sent a letter indicating the Housing Permit issued originally in 2009, was extended to July 1, 2017, pursuant to Virginia Code Section 15.2-2209.1. See Exhibit # D
50. On March 20, 2017, the Virginia General Assembly extended Housing Permits to July 1, 2020, pursuant to Virginia Code Section 15.2-2209.1.
51. On October 2, 2018, there was a "Comprehensive Plan:" Future Land Use Map Change for 4358 Greenwood Drive.
52. The Planning Commission forwarded a recommendation to City Council: Approved "Build One Plan" with a change to future land use of map's designation for 4358 Greenwood from multi-family to mixed residential (low to medium density).
53. The civic League submitted a letter of support for multi-family at the time Plaintiffs submitted their housing permit application and supporting documents to the Planning department.
54. The Planning staff preferred mixed residential.

55. There were no speakers for or against appearing at the public hearing before the Planning Commission.
56. On October 22, 2018, the city council had before it the "COMPREHENSIVE PLAN; FUTURE LAND USE MAP CHANGE (4358 Greenwood Drive).
57. At the City Council work session, a briefing was provided council by the Planning Director, Bob Baldwin.584. There was a consensus of City Council to discuss the land use options for 4358 Greenwood Drive.
58. The result of the discussion was a consensus by City Council to downzone the property to "single family", even though the Housing Use permit had been extended to July 1, 2020. (Allowing Construction of 234 units).
59. No other property was targeted by City Council.
60. No other property, included as part of the Comprehensive Plan was targeted for any action.
61. The public hearing for the Future Land Use change was scheduled for the November 13, 2018, the regular City Council meeting.
62. On November 13, 2018, the "COMPREHENSIVE PLAN/FUTURE LAND USE MAP (CP-18-01 and CITY ZONING CODE AMENDMENT (CA-18-03) was presented to City Council.
63. A public hearing was held.

64. City Council approved the draft comprehensive plan as shown on the “Build One Portsmouth” website with the exception that the Future Land Use Map be changed to show the future use of 4358 Greenwood Drive, tax parcel 0559-0010 as single family residential. See Minutes and Video of Meeting.
65. The Planning Commission did not recommend acceptance.
66. The Planning Director made the following statement: “Perfect logical land use consistent with what is around it and across the street.”
67. The previous statement contradicts CPC’s Assessment of the Project Compatibility in support of the March 24, 2009, awarding of the initial Housing Use Permit, which allowed construction of 234 multi-family dwelling units on the site.
68. At the time of awarding the initial Housing Use Permit, the Planning Director stated, “The proposed project is compatible with surrounding land uses; the density of the project does not exceed maximum allowable for the district...”
69. On March 1, 2021, the General Assembly provided for the extension of HOUSING USE PERMITS approvals to address Housing Crisis to July 1, 2022.
70. The legislation extends HP-09-02 to July 1, 2022.
71. On March 2, 2021, an application was submitted by a potential owner to the Planning Commission requesting a Use Permit for 280 multi-family mixed Use Development (UP-21-03).
72. The Planning Commission recommended denial.

73. During the public hearing, several speakers from the community opposed issuing a permit for the development of 280 multi-family mixed use.
74. They wanted single family homes.
75. The city council voted to approve the development of the 280 multi-family mixed use.

**SALE, FORECLOSURE & BANKRUPTCY**

76. The City Council's change of the property from multi-family to single family negatively impacted the value of the property.
77. Southern Bank and Trust obtained an opinion regarding the value of the property as single-family development.
78. As-is Value with fee simple interest was One Million Three Hundred Thousand (\$1,300,000) and 00/00 Dollars as single family.
79. The new valuation anticipated the rezoning to reflect City Council's vote to change the future land use map.
80. The rezoning never occurred.
81. On January 4, 2019, New Bethel Development LLC obtained an appraisal on the property.
82. The impact of the change in highest and best use: Southern Bank hired Herman & Kittle to determine the value of downzoning to single and/or cancellation of the Housing Use Permit.

83. The conclusion was that the property is worth at least Two Million Two Hundred Thousand (\$2,200,000) and 00/00 Dollars as multi-family. As single family the property is worth One Million Three Hundred Thousand (\$1,300,000) and 00/00 Dollars.
84. Due to the change in the land use map, Mr. Hill from Southern Bank was of the opinion that although, “the property is still technically zoned as multi-family, the reality is it is unlikely to garner any interest or offers.”
85. The City Council would not approve the project given the change in the Comprehensive plan.
86. Southern Bank scheduled a foreclosure for the property for September 24, 2019.
87. Southern Bank submitted a minimum bid of Six Hundred Thousand (\$600,000) and 00/00 Dollars. at the foreclosure sale, however there were no bids.
88. On September 24, 2019, New Bethel Baptist Church filed for Chapter 11 in U.S. Bankruptcy Court.
89. The foreclosure was stayed because of the Bankruptcy filing.
90. On March 9, 2021, New Bethel Church filed for Chapter 11, plan proposal pursuant to the Bankruptcy Code.
91. On March 10, 2021, New Bethel Baptist Church proposed a new payment plan: Secured Claim Amount of Six Hundred Thousand (\$600,000) and 00/00 dollars; Interest Rate: 4.5% per annum; Amortization Schedule: 25 years until paid in full. Southern Bank would retain its senior lien status on New Bethel Baptist Church ‘s property.

92. The proposal was rejected by Southern Bank.
93. Southern Bank sold the property for Four Hundred Thousand Dollars (\$400,000) and 00/00 Dollars.
94. The newly adopted Future Land Use Map from multi-family to single family and the anticipated downzoning of the property 1) created an unsecured liability for the bank, 2) caused an astronomical decline in the market and financing value ,3) forced the property into foreclosure; forced the involuntary sale of the property at a significant loss, and 5) created an environment where bankruptcy was unavoidable and a necessary protective option.

#### **INVERSE CONDEMNATION**

95. The above paragraphs are incorporated herein by reference.

#### **A. REGULATORY TAKING**

96. On November 10, 2008, New Bethel Development LLC submitted a HOUSING USE PERMIT APPLICATION (HP-09-02) including site plan, to the City of Portsmouth Planning Commission.
97. The City Planning Commission and staff supported the application with conditional Approval of application pursuant to Section 40-115 of the city code.
98. The permit allowed construction of 234 multi-family dwelling units on the site.
99. The Planning Commissions' recommendation was forwarded to Portsmouth City council for action.

100. The development plans and elevations submitted by New Bethel Development LLC were completed and dated November 20, 2008.
101. On March 24, 2009, the Portsmouth City Council granted the Housing Permit for the construction of 234 DU residential apartments subject to the terms and conditions.
102. On September 24, 2016, the General Assembly Acts extended HOUSING USE PERMITS that was originally granted in 2009 to July 1, 2017 to address the financial and housing crisis.
103. On March 20, 2016, the General Assembly Acts extended the HOUSE USE PERMIT to July 1, 2020.
104. On March 1, 2021, the General assembly Acts extended the HOUSE USE PERMIT to July 1, 2022.
105. Despite the HP-09-02 permit remaining in effect, City council rejected Plaintiff's application to develop the property consistent with approved permit.
106. The City Council Invaded Plaintiff's property through a regulatory taking.
107. Plaintiff's had a vested right in the land use.
108. Under Code Section 15.2-2307, a landowner may establish a vested right in a land use when he "(i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act."

on that act, and that they incurred extensive obligations and substantial expenses in diligent pursuit of developing their property as a mixed use.

109. Plaintiff's spent considerable amount of money to demolish the apartment on the property.

110. Plaintiffs also spent the following: The newly adopted Future Land Use Map from multi-family to single family and the anticipated downzoning of the property 1) created an unsecured liability for the bank, 2) caused an astronomical decline in the market and financing value ,3) forced the property into foreclosure; forced the involuntary sale of the property at a significant loss, and 5) created an environment where bankruptcy was unavoidable and a necessary protective option.

111. As a result, the actions of City Council constitute a compensable constitutional taking.

**B. CITY COUNCIL ACTIONS WERE ARBITRARY AND CAPRICIOUS**

112. On October 2, 2018, there was a "Comprehensive Plan." Future Land Use Map Change for 4358 Greenwood Drive.

113. The Planning Commission forwarded a recommendation to City Council: Approved "Build One Plan" with a change to future land use of map's designation for 4358 Greenwood from mutli-family to mixed residential (low to medium density).

114. The civic League requested change of future land use to low-to-medium density.

115. The same Civic League submitted a letter of support for multi-family when Plaintiffs submitted their housing use permit application and supporting documents to the Planning Department.
116. The letter of support was still in effect as their Housing Use Permit was extended by the Virginia General Assembly.
117. The Planning staff preferred mixed residential.
118. There were no speakers for or against appearing at the public hearing before the Planning Commission.
119. On October 22, 2018, the City Council had before it the "COMPREHENSIVE PLAN; FUTURE LAND USE MAP CHANGE (4358 Greenwood Drive).
120. At the City Council work session, a briefing was provided council by the Planning Director, Bob Baldwin.
121. There was a consensus of City Council to discuss the land use options for 4358 Greenwood Drive.
122. The result of the discussion was a consensus by City Council to only allow the development of the property as "single family", even though the Housing Use permit had been extended to July 1, 2020. (Allowing Construction of 234 units).
123. No other property, included as part of the Comprehensive Plan was targeted for any action.

124. The public hearing for the Future Land Use change was scheduled for the November 13, 2018, the regular City Council meeting.
125. On November 13, 2018, the "COMPREHENSIVE PLAN/FUTURE LAND USE MAP (CP-18-01 and CITY ZONING CODE AMENDMENT (CA-18-03) was presented to City Council.
126. A public hearing was held.
127. City Council approved the draft comprehensive plan as shown on the "Build One Portsmouth" website with the exception that the Future Land Use Map be changed to show the future use of 4358 Greenwood Drive, tax parcel 0559-0010 as single family residential. See Minutes and Video of Meeting.
128. The Planning Commission did not recommend acceptance.
129. The Planning Director made the following statement: "Perfect logical land use consistent with what is around it and across the street."
130. The previous statement contradicts CPC's Assessment of the Project Compatibility in support of the March 24, 2009, awarding of the initial Housing Use Permit, which allowed construction of 234 multi-family dwelling units on the site.
131. At the time of awarding the initial Housing Use Permit, the Planning Director stated, "The proposed project is compatible with surrounding land uses; the density of the project does not exceed maximum allowable for the district..."
- City Council denied the application for the development of 234 units submitted by Plaintiffs.

132. The city council did not consider the relevant factors in changing the zoning ordinances and districts pursuant to Virginia Code Section 15.2-2284 which are as follows:

- 1) The existing use and character of property.
- 2) The comprehensive plan.
- 3) The suitability of the property for various uses.
- 4) The trends of growth or change.
- 5) The current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies.
- 6) The transportation requirements of the community.
- 7) The requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services.
- 8) The conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forestall land and the conservation of properties and their values.
- 9) The encouragement of the most appropriate use of land throughout the locality.

133. The City Council's action on November 13, 2018, constituted a compensable constitutional taking.

134. The unconstitutional taking was as a result of denial of a use that would have permitted the only “practically” viable use of the property and was invalid.
135. The application of the zoning of the zoning ordinance had the effect of completely depriving Plaintiffs of beneficial use of their property by precluding all practical uses.
136. a zoning of land for single family residences is unreasonable and confiscatory and, therefore illegal where it would be practically impossible to use the land for single family residences.
137. In further support that City council’s action were arbitrary and capricious is where they voted to approve a multi-family development by a new owner of the property for 280 Units.
138. City Council chose not to consider the requirements of Virginia Code Section 15.2-2284.
139. The City Council’s intentional actions and inactions have caused a taking to occur on Plaintiffs’ property and has interfered with Blue Mount’s exclusive use and enjoyment of its property.
140. The property has been damaged as a result of the City Council’s actions and inactions without just compensation.
141. The Condemnation, including lost profits and the related damages have impaired Plaintiffs’ ability to develop the property to its full and rightful capacity.

142. As a result of the City Council's Condemnation and damaging the Plaintiffs' property, Plaintiffs have suffered \$5,000,000.00 in taking and damages.

143. The City is not immune from liability under the laws of the Commonwealth of Virginia.

144. Such inverse condemnation is a direct result of the intentional or purposeful failure of the City to allow Plaintiff to develop the property consistent with the Housing Use Permit that is still in existence.

**WHEREFORE, Plaintiff prays for relief**

1. Against Defendant, Inverse condemnation, as follows; the amount of \$5,000,000.00 in compensatory damages; the amount of \$350,000.00 in punitive damages.
2. The award of their costs and fees incurred in bringing and prosecuting this action.
3. Interest at the legal judgment rate on the judgment amount from the date this case was filed.
4. Post-judgment interest at the legal judgment rate; and
5. For such other and further relief as this Court deems is meet and proper.

**PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL CLAIMS**

**NEW BETHEL DEVELOPMENT, LLC.  
NEW BETHEL BAPTIST CHURCH**

By: Verbena M. Askew

**OF COUNSEL**

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