

ORIGINAL

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

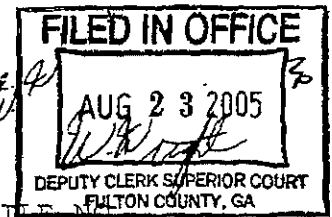
PACE ACADEMY, INC.

Plaintiff

v.

CITY OF ATLANTA; et al.,

Defendants



CIVIL ACTION FILE NO.
2005cv97331

DISMISSAL WITHOUT PREJUDICE

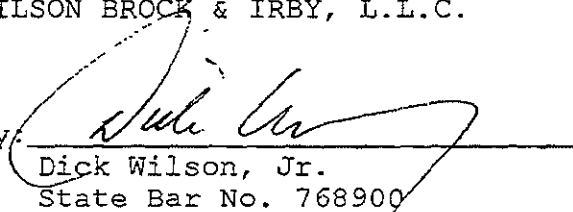
Now comes Plaintiff, Pace Academy, Inc., and voluntarily dismisses without prejudice its Complaint against the Defendants in the above-styled lawsuit.

This the 23 day of August, 2005.

Respectfully submitted,

WILSON BROCK & IRBY, L.L.C.

By:


Dick Wilson, Jr.

State Bar No. 768900

Overlook I, Suite 700
2849 Paces Ferry Road.
Atlanta, Georgia 30339
(404) 853-5050

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Dismissal Without Prejudice upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

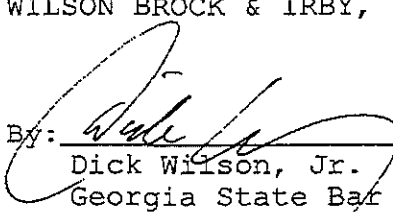
David D. Blum
Senior Assistant City Attorney
City of Atlanta - Department of Law
Suite 4100, 68 Mitchell Street, SW
Atlanta, Georgia 30303-3520

This 23 day of August, 2005.

Respectfully submitted,

WILSON BROCK & IRBY, L.L.C.

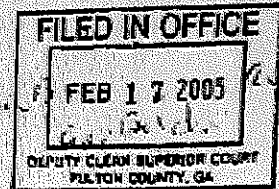
Suite 700
2849 Paces Ferry Road
Atlanta, Georgia 30339
(404) 853-5050

By: 

Dick Wilson, Jr.
Georgia State Bar No. 768900
Robert M. Hoyland
Georgia Bar No. 141931

ORIGINAL

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



PACE ACADEMY, INC.

Plaintiff

v.

CIVIL ACTION FILE

NO.

CITY OF ATLANTA, SHIRLEY
FRANKLIN in her official
capacity as Mayor of the City
of Atlanta; LISA BORDERS,
Council President; CARLA SMITH,
DEBI STARNES, IVORY LEE YOUNG,
JR., CLETA WINSLOW, NATALYN
MOSSBY ARCHIBONG, ANNE FAUVER,
HOWARD SHOOK, CLAIR MULLER,
FELICIA A. MOORE, CLARENCE T.
MARTIN, JIM MADDOX, JOYCE
SHEPERD, CEASAR C. MITCHELL,
MARY NORWOOD and H. LAMAR
WILLIS, Members of the Atlanta
City Council,

Defendant:

APPEAL AND PETITION FOR MANDAMUS,
DECLARATORY JUDGMENT AND OTHER EQUITABLE RELIEF

NOW COMES, Plaintiff, Pace Academy, Inc. (hereinafter
"Pace"), by and through counsel, and files this Appeal and
Petition for Mandamus, Declaratory Judgment and Other Equitable
Relief against Defendants as follows:

PARTIES

1.

Plaintiff is the owner of 7.2 acres of land, more or less,
fronting on Rilman Road and facing the South side of West Paces
Ferry Road in the City of Atlanta, Georgia as more particularly

described in the legal description attached hereto as Exhibit "A" and incorporated herein by reference (the "Property").

2.

The City of Atlanta (hereinafter the "City") is a lawful entity which may sue and be sued. The City is subject to the jurisdiction and venue of this court and, in accordance with O.C.G.A. § 5-11-4, may be served with summons and process by serving the Honorable Shirley Franklin, Mayor of the City of Atlanta, at City Hall located at 55 Trinity Avenue, SW, Suite 240B, Atlanta, Georgia 30335.

3.

Defendants, Shirley Franklin, Mayor (hereinafter "Mayor Franklin"), Lisa Borders, Council President, Carla Smith, Debi Starnes, Ivory Lee Young, Jr., Clara Winslow, Katalyn Mosby Archibong, Anna Pauver, Howard Shook, Clair Muller, Felicia A. Moore, Clarence T. Martin, Jr., Jim Maddox, Joyce Sheperd, Caesar C. Mitchell, Mary Norwood and H. Lamar Willis, Members of the Atlanta City Council (collectively, the "City Council"), in their official capacities, are subject to the jurisdiction and venue of this court. These defendants may be served at the following addresses:

Shirley Franklin, Mayor
Office of the Mayor
55 Trinity Avenue, SW
Atlanta, Georgia 30303-3584

132354.3 | 039921-038921

-2-

President of Council and
Members of the Atlanta City Council
Council Office
Suite 2900
55 Trinity Avenue
Atlanta, Georgia 30303-3584

FACTS

4.

The Property is currently zoned to the R-2 (Single Family Residential) zoning district and is part of the Pace Academy campus, which consists of several academic and athletic buildings as well as a baseball field, several tennis courts, parking lots, and a soccer field, as authorized by permit No. U-93-22.

5.

The topography of the Property is very steep, sloping upward in an easterly direction from Ralman Road to an elevation approximately 75 feet above the road. The site is currently undeveloped.

6.

Plaintiff seeks to develop the Property by constructing an un-lit track surrounding a lacrosse field. The proposal includes a one-story building that would house concessions, restrooms and maintenance facilities. The plan calls for planted buffers, limited hours of operation and various other accommodations, all of which comply with the requirements of the Zoning Ordinance.

(12345) 639921-02/001

-3-

7.

In accordance with the City of Atlanta Zoning Ordinance ("Zoning Ordinance"), Plaintiff's proposed use requires a special use permit.

8.

Therefore, on or about August 9, 2004, Plaintiff filed Application No. 0-04-17 (the "Application").

9.

In addition, Plaintiff applied to modify conditions 1, 2, 8, 11 and 14 of an existing Special Use Permit, 0-93-22, to allow development of the Property as proposed.

10.

As part of the zoning review process, the Application was submitted to the Department of Planning and Community Development ("Planning Staff") for review.

11.

The Planning Staff is charged with determining whether the criteria for issuance of a use permit, as contained in the Zoning Ordinance, are met and a recommendation of approval or denial of the Application.

12.

In this case, the Planning Staff made detailed findings regarding the Application and concluded that the use permit standards had been met.

Continued

4

13.

Thus, the Planning Staff recommended that the City Council approve the requested use permit, including the requested modification of conditions 1, 2, 8, 11 and 14 of Use Permit U-93-22.

14.

Nevertheless, on January 18, 2005, Defendants met and voted to deny Plaintiff's Application.

15.

Plaintiff's proposed use of the Property is consistent with the uses currently allowed on the Pace Academy campus, the City Land Use Plan and other nearby and adjacent land uses.

16.

Within thirty (30) days of the date of the action taken by Defendants on the Application, Plaintiff brings this suit seeking redress for the deprivation of Constitutional rights by Defendants.

17.

Until the use permit requested in the Application is issued and the conditions of U-93-22 are modified to authorize the development of the Property as requested, Defendants will refuse to issue to Plaintiff or its successors in title the necessary permits and approvals required by the City for construction or development of the Property in any manner other than as permitted

EXHIBIT (10/1/2005)

8

under the existing laws and regulations for Page
Number

The proposed changes to the proposed changes
to the proposed changes to the proposed changes

The proposed changes to the proposed changes to the proposed changes
to the proposed changes to the proposed changes to the proposed changes

The proposed changes to the proposed changes to the proposed changes
to the proposed changes to the proposed changes to the proposed changes

The proposed changes to the proposed changes to the proposed changes
to the proposed changes to the proposed changes to the proposed changes

The proposed changes to the proposed changes to the proposed changes
to the proposed changes to the proposed changes to the proposed changes

38.

Plaintiff has a clear legal right to issuance of the modification.

39.

Moreover, Defendants actions in refusing the requested modification constituted a gross abuse of discretion.

COUNT VI

40.

Paragraphs 1 through 39, above, are incorporated by reference as if fully set forth herein.

41.

The Zoning Ordinance, Section 16-25.002(3), provides that no use permit shall be issued unless it is determined that satisfactory provisions and arrangements have been made concerning the following, applicable to each application:

- a. Ingress and egress to the property and proposed structure and uses thereon, with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or other catastrophe;
- b. Off-street parking and loading areas where required, with particular attention to the items in a. above;
- c. Refuse and service areas.

121254.11 020211-000001

- d. Appropriate buffering or screening to alleviate such potentially adverse effects as may be created by noise, glare, odor, lighting, signs or traffic congestion;
- e. Hours and manner of operations;
- f. Length of time regarding the duration of such permit, if any;
- g. Tree preservation and replacement in accordance with the requirements of the City of Atlanta Tree Ordinance; and
- h. Required yards and open areas.

42.

As noted by the Planning Staff, Plaintiff met all of the requirements for issuance of a use permit.

43.

Moreover, Plaintiff met ingress and egress, parking, tree preservation and other standards and requirements as set forth in the City of Atlanta Code of Ordinances.

44.

If, however, the Court interprets Section 16-25.002, as giving Defendants unfettered discretion to determine what constitutes "satisfactory provisions and arrangements," Section 16-25.002, and the applicable standards and criteria set forth in paragraph (3) are unconstitutionally vague and are, therefore, void.

573154 11 0259921400021

- 11 -

WHEREFORE, Plaintiff requests the following relief:

- a. That Summons and Process issue and that Defendants be served as required by statute;
- b. That this Court issue a mandamus nisi pursuant to O.C.G.A. § 9-6-27 requiring the Defendants to prepare the record of proceedings before the City in this case and forward it to the Clerk of this Superior Court and requiring Defendants to be and appear before the Court within the time prescribed, being not less than ten (10) days nor more than thirty (30) from the date of the Petition, to show cause why the writ of mandamus and other relief sought by the Plaintiff should not be granted;
- c. That this Court issue an order granting a Writ of Mandamus compelling Defendants to issue the requested Use Permit;
- d. That this Court issue an order granting a Writ of Mandamus compelling Defendants to issue the requested Use Permit modification;
- e. That this Court find and declare that Plaintiff is entitled to issuance of a use permit and Use Permit modifications, as requested;
- f. That this Court find that Section 16-25.002(3) of the Zoning Ordinance is void for vagueness;

(521354); 020921-000301

- 12 -

- g. That this Court find and declare that Defendants' act ons were not a valid exercise of the City's police power and are, therefore, void; and
- h. That this Court grant such other and further relief as it deems just, proper, and appropriate under the facts and evidence presented.

This 12 day of February, 2003.

Respectfully submitted,

WILSON BUCKLE & BERRY, P.C.

By: 

Kelly M. Fitzgerald, Jr.
State Bar No. 768900
Kelly M. Fitzgerald
State Bar No. 262260

Overlook I, Suite 700
2049 Paces Ferry Road
Atlanta, Georgia 30339
(404) 953-5055

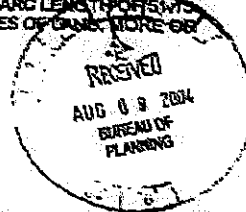
(312) 611-0000

LEGAL DESCRIPTION

ALL THAT TRACT OR PARCEL OF LAND SITUATED AND LYING IN LAND LOTS 157, 158, 181 AND 182, 17TH LAND DISTRICT, CITY OF ATLANTA, FULTON COUNTY, GEORGIA, SAID TRACT BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE EASTERLY LINE OF RILMAN ROAD (40' R/W) WITH THE SOUTHERLY LINE OF ASHEWORTH COURT; THENCE, ALONG THE EASTERLY LINE OF RILMAN ROAD ALONG A CURVE TO THE RIGHT HAVING A RADIUS OF 580.11 FEET, A CHORD BEARING AND DISTANCE OF S 02° 55' 09" W, 4.98 FEET AND AN ARC LENGTH OF 4.98 FEET TO A CROSS CUT SCRIBED IN A CONCRETE SIDEWALK AND THE POINT OF BEGINNING OF THE HEREIN DESCRIBED TRACT OF LAND;

THENCE, S 87° 00' 50" E, LEAVING THE EASTERLY LINE OF RILMAN ROAD, A DISTANCE OF 627.10 FEET TO A 1/2" REBAR;
THENCE, N 02° 40' 38" W, A DISTANCE OF 53.70 FEET TO A POINT;
THENCE, N 77° 44' 50" E, A DISTANCE OF 149.77 FEET TO A POINT;
THENCE, S 11° 27' 25" E, A DISTANCE OF 215.18 FEET TO A POINT;
THENCE, N 79° 02' 23" E, A DISTANCE OF 79.21 FEET TO A POINT;
THENCE, S 12° 38' 37" E, A DISTANCE OF 85.45 FEET TO A POINT;
THENCE, S 34° 48' 32" W, A DISTANCE OF 70.18 FEET TO A 1/2" REBAR;
THENCE, S 34° 48' 30" W, A DISTANCE OF 83.03 FEET TO A 1/2" REBAR;
THENCE, S 34° 48' 28" W, A DISTANCE OF 111.34 FEET TO A 1/2" REBAR;
THENCE, N 57° 17' 35" W, A DISTANCE OF 28.08 FEET TO A 1/2" REBAR;
THENCE, S 34° 48' 50" W, A DISTANCE OF 130.80 FEET TO A 1/2" REBAR;
THENCE, N 55° 44' 18" W, A DISTANCE OF 337.91 FEET TO A POINT;
THENCE, S 34° 48' 50" W, A DISTANCE OF 80.06 FEET TO A 3/4" PIPE;
THENCE, N 05° 41' 53" W, A DISTANCE OF 293.17 FEET TO A 1/2" REBAR ON THE EASTERLY LINE OF RILMAN ROAD;
THENCE, ALONG THE EASTERLY LINE OF RILMAN ROAD THE FOLLOWING CALLS:
FIRST, ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 2011.54 FEET, A CHORD BEARING AND DISTANCE OF N 06° 35' 38" E, 148.85 FEET AND ARC LENGTH OF 148.80 FEET TO A 1/4" REBAR;
THENCE, N 07° 34' 25" E, A DISTANCE OF 99.24 FEET TO A POINT;
THENCE, ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 580.11 FEET, A CHORD BEARING AND DISTANCE OF N 05° 38' 38" E, 61.13 FEET AND AN ARC LENGTH OF 61.13 FEET TO THE POINT OF BEGINNING AND CONTAINING 7.20 ACRES OF LAND, MORE OR LESS.



STATE OF GEORGIA

COUNTY OF FULTON

VERIFICATION

PERSONALLY APPEARED before the undersigned officer, an officer duly authorized by law to administer oaths under the laws of this state, C. Mark Pitting, on behalf of Pace Academy. That who states that the facts set forth in the foregoing Appeal and Petition for Writ of Habeas Corpus, Declaratory Judgment and Other Equitable Relief are true and correct to the best of my knowledge.

This 15 day of February, 2008.

Pace Academy, Inc.

By C. Mark Pitting
C. Mark Pitting, Chairman
Board of Trustees

Sworn to and subscribed before me
this 15 day of February, 2008.

Ellen W. [Signature]
Notary Public

Commission Expires: 12/31/2010



(Form 1) (000) 400001