



# Going Up: the fall and rise of 1717 Bissonnet

BY BRANDI SMITH

Just more than 10 years after Buckhead Investment Partners Inc. acquired a 1.6-acre piece of Houston property, one chapter in the legal battle over its planned redevelopment has finally come to an end\*.

"It feels good to be vindicated," said Kevin Kirton, Buckhead's CEO and director. "We were confident the law was on our side from the beginning."

When Buckhead purchased the site in August 2006, the multi-family Maryland Manor Apartments were operating there.

**The goal of the project, called 1717 Bissonnet, was to create "a neighborhood gathering place."**

"It was a two-story building, but it was certainly different in character than the properties that it abutted, which were single-family and some duplexes," said Reid Wilson, attorney and chairman of Wilson, Cribbs & Goren, P.C., the firm representing Buckhead on real estate and litigation issues.

## Neighborhood Gathering Place

Early in 2007, on-site leaks prompted a new sewer design and construction. As that project wrapped up, Buckhead decided to move forward with redeveloping the site to a primarily residential, mixed-use concept. The 23-story design included specialty retail and a restaurant at street level, along with a spa and office space on the sixth floor, combined with 17 floors of apartments or condominiums.

Buckhead said the goal of the project, called 1717 Bissonnet, was to create "a neighborhood gathering place." At the time it was proposed, it would have been one of the city's first high-rise residential projects.

The company met with the two neighborhood civic associations to educate neighbors about plans for the property, hoping for an amicable start to the project. What ensued was anything but. Opponents launched a website and distributed signs in the area, even getting the city to revoke its prior approval of 1717 Bissonnet's traffic impact analysis.

The neighborhood pressured the City of Houston on the issue of permitting the project. It took 11 submissions before the City issued a permit for a reduced density project, resulting in litigation between Buckhead and the City over the density. In a 2012 settlement, most of the requested density was permitted, and Buckhead agreed to reduce the project from 23



Reid Wilson

Kevin Kirton

stories to 21 stories, add a pedestrian plaza and provide traffic and noise mitigation measures.

"As soon as Buckhead tore Maryland Manor down in Spring 2013, the neighbors brought a lawsuit against our client, the developer, saying that the proposed high rise, if built as permitted by the City, constituted a private nuisance," Wilson said. "Let's just say that was a novel and extreme interpretation of the law."

## Community Disapproval

The threat of a lawsuit sent a chill through the Houston development community because of the dangerous precedence the case could create.

"A nuisance case would be filed and say, 'We don't care that you have your city permits. We don't care that there's not an element of danger. We just feel this is abnormal and out of place,'" said Wilson. "People could argue that many, many situations in Houston seem abnormal to folks outside Houston."

In time, 140 neighbors joined the effort to get an injunction against Buckhead to stop the construction of 1717 Bissonnet. They nicknamed it the "Tower of Traffic," arguing that it would have a damaging impact on the neighborhood.

"I think this is the ultimate example of a NIMBY: Not In My BackYard," said Wilson.

Continue on page 26



"The only reason the case went as far as it did was because it played out in a very wealthy neighborhood. There were a number of people who obviously felt strongly about it and supported the litigation with their pocketbooks."

**"Matthew [Morgan, Buckhead's president] and I grew up in this community. We believe in our location, we believe in our product, and we have designed a project that will complement the community and the City of Houston as a whole. The 1717 Bissonnet project is a perfect fit for the area and its residents."**

"Some mention has been made of the personal nature of the opposition, especially early on in this saga," Kirton said. "We believe it was an emotional response to proposed change, maybe a fear of the unknown."

Though some developers may have backed down in the face of the mounting legal challenge, Buckhead did not, due to an overwhelming belief in its project.

"Good projects in good locations get built," explained Kirton. "Matthew [Morgan, Buckhead's president] and I grew up in this community, we believe in our location, we believe in our product, and we have designed a project that will complement the community and the City of Houston as a whole. The 1717 Bissonnet project is a perfect fit for the area and its residents."

By the time *Loughhead et al v. 1717 Bissonnet, LLC* went to trial in November 2013 - six months after the lawsuit's filing - the number of plaintiffs had dropped to 45 property owners and 30 properties. Fred Cook of Wilson Cribbs + Goren led a five attorney trial team (plus Ray Viada, an appellate specialist) for the 4 week trial. The jury ended up agreeing with the closest of the project's opponents.

"It was a fully entitled project, approved by the City after litigation, and on unrestricted property in an unzoned city, yet [the jurors] determined that it would be a nuisance to the fenceline neighbors," said Wilson.

The jury awarded roughly \$1 million in damages to the plaintiffs due to loss of market value for the closest 20 homes, denying damages to 10 others. However, the judge denied the injunction, allowing Buckhead to move forward with construction. Buckhead appealed to the Fourteenth Court of Appeals,

specifically taking on the project's label as a 'nuisance', and the prospective nature of that determination.

"This is technical, but it's an important distinction. The way the judge presented it to the jury would allow someone who just didn't like a project to challenge it," Wilson said. "We argued: how can you determine something is a nuisance if it doesn't exist yet?"

## Attractive Alternative

Wilson addressed the issue of nuisance law in a paper he presented at a land-use conference in 2015. In it, he said, "Nuisance law is a tool to protect a landowner from 'unreasonable' loss of use and enjoyment of that land owner's property." But, he pointed out, its use must be balanced.

Wilson also stated that cities with zoning or land-use development regulation rarely run into issues regarding nuisance law because a "detailed regulatory scheme" already exists.

"All developers know to investigate local land use regulations before purchasing land for redevelopment," he wrote. In the case of Buckhead, the company did do its research and learned that, though several adjacent properties had deed restrictions, its property did not.

**"The court said that you can't have a nuisance for something that doesn't exist. It reversed all of the damages. It upheld the denial of the injunction," Wilson said.**

Here, however, neighboring landowners who believed the development plan would, in the future, interfere with their property in some way invoked nuisance law as a means to prevent a project from being completed. Wilson called this "judicial zoning."

Incidentally, one week before the appellate court rendered its decision on the Buckhead case, the Texas Supreme Court tackled a nuisance issue.

Also in its appeal, Buckhead challenged the award of damages to the plaintiffs.

The three-judge panel ruled earlier this summer, favoring Buckhead on every issue.

"The court said that you can't have a nuisance for something that doesn't exist. It reversed all of the damages. It upheld the denial of the injunction," Wilson said. "That was very

important, so we feel very, very good about the decision."

**"...a year after the dust settles from our construction, most people who opposed the project will be glad to have another residential alternative that gives them, a friend or a family member, a place to live that is walking distance to some of the best that Houston has to offer."**

"The appeals court got it right and we are very grateful for its well-reasoned decision," added Kirton. "Stepping back and looking at the big picture, it is a big victory for the development community. This decision, along with the recent Texas Supreme Court ruling on another nuisance case, provides clarity and certainty for developers, allowing them to confidently make investments in urban developments."

Now that the ruling is in, Buckhead plans to move forward with construction of 1717 Bissonnet, according to Kirton.

"Matthew, myself and our investment partners will build a great project on the best residential redevelopment site in the City of Houston," he said. "I have said for a long time that a year after the dust settles from our construction, most people who opposed the project will be glad to have another residential alternative that gives them, a friend or a family member, a place to live that is walking distance to some of the best that Houston has to offer."

While this legal fight has come to a close, Wilson said there are many more on the horizon.

"There are more local land use disputes today than there were when I started practice," he said. "We're even seeing it in Houston, the Great Unzoned City. There's more conflict as new development becomes bigger and denser."

He called the changes inevitable and also predicted it would usher in a wave of more government regulation on development in Houston and beyond.

"We're in battle every day on land use issues," Wilson said, "and we're seeing more demand from the private sector for representation in this area. In fact, we are bulking up that practice area with the hiring of Omar Izfar, formerly the City Attorney for the Houston Planning Commission." ●