

## Request from City of Austin denied for injunction against proposed asphalt plant

Written by Marty Randall

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Though a request for a preliminary injunction prohibiting the placement of a temporary asphalt plant was not granted to the City of Austin, the fight over the plant is certainly not over.

Judge Roger Duvall of Scott Circuit Court indicated through his ruling against the preliminary injunction for placement of a small asphalt plant was apparently not strong enough to deny installing the plant on North Dowling Drive just west of the I-65 interchange in Austin

Judge Duvall denied the City of Austin's request on Wednesday, July 24, for the temporary injunction, which would have halted any further work on the site. Some work at the site, where the old Home Oven restaurant once stood, has already been done.

In his ruling, Judge Duvall stated that the papers filed by the city for a motion for a temporary restraining order and preliminary injunction and for a declaratory judgment showed "...no evidence..." that "...there was any action taken by the Board of Zoning Appeals of the City of Austin or the Plan Commission...to address an alleged zoning violation."

The issue of the asphalt plant first arose when Austin Mayor Doug Campbell was contacted by a representative of Valley Asphalt Corporation, an entity operated by the John R. Jurgensen Company of Cincinnati, Ohio, (Valley/Jurgensen) on May 9. Valley/Jurgensen is the firm which has been awarded a multi-million-dollar contract with the Indiana Department of Transportation to rehabilitate ten bridges and repave 12.5 miles of I-65. The contracted period over which the project will be completed spans from this summer to November/December, 2014.

Valley/Jurgensen located a possible site for its asphalt facility in Austin. A representative of Valley-Jurgensen was quoted as having stated in the court ruling that she was told by the mayor that the site was properly zoned.

When Mayor Campbell presented the matter during a specially-called meeting on May 24 of the Austin City Council, those Councilmen present voted against that use of the site.

On June 10, representatives of Valley/Jurgensen attended a business meeting of the City Council. The firm's attorney, John Kraft, advised the Council that its previous vote had no effect on if the land was used for the plant or not because the Council had not deferred to members of the Austin Area Plan Commission, which Kraft stated would be the proper venue to make such a decision under its present Zoning Ordinance.

The case's chronology reflects that a Valley/Jurgensen representative was told on June 26 that there was no need to file for any permits when she met with the mayor and Clerk-Treasurer Dillo Bush. Bush also serves as the chairman of the Austin Area Plan Commission. On July 1, that same representative "...received a call from the City that permits were actually going to be necessary for a modular office..." at the site. Though the city's building inspector visited the site on July 1, the ruling stated that no violations were mentioned.

Consequently, the company submitted an application for an Improvement Location Permit on July 2. That permit was issued the same day.

"No properly verified evidence was presented to show there was any action taken by the Board of Zoning appeals of the City of Austin or the Plan Commission....to address an alleged zoning violation," it was noted.

On July 5, Valley/Jurgensen received a letter dated July 3 that the City of Austin was revoking

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the permit. A "Stop Work" was received July 5. On July 11, the City Council approved a resolution allowing the filing of the suit for a temporary restraining order and preliminary injunction. However, the Council had no power to approve such a resolution, a matter which was instead within the jurisdiction of the Austin Board of Zoning Appeals.

Judge Duvall apparently based much of his action to deny the city's request on a 2005 court case in which it was established, "If a movant (plaintiff) fails to prove even one of (the) requirements (necessary for issuing an injunction to halt all work/action), the trial court's grant of an injunction is an abuse of discretion." He stated that the plaintiff's affidavit provided by its building inspector "...constitutes the only evidence submitted to the Court..." but concluded that the affidavit "...does not sufficiently address the necessary requirements of a preliminary injunction..."

Judge Duvall also noted, "The Court does not have the luxury to assume facts not in evidence." The judge instructed the parties to participate in a telephone conference on Thursday, July 25. Through that conference, parties agreed that a bench trial before the judge will now be held on August 12 at 10 a.m.