

D-1-GN-07-001957

CAUSE NO. \_\_\_\_\_

RESPONSIBLE GROWTH  
FOR NORTHCROSS, INC.  
Plaintiff

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IN THE DISTRICT COURT

v.

TRAVIS COUNTY, TEXAS

THE CITY OF AUSTIN,  
LINCOLN PROPERTY  
COMPANY COMMERCIAL,  
INC., and LINCOLN NORTH-  
CROSS, LTD.  
Defendants

200<sup>th</sup> JUDICIAL DISTRICT

Filed In The District Court  
of Travis County, Texas

JUN 28 2007  
At  
Amalia Rodriguez-Mendoza, Clerk

PLAINTIFF'S ORIGINAL PETITION  
AND APPLICATION FOR TEMPORARY RESTRAINING ORDER  
AND TEMPORARY INJUNCTION

TO THE HONORABLE JUDGE OF THE COURT:

Comes now Responsible Growth for Northcross, Inc. ("Responsible Growth"), Plaintiff and files this Original Petition and writ of mandamus, and in support thereof shows as follows:

1. Plaintiff intends at this time to conduct discovery under level 3 of Texas Rule of Civil Procedure 190.1.

JURISDICTION AND VENUE

2. Jurisdiction in this Court is proper pursuant to Tex. Const. Art. V § 8 and Tex. Gov't Code § 24.008. Venue is proper in this Court pursuant to Texas Civil Practice and Remedies Code § 15.002(a)(1) & (2).

PARTIES

3. Plaintiff is a nonprofit corporation headquartered in Travis County, Texas, whose members reside and/or own property in Travis County, Texas. Plaintiff promotes community involvement in land use planning to ensure that redevelopment of the Northcross area considers

long-range environmental and neighborhood impact, embodies transit-oriented pedestrian-friendly land use and includes mixed-use development with a community focus. Plaintiff's mission is to ensure that Northcross Mall redevelopment complies with the City's vertical mixed-use guidelines in a way that enhances quality of life for the surrounding neighborhoods.

4. Responsible Growth is an "interested party" as defined by the City Land Development Code ("LDC"), § 25-1-131, with regard to Defendants' site plan to replace the existing Northcross Mall with a proposed big box Wal-Mart. Responsible Growth has members who own real property and/or operate businesses within 500 feet of the Northcross Mall property. Responsible Growth has members who are "interested parties" as defined by City of Austin ordinances with regard to Defendants' site plans proposed for the redevelopment of Northcross Mall. Responsible Growth has members who will be uniquely adversely affected by the traffic, noise, water runoff, and water pollution generated by the proposed Wal-Mart redevelopment of Northcross Mall.

5. Defendant City of Austin ("City") is a municipality located primarily in Travis County, Texas. The City has regulatory authority over the Northcross Mall site, and, in particular, authority to approve site plans submitted in conformity with City regulations. The City can be served by serving the City Clerk, Shirley A. Gentry, at City Hall, 301 W. Second St., Austin, Texas 78701.

6. Defendant Lincoln Property Company Commercial, Inc. ("Lincoln Property") is a real estate and development company headquartered in Dallas, Texas. Lincoln Property submitted the application for the site plan for construction of the proposed Wal-Mart and is the holder of the site plan approved for the project. Lincoln Property may be served with process by serving its registered agent C T Corporation System, 350 N. St. Paul St., Dallas, Texas 75201.

7. Defendant Lincoln Northcross, Ltd. is the record owner of the Northcross Mall property encompassed by both Wal-Mart site plans. Lincoln Northcross may be served with process by serving the registered agent of its general partner Lincoln GP Northcross, Inc. This registered agent is C T Corporation System, 350 N. St. Paul St., Dallas, Texas 75201.

#### FACTS

8. Northcross Mall is located in Northwest Austin, at Burnet Road and Anderson Lane, in the Shoal Creek watershed less than 1000 feet from Shoal Creek. As a result of high-density development, Shoal Creek is polluted and has suffered from severe flooding causing loss of life and destruction of homes.

9. The boundaries of the Allandale Neighborhood Association encompass Northcross Mall. Crestview Neighborhood Association encompasses the eastern boundary of Northcross Mall, Burnet Road, and the neighborhood to the East. Traffic on the two commercial streets that form Northcross Mall's northern and eastern boundary is usually heavily congested.

10. The official City-approved Neighborhood Plan for the Crestview (and Wooten) neighborhoods established a goal of keeping out "Big Box retail" and concluded that Research Boulevard, rather than Burnet Road or Anderson Lane, is the most appropriate location for the "most intense commercial uses in the planning area. . . ." This neighborhood plan was adopted by the City Council as an amendment to the City's Comprehensive Plan.

11. In or around October of 2005, a subcommittee of the City Planning Commission began the process of considering a zoning ordinance that would eliminate big box retail stores from all zoning categories unless after notice and hearing a specific big box retail store were specifically authorized as a conditional use.

12. On January 26, 2006, Defendant Lincoln Property submitted a site plan application to City staff that would authorize destruction of Northcross Mall and its replacement with an immense 224,500 square foot Wal-Mart, the biggest retail big box store ever built in Travis County. (hereinafter "Site Plan 1")

13. City staff facilitated Defendant Lincoln Property's efforts to keep its plans secret by illegally processing the application administratively, without involvement of City Council or any boards and commissions. City staff failed to provide notice to adjacent neighbors and neighborhood associations as required by City ordinance; failed to provide a public hearing and secure Zoning and Platting Commission approval for the garden center conditional use; and arbitrarily granted Lincoln Property an extension of the time allowed to correct the site plan, without providing notice to adjacent landowners. City staff also illegally exempted Lincoln Property from additional substantive requirements of City ordinances and a plat note.

14. On August 8, 2006, Site Plan 1 was approved by City staff. The big box ordinance was still being reviewed by City staff at this time and had not yet been submitted to City Council.

15. In November of 2006, Wal-Mart disclosed to the press, and the public learned for the first time, that a site plan had been approved for Northcross Mall to be torn down and replaced by a big box Wal-Mart. City Councilmember Brewster McCracken, who had been pursuing the new retail design guidelines and the big box ordinance, indicated that he was surprised to learn, on November 10, of the August site plan approval.

16. Following the public revelation, neighborhood associations and community groups like Responsible Growth raised an outcry and pointed out that Site Plan 1 was unlawfully approved. On December 13, Lincoln Property filed an entirely new application for a site plan.

(hereinafter "Site Plan 2"). Site Plan 2 originally was identical to Site Plan 1, but the submission of Site Plan 2 gave the City and Lincoln Property a chance to correct some of the procedural illegalities committed during the processing of Site Plan 1.

17. At the urging of Plaintiff, the City Council on December 15, 2006 considered resolution directing the City Manager to revoke Site Plan 1, but took no action. At the public hearing, City staff admitted that they had not followed the law regarding the notice required to adjacent neighbors and neighborhood associations.

18. On February 10, 2007, over 2500 people completely encircled Northcross Mall to protest the Wal-Mart Site Plans.

19. The City Council enacted the Big Box Ordinance on February 15, 2007. This Ordinance required City Council approval of any big box retail store. The City Council could not approve such a big box development if the development would adversely affect adjoining neighborhoods, traffic or the public welfare.

20. In contrast to Site Plan 1, the public was well aware of Site Plan 2 and the review and processing of Site Plan 2 was subject to significant public scrutiny. Inadequacies in Site Plan 2, errors by City staff, and misinterpretations of law were pointed out by Responsible Growth and others. But as with Site Plan 1, City staff decided to process Site Plan 2 administratively, rather than submitting it to the Zoning and Platting Commission or City Council. Responsible Growth urged the City Council to exercise its authority to review Site Plan 2 pursuant to the Land Development Code. Council members responded that they had been directed by the Legal Department not to review the Site Plan, and had been warned that if they did review the Site

Plan, individual Council members could be personally sued and the City would not provide them with a defense.<sup>1</sup>

21. Nevertheless, as a result of this scrutiny by Responsible Growth and others, aspects of Site Plan 2 that had been approved in Site Plan 1 were criticized by City staff and City Councilmembers. One consequence of this of this renewed public scrutiny of the approval process was that the applicant scaled back the size of the building by approximately 32,500 square feet.

22. On June 26, 2007, Site Plan 2 was approved and released.

#### **THE SITE PLANS VIOLATE A PLAT NOTE PROTECTING SHOAL CREEK**

23. Site Plan 2 authorizes a high level of impervious cover on a large tract of land near Shoal Creek. Impervious cover increases runoff and associated pollutants. Shoal Creek is polluted and suffers from dangerous flooding caused by increased urban runoff.

24. The current City-approved plat for the Northcross subdivision contains the following plat note 24:

ALL EXISTING NOTES AND RESTRICTIONS FROM PLATS AND RESUBDIVISIONS OF RECORD IN NORTHCROSS SECTION TWO, VOLUME 57, PAGE 24, SECOND RESUBDIVISION OF A PORTION OF LOT 3 NORTHCROSS, SECTION TWO, VOLUME 76, PAGE 143 AND THIRD RESUBDIVISION OF A PORTION OF LOT 3, NORTHCROSS SECTION TWO, VOLUME 76, PAGE 361, APPLY TO THIS REPLAT.

25. The following drainage note is found in the Third Resubdivision of a Portion of Lot 3:

Rainwater runoff shall be held to the amount existing at undeveloped status by use of ponding or other approved methods.

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<sup>1</sup> In Fact Daily May 4, 10, & 11, 2007. State law in actuality provides for the City Council, not the City Legal Department, to decide when a defense is provided to a City Council member. See Tex. Att'y Gen. Op. JC-0294 (2000).

This plat note protects Shoal Creek from pollutants found in urban runoff and from erosion and sedimentation caused by urban runoff. It provides significant water quality protection.

26. The City is required to enforce the drainage requirements found in a plat. LDC § 25-7-64. However, the Site Plans authorize construction that does not comply with the plat note – i.e. the project does not contain measures calculated to hold the amount of runoff to the amount existing at undeveloped status. Site Plan 2 is in violation of plat drainage requirements for the protection of Shoal Creek’s water quality and should not have been approved. No building permit should be issued.

**CITY STAFF FAILED TO REVIEW THE SITE PLAN  
TO ENSURE COMPLIANCE WITH TRAFFIC AND PUBLIC SAFETY PROVISIONS  
OF THE LAND DEVELOPMENT CODE**

27. A significant part of the site plan approval process involves consideration of the impact of the project on City transportation systems. The City Land Development Code (“LDC”) requires that the applicant prepare a Traffic Impact Analysis (“TIA”).

28. The City of Austin Transportation Criteria Manual provides engineering guidelines for the TIA. But in addition to these engineering standards, Division 2 of Article 3 of the LDC establishes non-engineering standards for the site plan relating to traffic impacts. The approval process for TIAs set forth in this Division requires the City to conduct a review of the impact of the project on the street system and public safety.

29. LDC Section 25-6-141(B)(2) requires the Council or City staff to “deny an application if the traffic impact analysis . . . demonstrates that . . . the project endangers public safety.” The term public safety is not an engineering term but a broad term that includes

consideration of such matters as increased traffic accidents, reduced response time of fire and EMS vehicles, and increased ozone emissions due to congested streets and roadways.

30. LDC Section 25-6-141(A) allows the Council or City staff to deny a site plan "if the results of a traffic impact analysis demonstrate that a proposed development may overburden the City's street system."

31. Neither the City staff nor City Council conducted an independent review to determine whether the project endangered public safety. Nor was any review conducted to determine whether the proposed development might overburden the City's street system.

32. Because the City failed to make a determination as to whether the site plan satisfied the requirements of section 25-6-141 of the LDC, Site Plan 2 was approved unlawfully and its approval was ultra vires.

#### **GARDEN CENTER IS A CONDITIONAL USE THAT WAS NOT PROPERLY APPROVED**

33. Both Site Plans designate a "garden center" to be part of the project. Garden centers are integral components of big box Wal-Marts and essential to the profits of the store. A garden center is defined as a plant nursery use. LDC 25-2-4 (51). The property is zoned GR. A plant nursery is a use that is not prohibited under GR zoning, but instead one that requires a conditional use permit from the Zoning and Platting Commission. LDC §§ 25-2-491(C); 25-5-142(1).

34. A site plan containing a conditional use must be submitted to and approved by the Zoning and Platting Commission. LDC 25-5-142(1). Every site plan application considered by the Zoning and Platting Commission requires a public hearing. LDC 25-5-144. A site plan requiring approval by the Zoning and Platting Commission cannot be administratively approved. LDC 25-5-111.

35. The Administrative approval of Site Plan 2 is invalid because City staff had no authority to administratively approve the site plan. The approval was *ultra vires*.

**SITE PLAN APPROVALS  
VIOLATED DICTATES OF TREE ORDINANCE**

36. The big box development reflected in Site Plans 1 and 2 is incompatible with the City's tree ordinance. The existing Northcross site contains 77 protected trees, the last vestiges of an urban forest. Lincoln Property never engaged in the process required by City Code of considering development alternatives that would have preserved these trees. Instead, the site plans Lincoln Property submitted included only a mammoth big box structure, oversized for the site, that required destruction of dozens of old, large protected trees.

37. The site plans were required to demonstrate "retention of trees eight inches or larger in diameter to the extent feasible." LDC 25-8-604(A)(2). A category defined as "protected trees," composed of trees larger than 60-inches in circumference, cannot be destroyed without a review and recommendation of the City arborist. LDC 25-8-602 & 604. See 25-8-624(A).

38. Both Site Plans authorized the destruction of approximately 29 trees of eight-inch or larger diameter, including most of the largest trees: six 21-inch live oaks; one 22-inch live oak; two 23-inch live oaks; and one 25-inch live oak. It is feasible to operate and/or develop the Northcross Mall property without destroying any of these trees.

39. The City of Austin Environmental Criteria Manual ("ECM") sets forth some procedural requirements governing the submission of a site plan and its review by the City. The ECM requires consideration of different design alternatives at the beginning of the process and allows the City to consider authorizing removal of existing trees "only after all design alternatives which could save more existing trees have been evaluated." This early consideration

of design alternatives never occurred. Lincoln Properties only submitted to the City one alternative – a mammoth big box structure oversized to a site that would destroy almost half of 77 large, mature trees given protected status by the Land Development Code.

40. The approval of the site plan authorizing the unjustified destruction of 29 trees was in violation of the tree ordinance and ultra vires.

**WHEN SITE PLAN 2 WAS RELEASED, SITE PLAN 1 BECAME VOID**

41. On July 26, 2007, when Site Plan 2 was released by the City of Austin, the previously approved Site Plan 1 became void. LDC § 25-5-44.

42. That the City of Austin's approval and release of Site Plan 2 was unlawful and ultra vires does not mean that Site Plan 1 is valid.

**SITE PLAN 1 HAD THE SAME LEGAL DEFICIENCIES AS SITE PLAN 2**

43. Alternatively, if Site Plan 1 is not void due to LDC § 25-5-44, it is invalid for the same reasons that Site Plan 2 is invalid.

44. Plaintiff incorporates paragraphs 3 through 40 into this cause of action as applied to Site Plan 1.

**THE NOTICE FOR SITE PLAN 1  
DID NOT CONTAIN THE REQUIRED CONTENT**

45. Alternatively, if Site Plan 1 is not void due to LDC § 25-5-44, it is invalid and of no legal force and effect because the notices associated with Site Plan 1 did not conform to the requirements of the LDC.

46. The notice of the site plan filing was required to "generally describe the nature of the proposed development" as required by 25-1-133(C)(3). The notice for Site Plan 1 failed to disclose that the nature of Lincoln Property's Wal-Mart development is the teardown of a mall

and its replacement with an immense big box, the largest big box in the history of the City of Austin.

47. The notice only said that Lincoln Property “proposes to demolish the westerly two-thirds of the existing shopping mall, renovate the remaining portion, construct 5 ancillary retail buildings, a three-level parking garage and associated improvements.” This misleadingly gives the impression that what is being proposed is a remodel of a existing shopping mall, rather than the replacement of the shopping mall by a big box anchor tenant.

48. The notice also failed to “describe the procedure and requirements for becoming an interested party” as required by 25-1-133(C)(6). A person who had registered as an interested party would have received notice of the proposed site plan extension and other administrative actions. 25-1-88(A)(1). The notice gave no indication that by failing to seek interested party status, adjoining neighbors would be waiving rights including rights to future notices.

49. The notice additionally failed to state the earliest date that action under a decision may occur as required by 25-1-133.

50. City staff had no authority to administratively approve a site plan without following the public notice requirements and the approval of Site Plan 1 therefore was *ultra vires*. Because Site Plan 1 was not approved pursuant to the requirements of City ordinance, it is invalid.

**CITY STAFF UNLAWFULLY EXTENDED  
THE 180-DAY DEADLINE FOR THE SITE PLAN 1.**

51. Alternatively, if Site Plan 1 is not void due to LDC § 25-5-44, it is invalid and of no legal force and effect because the applicant failed to comply with the 180-day deadline for updating Site Plan 1. As a result, the Site Plan application should have been rejected. Instead, unbeknownst to the community, City staff quickly granted a 60-day extension. City ordinances

that authorize such extensions are unlawful because they unconstitutionally delegate such authority to City staff without providing sufficient guidelines and limitations on staff discretion. Moreover, in granting the extension, City staff failed to follow procedural requirements in City ordinances as set forth below. The extension therefore was invalid

52. The letter from City staff granting the extension provided that it was granted pursuant to 25-1-88. This section requires staff to give notice of the extension request under 25-1-133(B) to interested parties<sup>2</sup> and to the record owner. 25-1-88(A)(1). In situations where 25-1-133(B) applies, section 25-1-133(D) requires staff to delay any decision regarding an extension request until 14 days have elapsed after notice is provided. Here the extension was granted 4 days after it was requested.<sup>3</sup> The extension was the result of a decision that was unlawfully rushed by City staff.

53. The only authority relied on by City staff for the extension is 25-1-88. The text of 25-1-88(A)(2) gives discretion to the staff without any real or clear guidelines to limit that discretion – the only limitation being a requirement that “good cause” be shown. Because this non-standard leaves the extension decision to the caprice, whim or unbridled discretion of an individual City employee, this ordinance is an unconstitutional delegation of authority by City Council.

54. Because the extension was unlawful, and Lincoln Property did not fulfill its obligations before the 180-day period had run, there was no basis for the City of Austin to approve Site Plan 1. The approval of Site Plan 1 was *ultra vires*.

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<sup>2</sup> To the extent that the initial notice failed to inform recipients as to how to register to become an interested party, the failure is compounded by the fact that those who didn't get notice on how to be an interested party did not get notice of the request for extension. Similarly, they did not get notice of the approval of the Site Plan.

<sup>3</sup> Any decision as to whether to comply with the 14-day delay timetable for deciding on the extension is also unconstitutionally delegated to the unbridled discretion of the staff. 25-1-133(D).

## DECLARATORY RELIEF

55. Pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, Plaintiff seeks a declaration that the administrative approval of Site Plan 2 was *ultra vires* and is null and void. Plaintiff, in addition, seeks a declaration that Site Plan 1 is void.

56. Pursuant to Texas Civil Practice and Remedies Code § 37.009, Plaintiff seeks compensation for its costs and reasonable and necessary attorneys fees.

## APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

57. The status quo that Plaintiff seeks to protect in this litigation includes 77 trees with greater than 8-inch diameter that are located on the Northcross site and that are protected under City of Austin ordinances. As a result of the Site Plans being released by the City of Austin, Defendant Lincoln Property believes it has the right to destroy approximately 29 of these trees. As a result of approval of one or more of the Site Plans, Lincoln Property has already initiated substantial demolition and construction on the site. If such demolition and construction continues unabated, some or all of these 29 protected trees are in imminent danger of being destroyed. Plaintiff's claims in the instant suit include an allegation that the City of Austin has not properly enforced its ordinances to protect these trees. If Plaintiff prevails in any of its claims, it is likely that Defendant Lincoln Property may not be able to build the big box store that would result in destruction of all 29 trees. If Defendants Lincoln Property and Lincoln Northcross Ltd. are not restrained from destroying these protected trees a subject matter of this lawsuit would be destroyed and the lawsuit could, in part, become moot thereby irreparably injuring Plaintiff. Tex. Civ. P. & Rem. Code § 65.011(2).

58. Defendant Lincoln Property's demolition and construction if continued unabated will caused increased pollution of Shoal Creek. Typically, the construction phase of development is the phase in which the most pollution from urban runoff occurs. This increased pollution from reconstruction is imminent and in fact may have already occurred. In addition, the reconstruction of the site, if continued unabated, will result in a high impervious cover site that will result in greater amounts of pollutants in Shoal Creek and a greater risk of flooding of Shoal Creek than would otherwise occur if the plat note sought to be enforced by Plaintiff's lawsuit were in fact enforced. Members of Responsible Growth would be irreparably injured by this greater level of pollution and increased risk of flooding.

59. Plaintiff has a reasonable likelihood of prevailing on the merits

60. Plaintiff asks that in order to preserve the status quo that Defendants Lincoln Property and Lincoln Northcross, Ltd. be enjoined from destroying any of the 77 protected trees during the pendency of this lawsuit. Tex. Civ. Prac. & Rem. Code § 65.011(2).

61. In addition and in the alternative, Plaintiff asks that in order to preserve the status quo that Defendant Lincoln Property and Lincoln Northcross Ltd. be enjoined from engaging in any further demolition or construction activities on the site.

62. Plaintiff is willing to post a bond in conformance with Texas Rule of Civil Procedure 684 and the law of equity.

63. Plaintiff seeks a temporary restraining order and temporary injunction. Upon the granting of a TRO, Plaintiff requests a setting for a hearing on the request for temporary injunction within 14 days of the date the TRO is granted.

**PRAYER**

Wherefore, premises considered, Plaintiff Responsible Growth for Northcross requests that Defendants be ordered to appear and answer herein, that a TRO and temporary injunction be granted to preserve the staus quo as requested herein, that declaratory relief be awarded as requested herein, that Plaintiff be awarded its costs of litigation and reasonable attorney's fees, and that Plaintiff have such other further relief to which it may be entitled.

Respectfully submitted,

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