

ALLANDALE NEIGHBORHOOD ASSOCIATION,

v.

CITY OF AUSTIN,
LINCOLN PROPERTY COMPANY
COMMERCIAL, INC., and
LINCOLN NORTHCROSS, LTD.,

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IN THE DISTRICT COURT
JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

Filed in The District Court
of Travis County, Texas

JUL 3 2007

At
Amalia Rodriguez-Mendoza, Clerk

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Allandale Neighborhood Association, a Texas Nonprofit Corporation, ("ANA" or "Plaintiff") and petitions this court pursuant to Chapter 37 of the Uniform Declaratory Judgments Act for a declaratory judgment interpreting §§ 25-2-491(C) and 25-5-142(1) of the City of Austin's Land Development Code and seeks a declaration that the site plans submitted by Lincoln Property Company Commercial, Inc. and Lincoln Northcross, Ltd. (together hereafter referred to as "Lincoln") for redevelopment of Northcross Mall should not have and cannot be administratively processed and that approval of such plans must be secured from the Land Use Commission and require a public hearing.

I. DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3.

II. PARTIES

2. Plaintiff is Allandale Neighborhood Association ("ANA"), a Texas Nonprofit Corporation, in Austin, Travis County, Texas.

3. Defendant City of Austin (the “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 with process by serving the City Clerk, Shirley A. Gentry, at City Hall, 301 W. Second St., Austin, Texas 78701.

4. Defendant Lincoln Northcross, Ltd. is the record owner of the Northcross Mall property which is located within the City of Austin, Travis County, Texas. Lincoln Northcross, Ltd. may be served with process by serving the registered agent of its general partner Lincoln GP Northcross, Inc., the registered agent of which is CT Corporation System, 350 N. St. Paul St., Dallas, Texas 75201.

5. Defendant Lincoln Property Company Commercial, Inc. is a real estate and development company headquartered in Dallas, Texas and doing business in Travis County. Lincoln Property Company Commercial, Inc. submitted both plans for the redevelopment of Northcross Mall, including the addition of a Wal-Mart Supercenter, and the first Lincoln site plan approval was issued to it. Lincoln Property Company Commercial, Inc. may be served with process by serving its registered agent CT Corporation System, 350 N. St. Paul St., Dallas, Texas 75201.

III. JURISDICTION & VENUE & STANDING

6. Jurisdiction in this Court is proper pursuant to 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).

7. Plaintiff has standing in this action pursuant to the City of Austin Land Development Code § 25-1-131 (A)(2)(a) as Plaintiff is an “interested party” with regard to Defendants’ site plan to reconstruct the existing Northcross Mall. Plaintiff has members who own real property and/or operate businesses within 500 feet of the Northcross Mall property, such members are

also “interested parties” as defined by City of Austin ordinances with regard to any site plans proposed for the redevelopment of Northcross Mall.

V. FACTS

8. On January 26, 2006, Defendant Lincoln Property Company Commercial, Inc. submitted a site plan application¹ to City of Austin staff that would authorize substantial destruction of Northcross Mall and construct in its place a retail center to include the biggest retail big box store ever built in Travis County, which is to be leased to Wal-Mart, Inc. (hereafter “Site Plan 1”). Nothing on the site plan, however, mentioned Wal-Mart or disclosed the fact that the shopping center was being transformed to include a big box site.

9. An express element of the submitted site plan was a garden center, yet the application submitted was not for a conditional use permit.

10. The boundaries of the ANA encompass and/or abut Northcross Mall and, as a result, ANA qualifies under Austin Land Development Code § 25-1-131 (A)(2)(a)² as an “Interested Party” and also as a party to receive notice of application, administrative decisions, and public hearings under LDC §§ 25-1-132 (C)(1); 25-1-133(A)(3).

11. The notice sent February 17, 2006 relating to Site Plan 1 described the project as follows:

“The applicant 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.”³

¹ The application was not administratively complete until February 10, 2006.

² The City of Austin Land Development Code will be referenced herein as the “LDC.”

³ See Notice of Application February 17, 2007 attached as Exhibit A.

The notice contains no mention of any big box retail anchor with over 200,000 square feet and instead attempts to make the project appear to be a mere remodeling of the current retail facilities.

12. On August 8, 2006, Site Plan 1 was approved by City of Austin staff. The application was not reviewed by the Land Use Commission nor City Council and no hearings were held on the application.

13. In November of 2006, it was first disclosed to the press and the public that the site plan had been approved by City staff and provided for Northcross Mall to be torn down and replaced by a new mall, including a multi-story Wal-Mart, creating the largest big box retail project ever proposed in Travis County.

14. According to the memorandum by Laura Huffman, Austin City Manager, on December 8, 2006⁴, notice was sent as required under LDC § 25-1-133 and containing all information required therein. However, she also states that for at least 10 years the City's notice, including the Northcross Mall notice, has not included all of the information required in that provision⁵. When asked at the City Council meeting whether all notices had been sent regarding this application, staff represented that they had no proof, but that all notices had been sent as required.

15. On December 19, 2006, Lincoln Property filed documents for a building permit and City staff immediately began processing the building permit application.

⁴ Attached hereto as Exhibit B.

⁵ *Id.* pg. 4, ¶1.

16. On December 13, 2006, Lincoln filed a second site plan for Northcross Mall (hereafter “Site Plan 2”), also containing a garden center. This application, once again, was not for a conditional use permit.

17. In or about February of 2007, City staff decided with respect to Site Plan 2, as they had with respect to Site Plan 1, that they would administratively process the site plan.

18. Both Site Plans 1 and 2 designate a “garden center” as an integral part of the project. A garden center is defined by the City of Austin Land Development Code as a plant nursery use. *See* LDC § 25-2-4 (51). Further, a large retail use is defined in LDC § 25-2-813 as one with over 100,000 square feet of gross floor area for general retail use. *See* LDC § 25-2-813 (10). The Northcross Mall property is presently zoned General Retail (GR), and both a plant nursery and large retail are uses that are not prohibited under GR zoning, but instead require a conditional use permit from the Land Use Commission. *See* LDC §§ 25-2-491(C); 25-5-142(1).

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

VI. ADMINISTRATIVE APPROVAL OF SITE PLANS IS INVALID

20. The Administrative approval of Site Plans 1 and/or 2 is invalid because City staff had no authority to administratively approve the site plan under the City Code.

21. Both of the submitted site plans include a garden center, therefore each required an application for a conditional use permit under the provisions of the City Code.

22. City Code further provides that a site plan requiring a conditional use permit also requires a public hearing. There was no public hearing with respect to either of Site Plans 1 or 2 submitted by Lincoln.

23. The failure of the City of Austin to require conditional permits and the submission of both Site Plans 1 and 2 to the Land Use Commission violates the provisions of the City of Austin's Land Development Code.

VIII. ATTORNEYS' FEES

24. Plaintiff has retained the firm of Blazier, Christensen, Bigelow & Virr, P.C. to represent Plaintiff in this action and has agreed to pay the firm reasonable and necessary attorney's fees. An award of reasonable and necessary attorney's fees to the Plaintiff would be equitable and just and is therefore authorized by Section 37.009 of the Civil Practice and Remedies Code.

PRAYER

WHEREFORE, the Plaintiff requests that Defendants be cited to appear and answer herein, and that on final hearing, the Plaintiff have judgment as follows:

1. A declaration that the site plans submitted by Lincoln require a conditional use permit under LDC §§ 25-2-491(C); 25-5-142(1);
2. A declaration that the provisions of LDC §§25-2-491(c) and 25-5-142(1) require a hearing on each of Lincoln Site Plans 1 and 2 before the Land Use Commission;
3. A declaration that the City of Austin erred in approving the applications by Lincoln without a conditional use permit;
4. A declaration that the City of Austin erred in approving the applications by Lincoln without a public hearing;

5. A declaration that plan approvals given by City of Austin staff to Lincoln are void;
6. Attorney's fees;
7. Costs of suit; and
8. All other relief, in law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

BLAZIER CHRISTENSEN BIGELOW & VIRR, PC
221 West 6th Street, Suite 1500
Austin, Texas 78701
(512) 476-2622
Fax: (512) 476-8685

BY: 

MAURA PHELAN
STATE BAR NO. 15902010

ATTORNEY FOR APPLICANT



NOTICE OF FILING OF APPLICATION FOR ADMINISTRATIVE APPROVAL OF A SITE PLAN

Mailing Date: February 17, 2006

Case Number: SP-06-0041C

Please be advised that the City of Austin has received an application for an administrative approval of a site plan. You are being notified because City Ordinance requires that all property owners within 300 feet of the subject property and affected neighborhood organizations be notified when an application has been filed.

If you have any questions concerning this application, please contact Kathy Haught of the Watershed Protection and Development Review Department at (512) 974-2724 and refer to the Case Number at the top right of this notice. However, you may also find information on this case at our web site www.ci.austin.tx.us/gis/reviewcases/rcase_table_search.cfm.

Owner: Lincoln Property Company (Robert Dozier)

Telephone: 214-740-3300

Agent: Jones & Carter, Inc, (James M. Schissler)

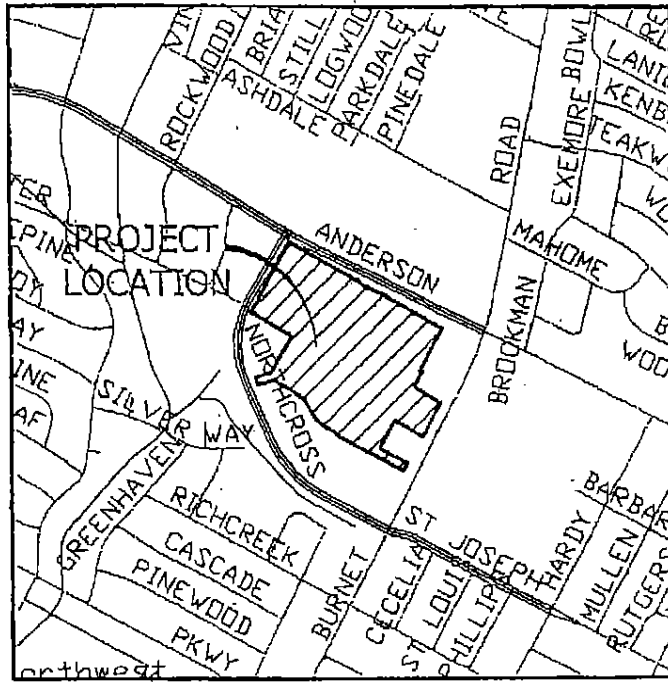
Telephone: 512-441-9493

Project Location: 2525 W. Anderson Lane

Project Description: The applicant 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.

For additional information on the City of Austin's land development process, please visit our web site www.ci.austin.tx.us/development.

EXHIBIT "A"



NORTHCROSS MALL REDEVELOPMENT 2525 W. ANDERSON LANE		
LOCATION MAP		
JC JONES & CARTER, INC. ENGINEERS • PLANNERS • SURVEYORS		
805 Las Cimas Parkway, Suite 230 Austin, Texas 78746-5493 (512) 441-9493		
Exhibit: 1	Job No. AD9D-001	Date: 01-19-06



MEMORANDUM

TO: Mayor and Council Members

FROM: Laura J. Huffman
Assistant City Manager

DATE: December 8, 2006

SUBJECT: Northcross Mall Development Summary

Based on citizen concerns raised at the November 30, 2006 council meeting, Council asked for clarification on a number of questions related to the proposed development of Northcross Mall by Lincoln Property Group. As requested, staff has conducted a thorough review of the site permit application process. Below are the answers to the specific questions raised by Council.

How is Northcross Mall currently zoned and what does that zoning allow for development?

- Existing Zoning Entitlements:
 - In 1969, Northcross Mall was zoned General Retail District ("GR") zoning, now called Community Commercial Retail ("GR"). The District included:
 - No traffic, height, or hours of operation conditional overlay limitations were imposed by Council on initial zoning.
 - No impervious cover limit when site was originally developed.
 - The current GR zoning regulations for this project are:
 - Height: 60 feet
 - Floor to Area Ratio: 1 to 1 (permits a maximum of 1,211,752 square feet)
 - Impervious Cover 90%
 - Building Coverage 75%

What is the existing build out on the site compared to the proposed development?

As shown by the information below, the proposed development would increase Floor to Area Ratio and retail square footage by 10.8%, decrease impervious cover by 94,080 square feet (8.2%), and add a second story to part of the building.

EXHIBIT "B"

- Existing build out:
 - Height: 27 feet excluding skylights
 - Height: 42 feet including skylights
 - Floor to Area Ratio: 0.320 to 1
 - Impervious Cover: 95%
 - Building Coverage (also total mall square footage): 375,213 square feet

- Proposed build out under site plan:
 - Height: 60 feet
 - Floor to Area Ratio: 0.343 to 1
 - Impervious Cover: 87.1%
 - Building Coverage: 411,786 square feet
 - Total mall square footage: 415,960 (includes the second story)

What has Lincoln Property Group proposed for redeveloping Northcross Mall?

The proposed development consists of demolition of the western two-thirds of the existing shopping mall building and renovation of the remaining portion of the existing shopping mall building. In addition, the applicant is proposing to construct five ancillary retail buildings and a three-level garage, utility improvements and landscaping improvements.

What City approvals are required for construction of the proposed development?

Lincoln Properties needs site plan approval, which it has obtained; an interior remodel permit, for which it has applied; and a demolition and new construction permit, for which it has not applied.

Why didn't Lincoln Property Group's proposed site plan receive Land Use Commission review?

This site plan qualifies as an administrative site plan under the Land Development Code regulations. The use is fully permitted, not conditional, and is not located on a Hill Country Roadway.

The director of WPDR has authority to approve administrative site plans under City Code Section 25-5-112. Only the applicant may appeal the director's decision on an administrative site plan. The Land Use Commission hears the appeal. After a decision by the Land Use Commission, the applicant or any interested party may appeal the Land Use Commission's decision to the City Council under Section 25-5-149 of the Code.

How do state law vesting requirements apply to this project?

Based on current state law, Lincoln Property Group vested its development rights for the Northcross Mall redevelopment project on January 26, 2006, the date the site plan application was filed for completeness check. This means that the site plan had to conform with the Land Development Code and City regulations in effect in January, 2006. The development is exempted from any changes to the code (i.e. Commercial

Design Standards, Big Box Ordinance) that occur after this date. The zoning, granted in 1969, allows development of a commercial retail project of up to 1,211,752 square feet.

Does the City have the authority to deny an administrative site plan if the applicant has complied with all applicable criteria?

No. Code Section 25-5-112 makes approval of an administrative site plan purely ministerial. The director of WPDR does not have discretion to deny an application that complies with all Code requirements. Because the site plan fully complied with all legal requirements, the director could not have denied Lincoln Property Group's application.

What are the criteria for approval of an administrative site plan?

To receive approval under section 25-5-112 of the City Code, an administrative site plan must comply with all applicable development regulations. For example, a site plan must comply with all applicable zoning entitlements and restrictions, all drainage and transportation requirements, set backs, landscaping, and compatibility requirements. Under current regulation, after a site plan is filed, it is distributed for the following reviews: Drainage Engineering, Water Quality, Transportation, Environmental, Site Plan, Fire, Water/Wastewater, Austin Energy, Industrial Waste, Addressing, Flood Plain and Mapping.

What are the notice requirements related to approval of an administrative site plan?

City Code Section 25-1-133 requires the director to mail notice to the applicant, the owner of real property located within 300 feet of the subject property according to Travis County Appraisal District records, and any registered neighborhood association for the area that includes the subject property no later than the 14th day after the filing of an application. The Land Development Code requires that the notice include the following:

- A description of the general nature of the application;
- Identification of the applicant and the location of the site;
- A general description of the proposed development;
- Identification of the entity that may approve the application;
- The earliest date that action under a decision may occur;
- A description of the procedure and requirements for becoming an interested party;
- If the decision may be appealed, describe the procedure for an appeal;
- Include the address and telephone number of the accountable official from whom additional information may be obtained.

Did the notice comply with these requirements?

For notice purposes, the City considers the date of filing to be the date the application is submitted for review (this follows the completeness check process). Notice was sent within 14 days.

Section 25-1-133 requires the notice to describe the procedure and requirements for becoming an interested party in an administrative decision process. For at least ten years, the City's notice, including the Northcross Mall notice, has not included this information. However, the notice does provide contact information for the case manager and the site plan and encourages telephone calls to the case manager in the event that there are any questions concerning the application. The procedure for becoming an interested party is to contact the case manager and to request party status.

Could this be used to revoke or deny the site plan?

No. A deficiency in the notice given is not a deficiency in the application submitted and does not affect the validity of the director's decision.

Did property owners within 300 feet receive notice?

Yes. Staff reviewed the notice sent for this application and has confirmed that the notice was sent to all record property owners and registered neighborhood associations as required. Notice was sent to 25 property owners, as well as North Austin Neighborhood Alliance, North Shoal Creek Neighborhood Association, Crestview Neighborhood Association, Allandale Neighborhood Association, Crestview/Wooten Combined Neighborhood Planning Team - City of Austin Liaison, and the Austin Neighborhoods Council. The department received no requests for interested party status.

During Citizen Communications at the November 30th Council meeting, a speaker indicated that he did not receive notice of the site plan application. Staff researched Travis County property records and found he was not within the 300-foot notice area.

Was information related to the proposed redevelopment accessible on the City's website?

Yes. The project was listed by case number, address, owner, and name (Northcross Mall). Because a citizen raised a concern that project information was not readily available through the website referenced in the notice, staff conducted a search based on the case number in the notice and retrieved the project information. Additionally, the website includes instructions for the best methods to search for information, such as using a 'wild card' query that includes connectors between words. This feature is included in the City's website to account for variations in addresses and project names. Information on hits to the website are attached.

How can concerned citizens contribute input to an administrative decision?

Interested parties may contribute input to an administrative decision. Interested parties are defined in section 25-1-131 as persons who communicate an interest, and must be either the record owner or occupier of a primary residence within 500 feet of the site, or an officer of an environmental or neighborhood organization that has an interest in the proposed development site or whose boundaries are within 500 feet of the site. A person qualifies as an interested party under that section by communicating their interest in the matter either in writing or by telephone.

Once registered, an interested party becomes entitled to additional notice of actions taken by the director including extension requests, phasing decisions, approval of the site plan, and any appeal of the director's decision by the applicant to the Land Use Commission, among others. See, e.g., Sections 25-5-62, and 114.

Does the site plan application require disclosure of prospective tenants? If not, why not?

No. The criteria for site plan approval are owner, tenant, applicant neutral. That is, the standards are applied uniformly based on compliance with current Land Development Code regulation and requirement by the proposed development. The City's zoning authority is based on approval of uses on property and may not be used to target a particular person or entity.

What are the applicable deadlines for an administrative site plan and how does an applicant get an extension?

Administrative site plan applications expire 180 days after the date it is filed. Under Code Section 25-1-88 the application update deadline may be extended upon a good cause determination by the director of WPDR for a period not to exceed 180 days. Generally, good cause is considered to be satisfaction or completion of perfunctory requirements such as easement recordation, minor remaining utility issues, minor fiscal satisfaction requirements, or conclusion of financing arrangements.

For the Northcross Mall redevelopment, Lincoln Property Group received a 60-day extension because it was in the process of obtaining final easement recordation for water and wastewater utility easements. Under the circumstances, the grant of the extension request fit within departmental policies and standard practices. As a practical matter, Lincoln Property Group received an extension on July 24, 2006 and completed the project and received final plan approval on August 8, 2006.

What was the process for staff review of traffic issues, including impact on neighboring streets?

In reviewing the Lincoln Property Group's site application, staff examined parking, access, and on-site circulation as well as traffic impact on surrounding streets. This site is bounded by Anderson Lane, classified as a 4-lane divided major arterial; Burnet Road, classified as a 4-lane divided major arterial; Northcross Drive, classified as a divided commercial collector. Staff's traffic impact review included 11 intersections near Northcross Mall. Part of staff's review includes examination of a traffic impact study (TIA) prepared by a registered professional engineer hired by the developer to determine if it complies with City regulations, specifically Chapter 25-6 of the City Code and in Section 2 of the Transportation Criteria Manual (Manual), which has been adopted by the City, and the Highway Capacity Manual published by the Transportation Research Board. Staff compares the numbers in the TIA to nationally recognized data from the Institute of Transportation Engineers (ITE). This data is used to estimate traffic from new developments and based on empirical studies conducted nationwide. The data is frequently updated, the most recent edition was published in 2003.

A traffic impact analysis is rarely the basis of denial of a site plan because current regulation allows an applicant to mitigate the impact of increased traffic through a variety of methods. However, a site plan may be denied if a TIA will overburden City streets.

Was staff's review accurate and thorough?

Yes. Staff raised questions about the TIA submitted with the site plan related to the proposed land uses and square footages associated with those uses. In response, the applicant demonstrated that the proposed uses would result in fewer trips than projected by the original TIA. In fact, the audit conducted of the original TIA submission and review confirmed that the approved site plan trips are fewer in number than those shown on the site plan TIA. A copy of staff's review is attached.

Staff's initial analysis of the submitted data consisted of a comprehensive review of:

- Vehicle trips per day/traffic volumes
- Proposed land uses
- Level of service impact for each of the intersections on the bounded roads
- Site access and characteristics
- Existing and future thoroughfare system
- Forecasted traffic conditions from the proposed development

Additional drainage information came to light during the staff's audit of the application that requires supplementation of the site plan file. This information does not cause a change to the site plan or a change in the Director's decision.

How did the review of the Northcross Mall site plan compare with the schedule for the consideration of the big box ordinance?

A comparison chronology is attached.

What does the developer mean by the term "new urban model"?

A Wal-Mart representative indicated that its use of the term refers to a store with multiple stories or a store that has a parking garage.

We will post this information on our website and will continue to update the document with additional questions we receive. I will also schedule a meeting with neighborhood representatives and Livable Cities to discuss concerns about city processes. Please feel free to contact me at (512) 974-7097 if you would like to discuss this further.

c: Toby Hammett Futrell, City Manager
David Smith, City Attorney
Victoria Hsu, Director, Watershed Protection and Development Review
Marty Terry, Assistant City Attorney

Attachments