

CAUSE NO. D-1-GN-13-000965

P. MICHAEL HEBERT AND MARY
MINOR HEBERT,

Plaintiffs,

VS.

CITY OF AUSTIN,

Defendant.

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

345th JUDICIAL DISTRICT

**PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION, REQUEST FOR
TEMPORARY RESTRAINING ORDER, AND
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIONS**

TO THE HONORABLE COURT:

Plaintiffs, P. MICHAEL HEBERT AND MARY MINOR HEBERT, (“Plaintiffs”), file this Second Amended Original Petition, Request for Temporary Restraining Order, and Application for Temporary and Permanent Injunctions against the CITY OF AUSTIN (“Defendant”), and for cause of action would respectfully show the Court as follows:

**I.
DISCOVERY**

1. Pursuant to Rule 190.1, Plaintiffs hereby allege that discovery will be conducted pursuant to Level 3.

**II.
PARTIES AND SERVICE OF PROCESS**

2. Plaintiffs are residents of Austin, Travis County, Texas.

3. Defendant, CITY OF AUSTIN, is an incorporated city located in Travis County, which may be served with process by serving its Mayor, Lee Leffingwell, at 301 W. 2nd Street, Austin, Texas 78701.

III.
JURY DEMAND

4. Pursuant to Rule 216 of the Texas Rules of Civil Procedure, Plaintiffs request a jury trial on all issues triable by a jury.

IV.
JURISDICTION AND VENUE

5. Pursuant to Section 24.007 of the Texas Government Code, this Court has jurisdiction over the subject matter of this cause. The amount in controversy exceeds the minimum jurisdictional limits of this Court.

6. Pursuant to Texas Civil Procedure and Remedies Code Section 15.002, venue is proper in that the occurrence complained of occurred and will occur in Travis County. Venue is further proper in Travis County pursuant to Texas Civil Procedure and Remedies Code Section 15.0151 because Defendant is a municipality located in Travis County.

V.
FACTUAL BACKGROUND

7. Plaintiffs own Lots 7, 8, 9, and 10, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C”, a subdivision in Travis County, Texas, according to the map or plat thereof of record in Volume 3, Page 89 of the Plat Records of Travis County, Texas, filed of record September 27, 1923, (hereinafter called the “Plat”).

8. The Plat contains the following language: “We, W.A. Harper and Sam H. Hirschfield – owners of property as shown by this plat, hereby dedicate to the use of the public the streets and alleys as shown”. A true and correct a copy of the Plat is attached as Exhibit A to Exhibit 1, the Affidavit of P. Michael Hebert (“Hebert Affidavit”) and incorporated into this pleading for all purposes.

9. Opposite on the rear of the Hebert property are Lots 4, 5, and 6, Block “11”, which are owned by Kevin Cutsinger, Wanda Cutsinger, and Ross Cole (hereinafter collectively called “Cutsinger”). These properties are commonly known as 718, 720, and 722 Harris Avenue. The Hebert property and the Cutsinger property are separated by a public alley 25 feet in width.

10. The alley separating the Hebert property and the Cutsinger property runs generally from northwest to southeast. It serves as a driveway for the Hebert property and four (4) other properties. The alley ends at the center line of Waller Creek, immediately to the southeast of both properties.

11. The Heberts and their guests, including children, regularly walk through the alley.

12. Cutsinger has obtained demolition permits to demolish all structures on the Cutsinger property, and Cutsinger’s demolition subcontractor demolished all such structures. Cutsinger’s demolition subcontractor also illegally cleared vegetation in the alley and pushed dirt into the 100 year flood plain, in violation of City ordinances.

13. Cutsinger has applied for building permits for the construction of three duplex buildings each having 6 bedrooms, and the City of Austin (hereinafter called the “City” or “Defendant”) has granted preliminary approval for Cutsinger to build 18 parking spaces accessed from the alley and parked on site. A true and correct copy of the preliminary parking approval is attached to the Hebert Affidavit as Exhibit B and incorporated into this pleading for all purposes.

14. Cutsinger also has sought from the City three water and sewer hookups, which have been installed in the right of way of Harris Avenue and are ready for connection. A true and correct copy of a printout from the City website indicating issuance of the water and wastewater permits is attached to the Hebert Affidavit as Exhibit C and incorporated into this pleading for all purposes.

15. In addition, Cutsinger has caused AT&T to relocate three telephone poles on the rear of the Cutsinger property adjacent to the alley. Finally, the City has ordered the Heberts to relocate a fence and underground irrigation lines that encroach in the alley, giving as a reason that Cutsinger will soon be issued a building permit and that the encroachments will become obstructions to his use of the alley. A true and correct copy of the letter sent by the City to the Heberts is attached to the Hebert Affidavit as Exhibit D and incorporated into this pleading for all purposes.

16. The proposed project is being developed as a single site. It is a *de facto* commercial apartment project masquerading as single-family duplexes. Each building is to be located on a 50-foot wide lot and would contain six bedrooms. Cutsinger has a history of renting similar properties to students at rates of \$850 to \$1,000 per bedroom per month.

17. The use of the alley was dedicated to the public in 1923, a time when the predominant automobile was the Ford Model T. Until the recent demolition by Cutsinger of all improvements on the Cutsinger site, there were located on it two antique frame buildings formerly used as garages and of a size large enough only to accommodate a vehicle the size of a Model T. A true and correct copy of a satellite photograph of the site prior to Cutsinger's demolition, obtained from Google Maps, is attached to the Hebert Affidavit as Exhibit E and incorporated into this pleading for all purposes.

18. Plaintiffs own a property right to the centerline of the alley, subject only to the easement in favor of the City. The easement was created in 1923, and its scope was defined by the expectations of people who would purchase lots and build homes backing on the alley. The homes that were built were single-family homes. When garages were built off the alley, the garages provided parking for a maximum of two vehicles per lot.

19. Allowing the expansion of the easement rights to include parking for six vehicles per lot would create a substantial increase in traffic in the alley. The alley, which is not a public street, is not designed to accommodate such traffic. The increased traffic would create a safety hazard for the Heberts and their guests, including children, and the public that uses the alley in accordance with the purposes for which it was granted.

20. Any construction today of garages or parking spaces in excess of two per lot would be outside the expectations of both the City officials and the grantors of the easement at the time the easement was granted.

VI.
APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND TEMPORARY INJUNCTION

21. Plaintiffs reassert and re-allege all preceding paragraphs.

22. This application for temporary restraining order is supported by the affidavit of P. Michael Hebert (“Hebert Affidavit”), which is attached to this pleading as Exhibit 1 and incorporated herein for all purposes. The Heberts seek this temporary restraining order and temporary injunction pursuant to TEX. CIV. PRAC. & REM. CODE § 65.011.

23. Plaintiffs will likely succeed on the merits of their claims at trial of this matter because, absent an injunction, the City will likely issue a permit to Cutsinger that will allow them to engage in construction activities that will result in an undue burden on Plaintiffs’ property rights. As discussed more fully above, such permits, if issued, would burden Plaintiffs’ property beyond what is permitted under the easement. This overburdening of Plaintiffs’ rights constitutes a deprivation of Plaintiffs’ property without due course of law in violation of Article 1, § 19 of the Texas Constitution, and the Fifth Amendment to the United States Constitution.

24. The harm to Plaintiffs is imminent because the City has been issuing permits to Cutsinger in the normal course of business. Furthermore, the Heberts and other nearby residents

have repeatedly requested information regarding the process by which Cutsinger must obtain necessary approvals and the Heberts' right to participate and be heard by City officials. Nevertheless, the City at first refused to respond, and has only sporadically responded since the filing of this lawsuit, and even then with incomplete or inaccurate information.

25. Additionally, Cutsinger has already shown by his actions that he does not respect laws and ordinances regarding the 100 year flood plain, or the environmentally sensitive Waller Creek. Continued encroachments into the 100 year flood plain, unauthorized destruction of vegetation and pushing of debris toward Waller Creek present an imminent threat of irreparable harm not only to the Heberts, but to the community at large.

26. The Heberts are not required to plead or prove an inadequate remedy at law.

27. The Heberts are willing to post adequate bond as required by law.

28. The Heberts respectfully request that the Court issue a temporary restraining order preserving the *status quo* and prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block "11", of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division "C" (commonly known as 718, 720, and 722 Harris Avenue).

29. The Heberts further respectfully request that the Court issue a temporary restraining order requiring the City to revoke all building permits, construction permits, or other instruments allowing Cutsinger to engage in construction activities on Lot 4 Block "11", of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division "C".

30. The Heberts further respectfully request that, upon hearing, the Court enter a temporary injunction preserving the *status quo* while this lawsuit is pending and prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C” (commonly known as 718, 720, and 722 Harris Avenue).

31. The issuance of the requested temporary restraining order or temporary injunction will not create an undue burden on the City. Any potential burden on the City, if any, is greatly outweighed by the potential irreparable harm that Plaintiffs would suffer in the absence of such temporary restraining order or temporary injunction.

VII.
APPLICATION FOR PERMANENT INJUNCTION

32. Plaintiffs reassert and re-allege all preceding paragraphs.

33. For the reasons stated above, the Heberts respectfully request that, upon trial of this cause, the Court issue a permanent injunction prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C” that provide for more than two (2) parking spaces per lot accessed from the alley.

VIII.
REQUEST FOR DECLARATORY JUDGMENT

34. Plaintiffs reassert and re-allege all preceding paragraphs.

35. As stated more fully above, Plaintiffs own the servient estate with respect to the above-referenced easement. Permitting parking for more than two (2) vehicles per lot would burden the servient estate beyond what was contemplated in the original grant of the easement. Permitting parking for more than two (2) vehicles per lot would overburden Plaintiffs' rights and constitute a deprivation of Plaintiffs' property without due course of law in violation of Article 1, § 19 of the Texas Constitution, and the Fifth Amendment to the United States Constitution.

36. A ripe, justiciable controversy exists because Defendant has already approved a parking plan for six (6) vehicles per lot on Lots 4, 5, and 6, Block "11", of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division "C", commonly known as 718, 720, and 722 Harris Avenue. Consequently, there is uncertainty and insecurity with respect to the Plaintiffs' rights, status, and other legal relations under the easement.

37. Plaintiffs respectfully request that this Court render a declaratory judgment that any permit for parking of more than two (2) vehicles per lot on Lots 4, 5, and 6, Block "11", of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division "C", commonly known as 718, 720, and 722 Harris Avenue, constitutes an overburdening of Plaintiffs' servient estate, and is therefore in violation of the terms of the easement, and a violation of Article 1, § 19 of the Texas Constitution, and the Fifth Amendment to the United States Constitution. Plaintiffs also seek recovery of reasonable and necessary attorneys' fees and costs pursuant to TEX. CIV. PRAC. & REM. CODE § 37.009

IX.
CONCLUSION AND PRAYER

WHEREFORE, Plaintiffs request that Defendant be cited to appear and answer and that on final trial, Plaintiffs have:

1. A temporary restraining order preserving the *status quo* and prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C” (commonly known as 718, 720, and 722 Harris Avenue);
2. A temporary restraining order preserving the *status quo* and requiring the City to revoke all building permits, construction permits, or other instruments allowing Cutsinger to engage in construction activities on Lot 4 Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C”.
3. Upon hearing, a temporary injunction preserving the *status quo* while this lawsuit is pending and prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C” (commonly known as 718, 720, and 722 Harris Avenue);
4. Upon trial of this cause a permanent injunction prohibiting the City from issuing any building permits, site plan approvals, construction permits, certificates of occupancy, driveway permits, electrical permits, plumbing permits, paving permits, right-of-way construction permits, or the like, that would enable parking access from the alley in connection with any application by any person seeking approval of any such application that would allow more than two vehicles per lot of Lots 4, 5, and/or 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C” that provide for more than two (2) parking spaces per lot accessed from the alley;
5. Upon trial of this cause a declaration that any permit for parking of more than two (2) vehicles per lot on Lots 4, 5, and 6, Block “11”, of the W.A. Harper Subdivision of Parts of Outlots 7 and 8, Division “C”, commonly known as 718, 720, and 722 Harris Avenue constitutes an overburdening of Plaintiffs’ servient estate, and is therefore in violation of the terms of the easement, and a violation of

Article 1, § 19 of the Texas Constitution, and the Fifth Amendment to the United States Constitution;

6. Reasonable and necessary attorneys' fees and costs; and
7. Such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

WILSON TROSCLAIR & LOVINS, P.L.L.C.

/s/ Michael E. Lovins

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing pleading has been served on opposing counsel in this cause on counsel for Defendant, Mishell Kneeland, by facsimile transmission to 512-974-1311.

/s/ Michael E. Lovins

Michael E. Lovins