

CAUSE NO. _____

**P. MICHAEL HEBERT AND MARY
MINOR HEBERT,**

Plaintiffs,

VS.

**KEVIN CUTSINGER, WANDA
CUTSINGER, AND ROSS COLE,**

Defendants.

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

_____ **JUDICIAL DISTRICT**

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE COURT:

Plaintiffs, P. MICHAEL HEBERT AND MARY MINOR HEBERT, (“Plaintiffs”), file this Original Petition against Kevin Cutsinger, Wanda Cutsinger, and Ross Cole (“Defendants”), 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.
2. Plaintiffs are residents of Austin, Travis County, Texas.
3. Defendant Kevin Cutsinger is an individual residing in Williamson County, Texas, who may be served with process at 1979 County Road 200, Liberty Hill, TX 78642.
4. Defendant Wanda Cutsinger is an individual residing in Williamson County, Texas, who may be served with process at 1979 County Road 200, Liberty Hill, TX 78642.
5. Defendant Ross Cole is an individual residing in Travis County, Texas, who may be served at his place of business located at 502 W. 30th, Austin, Texas 78705.

III.
JURY DEMAND

6. 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

7. This Court has jurisdiction over the subject matter of this cause pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code.

8. 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.

V.
FACTUAL BACKGROUND

9. 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”).

10. 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 this pleading and incorporated into this pleading for all purposes.

11. Opposite on the rear of the Hebert property are Lots 4, 5, and 6, Block “11”, which are owned¹ by Kevin Cutsinger, Wanda Cutsinger, and Ross Cole (hereinafter collectively called “Cutsinger/Cole”). These properties are commonly known as 718, 720, and 722 Harris

¹ Lots 4 and 5 are owned jointly by Defendants Ross Cole and Kevin Cutsinger. Lot 6 is owned jointly by Defendants Kevin and Wanda Cutsinger.

Avenue. Between the Hebert property and the Cutsinger/Cole properties is a public alley 25 feet in width.

12. The alley shared by the Hebert property and the Cutsinger/Cole properties 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.

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

14. Defendants obtained demolition permits to demolish all structures on the Cutsinger/Cole properties, and Defendants' demolition subcontractor demolished all such structures. Defendants' demolition subcontractor also illegally cleared vegetation in the alley and pushed dirt into the 100 year flood plain, in violation of City ordinances.

15. Defendants applied for building permits for the construction of three duplex buildings each having 6 bedrooms, and the City of Austin has granted preliminary approval for Defendants 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 as Exhibit B and incorporated into this pleading for all purposes.

16. Defendants also sought from the City of Austin 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 as Exhibit C and incorporated into this pleading for all purposes.

17. In addition, Defendants have caused AT&T to relocate three telephone poles on the rear of the Cutsinger/Cole property adjacent to the alley. Finally, the City of Austin has instructed the Heberts to relocate a fence and underground irrigation lines that encroach in the

alley, giving as a reason that Defendants 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 of Austin to the Heberts is attached as Exhibit D and incorporated into this pleading for all purposes.

18. Defendants are developing the Cutsinger/Cole properties as a single site. It is a *de facto* multi-family apartment project masquerading as single-family duplexes. Each building is to be located on a 50-foot wide lot and would contain six bedrooms. Defendants have a history of renting similar properties to students at rates of \$850 to \$1,000 per bedroom per month.

19. 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 Defendants of all improvements on the Cutsinger/Cole 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 Defendants' demolition, obtained from Google Maps, is attached as Exhibit E and incorporated into this pleading for all purposes.

20. Plaintiffs own fee simple title to the centerline of the alley, subject only to the easement in favor of the City of Austin. 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.

21. Construction for parking for six vehicles per lot, accessed from the alley, 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.

22. 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.

23. Substantial portions of the Cutsinger/Cole properties lie within the 100-year floodplain. Defendants' planned development of the Cutsinger/Cole properties requires substantial encroachment into the 100-year floodplain. As stated above, Defendants' demolition contractor has already illegally pushed dirt into the 100-year floodplain.

24. Austin City Ordinances prohibit encroachment into the 100-year floodplain except in limited circumstances. Specifically, Defendants must show that the planned encroachment does not result in additional adverse flooding of other property. *See* Austin City Ordinances, § 25-7-92(C)(1)(g). Defendants have not, and cannot, make such showings.

VI. **REQUEST FOR DECLARATORY JUDGMENT**

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

26. As stated more fully above, Plaintiffs own the servient estate with respect to the above-referenced easement. Constructing parking spaces for more than two (2) vehicles per lot accessed from the alley, and thus allowing tenants to park more than two (2) vehicles per lot via access from the alley, would burden the servient estate beyond what was contemplated in the original grant of the easement. Specifically, parking spaces for more than two (2) vehicles per lot accessed from the alley would result in traffic far in excess of what was contemplated in the original granting of the easement at issue, and create a nuisance and a safety hazard not permitted under the easement.

27. A ripe, justiciable controversy exists because Defendants have already obtained preliminary approval for a parking plan for six (6) vehicles per lot accessed from the alley 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.

28. Plaintiffs respectfully request that this Court render a declaratory judgment that any construction of more than two (2) parking spaces per lot accessed from the alley 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, would result in an overburdening of Plaintiffs’ servient estate, cause traffic in excess of what was contemplated in the original granting of the easement at issue, and create a nuisance and a safety hazard not permitted under the easement.

29. Plaintiffs also seek recovery of reasonable and necessary attorneys’ fees and costs pursuant to TEX. CIV. PRAC. & REM. CODE § 37.009.

VII. **CONCLUSION AND PRAYER**

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

1. A declaratory judgment that construction of more than two (2) parking spaces per lot accessed from the alley 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, would result in an overburdening of Plaintiffs’ servient estate, cause traffic in excess of what was contemplated in the original granting of the easement at issue, and create a nuisance and a safety hazard not permitted under the easement; and
2. 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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