

Filed in The District Court  
of Travis County, Texas

NOV 09 2007

At 9:30 AM  
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600 CONGRESS AVENUE, 15TH FLOOR  
AUSTIN, TEXAS 78701-2589  
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FAX (512) 474-0731  
WWW.SCOTTDOUG.COM

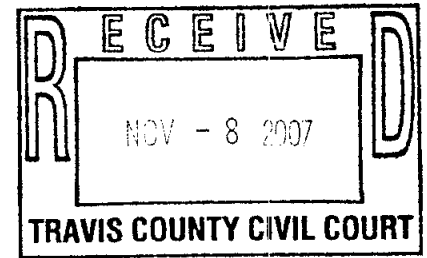
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November 5, 2007



VIA HAND DELIVERY

The Honorable Margaret Cooper  
Travis County District Judge  
1000 Guadalupe  
Austin, Texas 78701

Re: Cause No. D-1-GN-07-001957; *Responsible Growth for Northcross, Inc. and Allandale Neighborhood Association v. The City of Austin, Lincoln Property Company Commercial, Inc. and Lincoln Northcross, Ltd.*, in the 200<sup>th</sup> Judicial District Court of Travis County, Texas

Dear Judge Cooper:

In connection with your ongoing consideration of the cross motions for summary judgment, I would like to provide the Court with an "amicus brief" of sorts. Given that it completely supports the City's position, the enclosed material has a curious provenance, to wit, a link from Plaintiff Allandale Neighborhood Association's website, [allandale.typepad.com](http://allandale.typepad.com).

On Friday afternoon, instead of doing whatever I should have been doing, I was reading the Austin Chronicle on line, and their very brief account of our hearing Thursday had a link to the Allandale Neighborhood website. The Neighborhood's website, immediately after its account of our hearing, had a link to a blog called Austin Contrarian. As you might imagine, the title of the link grabbed my attention, "Did Lincoln's site plan for Northcross require a conditional use permit?" I don't know who writes this blog, and though there is a link to it on their website, I am sure Allandale Neighborhood Association does not endorse the views of the Austin Contrarian.



However, whoever writes it obviously has a keen legal mind. Writing on July 27 of this year, the blogger says:

Here's my guess. The ordinance defining commercial accessory uses states that "a commercial use . . . *that is otherwise prohibited*" is an accessory use if the various conditions are satisfied. I think RG4N will argue that a conditional use is not "prohibited" -- after all, it could be authorized -- and therefore cannot be an accessory use.

The problem with this is that all conditional uses are "otherwise prohibited" unless approved by the Land Commission or City Council. A conditional use will either be approved -- in which case it does not need to satisfy the accessory-use criteria -- or it will be denied, in which case it is "otherwise prohibited" and qualifies as an accessory use. A hearing would be an empty formality. Why read the ordinance to waste Council's time? The more natural reading of the ordinance is instead, "Even if a commercial use is not permitted under other provisions, it will be permitted as an accessory use if . . ."

By definition, an accessory use is a relatively minor, typical component of an acceptable primary use. If the primary use is acceptable, the collateral use will likely be acceptable too, which is why the Code permits accessory uses as a matter of right without a hearing. But if you were worried that some accessory uses might be objectionable, you would not single out conditional uses. A use is classified as "conditional" only if it is potentially compatible with the other uses in the district; conditional uses are judged and approved under a relatively lenient, discretionary standard. Uses that are flat-out "prohibited" -- i.e., uses that are neither permitted nor conditional -- are presumed to be so incompatible with the other uses in the district that they require either a variance or an amendment to the zoning code. It makes no sense to insist that relatively benign conditional uses get special permission while giving a free pass to uses that are presumptively inappropriate for the zoning district.

I think it is pretty clear that "otherwise prohibited" refers to any use that is not a permitted use. But suppose RG4N convinces the court that its interpretation is reasonable too. Its very best case then will be that the ordinance is ambiguous. It will still have a big problem. When an

The Honorable Margaret Cooper

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ordinance is ambiguous, courts give serious consideration to the interpretation of the officials charged with enforcing it. In other words, the court will largely defer to the City's interpretation in deciding whether a conditional use can be an accessory use.

What this means is that if the City has treated conditional uses as accessory uses in the past, RG4N will almost certainly lose. Despite RG4N's insinuations that City staff is in cahoots with Wal-Mart, I don't think the City would change its interpretation of the ordinance mid-stream just to approve the Wal-Mart site plan. I also suspect that if the City had given the ordinance conflicting interpretations in the past, we'd have already heard about it in a press release.

Does that argument sound familiar, Judge? I promise I did not plagiarize my argument Thursday afternoon from this blog, but I obviously could have.<sup>1</sup>

The blogger goes on to make the exact point I made to the Court about ripeness/exhaustion of administrative remedies:

RG4N also faces a procedural obstacle. The Land Development Code gives the Director of the Neighborhood Planning and Zoning Department the authority to determine the appropriate use classification for an existing or proposed use or activity. People who disagree with that determination may appeal the classification as "interested persons" to the Board of Adjustment. Decisions of the Board of Adjustment can then be reviewed by a district court.

The right to appeal Director classifications to the Board of Adjustment is what courts call an "administrative remedy." Courts take administrative remedies very seriously. So seriously, in fact, that they usually will refuse to hear a litigant's claims if he refuses to exhaust his administrative remedies.

The Director has classified the garden center as an accessory use. To my knowledge, no one has appealed that classification. The claim should be thrown out for failure to exhaust administrative remedies. Even if an

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<sup>1</sup> The blog references RG4N's lawsuit, not Allandale's, but obviously, the two groups are advancing exactly the same argument contending that conditional uses can never be accessory uses.

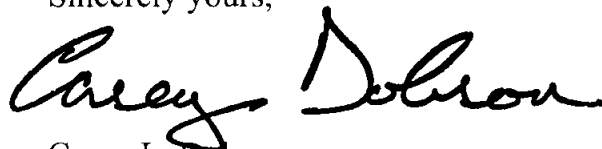
The Honorable Margaret Cooper  
November 5, 2007  
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appeal was filed, then the claim should still be thrown out (or at least abated) because it is not ripe until the Board of Adjustment has ruled on it. I don't see how a district court can consider the conditional use claim on this record. (If I'm missing something, I'm sure somebody will point it out.)

This blogger even cites the same sections of the Land Development Code and the same cases (the Junior's Ice case and the tennis court case out of Dallas) that I cited to the Court on this ripeness point. I am enclosing a hard copy of the material quoted above.

Your Honor, I have never cited a blogger before, but this person's analysis was too spot-on to resist. Even anonymous people in cyberspace, whose opinions can be accessed through the Allandale Neighborhood's own website (that is, until Allandale's lawyers receive their copy of this letter!) see the obvious correctness of the City's position: conditional uses can be administratively approved as accessory uses without a conditional use hearing. Why has the City interpreted its Code this way for more than a generation? Because all the machinery of the City's months-long hearing process (possible notice to dozens or hundreds of neighbors, posting, opposing speakers, appeal to Council, etc.) should not be routinely involved when a grocery store wants to sell some garden supplies, a hardware store wants to attract customers with breakfast tacos, or a bar wants to put a guitar player on the patio. Please grant the City's Motion for Summary Judgment.

Sincerely yours,

A handwritten signature in black ink that reads "Casey L. Dobson". The signature is written in a cursive, flowing style.

Casey L. Dobson

CLD:js

cc: Maura Phelan/Bruce Bigelow (via fax)  
Brad Rockwell (via fax)  
Bruce Scrafford (via fax)

# AustinContrarian

Economics, zoning and Austin, Texas

« Milk | Main | Transferable McMansion development rights »

July 27, 2007

## Did Lincoln's site plan for Northcross require a conditional use permit?

RG4N says "Yes." This is the most important claim in its court petition. RG4N makes other claims, of course, but this is the only claim that would (a) entitle it to a hearing before City Council; and (b) make approval of the site plan discretionary rather than a matter of legal right.

I think the answer is "No," but I will set out the relevant ordinances and let you make up your own mind.

### RG4N's Petition

Let's start with the pertinent part of RG4N's petition:

#### 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 Wal-Mart. 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 §§ 25-2-4 (51) and 25-2-4 (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 submitted to 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 lacks the authority to administratively approve the site plan. The approval was *ultra vires*.

RG4N is correct that the Northcross site is zoned GR (General Retail), correct that a garden center is a "plant nursery" for zoning purposes, and correct that a plant nursery is a conditional use in GR districts.

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But it has ignored the main issue. The City says the proposed garden center is permitted as an "accessory use." If the City is right, then the garden center did not require a conditional use permit, and RG4N was not entitled to a hearing before City Council after all.

**Is the Wal-Mart garden center an accessory use?**

Let's look at the two relevant ordinances:

*An accessory use is a use that:*

- (1) is incidental to and customarily associated with a principal use; [and]*
- (2) unless otherwise provided, is located on the same site as the principal use[.][1]*

A commercial use such as a plant nursery must satisfy extra requirements. Specifically:

*A commercial . . . use that is otherwise prohibited in the zoning district is permitted as an accessory use if the use:*

- (1) is operated primarily for the convenience of employees, clients, or customers of the principal use;*
- (2) occupies less than 10 percent of the total floor area of the use; [and]*
- (3) is an integral part of the principal use[.][2]*

There are six criteria between the two ordinances: (1) an accessory use must be incidental to the primary use; (2) it must be customarily associated with the primary use; (3) it must be located on the same site; (4) it must be operated primarily for the convenience of the employees, clients, or customers of the business; (5) it must occupy less than 10% of the total floor area of the use; and (6) it must be an integral part of the principal use.

Most of these are beyond dispute. Garden centers are commonly (i.e., "customarily") included in big-box retail (#2). The proposed garden center would be located on the same site as the Supercenter (#3). It would be operated primarily for the convenience of Wal-Mart customers (#4). It would take up less than 10% of the Supercenter's floor space (#5). (I'm crediting City staff with the ability to correctly calculate the relevant floor areas.)

Perhaps RG4N disputes that the garden center is "incidental" (#1). A tertiary meaning of "incidental" is "inessential," and RG4N does allege that garden centers are "essential" to Wal-Mart Supercenters. But it makes no sense to permit a principal use and then exclude essential collateral uses. No, in the context of accessory uses, "incidental" means "minor" or "subordinate to," either of which is a fair description of garden centers in Wal-Mart Supercenters.

This leaves "integral" (#6), which is what I initially assumed RG4N would dispute. One meaning of "integral" is "essential," and I doubt that a garden center is really essential to a Wal-Mart Supercenter. I think "integral" here probably means "constituent" rather than "essential," but still I figured RG4N would make the argument. But RG4N evidently decided to go

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another way since it *admits* that "[g]arden centers are integral components of big box Wal-Marts . . ." [3]

It does not appear that RG4N will seriously dispute that the garden center satisfies the criteria for an accessory use. So what will it argue?

RG4N's petition does not say so we have to guess. But I think this sentence in the petition is a clue: "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." That's a strange statement. Why go out of your way to say that the use you are objecting to is "not prohibited" on the site?

Here's my guess. The ordinance defining commercial accessory uses states that "a commercial use . . . *that is otherwise prohibited*" is an accessory use if the various conditions are satisfied. I think RG4N will argue that a conditional use is not "prohibited" -- after all, it could be authorized -- and therefore cannot be an accessory use.

The problem with this is that all conditional uses are "otherwise prohibited" unless approved by the Land Commission or City Council. A conditional use will either be approved -- in which case it does not need to satisfy the accessory-use criteria -- or it will be denied, in which case it is "otherwise prohibited" and qualifies as an accessory use. A hearing would be an empty formality. Why read the ordinance to waste Council's time? The more natural reading of the ordinance is instead, "Even if a commercial use is not permitted under other provisions, it will be permitted as an accessory use if . . ."

By definition, an accessory use is a relatively minor, typical component of an acceptable primary use. If the primary use is acceptable, the collateral use will likely be acceptable too, which is why the Code permits accessory uses as a matter of right without a hearing. But if you were worried that some accessory uses might be objectionable, you would not single out conditional uses. A use is classified as "conditional" only if it is potentially compatible with the other uses in the district; conditional uses are judged and approved under a relatively lenient, discretionary standard. Uses that are flat-out "prohibited" -- i.e., uses that are neither permitted nor conditional -- are presumed to be so incompatible with the other uses in the district that they require either a variance or an amendment to the zoning code. It makes no sense to insist that relatively benign conditional uses get special permission while giving a free pass to uses that are presumptively inappropriate for the zoning district.

I think it is pretty clear that "otherwise prohibited" refers to any use that is not a permitted use. But suppose RG4N convinces the court that its interpretation is reasonable too. Its very best case then will be that the ordinance is ambiguous. It will still have a big problem. When an ordinance is ambiguous, courts give serious consideration to the interpretation of the officials charged with enforcing it [4]. In other words, the court will largely defer to the City's interpretation in deciding whether a conditional use can be an accessory use.

What this means is that if the City has treated conditional uses as accessory uses in the past, RG4N will almost certainly lose. Despite RG4N's insinuations that City staff is in cahoots with Wal-Mart, I don't think the City would change its interpretation of the ordinance mid-stream just to approve the Wal-Mart site plan. I also suspect that if the City had given the ordinance conflicting interpretations in the past, we'd have already heard

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**Exhausting Administrative Remedies**

RG4N also faces a procedural obstacle. The Land Development Code gives the Director of the Neighborhood Planning and Zoning Department the authority to determine the appropriate use classification for an existing or proposed use or activity.[5] People who disagree with that determination may appeal the classification as "interested persons" to the Board of Adjustment.[6] Decisions of the Board of Adjustment can then be reviewed by a district court.

The right to appeal Director classifications to the Board of Adjustment is what courts call an "administrative remedy." Courts take administrative remedies very seriously. So seriously, in fact, that they usually will refuse to hear a litigant's claims if he refuses to exhaust his administrative remedies.[7]

The Director has classified the garden center as an accessory use. To my knowledge, no one has appealed that classification. The claim should be thrown out for failure to exhaust administrative remedies. Even if an appeal was filed, then the claim should still be thrown out (or at least abated) because it is not ripe until the Board of Adjustment has ruled on it. I don't see how a district court can consider the conditional use claim on this record. (If I'm missing something, I'm sure somebody will point it out.)

**A final point**

It's worth noting that this debate over the accessory use ordinance has nothing to do with the real objections to Wal-Mart. Who objects to the Wal-Mart just because it will have a garden center? I haven't seen any "No garden center at Northcross" T-shirts. The fact is that the garden center is the only hook RG4N can find for demanding a hearing before Council. It has identified a potential ambiguity in the Code that it thinks it may be able to exploit to get its way. In other words, it is relying on a technicality (erroneously, IMHO). Bear this in mind the next time RG4N accuses Lincoln of exploiting "loopholes" (such as ignoring ordinances that were enacted months after it filed its site plan).

**Postscript.** RG4N held a meeting a week or so ago to explain its claims. I didn't go. If you were there and heard any of these points addressed, I'd appreciate it if you'd comment.

**Sources**

[1] City of Austin Land Dev. Code s. 25-2-891.

[2] City of Austin Land Dev. Code s. 25-2-894.

[3] RG4N Petition par. 33.

[4] *City of Austin v. Hyde Park Baptist Church*, 152 S.W.3d 162, 166 (Tex. App. -- Austin 2004) ("If the meaning of an ordinance is doubtful or ambiguous, we will give serious consideration to the construction given it by the governmental body charged with its enforcement or administration."); *Zamora v. City of Austin*, 2002 WL 31769039, \*3 (Tex. App. -- Austin 2002, pet. denied) (affirming Board of Adjustment ruling which chose between two competing interpretations of CS zoning requirements regarding the permitted use of the property).

[5] City of Austin Land Dev. Code s. 25-2-2(A).

[6] City of Austin Land Dev. Code s. 25-2-2(C).

[7] *Currey v. Kimple*, 577 S.W.2d 508, 513 (Tex. App. -- Texarkana 1978, writ ref'd n.r.e.)

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(holding claimants could not challenge issuance of building permit where they had not appealed permit to Board of Adjustment).

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Another test would be to see how this was handled at other locations. Most Wal-Marts and Lowes stores have garden centers. Did those require conditional use permits? If so, would the success of this suit make them automatically illegal?

Posted by: BeatrixKiddo | July 28, 2007 at 02:22 PM

Good analysis.

"but this is the only claim that would (a) entitle it to a hearing before City Council; and (b) make approval of the site plan discretionary rather than a matter of legal right." Care to explain that a bit?

Are the city's other failures (such as proper notification to all interested parties) "harmless error" that doesn't affect the proceedings? I have developer friends (mostly duplex builders), and the city is getting really careful about making sure the notification is correct.

Posted by: el\_longhorn | July 31, 2007 at 03:19 PM

According to the suit there are a number of issues involved, any one of them would merit the site plan as.... erroneously approved.... My impression was that if any one of the point were found to be valid in the suit the case would effectively put the site plan in hot water. I would like to hear your impression of the other points of the case.

I also would like to point out that the conditional use permit issue you say is irrelevant because of the standardization of garden centers at supercenters doesn't seem to be a fair addressing of the issue from the perspective of a consumer or resident (not a developer). People will go to this shop to go exclusively to the garden center and not necessarily be customers of the principal use. Having a snow cone shop in the middle of the store would be accessory use. Having a 12,000 sf garden center would not. Because of this and because of the nature of supercenters more traffic will be coming to this store than otherwise. The garden center, by generating more traffic, has ceased to be an "accessory use" by virtue of the size and impact it has on the community around it from the traffic. If it were accessory it wouldn't generate more customers, just offer something to the ones already there (what accessory use is supposed to mean). This is one of the primary concerns of the communities surrounding this development. The fact that the city doesn't take into account these problems with supercenters doesn't mean this isn't the time to start. the first Wal-Mart in Austin's core (off a freeway) in such a congested area certainly warrants a closer look. That didn't occur here.

The issue of not liking the wording of the suit is irrelevant. Though I do agree I think it could have been phrased better myself.

Posted by: Confused | July 31, 2007 at 05:06 PM

Notice conceivably could be an issue with the first site plan but not with the second site plan. RG4N obviously had actual knowledge of the second site plan, and so can't object to it on notice grounds. If you read its petition, you will see that it doesn't raise notice as an objection to the second site plan, but only as an alternative objection to the first site plan --

objection to the second site plan, but only as an alternative objection to the first site plan which will be relevant only if the second site plan is invalidated.

RG4N's other claims -- about a drainage plat note, traffic impact, and trees -- are that Staff had no choice but to disapprove the site plan, i.e., that the site plan violated specific legal requirements. RG4N doesn't complain (as best I can tell) that these decisions were made by Staff rather than Council; it just contends that Staff made the wrong determinations. The point of its conditional-use argument, by contrast, is that the decision should have been made by Council rather than Staff, and that Council would have had broad discretion to approve or deny the site plan.

Posted by: AC | July 31, 2007 at 06:23 PM

"Confused", you're making several tangential claims which are all unconvincing to me. First, you write "People will go to this shop to go exclusively to the garden center and not necessarily be customers of the principal use." but THEN write "because of the nature of supercenters more traffic will be coming to this store than otherwise"

You can't have both of these. Either the garden area is an independent attractor (not supplemental), or it's a supplemental feature that somehow magnifies the number of people coming in.

As a thought experiment, imagine a mall that has both a two-story department store and a SEPARATE garden center business.

As it is, I don't really go for either of your points. You won't find an licensed engineer that will sign off on an official traffic study that magnifies traffic at a mall just because one of the anchor stores is particularly big (but not unusually big by inner-city department store standards).

You also allude to the Northcross area as currently being "such a congested" area. Not by any urban standard. I'll add that I used to live right there until this spring, so I am quite familiar with the area.

Finally, just a comment: 12,000 sq ft is pretty small for a nursery. For comparison, the Shoal Creek Nursery (formerly Park Place Gardens) on Hancock is roughly 7 or 8 times as large, is TRULY in the middle of residential, and hardly makes a difference in the traffic there. I doubt dedicating 12,000 sq ft of Northcross Mall to a garden center is going to make any difference in overall impact.

Posted by: DSK | July 31, 2007 at 08:02 PM

Confused:

Where is it written that accessory uses cannot generate any extra traffic? The ordinances don't say that. They don't mention traffic at all.

Perhaps RG4N will argue that a use cannot be "incidental" if it will draw customers all by itself. "Incidental" means, say, "almost always secondary." But "incidental" could mean "minor," or "often secondary" and nothing in the ordinance compels a different interpretation.

This gets me to the main point: How the City has interpreted the ordinances in the past matters a lot. I've seen a lot of comments elsewhere that it shouldn't matter -- e.g., "It's time for the city to start doing it right." That's wrong. If an ordinance can be interpreted reasonably in different ways, the court will give a lot of deference to the city's interpretation. It will say, in effect, "Hey, the City's been interpreting the ordinance this way for a while, and it's a reasonable interpretation. That's good enough for me."

I know I haven't addressed RG4N's other arguments. I have less to say about them, since they depend to some extent on the City's review, and I don't have all the documents or access to the reviewers. The important thing to bear in mind is that RG4N will have to prove that Staff acted "arbitrarily and capriciously" -- a very tough standard to meet.

Posted by: AC | July 31, 2007 at 08:08 PM

Thanks for the clarification guys. Another question I have is this: this pertains to the RG4N case and not the case just presented by ANA. have you heard or can you make comments on their arguments?

Posted by: Confused | November 02, 2007 at 10:37 AM

Actually. I just realized this was the same guy who wrote up the racist comments on the austinzoning typepad.  
http://austinzoning.typepad.com/austincontrarian/2007/02/what\_about\_thes.html  
I can't help but question the "informed opinion" of someone who sites "nearby neighborhoods not with RG4N" as not in the group because they are minority.... failing to mention there are CLOSER whiter richer neighborhoods not included in the fight either. All those neighborhoods are not in the fight because they are either separated by 2 major arterials or huge highways. They aren't involved because they aren't in the neighborhood, not because they are minority. Your argument is very racist. Thank God a judge can't consider your stance.

Why the constant anti neighborhood propaganda? Why a vendetta against a group concerned about their neighborhood? I can't help but feel there is a hidden agenda here.

Posted by: Confused | November 02, 2007 at 02:14 PM

For those keeping score, that basically marks "Confused" as Hugh McCann from Allandale.

Posted by: M1EK | November 02, 2007 at 03:24 PM

Anyone who wants to understand "Confused's" position in more detail can read the 25 or so comments he left on the post he linked to. (He was "Big Question" and "another question" then, I think.) I thought he'd agreed towards the end that maybe I wasn't a racist after all. Oh well. Anyway, anyone who cares to can wade through the many, many comments to that post and make up his own mind. (None of this has anything to do with the legal merits of RG4N's suit, by the way.)

Posted by: AC | November 02, 2007 at 05:22 PM

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