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No. 2013-26155

PENELOPE LOUGHHEAD, HOWARD EPPS, PHYLLIS GRIFFIN EPPS, EARLE MARTIN, JEANNE MEIS, STEPHEN GLYNN ROBERTS, AND SAMUEL STUBBS	§	**IN THE DISTRICT COURT OF**
	§	**HARRIS COUNTY, TEXAS**
Plaintiffs	§	
v.	§	
BUCKHEAD INVESTMENT PARTNERS, INC., MARYLAND MANOR ASSOCIATES, INC., AND 1717 BISSONNET, LLC,	§	**157th JUDICIAL DISTRICT**
Defendants	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' SPECIAL EXCEPTIONS

Defendants' Special Exceptions pleading contends that Plaintiffs' Original Petition suffers from three pleading defects: (i) that Plaintiffs have not alleged a viable cause of action (special exception #1, 2, 3, & 6)[1]; (ii) that injunctive relief is not a proper remedy for a nuisance claim (special exception #4); and (iii) that Plaintiffs' claims are not ripe (special exception #5). Each of those exceptions is without merit and should be denied.

Plaintiffs have alleged a viable cause of action for private nuisance, a claim that is well-recognized under Texas law. Plaintiffs assert a cause of action for nuisance arising out of Defendants' planned construction of a 21-story apartment complex (the "Ashby High Rise"). The nuisance claim is based on a number of aspects of the Ashby High Rise that will interfere with Plaintiffs' property rights and use and enjoyment of their properties. Specifically, Plaintiffs' Original Petition alleges that the Ashby High Rise is a legal nuisance because it will:

[1] For the convenience of the Court, the special exception numbers used in this pleading refer to the numbering contained in Defendants' Special Exceptions and Original Answer.

(i) unreasonably increase traffic and create gridlocked intersections to the point of having a detrimental impact on the safety and living conditions in the neighborhood (Orig. Pet. at ¶¶21-25); (ii) block sunlight and rain from reaching neighboring properties, thereby causing property damage to Plaintiffs' grass, trees, and gardens (Orig. Pet. at ¶25); (iii) destroy the privacy of neighboring homeowners (Orig. Pet. at ¶25); (iv) cause physical damage to surrounding homes and their foundations (Orig. Pet. at ¶26-27); (v) and destroy the trees on the City right-of-way (Orig,. Pet. at ¶28).[2]

Texas law plainly recognizes that nuisance is a valid private cause of action: "A nuisance is a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." *GTE Mobilnet of S. Tex., Ltd. V. Pascouet*, 61 S.W.3d 599, 614 (Tex. App. – Houston [14th Dist.] 2001, pet. denied).

Texas courts divide actionable nuisance into three categories: "(1) negligent invasion of another's interest; (2) intentional invasion of another's interest; or (3) other conduct, culpable because abnormal and out of place in its surroundings, that invades another's interest." *Pool v. River Bend Ranch, LLC*, 346 S.W. 3d 853, 857 (Tex. App. – Tyler, 2011) (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *See also GTE Mobilnet of S. Tex. Ltd.*, 61 S.W. 3d at 614 ("A 'nuisance in fact' is a condition that is a nuisance because of its particular surroundings.").

[2] On May 23, 2013, three days after Defendants' filed their Special Exceptions, Plaintiffs filed a First Amended Petition and First Application for Temporary Restraining Order and Temporary Injunction (the "First Amended Petition"). That First Amended Petition was filed because of the need to seek immediate injunctive relief in connection with the demolition activities at the Ashby High Rise site, not in response to Defendants' Special Exceptions. The First Amended Petition is Plaintiffs' live pleading, and it contains all of the allegations from the Original Petition along with additional allegations regarding Defendants' wrongdoing and a trespass claim. However, because Defendants' Special Exceptions cite to the paragraph numbers of Plaintiffs' Original Petition, this pleading likewise cites to those same paragraph numbers in the Original Petition so as to avoid confusion.

Mayor Anise Parker has repeatedly stated that she believes the Ashby High Rise is "the wrong project in the wrong place," and she is right. Texas law recognizes that an otherwise legal business or a perfectly legitimate building – be it a Church parking garage built close to neighboring homeowners, a motel in a residential neighborhood, or a massive 21-story high-rise apartment complex squeezed onto a small parcel of land amidst single family homes – can be a nuisance because it is out of place with its particular surroundings. *See Champion Forest Baptist Church,* 1987 WL 5188, *1 (Tex. App. Hou. [1st Dist.], Jan. 8 1987) (enjoining construction of a parking garage); *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App. – Hou. [14th Dist.] 1987, no writ) (enjoining construction of a motel); *Pool*, 346 S.W. at 857 (Tex. App. – Tyler, 2011) ("A business that is lawful in and of itself may become a nuisance because of the locality in which it is carried on. A business may also be a nuisance because the place where it is located is uncongenial to that type of enterprise. "); *GTE Mobilnet of S. Tex. Ltd.*, 61 S.W. 3d at 614 ("A 'nuisance in fact' is a condition that is a nuisance because of its particular surroundings.")

The *Champion Forest Baptist Church* case from the Houston 1st Court of Appeals is instructive. In that case neighborhood residents brought claims to enjoin the construction of a parking garage for the local Baptist Church. 1987 WL 5188, *1 (Tex. App. Hou. [1st Dist.], Jan. 8 1987). At a temporary injunction hearing, the Court heard evidence that the garage "would block wind and light," that "the residents viewed it as an eyesore and a health hazard," that "the view from the garage would invade their privacy," "that they were concerned about fumes, lights, noise and criminal activities," and that "speed and traffic problems would be augmented by use of a garage." *Id.* at *1. Those are similar to the types of complaints Plaintiffs allege in this lawsuit.

The trial court entered a temporary injunction restraining the construction of the parking garage, and the 1st Court of Appeals affirmed the injunction. *Id.* at *1-2. The Court of Appeals noted the Baptist Church's argument that "ancient lights" are not protected under Texas law, and that "conditions that annoy...are not nuisances simply because they affect the value of property," but it rejected those arguments based on the evidence in that case because "the right to use one's own property, however, is not without limitation," and "[t]he Supreme Court of Texas has held that any structure, including a church, by the time and manner of its use, may interfere with the rights of others so as to be subject to injunction." *Id.* at *2.

Following the entry of the temporary injunction, the trial court then presided over a jury trial on the residents' nuisance action and held a hearing on the request for a permanent injunction, with the following result: "On November 30, 1987, the [trial court] issued a permanent injunction prohibiting the construction of the proposed parking garage at its proposed location on Church property." *See Rowe v. Moore*, 756 S.W.2d 117, 118 (Tex. App. Hou. [1st Dist.], 1988, no writ). Following the entry of the permanent injunction, the Church abandoned its plan to build the parking garage so close to the adjacent resident properties, and instead modified its construction plan to construct a garage that would take into account the residents' property rights. *Id.* (explaining that the Church re-configured the garage, moved it further away from the adjacent property lines, improved the flow of traffic, and installed a greenbelt to provide a screen between the garage and the neighboring properties.).

The *Champion Forest* case is instructive for a number of reasons. The residents' nuisance claims in that case mirror those that Plaintiffs allege here: that it is the wrong project for that locale, the structure would block wind and light, constitute an eyesore and health hazard, invade their private property, and augment speed and traffic problems for the residential

neighborhood. Plaintiffs in this lawsuit allege that the Ashby High Rise will cause those same problems and more. The decisions in *Champion Forest* made by the trial court (entering a temporary and permanent injunction against the construction of the garage) and the 1st court of appeals (affirming the temporary injunction) recognize that such allegations give rise to a valid nuisance claim under Texas law. They also affirm that injunctive relief against the construction of a building that will create a private nuisance is appropriate and available relief under Texas law.

In short, Plaintiffs' claims about the Ashby High Rise in this case are similar to those raised by the neighborhood residents in the *Champion Forest* case. The trial court and the 1st Court of Appeals in that case concluded that those claims were viable and sufficient to support a temporary injunction, and ultimately a permanent injunction. The same is true here.

Whether a structure such as the Ashby High Rise is a nuisance is a fact-dependent question that should be decided based on the evidence. It is not suitable for resolution through special exceptions. Plaintiffs allege that construction of the Ashby High Rise would create a private nuisance, and have pleaded factual allegations that more than satisfy the notice pleadings requirements under the Texas rules. Defendants' special exceptions are not well founded, and should be denied.

1. *Special Exception to Traffic Complaints*

Defendants first specially except to paragraphs 21-24 and 35 of the Original Complaint, which paragraphs allege that construction of the Ashby High Rise will significantly increase traffic in the neighborhood to the point of failure on the recognized standard scale, cause unreasonable delays, negatively affect the safety of the surrounding residential streets, and hinder

the ingress and egress of emergency vehicles. (Pet. at ¶¶ 21-24, 35) Defendants' argument is that Plaintiffs have no authority to restrict the use of public streets. Special Exceptions at 1-2.

That argument mischaracterizes Plaintiffs' claims. Plaintiffs are not seeking to regulate public streets. Rather, Plaintiffs allege that the increased traffic and gridlocked intersections caused by the Ashby High Rise will negatively impact Plaintiffs' property rights, and are part of the analysis of why the Ashby High Rise would create a nuisance.

As discussed above, a project like the Ashby High Rise creates a nuisance if it "substantially interferes with the use and enjoyment of land." *GTE Mobilnet of S. Tex. Ltd.*, 61 S.W 3d at 614. One of the ways that the Ashby High Rise will substantially interfere with Plaintiffs' use and enjoyment of their property is by causing increased traffic, gridlocked intersections, and unsafe conditions on single-lane residential streets that are not suitable for the amount of traffic that the Ashby High Rise will bring. The increased traffic will also significantly delay emergency fire and ambulance personnel from the nearest fire station from reaching the local residents in the event of an emergency. (Pet. at 24). The traffic problems that the Ashby High Rise will cause are one of the reasons that the building will constitute a nuisance.

In two separate cases, the 1st and 14th Courts of Appeal have each upheld a finding that a proposed construction project would create a nuisance, based in part on the impact that those projects would have on traffic, congestion, and related safety hazards in the surrounding neighborhood. In the *Champion Forest* case discussed above, the plaintiffs put on evidence that construction of a parking garage on the church's property was a nuisance because "speed and traffic problems would be augmented by use of a garage." *Champion Forest Baptist* Church, 1987 WL 5188 at * 1. The trial court entered a temporary injunction, the 1st Court of Appeals affirmed that temporary injunction, and, following a jury trial, the trial court entered a permanent

injunction against the construction of the parking garage. *Id.* at * 1-2; *Rowe*, 756 S.W.2d at 118. The church ultimately modified its plans for the parking garage in order to resolve the nuisance problem, including altering the design "for egress from the garage to expedite the flow of traffic when the garage is in use." *Rowe*, 756 S.W.2d at 118.

In *Spiller v. Lyons*, The 14th Court of Appeals addressed a nuisance claim brought by a group of homeowners claiming that the proposed construction of a motel in their neighborhood would constitute a nuisance. *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App. – Hou, [14th Dist.] 1987, no writ). At the trial of that case, the neighborhood residents presented evidence that "the increased traffic would be a danger to children walking to and from nearby schools," and testified that "their neighborhood was quiet and family-oriented and that traffic and the influx of strangers and transients would be an offense to normal sensibilities." *Id.* at 30. The jury "unanimously found that the operation of a motel on appellees' property would create a nuisance." *Id.*[3] After the trial court entered a judgment n.o.v. in favor of the developer in that case, the 14th Court of Appeals reversed that judgment n.o.v., rendered judgment for the homeowners, and reinstated a permanent injunction against construction of the project. *Id.* The Court of Appeals specifically referenced the evidence presented by the residents regarding the traffic impact of the proposed motel in its decision to reinstate the jury verdict and permanent injunction. *Id.*

Courts outside of Texas likewise recognize that increased traffic can be part of a nuisance claim. *See, e.g. Long Island Court Homeowners Associations v. Methner*, 254 N.W.2d 57, 59 (Mich. App. 1987) ("The creation of traffic problems by an otherwise legitimate business can constitute a nuisance."); Wade *v. Fuller*, 365 P.2d 802, 804 (Utah 1961) (affirming trial court

[3] The jury also found that construction and operation of a motel in the neighborhood would violate the restrictive covenants in the neighborhood.

injunction based on evidence that defendant's business interfered with residents' use and enjoyment of their properties, including evidence that as a result of the business "[f]requent traffic jams occurred in the vicinity."); *Durand v. Bd. of Co-op Educ. Servs.*, 334 N.Y.S.2d 670, 677 (N.Y. Sup. Ct. 1972) (analyzing plaintiffs' claim that construction of a bus maintenance facility "will generate traffic which will constitute a hazard," but ultimately concluding based on the evidence presented at trial that the facility would not create any additional traffic hazards.)

Defendants also argue that the traffic impact of the Ashby High Rise was "addressed and resolved" in an earlier lawsuit between the Developers and the City of Houston. Special Exceptions at 1. Defendants provide no argument, authority or explanation to support. That argument fails for two reasons. First, it improperly relies on facts outside of the petition with respect to exactly what was "addressed and resolved" in the Developers' lawsuit against the City of Houston. Special Exceptions are limited to the pleadings. *Augustine v. Nusom*, 671 S.W.2d 112 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

Second, Plaintiffs' property rights and nuisance claims were neither addressed nor resolved by the Developers' previous lawsuit against the City of Houston. Plaintiffs were not a party to that lawsuit. That lawsuit resolved certain claims that the Developers asserted against the City of Houston about the permitting process; it did not involve any property rights or nuisance claims.

The fact that the City of Houston settled the lawsuit that the developers filed against it and has issued permits for the project does nothing to diminish the property rights of private individuals like Plaintiffs. Texas law recognizes that an entirely legal business (such as one that does not violate any City permits) can be a nuisance if its location is incongruent with the neighboring properties:

> A business that is lawful in and of itself may become a nuisance because of the locality in which it is carried on. A business may also be a nuisance because the place where it is located is uncongenial to that type of enterprise. The law does not allow one to be driven from his home or compelled to live in substantial danger or discomfort even though the danger or discomfort is caused by a lawful and useful business. The right to acquire a known property and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. However, it is a right that takes into account the equal rights of others, for it is qualified by the obligation that the use of the property shall not be to the prejudice of others.

River Bend Ranch, LLLC, 346 S.W. 3d at 860.

That is precisely the situation here: the Ashby High Rise may be a permitted project, but is the wrong project for the 1717 Bissonnet property and the neighboring residents. The building is too big and includes too many apartments for the small parcel of land and the tight residential streets to accommodate. That is why its construction will have all of the negative affects alleged in the petition, and thus create a nuisance. Private nuisance claims are entirely distinct from the City's permitting process, and the fact that the Ashby High Rise may have construction permits does not mean Plaintiffs have no cause of action.

This lawsuit concerns the private property rights and nuisance claims of these Plaintiffs, none of which have been addressed or resolved by any previous lawsuit or by the City's permitting process. Defendants' special exceptions to the allegations about the traffic problems that the project will create should be denied.

2. *Special Exceptions to Light and Air Complaints*

Defendants next challenge Plaintiffs' allegations that the inordinate size of the Ashby High Rise will destroy Plaintiffs' yards, trees, and gardens, and invade their privacy (Pet. ¶¶ 25, 31, 34-35). Defendants claim that even if those allegations are true, they do not state a cause of action for nuisance. Special Exceptions at 2. Even though Plaintiffs filed their special

exceptions more than two weeks ago on May 20, they do not offer any caselaw, authority, or even argument in support of that contention. *Id.*

Plaintiffs allege that the excessive size of the Ashby High Rise will block sun and rain to neighboring properties, which will "inevitably damage Plaintiffs' grasses and trees and make it impossible for certain of the Plaintiffs to maintain their gardens." (Pet. at ¶ 25). Plaintiffs also allege that the height of the building will be such that "scores of windows will have direct views, day and night, into the neighboring yards and homes" and that "Plaintiffs would no longer feel free to use their yards as they currently do." *Id.* Those allegations fit squarely within the definition of a nuisance: something that substantially interferes with the use and enjoyment of land.

The 14th Court of Appeals recently addressed a nuisance case that arose out of the construction of a 126 foot cellular phone tower in Bunker Hill that was placed 20 feet from the plaintiff's backyard. In considering the nuisance claim, the Court discussed that the evidence that GTE workers "peeped into the [plaintiffs'] backyard while on service visits" was part of the evidence supporting the finding of a nuisance. *GTE Mobilnet of S. Tex., Ltd.*, 61 S.W.3d at 616. To abate the nuisance, GTE built a 12 foot fence so that workers could not look into the plaintiffs' backyard and invade their privacy. *Id.* at 617. In this case, the 21-story Ashby High Rise will stand much taller than 126 feet tall, it will be much closer than 20 feet from the neighboring properties, and the invasion of privacy will be much more continuous and pervasive from the many apartments that will look into the neighboring backyards than the privacy concerns from periodic service visits to a cellular tower that were present in the *GTE Mobilnet* case. The invasion of privacy issues here are substantial.

The *Champion Forest* case also refutes Defendants' argument. In that case the 14th Court of Appeals specifically recounted that the homeowners seeking to enjoin the proposed parking garage proved their nuisance claim in part by presenting "evidence that the garage would block wind and light." *Champion Forest Baptist Church*, 1987 WL 5188 at *1. The 14th Court of Appeals noted the developer's argument that "'ancient lights' are not protected under Texas law," but rejected that argument and affirmed the injunction entered by the trial court based on Texas nuisance law. The cases rejecting the "ancient lights" doctrine (which themselves are ancient) turned on the fact that merely blocking a view was not sufficient to constitute a nuisance. *See, e.g. Scharlack v. Gulf Oil Corp*, 368 S.W.2d 705, 707 (Tex. Civ. App. – San Antonio 1963, no writ) ("Under the rule recognized in this State, a building or structure cannot be complained of as a nuisance merely because it obstructs the view of the neighboring property.") As explained above, the nuisance claim in this case is not based on the argument that the Ashby High Rise will simply block someone's view.

*3. **Special Exception to Aesthetic Complaints***

Defendants next claim that certain allegations in the Petition are "aesthetic complaints and emotional reactions" that "may not be considered by any fact finder in a nuisance action, nor give rise to a cause of action for nuisance." Special Exceptions at 2 (citing Pet. ¶¶ 25, 28, 31, 34 & 35).

The allegations cited by Defendants are not purely "aesthetic complaints" or "emotional reactions." Plaintiffs allege in those paragraphs that the Ashby High Rise would cause significant harm to Plaintiffs in the form of damage to grasses, trees, and gardens, that it will deprive them of the use and enjoyment of their homes and yards, that it will destroy the privacy of the homes that sit under its 21-story shadow, that Plaintiffs would no longer be able to use

their yards as they currently do, that it will create congested and unsafe traffic, and that it will threaten damage to Plaintiffs' homes. (Pet. ¶¶ 25, 28, 31, 34 & 35). Those factual allegations state a valid nuisance claim. Defendants cannot obtain dismissal of them by mislabeling them as "aesthetic complaints."

Defendants' also ignore Texas law that an otherwise legal business or building may constitute a nuisance if it is in the wrong place and interferes with the property rights of others as a result. *See Pool v. River Bend Ranch, LLC*, 346 S.W. 3d 853, 857 (Tex. App. – Tyler, 2011) (stating that one category of nuisance is something that is "abnormal and out of place in its surroundings" and "invades another's interest.") (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *See also GTE Mobilnet of S. Tex. Ltd.*, 61 S.W. 3d at 614 ("A 'nuisance in fact' is a condition that is a nuisance because of its particular surroundings."). The particular surroundings of the Ashby High Rise – a quiet neighborhood of single family homes that sit only a few feet from the Ashby High Rise property – render the proposed apartment complex a nuisance if it is built on the 1717 Bissonnet property that is too small for a structure of this scope.

An opinion issued by the 14th Court of Appeals just last week, on May 30, 2013, reiterates that under Texas law "[a] nuisance may arise by causing...emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind." *Owens v. Mason*, 2013 Tex. App. LEXIS 6532, * 15 (Tex. App. – Houston [14th Dist], May 30, 2013, no pet. h.) (citing *Kane v. Comeron Int'l Corp.*, 331 S.W.3d 145, 147-48 (Tex. App. – Houston [14th Dist.] 2011, no pet.).

The fact that Defendants plan to construct an oversized high rise on an undersized property in a residential neighborhood is part of Plaintiffs' valid nuisance claim. Precisely because the project is so inordinately out-of-place in the neighborhood, it will create traffic

problems and related safety hazards, damage plants and vegetation, invade the privacy of its neighbors, and damage the foundations of the structures on adjacent properties. For all of those reasons, it will interfere with the neighborhood residents' ability to use and enjoy their property. That is an actionable nuisance under Texas law.

4. ***Special Exception to Request for Injunction Against the Project***

Defendants next specially except to Plaintiffs' request for an injunction, and claim that Plaintiffs' only remedy for a nuisance is money damages. Special Exceptions at 2-3. That argument is flat wrong under Texas law.

Texas courts routinely recognize that an injunction is an available and appropriate remedy for a private nuisance claim such as that asserted in this lawsuit. *See, e.g., Champion Forest Baptist Church* v. *Rowe*, 1987 WL 5188, *1 (Tex. App. Hou. [1st Dist.], Jan. 8 1987) (affirming order enjoining property owner from constructing a parking garage on its property based on a finding that the garage would create a nuisance); *Rowe v. Moore*, 756 S.W.2d 117, (Tex. App. – Houston [1st Dist.], no writ) (recounting that the trial court in the *Champion Forest* case "issued a permanent injunction prohibiting the construction of the proposed parking garage at its proposed location on Church property," and analyzing whether the Church's modified construction plans violated that permanent injunction); *Spiller v. Lyons*, 737 S.W.2d 29, (Tex. App. – Houston [14th Dist.] 1987, no pet.) (reinstating a permanent injunction obtained by a group of homeowners enjoining construction of a proposed motel in the neighborhood because the jury unanimously found that the motel would create a nuisance.).

5. ***Special Exception to Construction-Related Complaints***

Defendants object that the allegations in Paragraphs 26, 27, 29 and 35 are "speculative, premature and not ripe." Special Exceptions at 5. Once again, Defendants provide no argument or authority to support that objection.

Plaintiffs' claims are ripe. As the Court is aware, Defendants have already completed demolition of the existing apartment complex, and that demolition has already caused damage to the neighboring properties.[4] Defendants also tout that the City has already "issued approval for all required permits." Special Exceptions at 3. There is no question that Defendants intend to move forward with actual construction of the Ashby High Rise in the very near future. That is more than enough to give rise to justiciable controversy regarding Plaintiffs' nuisance claim. *See*, *Champion Forest Baptist Church*, 1987 WL 5188 at *1-2 (Tex. App. Hou. [1st Dist.], Jan. 8 1987) (enjoining property owner from constructing a parking garage on its property); *Spiller v. Lyons*, 737 S.W.2d at 30 (permanent enjoining construction of a proposed motel).

Defendants do not provide any explanation for what more they contend has to happen for Plaintiffs' claims to be ripe. Even if Defendants were able to articulate some aspect of Plaintiffs' claims that currently remains uncertain, Texas law is clear that "a justiciable controversy need not be a 'fully ripened cause of action.'" *Transp. Ins. Co. v. WH Cleaners*, 372 S.W.2d 223, 228 (Tex. App. – Dallas 2012, no pet.). Rather, "[t]o confer jurisdiction on the trial court, the fact situation must manifest the 'ripening seeds of a controversy.'" *Id.*; *See also Taylor v. State Farm Lloyds, Inc.*, 124 S.W.3d 665, 669 (Tex. App. – Austin 2003, pet. denied) ("[T]here must either be a pending cause of action between the parties or such a clear indication of the extent of the parties' differences that a court may presume one is imminent.")

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[4] *See* Plaintiffs' First Amended Petition and First Application for Temporary Restraining Order and Temporary Injunction at ¶¶ 22, 33-38, 42-45, 47-58.

To date, Defendants have refused to disclose information about the project and their plans for the Ashby High Rise in a timely manner, which forced Plaintiff Loughhead to file a Rule 202 proceeding. Even after the Court ordered the production of the plans for the Ashby High Rise in March 2013, Defendants still have not disclosed information about their construction plans, including any information about the demolition of the pre-existing apartments that has already been completed. Now, having resisted providing information at every turn, Defendants ask the Court to dismiss Plaintiffs' allegations through Special Exceptions in order to avoid having to disclose information through the discovery process and address Plaintiffs' nuisance claims on the merits. For the reasons stated herein, Defendants' Special Exceptions should be denied.

Respectfully submitted,

REYNOLDS, FRIZZELL, BLACK, DOYLE, ALLEN & OLDHAM, L.L.P.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been served upon the following counsel by electronic filing system, e-mail and/or facsimile on this the 5h day of June 2013:

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