

## **RESTRICTIVE COVENANT TERMINATION REVIEW SHEET**

**CASE:** C14-91-0038(RCT)  
Dabney Horne House

**P.C. DATE:** January 28, 2014  
January 14, 2014

**ADDRESS:** 507 W. 23rd Street

**AREA:** 0.116 Acres

**OWNER:** University Cooperative Society (George Mitchell)

**AGENT:** Mike McHone Real Estate (Mike McHone)

**NEIGHBORHOOD PLAN AREA:** Central Austin Combined (UNO)

**DESIRED DEVELOPMENT ZONE:** Yes

**WATERSHED:** Shoal Creek

**SCENIC ROADWAY:** No

**CAPITOL VIEW CORRIDOR:** No

**TIA:** N/A

### **SUMMARY STAFF RECOMMENDATION:**

Staff recommends granting the restrictive covenant termination request.

### **PLANNING COMMISSION RECOMMENDATION:**

January 28, 2014: TO GRANT THE RESTRICTIVE COVENANT TERMINATION REQUEST, (7-0-1) [HERNANDEZ- 1<sup>ST</sup>, OLIVER- 2<sup>ND</sup>; NORTEY- ABSENT]

January 14, 2014: *POSTPONEMENT REQUEST BY STAFF, APPROVED ON CONSENT*, (7-0-1) [HERNANDEZ- 1<sup>ST</sup>, STEVENS- 2<sup>ND</sup>; HATFIELD- ABSENT]

### **ISSUES:**

This restrictive covenant termination request (RCT) is related to two other current items: an appeal of a certificate of appropriateness (City File # C14H-1989-0010), and a rezoning request (City File # C14-2014-0148).

The appeal of the certificate of appropriateness has been withdrawn because the issue has been resolved based on a point of law. In accordance with Section 25-2-213 of the Land Development Code, the certificate of appropriateness has been approved.

### **DEPARTMENT COMMENTS:**

The subject property is located on the southeast corner of 23<sup>rd</sup> Street and Nueces Street and is developed with the Dabney-Horne House. Please refer to Exhibits A and B (Zoning Map and Aerial View).

The Applicant proposes relocating the Dabney Horne house within the subject property, adjusting its location to make development of the remainder of the property more feasible. The house would not be removed from the site. The restrictive covenant (RC) states, "The [Dabney-Horne] home existing on the Property on the date of the execution of this restrictive covenant shall be retained on the Property." Please refer to Exhibit C (Restrictive Covenant).

Since the language is unclear if this RC would allow relocation within the property, the Applicant proposes terminating the RC, while relocating the house to a portion of the property that has the protections of GO-CO-NP-H zoning. Please refer to Exhibit D (Relocation within Site Exhibit).

The subject property was rezoned in 1991 from MF-4 to GO-CO. A historic designation was not granted concurrent with that rezoning, so the City Council required the above-referenced restrictive covenant (RC) be placed on the property to protect the Dabney Horne home. The historic zoning designation was added later, making the RC redundant.

Staff has received correspondence in opposition to the Applicant's rezoning request. Please refer to Exhibit E (Correspondence).

**EXISTING ZONING AND LAND USES:**

	<b>ZONING</b>	<b>LAND USES</b>
<i>Site</i>	GO-CO-H-NP	Administrative office
<i>North</i>	CS-MU-NP, MF-4-NP, MF-4-CO-NP	Administrative office, Multifamily
<i>South</i>	GO-NP, MF-4-NP	Parking lot, Multifamily
<i>East</i>	CS-NP	Parking garage, Professional office
<i>West</i>	MF-4-NP, MF-4-H-NP	Single family, Duplex, Multifamily residential

**RELATED CASE NUMBERS:**

C14-91-0038: Request: From MF-4 to GO. PC: To grant GO, General Office, subject to the retention of the existing Dabney-Horne House and a maximum height of 40 feet.

CC: 7/11/91- 1st Reading: Urdy- 1st, Larson's 2nd, (6-0-1) (Garcia off dias).

8/1/91-: Approved 2nd/3rd readings: Reynolds- 1st, Epstein- 2nd, (7-0), with conditions imposed by Council incorporated into a Conditional Overlay and Restrictive Covenant. (GO-CO)

C14h-89-0010: Request: From GO-CO to GO-CO-H. PC: To grant GO-CO-H.

CC: 4/2/92- To grant GO-CO-H, (6-0-1) [Garcia- 1<sup>st</sup>, Larson- 2<sup>nd</sup>, Todd- off dias]

**ABUTTING STREETS:**

<b>Name</b>	<b>ROW</b>	<b>Pavement</b>	<b>Class</b>	<b>Sidewalk</b>	<b>Bus Route</b>	<b>Bike Route</b>
W. 23rd Street	60	22	Collector	Yes	No	No
Nueces Street	60	22	Collector	Yes	No	Yes

**SCHOOLS:**

Bryker Woods Elementary School

O Henry Middle School

Austin High School

**NEIGHBORHOOD ORGANIZATIONS:**

Austin Neighborhoods Council

Central Austin Community Development Corporation

Central Austin Neighborhood Plan Area Committee

Preservation Austin

University Area Partners

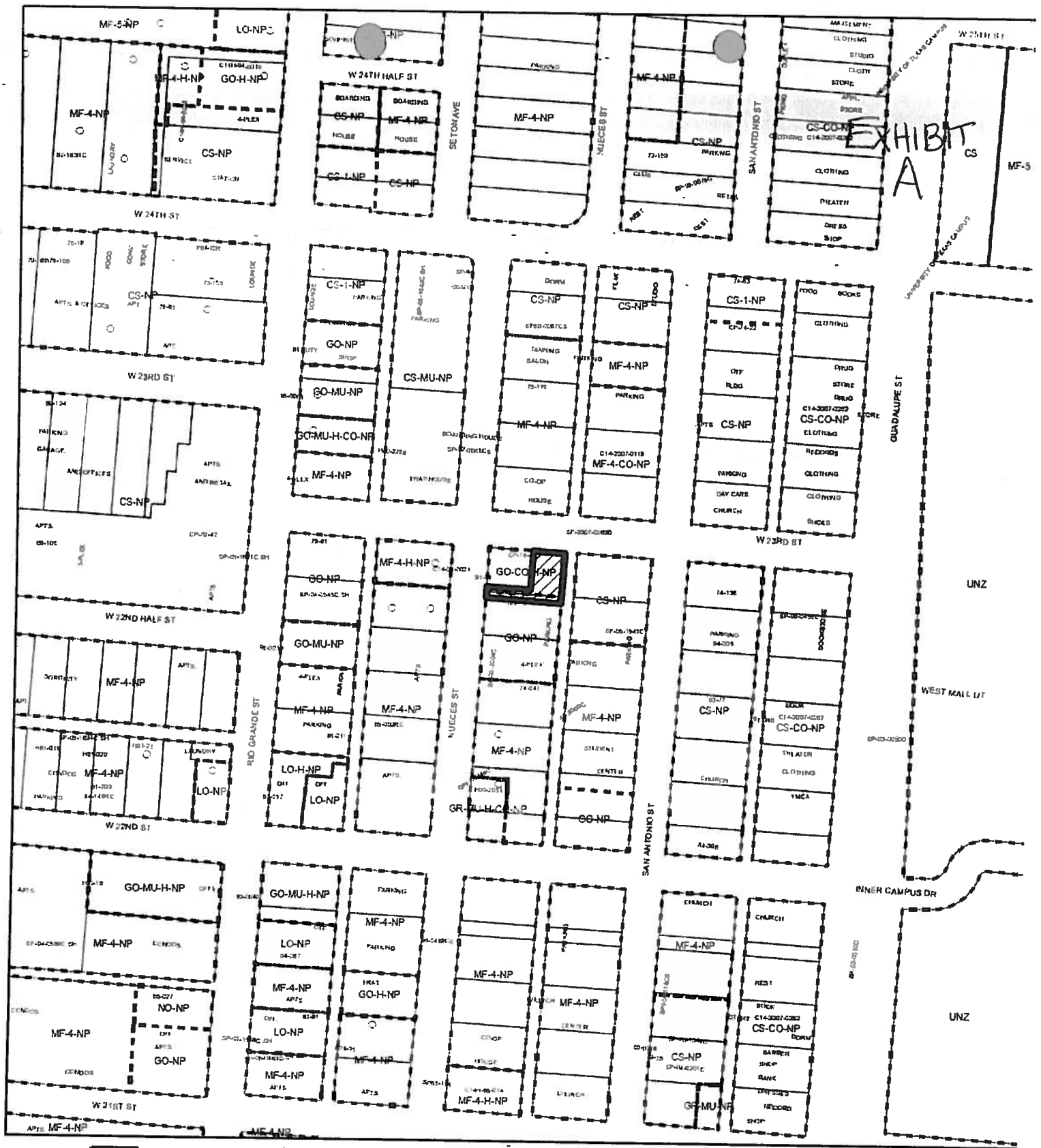
**CITY COUNCIL DATE & ACTION:**

February 13, 2013:

**ORDINANCE READINGS:** 1<sup>st</sup>    2<sup>nd</sup>    3<sup>rd</sup>    **ORDINANCE NUMBER:**

**CASE MANAGER:** Heather Chaffin  
e-mail: heather.chaffin@austintexas.gov

**PHONE:** 974-2122









DOC. NO.  
91077601

00004743387

EXHIBIT C

Zoning Case No. C14-91-0038

**RESTRICTIVE COVENANT**

OWNER: UNIVERSITY COOPERATIVE SOCIETY, INC., a Texas corporation

ADDRESS: 2246 Guadalupe Street, Austin, Texas, 78705.  
Attn: George Mitchell, President.

CONSIDERATION: Ten and No/100 Dollars (\$10.00) and other good and valuable consideration paid by the City of Austin to the Owner, the receipt and sufficiency of which is acknowledged.

PROPERTY: Tract 1: North 9 foot tract of land out of Lot 14, Outlot 34, Division D, Louis Horst Subdivision, said North 9 foot tract of land being that same tract of land conveyed to University Cooperative Society, Inc., a Texas corporation, and described in the deed recorded in Volume 4420, at Page 2060, of the Deed Records of Travis County, Texas, said deed being attached as "Exhibit A" and incorporated herein for all purposes.

Tract 2: Lot 13, Outlot 34, Division D, Louis Horst Subdivision, a subdivision in the City of Austin, Travis County, Texas, according to the map or plat of record in Book Z, Page 613, of the Plat Records of Travis County, Texas.

WHEREAS, the Owner of the Property and the City of Austin have agreed that the Property should be impressed with certain covenants and restrictions as conditions of zoning for the Property;

NOW, THEREFORE, it is declared that the Owner of the Property, for the consideration, shall hold, sell and convey the Property, subject to the following covenants and restrictions impressed upon the Property by this restrictive covenant. These covenants and restrictions shall run with the land, and shall be binding on the Owner of the Property, its successors and assigns.

1. The [Dabney-Horne] home existing on the Property on the date of the execution of this restrictive covenant shall be retained on the Property.
2. If any person or entity shall violate or attempt to violate this agreement and covenant, it shall be lawful for the City of Austin to prosecute proceedings at law or in equity against such person or entity violating or attempting to violate such agreement or covenant, to prevent the person or entity from such actions, and to collect damages for such actions.
3. If any part of this agreement or covenant is declared invalid, by judgment or court order, the same shall in no way affect any of the other provisions of this agreement, and such remaining portion of this agreement shall remain in full effect.
4. If at any time the City of Austin fails to enforce this agreement, whether or not any violations of it are known, such failure shall not constitute a waiver or estoppel of the right to enforce it.
5. This agreement may be modified, amended, or terminated only by joint action of both (a) a majority of the members of the City Council of the City of Austin, and (b) by the owner(s) of the Property at the time of such modification, amendment or termination.

11514 0506

REAL PROPERTY RECORDS  
Travis County, Texas

All citations to the Austin City Code shall refer to the Austin City Code of 1981, as amended from time to time, unless otherwise specified. When the context requires, singular nouns and pronouns include the plural.

UNIVERSITY COOPERATIVE SOCIETY, INC.,  
a Texas corporation

BY: George H Mitchell  
George Mitchell, President

Date: July 23, 1991.

THE STATE OF TEXAS  
COUNTY OF TRAVIS

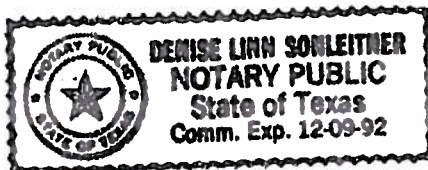
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This instrument was acknowledged before me on this the 23<sup>rd</sup> day of July, 1991,  
by George Mitchell, President of UNIVERSITY COOPERATIVE SOCIETY, INC., a Texas corporation,  
on behalf of said corporation.

Denise Linn Sonleitner

Notary Public Signature

Type or Print Name of Notary  
My Commission Expires: \_\_\_\_\_



After Recording, Please Return to:  
City of Austin  
Department of Law  
P. O. Box 1088  
Austin, Texas 78767  
Attention: Joe Jimenez, Legal Assistant

WARRANTY DEED

THE STATE OF TEXAS |  
COUNTY OF TRAVIS |

KNOW ALL MEN BY THESE PRESENTS:

That, for a good and valuable consideration to me in hand paid by University Cooperative Society, Inc., the receipt of all of which is hereby acknowledged, I, the undersigned, J. BURLESON SMITH, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF RUBY C. SMITH, DECEASED, of Bexar County, Texas, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said UNIVERSITY COOPERATIVE SOCIETY, INC., a Texas corporation of Travis County, Texas, its successors and assigns, the following described premises lying and being situated in Travis County, Texas, to-wit:

Lot No. Thirteen (13) and North Nine (9) feet of Lot No. Fourteen (14), HORST ADDITION, Outlot Thirty-four (34), Division "D", an Addition in the City of Austin, Travis County, Texas, according to the map or plat thereof, recorded in Plat Book 2, Pages 594, and 613, Plat Records of Travis County, Texas.

TO HAVE AND TO HOLD the said premises, together with all rights and appurtenances thereunto in anywise appertaining, unto the said University Cooperative Society, Inc., its successors and assigns, forever. For the same consideration, I, the undersigned, J. Burleson Smith, Independent Executor of the Estate of Ruby C. Smith, Deceased, do covenant and agree that the Estate of Ruby C. Smith, Deceased, will warrant and forever defend title to the said premises against all persons whomsoever lawfully claiming or to claim the same or any part thereof.

The grant hereof is subject to all restrictive covenants, if any, of record in Travis County, Texas, affecting the said premises or any part thereof.

REAL PROPERTY RECORDS  
Travis County, Texas

11514 0508

DEED RECORDS

11:00 2000

66-7797

Possession of the said premises shall be delivered contemporaneously with the delivery hereof.

EXECUTED this 26<sup>th</sup> day of September, 1972.

*J. Burleson Smith*  
J. Burleson Smith, individually  
and as Independent Executor of  
the Estate of Ruby C. Smith,  
Deceased.

THE STATE OF TEXAS |  
COUNTY OF TRAVIS |

BEFORE ME, the undersigned authority, on this day personally appeared J. Burleson Smith, Independent Executor of the Estate and under the Will of Ruby C. Smith, Deceased, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office on this the 26<sup>th</sup> day of September, A.D., 1972.

*[Signature]*  
Notary Public in and for Travis  
County, Texas.

NOTARY SEAL

STATE OF TEXAS  
COUNTY OF TRAVIS  
I hereby certify that this instrument was FILED on the  
date hereof in the Public Records Office, and was duly  
RECORDED, in the Volume and Page of the PUBLIC RECORDS  
of Travis County, Texas, as shown herein by me, on

OCT 4 1972



*[Signature]*  
COUNTY CLERK  
TRAVIS COUNTY, TEXAS

FILED

OCT 4 9 13 AM '72

-2-

11514

0509

REAL PROPERTY RECORDS  
Travis County, Texas

1120 2061

"EXHIBIT A" - Page 2 of 3



**SURVEY PLAT**

**TO ALL PARTIES INTERESTED IN PREMISES SURVEYED:—**

This is to certify that I have, this date, made a careful and accurate survey on the ground of property located at No.

Nueces & N 23rd St. in the City of Austin, Texas, being described as follows:

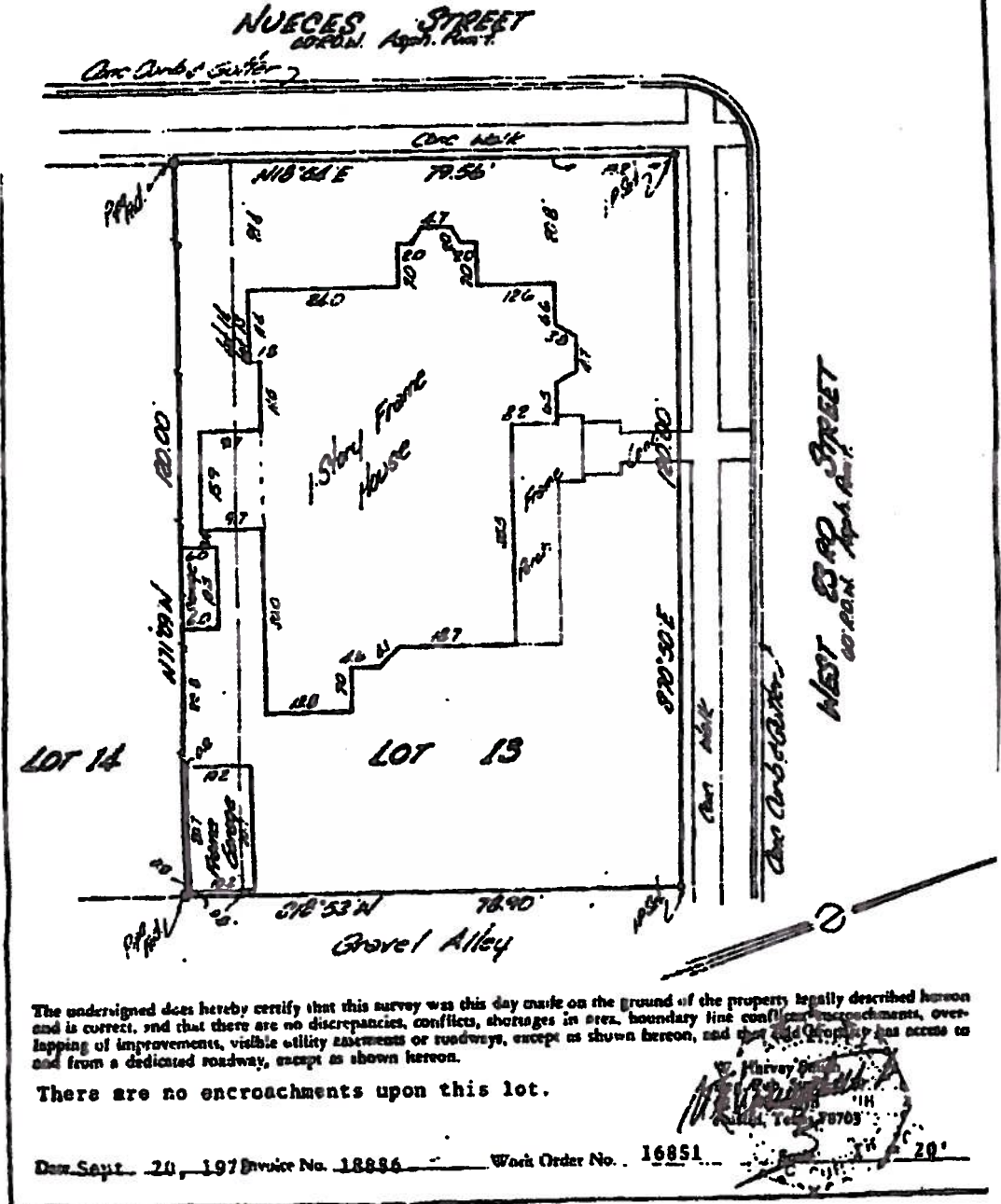
Lot No. 13 & N 9' of Lot 14, Block No. \_\_\_\_\_

of Louis Horst's Sub., \_\_\_\_\_ on addition to the City of Austin

Texas, according to the final plat thereof recorded in Vol. 2, at page 594 of the Book

Public Records of Travis County, Texas.

Ref. Ruby Smith Estate



11514 0510

FILED

1991 SEP -4 PM 3:16

DANA DE BEAUCOURT  
COUNTY CLERK  
TRAVIS COUNTY, TEXAS

STATE OF TEXAS

COUNTY OF TRAVIS

hereby certify that this instrument was FILED on  
date and at the time stamped hereon by me; and  
duly RECORDED, in the Volume and Page of the  
public RECORDS of Travis County, Texas, on

SEP 4 1991



*Dana DeBeaucourt*  
COUNTY CLERK

TRAVIS COUNTY, TEXAS

RECORDER'S MEMORANDUM - At the time of  
recording this instrument was found to be inadequate  
for the best photographic reproduction, because of  
illegibility, carbon or photo copy, discolored paper,  
etc. All blockouts, additions and changes were present  
at the time the instrument was filed and recorded.

11544 0511

REAL PROPERTY RECORDS

Travis County, Texas

SCANNED

# Item 3: Relocation within Site

EXHIBIT D



**Chaffin, Heather**

EXHIBIT E

**From:** crocker sarah <sarah@sarahcrockerconsultants.com>  
**Sent:** Tuesday, December 24, 2013 11:29 AM  
**To:** Chaffin, Heather  
**Subject:** C14-91-0038 (RCT) and C14-2013-0148  
**Attachments:** Interested Party Correspondence Amended july 10.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Heather,

My client owns the property at 2212 and 2210 Nueces Street and they are opposed to termination of the 1991 Restrictive Covenant ( C14-91-0038 (RCT) and the proposed zoning case (C14-2013-0148) to rezone the property fro GO-NP-H to GO-NP. I have attached the July 2, 2013 correspondence I transmitted to Greg Guernsey registering my client as an Interested Party.

I'd like to review the file after the first of the year , let me know what day would be best for you. Thanks  
Heather.

*Sarah Crocker*

**9415 Burnet Rd**

**Suite 306**

**Austin Texas**

**78758**

**512-529-2511**



# **SARAH PUTNAM CROCKER CROCKER CONSULTANTS**

**9415 Burnet Rd Suite 306**

**Austin Texas 78758**

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July 2, 2013

Mr. Greg Guernsey  
Director  
Planning and Development Review  
City of Austin  
Austin, Texas 78704

HAND-DELIVERED

RE: Catherine and George Cary/Gerhard-Schoch 1887 LLC/ Interested Party Status

Dear Mr. Guernsey,

I have been retained to represent Catherine and George Cary (Gerhard-Schoch 1887 LLC) with regard to the pending and anticipated future applications for the proposed development of a 170-foot residential tower at 507 W. 23<sup>rd</sup> Street, which is owned by the University Cooperative Society.

My clients own the historic Gerhard-Schoch house at 2212 Nueces and the adjacent duplex at 2010 Nueces. Due to their proximity to the subject tract, which is directly across the street, my clients meet the criteria for interested parties set forth in 25-1-131, Subsection A (2) (B) of Land Development Code.

Mike McLone, agent for the University Cooperative Society, has filed the following applications for 507 W. 23<sup>rd</sup> Street.

2013-005629 TP -- A request to remove a 31" Heritage Pecan tree. The EV Board recommended disapproval on March 6, 2013. The Planning Commission voted to deny the permit in April.

2013-044283 PR- Request to relocate the historic Dubney-Horne house from it's present location to 1200-02 Cotton Street. The case was postponed at my request at the May meeting of the Historic Landmark Commission. On June 24, Mr. McLone requested a thirty-day postponement. The case is scheduled to appear on the August agenda.

All three properties are located in the Inner West Campus Subdistrict of the UNO Overlay, which was awarded the most permissive site development regulations to encourage the dense development envisioned for this corridor.

My clients were aware this area was in transition when they purchased the property. But it seemed reasonable to assume that the Dabney Horne house would remain in place due to the fact the house and the lot is zoned historic.

My primary concern is the applicant's apparent disregard for the Order of Process set forth in subsection (A) of 25-1-61, which states:

(A) An applicant must obtain approvals in the following order:

(1) Zoning;

(2) Subdivision;

(3) Site plan; and

(4) Building permit.

In 1989 the City initiated historic zoning case C14h-89-0010 over the objections of the owners, who were opposed to the historic designation until such time that they were able to secure the appropriate commercial zoning. The case was postponed indefinitely. In 1991 the University Cooperative Society filed C14-91-0038 to change the zoning at 507 W 23<sup>rd</sup> Street from MF-4 to GO.

On August 1, 1991 City Council approved a zoning change from MF4 to GO-CO in conjunction with conditions. George Mitchell, President of the University Cooperative Society was required to sign a Restrictive Covenant, which requires the Dabney-Horne home to be retained on the property, as it existed on August 1, 1991. The Restrictive Covenant which is recorded in Volume 11514 Page 6506 of the Real Property Records of Travis County can only be amended, modified or terminated by joint action of a majority of the City Council and the owners of the property at the time of such modification, amendment or termination.

Part 2 (1) of Ordinance NO. 910801-C states that... "No structure of any kind shall be built to a height greater than 40 feet above ground level on the Property."

On August 2, 1992 the Council approved the 1989 historic zoning case, which rezoned the Dabney-Horne house and the entire lot to GO-CO-H.

I realize the purpose of the UNO Overlay is to promote high-density redevelopment, particularly in the Inner West Campus Subdistrict. The only rule for redevelopment in the Inner West Campus Subdistrict is there aren't any rules. Every facet of the approval process was streamlined which has resulted in the construction of a number of student housing projects.

However, even 25-2-752 (Conflict of Law) can't trump the restrictions set forth in a recorded Restrictive Covenant or a zoning ordinance that restricts height on a property

because City Council actions aren't subject to this division of the Land Development Code. Neither is 25-1-61, the Order of Process. The current zoning for 507 W. 23<sup>rd</sup> Street is GO-CO-H-NP ( C14-20120021) (Ordinance NO. 0408826-57)

On behalf of my client, I respectfully request that the application to relocate the Dabney-Horne house be withdrawn or suspended immediately and that staff take no further action or accept any application for the property at 507 W 23 St. until the applicant and owner have secured the following:

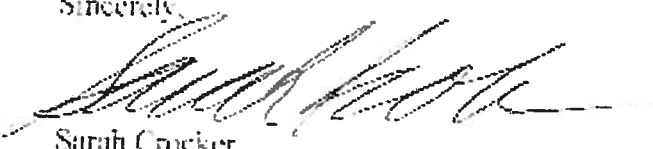
1. File a Zoning Amendment to terminate Restrictive Covenant (C14-91-0038) that requires the Dabney-Horne house to be retained on site.
2. File a Zoning Case to delete Part 2 (1), Condition Overlay District (Ordinance NO. 910801-C) Limit height of any structure to 40' above ground level.
3. File a Zoning Case to change the zoning from GO-CO-H- NP to GO-CO-NP to remove the historic designation from the entire lot.
4. A Neighborhood Plan Amendment may be required as per Article 16 of 25-1

My clients are not opposed to redevelopment or student housing. By this fall the Gerhard-Shock project will be an active participant in the UT student housing market.

The University Partners portion of the neighborhood plan recognized the need for density but noted there were a number of historically significant structures in this corridor that would and should survive. My clients have made a significant investment in the future by preserving a slice of Austin's history and they are equally committed to the survival of the Dabney-Horne house.

I look forward to hearing from you.

Sincerely,



Sarah Crocker

Authorized Agent

Gerard-Shock 1887 LLC

# **SARAH PUTNAM CROCKER CROCKER CONSULTANTS**

**9415 Burnet Rd Suite 306**

**Austin Texas 78758**

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January 26, 2014

Laurie Limbacher, Chair  
Historic Landmark Commission  
City of Austin  
Austin, Texas

RE: Request to Postpone Items A.1 and A.2 to February 24, 2014

Chair Limbacher,

I would respectfully request that these items be postponed until February 24<sup>th</sup> for the following reasons:

- I have retained the services of a civil engineer to prepare a massing study to illustrate a.) the gross s.f. that could be built under current conditions and b.) the gross s.f. that could be built if the pending zoning request is granted.
- Despite numerous requests the applicant has yet to provide the Commission with the pertinent information about the proposed student housing project, which is the driving force behind both of these cases.
- The applicant requested a permit to remove a Heritage Tree that is located behind the Dabney-Horne house and the Planning Commission denied that permit last March. The house cannot be relocated until that issue is resolved.
- There are no minimum setbacks in the Inner West Campus Subdistrict. The maximum setback is 10 feet. However, Section 25-2-757, (B), (4) allows the director to modify a maximum setback to protect a historic structure or a tree designated as significant by the city arborist.

The Commission is being asked to take the unprecedented step of reducing the setting of this historic landmark by 50% and removing approximately 25% of the structure to accommodate a student housing project.

The applicant has implied that if Dabney-Horne house isn't a.) relocated to another site or b.) whittled down to size, the proposed student housing project can't be built. To the best of my knowledge the applicant has never provided data to substantiate this claim.



This is the first student housing project that involves a historic landmark, which is why these cases are so important. Whatever action you take will have a direct impact of the viability of every historic landmark in the UNO Overlay.

The applicant filed their first application for a Certificate of Appropriateness on April 29, 2013. They have had nine months to produce this information. I'm asking for thirty days.

Sincerely,



Sarah Crocker  
Authorized Agent  
Gerhard-Schoch 1887 LLC

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President-Elect  
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Michael McGill, Inherit Austin  
John Rosato, Landmark Commission  
Mike Ward, Pioneer Farms

**STAFF**

Jacqui Schraad  
Executive Director

January 27, 2014

Chair Dave Anderson and Commission Members  
Planning Commission  
City of Austin  
Sent via E-mail

Re: C14H-1989-0010, Dabney-Horne House, 507 W. 23<sup>rd</sup> Street

Dear Chair Anderson and Commissioners:

We understand that you may be considering a proposal to relocate the historic landmark Dabney-Horne house on its existing site in order to allow for more intense development of the remainder of the site. While we have not yet been privy to the specifics of these plans, insofar as we understand the proposal from the application materials and from walking the site, we have concerns about this latest proposal. We'd like to express our concerns regarding the general concept. We recommend that the Planning Commission take into account the following concepts.

- 1) The siting and setbacks of the historic house are now and should continue to be in keeping with the setbacks that are typical of other older and landmarked homes in the area.
- 2) Non-historic additions could be removed if they do not contribute to the historic character of the landmark property.
- 3) New construction on or adjacent to the property should be consistent with the Secretary of Interior's Standards for Rehabilitation. Standard 9 states, *"New additions, exterior alterations, or related new construction will not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and will be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment."*

This is an important case that may influence treatment of other landmarked properties both in West Campus and throughout Austin. Thank you for considering our input, and for your service to our city.

Sincerely,

Tom Stacy  
President