

CAUSE NO. D-1-GN-19-008617

FRANCISCA ACUÑA; SUSANA	§	IN THE DISTRICT COURT OF
ALMANZA; JEFFERY L. BOWEN;	§	
WILLIAM BURKHARDT; ALECIA M.	§	
COOPER; ROGER FALK; SETH O.	§	
FOWLER; RANDY HOWARD; MARY	§	
INGLE; PATRICIA KING; FRED I.	§	
LEWIS; BARBARA MCARTHUR;	§	
ALLAN E. MCMURTRY; LAURENCE	§	
MILLER; GILBERT RIVERA; JANE	§	
RIVERA; JOHN UMPHRESS; JAMES	§	
VALADEZ; and ED WENDLER, JR.,	§	
<i>PLAINTIFFS,</i>	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
THE CITY OF AUSTIN; THE CITY	§	
COUNCIL OF AUSTIN; THE	§	
HONORABLE AUSTIN MAYOR	§	
KIRK WATSON, IN HIS OFFICIAL	§	
CAPACITY; THE HONORABLE AUSTIN	§	
CITY COUNCIL MEMBERS NATASHA	§	
HARPER-MADISON, VANESSA	§	
FUENTES, JOSÉ VELÁSQUEZ, JOSÉ	§	
“CHITO” VELA, RYAN ALTER,	§	
MACKENZIE KELLY, LESLIE POOL,	§	
PAIGE ELLIS, ZOHAI B “ZO” QADRI,	§	
ALISON ALTER, IN THEIR OFFICIAL	§	
CAPACITIES; AND CITY OF AUSTIN	§	
INTERIM CITY MANAGER, JESUS	§	
GARZA, IN HIS OFFICIAL CAPACITY,	§	
<i>DEFENDANTS</i>	§	201 ST JUDICIAL DISTRICT

**PLAINTIFFS’ SECOND AMENDED MOTION TO ENFORCE PERMANENT
INJUNCTION AND REQUEST FOR DECLARATORY JUDGMENT**

COME NOW PLAINTIFFS, FRANCISCA ACUÑA; SUSANA ALMANZA; JEFFERY L. BOWEN; WILLIAM BURKHARDT; ALECIA M. COOPER; ROGER FALK; SETH O. FOWLER; RANDY HOWARD; MARY INGLE; PATRICIA KING; FRED I. LEWIS; BARBARA MCARTHUR; ALLAN E. MCMURTRY; LAURENCE MILLER; GILBERT RIVERA; JANE RIVERA; JOHN UMPHRESS; JAMES VALADEZ; and ED WENDLER, JR., and file this First

Amended Motion to Enforce Permanent Injunction and Request for Declaratory Judgment and respectfully show as follows:

I.

INTRODUCTION

In November 2019, diverse property owners from across Austin sued the City of Austin for failing to provide notice and protest rights to property owners even though the City was proposing to rezone almost every property in Austin. In *Acuña et al. v. City of Austin et al.*, Cause No. D-1-GN-19-008617 (201st District Court of Travis County), this Court entered a final judgment on March 18, 2020, against the City, holding that it had violated the law by failing to provide notice and protest rights to Austin property owners and entered a permanent injunction requiring the City in the future to provide notice and protest rights to all property owners when proposing to change the zoning on their or nearby properties. The Court of Appeals unanimously affirmed, on all grounds, in March 2022. *City of Austin v. Acuña*, 651 S.W.3d 474 (Tex. App. —Houston [14th Dist.] 2022, no pet.).

The City simply disregarded this Court's injunction. Less than 3 months after the appellate decision, the City violated this Court's injunction—despite being told they were doing so by the public and several council members. The City passed on June 9, 2022, a zoning ordinance changing regulations for vertical mixed use zoned properties without notifying thousands of affected property owners—in direct violation of the injunction. The lack of notice precluded affected property owners from filing protests.

On December 1, 2022, the City Council passed another zoning ordinance, allowing residential uses and other zoning changes in commercially zoned property, without providing notice to tens of thousands of commercial property owners. The lack of notice precluded affected property owner from filing protests. That same day, the City Council passed a compatibility zoning ordinance that allows greater building heights and reduced setbacks on or near tens of thousands of single-family

zoned properties. The City mailed notice to some but not all property owners. The notice was grossly deficient in that it did not even tell recipients that the ordinance affected their or nearby property—in direct contravention of state law and the permanent injunction. The lack of notice precluded affected property owners from filing protests.

II.

NATURE OF THE CASE

1. The City of Austin repeatedly refuses to follow mandatory zoning procedures and to provide statutory protection to city property owners. On March 18, 2020, this Court entered a permanent injunction against the City. *See* Exhibit “A” hereto, a true and correct copy of the Final Judgment. The Final Judgment Provides:

IT IS ORDERED, ADJUDGED, AND DECREED that Defendants be, and hereby are, commanded to send written notice to all property owners in the City of Austin, and surrounding property owners within 200 feet, whose zoning regulations or zoning district boundaries are being changed, at least 10 days before the Planning Commission’s public hearing on those zoning changes, pursuant to §211.007(c); or in the alternative, Defendants may provide the alternative notice by following §211.007(d).

Final Judgment at 3.

2. The Final Judgment was unanimously upheld by the Fourteenth District Court of Appeals in March 2022. *See City of Austin v. Acuña*, 651 S.W.3d 474 (Tex. App.—Houston [14th Dist.] 2022, no pet.). The Court of Appeals held unequivocally that there are no exceptions to the state law requirement that zoning changes require proper notice to property owners and recognition of protest rights when the City “proposes changes in the zoning districts, boundaries, regulations, and classifications...” *Id.* at 485.

3. Despite the permanent injunction entered by this Court, and the *Acuña* opinion affirming it, the City Council passed vertical mixed use zoning changes on June 9, 2022, without

providing the required statutory notice to affected property owners. *See* Exhibit B, Ordinance No. 20220609-080. The lack of notice precluded affected property owners from filing protests.

4. Six months later, on December 1, 2022, the City Council passed major zoning changes to commercially zoned properties across the City without providing notice to affected property owners or recognizing property rights of those affected. *See* Exhibit C, Ordinance No. 20221201-055. The lack of notice precluded affected property owners from filing protests.

5. Also passed on December 1, 2022, was Ordinance No. 20221201-056. *See* Exhibit D hereto. This Ordinance was passed after grossly inadequate notice being given both under state law and the City’s own ordinances. While some property owners received written notice, the notice was too little to too few. Inadequate notice precluded those affected from filing protests.

6. In addition, the City allows for zoning changes without any notice whatsoever through the implementation of its “Affordability Unlocked Ordinance,” passed on May 9, 2019. *See* Exhibit E hereto, Ordinance No. 20190509-027. This ordinance grants broad zoning entitlements if developers submit an application that meets certain affordability housing requirements—including increased density, reduction in minimum lot sizes, greater heights, waiver of floor-area ratios, changes in setbacks and allows 25% commercial uses in residential areas. City staff is allowed to grant such applications without any notice or protest rights for surrounding property owners and with *no council approval*. The lack of notice precluded affected property owners from filing protests.

III.

FACTUAL BACKGROUND

7. City documents indicate that the City Council undertook efforts to change zoning in such a way as to attempt to circumvent this Court’s permanent injunction as well as the *Acuña* opinion.

A. Vertical Mixed Use II Ordinance—Passed June 9, 2022¹

8. Ordinance No. 20220609-080 changes zoning regulations on at least 1,675 properties without the Planning Commission providing the statutorily required notice to property owners. *See* Exhibit B. It also provides that “staff” can approve applications for the “affordable housing” bonus, resulting in zoning changes without approval of the City Council. *See* Tex. Local Gov’t Code §211.003 which provides that “the governing body of a municipality may regulate [zoning].” Not only was the ordinance passed without proper notice, there is no notice of the zoning changes that occur each time “staff” approves an application submitted pursuant to the Ordinance. The lack of proper notice precluded affected property owners from filing protests.

9. The City Council initiated this Ordinance by way of Resolution No. 20211118-052. *See* Exhibit G hereto. The Resolution states that the generation of affordable housing “has been stymied by [existing zoning restrictions].” Exhibit G at page 1. The Resolution also states that the City “would benefit from an expanded...option” that would increase the height restriction from 60 feet to 90 feet. *Id.* In addition to increased height, the Resolution affirmed the commitment to “increase density along transportation corridors.” *Id.* at page 2. Such changes are zoning changes that fall within this Court’s permanent injunction and Chapter 211 of the Texas Local Government Code that requires notice to property owners.

10. Ordinance No. 20220609-080 violated the permanent injunction and is void for failure to follow the statutory notice requirements. *See* Exhibit H, excerpts from the June 9, 2022, Questions and Answers Report at pages 21-22, where staff states that it did not provide notice and protest rights

¹ On June 8, 2022, counsel for Plaintiffs sent a letter to Defendants (with a copy to City Attorney Anne Morgan) detailing the legal issues related to this Ordinance—that zoning changes without proper notice and protest rights violates state law and this Court’s permanent injunction. *See* Exhibit F, a true and correct copy of June 8, 2022, letter from Douglas M. Becker to Defendants.

because to do so would be “time and resource intensive to conduct” and with 1675 properties affected could take up to two months to complete.

11. The transcript of the public hearing on June 9, 2022, shows that the draft of this Ordinance contained a provision for notice and protest rights:

It’s part 5. So what part 5 does is that it creates-it specifies what the...public process is for VMU2. . .[T]hat . . .process would be a zoning process essentially which carries with it notice, individual notice, to properties with a certain distance. And also the right to protest... I believe that fundamental fairness and respect for the public requires that people be notified when land use around their homes is being changed...[I]f we strike section five-if the council chooses to strike section 5, what you are saying in effect that these changes go into effect, people have no right to be notified about [the] change near their house and they don’t have a right to say anything about it. To me that’s fundamentally unfair.”

See Exhibit I, excerpts from the City Council Regular Meeting Transcript—06/09/022, at 10:55:49 PM-10:58:49 PM, comments by Councilmember Kitchen.

12. To which former Mayor Adler responded:

“My motion is to keep it by right. I move to strike part 5.”

Id. at 10:59:49 PM.

13. The City Council then voted 8-2 to remove the notice and protest provision from the Ordinance. *Id.* After the vote to remove the notice and protest right provision, Councilmember Kitchen stated:

I think it’s important to stick to what we have heard again and again from the public... which is to notify them when there are proposals that are significantly different than the zoning on the ground. They want the opportunity to participate in them...And I think it’s of grave concern to me that we’re moving forward potentially with that vote in a way that doesn’t allow folks the opportunity to have petition rights.

Exhibit I, at 11:00:54 PM-11:01:55 PM.

To which former Mayor Adler responded:

Let's move on.

Id. at 11:01:55 PM.

14. The City staff report on this Ordinance details the numerous zoning regulations that would be subject to change through the VMU2 Ordinance. *See* Exhibit J, Code Amendment Review Sheet, at page 2 of 18. Those zoning regulations included residential uses, unlimited FAR (floor to area ratio), waiver of site dimensional requirements, a 60% reduction in parking requirements, and a 30 foot increase in height restrictions. *Id.*

15. All of those changes fall within the permanent injunction and Chapter 211 of the Texas Local Government Code and are subject to the statutory notice and protest rights provisions.

B. Residential in Commercial Development Program—Passed December 1, 2022

16. The City Council passed Ordinance No. 20221201-055 allowing residential use in property previously zoned commercial on December 1, 2022. *See* Exhibit C. In passing this Ordinance, the City changes zoning regulations to allow residential uses for 8885 commercially zoned properties² (among other changes) with no notice provided by the Planning Commission to property owners. The lack of notice precluded affected property owners from filing protests. According to the December 1, 2022, Staff Ordinance Amendment Review sheet, “The proposed amendment will create an affordable housing bonus program to allow commercially zoned properties with no existing residential entitlements to develop projects with residential units in return for on-site affordable units.” *See* Exhibit H, at page 1

17. This Ordinance was initiated by the City Council in Resolution No. 20211209-056, which began:

² The City's Housing and Planning report as to this Ordinance acknowledged that the Ordinance could effect 8885 commercial properties. *See* Exhibit K at page 10.

WHEREAS, under the Land Development Code, residential development is not currently allowed in many of the commercial zoning districts in Austin; and

WHEREAS, City Council adopted the Austin Housing Strategic Blueprint (the Blueprint) in 2017 which called for 135,000 housing units by 2028, with 60,000 of those units at or below 80 percent of the median family income (MFI); and

WHEREAS, in the proposed Land Development Code Revision, residential uses were allowed in more zoning districts than in current city code;

...

See Exhibit L.

18. The agenda language for the December 1, 2022, meeting for this Ordinance shows it amounted to a zoning change:

Conduct a public hearing and consider an ordinance amending City Code Title 25 to allow residential uses on commercially zoned property under certain circumstances.

See Exhibit M, excerpts from City Council Agenda for December 1, 2022.

19. Likewise, the Ordinance Amendment Review Sheet (Council) shows this Ordinance changed zoning:

Description: Consider an amendment to Title 25 with the City Code to create an affordable housing bonus program and allow residential development on commercially zoned properties:

...

Summary of proposed code amendment

The proposed amendment will create an affordable housing bonus program to allow commercially zoned properties with no existing residential entitlements to develop projects with residential units in return for on-site affordable units.

...

See Exhibit N, at page 1.

20. The permanent injunction and Chapter 211 of the Texas Local Government Code apply to these zoning changes.

C. Compatibility Ordinance-Passed December 1, 2022

21. Ordinance No. 20221201-056 affects more property owners than the other three ordinances addressed herein. *See* Exhibit D. Before amendments added at the time it was enacted by the City Council, staff estimated it would rezone 6940 acres. *See* Exhibit O, excerpts from staff's Questions and Answers Report, dated December 1, 2022, at pages 1-3.

22. The stated purpose of the Ordinance was to increase housing capacity on certain roadways by relaxing compatibility regulations and reducing parking minimums. *See* Exhibit D at page 1.

23. "Compatibility" means a land use that is designed to be able to exist or occur without conflict with its surroundings—in terms of its uses, scale, height, and location on its site. Compatibility standards govern the height and setback of big building near residential areas, providing existing neighborhoods with buffers from large, multistory developments.

24. This Ordinance was initiated by the City Council through Resolution No. 20220609-066, which provided:

The City Council initiates the following amendments to City Code Title 25 (Land Development Code) to increase housing capacity and support transit investments on corridors by relaxing compatibility regulations and reducing parking minimums. It is Council's intent that these amendments apply to a property that is front-facing or side-facing a corridor. It is Council's intent that these amendments apply when the property's existing compatibility or parking regulars are more restrictive.

See Exhibit L, at page 2.

25. Prior to enactment of this Ordinance, structures 60-120 feet tall could not be built within 300 feet of single-family homes or townhomes; structures more than 120 feet tall could not be

built within 540 feet of single-family homes or townhomes. The Ordinance allows an 80% reduction in those distances.

26. This Ordinance was passed in violation of the permanent injunction and the notice provisions of Texas Local Government Code, Chapter 211. First, notice of the Planning Commission hearing held on November 8, 2022, failed to adequately inform property owners of what was going to be considered at the hearing. The notice stated:

A public hearing will be held to consider proposed amendments to Austin's Land Development Code.

Proposed Amendment:

Consider amendments to Title 25 of the City Code to modify compatibility standards and parking requirements on certain roadways.

...

See Exhibit P.

27. The notice failed to apprise impacted property owners that their property (or nearby property) was being considered for rezoning. There was no notice that the amendment might allow greater heights and less setbacks. There was no reference to an online source to review the draft ordinance. The inadequate notice precluded affected property owners from filing protests.

The notice sent violated not only state law, but also the City's own notice requirements.

The City's notice requirement includes:

Notice provided under this section must

- (1) generally describe the subject matter of the public hearing;
- (2) identify the applicant and the location of the subject property;

...

Ord. 25-1-132(a).

28. The notice sent failed to meet these requirements and violated the permanent injunction.

29. Second, the notice was not sent to all property owners who could be affected. This Ordinance is void for failure to provide the statutorily required notice to affected property owners. The failure to provide the required notice precluded affected property owners from filing protests.

D. Affordability Unlocked—Passed May 9, 2019

30. Ordinance No. 20190509-027 allows property to be rezoned without any notice to property owners. *See* Exhibit E.

31. The City Council initiated this Ordinance by Resolution No. 20190221-027, wherein it acknowledged that the goal was to make changes outside of the statutory zoning process:

WHEREAS, the City Council approves many zoning cases for affordable housing development; however, some restrictions that may result in additional affordable housing units cannot be waived in a zoning case; and

WHEREAS, the rezoning process may be costly, time consuming, and may ultimately limit the number of family-friendly units in an affordable housing development and allowing affordable housing to be built by-right without rezoning may benefit the City's affordable housing stock;

...

See Exhibit Q, at page 3.

32. The Resolution further states:

...

This program would be available for a residential development or redevelopment irrespective of whether the proposed development or redevelopment requires a zoning change or other discretionary action from a City commission or the Council. It is the intent of the Council for this program to be accessed without requesting a further discretionary action by the Council.

...

See Exhibit Q, at page 5.

33. According to the Resolution, the City Council intended for the program to allow multiple changes to zoning regulations including waiver of compatibility standards for height and setbacks required by the base zoning district; allow building height to be 1.25 times the base zoning district height restrictions; reduce front yard and rear setbacks by 50%; allow density to be 1.5 times the base zoning district's density limits or allow six units, whichever is greater; waive maximum floor-to-area ratio (FAR); waive common wall, roof, front porch and other restrictions specific to duplexes; and others. *See Exhibit Q at pages 7-8.*

34. This Ordinance provides that applications are to be submitted to "staff" for approval with no further action of the City Council. Zoning changes may only be made by the governing body. *See Tex. Local Gov't Code §211.003.* Allowing staff to make these zoning changes violates state law and results in zoning changes without notice to surrounding property owners in violation of the permanent injunction. Such lack of notice precludes affected property owners from filing protests.

IV.

CONCLUSION

Texas has always revered property rights. To protect these rights, state law requires local governments to notify all property owners, big or small, before affecting their property interests. Notice is fundamental to governmental accountability because it ensures Texans have an opportunity to be heard by filing protests to defend their property rights.

The City of Austin refuses to abide by these laws and respect these fundamental Texas values, despite being ordered in 2020 to do so. Plaintiffs seek to enforce the permanent injunction against the City of Austin and its officials from continuing repeatedly to violate state laws that protect property owners. The City has an illegal practice of repeatedly failing to notify property owners that it is changing the zoning on their and nearby property. The lack of proper notice precludes affected

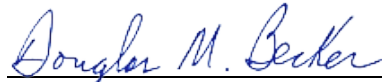
property owners from filing protests. The City should suffer appropriate sanctions for its actions and the Court should declare the infected ordinances void.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that Defendants be held in civil contempt for violation of the permanent injunction; that the Court sanction Defendants by (1) imposing a fine against them until they purge the contempt by voiding the ordinances addressed herein; (2) entering a Declaratory Judgment holding the above referenced ordinances void; (3) awarding Plaintiffs their reasonable and necessary attorney's fees and costs incurred in enforcing the Court's permanent injunction and requesting a Declaratory Judgment; and awarding such further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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Telephone: (512) 482-0061
Fax: (512) 482-0924

By:

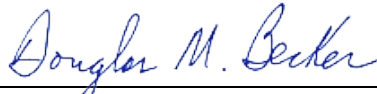


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CERTIFICATE OF SERVICE

I certify that on August 18, 2023, a true copy of *Plaintiffs' Second Amended Motion to Enforce Permanent Injunction* was served on counsel for Defendants in accordance with Texas Rule of Civil Procedure 21a via e-service through the Texas E-file system.

Hannah M. Vahl
City of Austin Law
Department P.O. Box 1546
Austin, Texas 78767-1546



Douglas M. Becker

MAR 18 2020 JG

CAUSE No. D-1-GN-19-008617

At 4:58 P.M.
Velva L. Price, District Clerk

FRANCISCA ACUNA, et al.,
Plaintiffs

v.

THE CITY OF AUSTIN, TEXAS, et al.
Defendants

§ IN THE DISTRICT COURT

§

§

§ TRAVIS COUNTY, TEXAS

§

§

§ 201st JUDICIAL DISTRICT

FINAL JUDGMENT

On March 11, 2020, this case was called for trial. Plaintiffs, Francisca Acuña, Susana Almanza, Jeffery L. Bowen, William Burkhardt, Alecia M. Cooper, Roger Falk, Seth O. Fowler, Randy Howard, Mary Ingle, Patricia King, Fred I. Lewis, Barbara McArthur, Allan E. McMurtry, Laurence Miller, Gilbert Rivera, Jane Rivera, John Umphress, James Valadez, and Ed Wendler, Jr., appeared through their counsel of record, Douglas M. Becker and Monte L. Swarengen, and announced ready for trial. Defendants, the City of Austin, the City Council of Austin, the Honorable Austin Mayor Steve Adler, in his official capacity, the Honorable Austin City Council Members Natasha Harper-Madison, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Jimmy Flannigan, Leslie Pool, Paige Ellis, Kathie Tovo, and Alison Alter, in their official capacities, and the Honorable Austin City Manager, Spencer Cronk, in his official capacity, appeared through their counsel of record, Jane Webre and Mary Byars, and announced ready for trial.

All matters in controversy, legal and factual, were submitted to the Court for its determination. The Court received the evidence and heard the arguments of counsel. Michelle Williamson, Court Reporter for the 345th District Court, made a record of the proceedings.

EXHIBIT A

Declaratory Relief

The Court FINDS:

1. Defendants violated Sections 211.006 and 211.007 of the Texas Local Government Code in their attempt to adopt a comprehensive revised Land Development Code by (a) failing to provide statutorily-required notice of the Planning Commission's public hearing to Plaintiffs as to the changes in zoning of Plaintiffs' property and nearby property in the City of Austin; and (b) failing to recognize Plaintiffs' protest rights.

2. Defendants' actions described above constitute *ultra vires* acts that contravene state law, entitling Plaintiffs to relief against Defendants.

The Court DECLARES:

1. Defendant City of Austin must send written notice to all property owners whose property is having its zoning changed, and to property owners within 200 feet of such property at least 10 days before the Planning Commission's public hearing to change the zoning of their property or nearby properties; or the City of Austin, upon a two-thirds vote of the City Council, may prescribe alternative notice of the time and place of a public hearing held jointly by the Austin City Council and the Austin Planning Commission pursuant to Texas Local Government Code 211.007(d).

2. The City Council's votes on first and second reading of the revised Land Development Code are void for failure to give the required statutory notice of the Planning Commission's public hearing.

3. Plaintiffs have protest rights pursuant to § 211.006(d) of the Texas Local Government Code as to any change in the zoning regulations or zoning district boundaries as to their property and any property within 200 feet of their property;

4. Defendants must not tell property owners that protest rights are not applicable to their property because of the Land Development Code revision; and

5. Defendants must affirmatively inform property owners and surrounding property owners of their protest rights.

Injunctive Relief

IT IS ORDERED, ADJUDGED, AND DECREED that Defendants be, and hereby are, commanded to send written notice to all property owners in the City of Austin, and surrounding property owners within 200 feet, whose zoning regulations or zoning district boundaries are being changed, at least 10 days before the Planning Commission's public hearing on those zoning changes, pursuant to § 211.007(c); or in the alternative, Defendants may provide the alternative notice by following § 211.007(d).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants be, and hereby are, commanded to desist and refrain from:

1. Refusing to recognize and accept Plaintiffs' protest rights pursuant to Texas Local Government Code § 211.006(d) as to any change in the zoning regulations or zoning district boundaries of Plaintiffs' property or any property within 200 feet of Plaintiffs' property; and

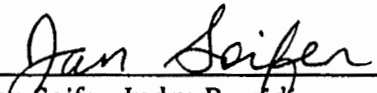
2. Refusing to require a three-fourths majority vote of all City Council Members to adopt any zoning change for any property that has been protested by the owners of at least 20% of the relevant property, pursuant to Texas Local Government Code § 211.006(d), in order for such change to be effective.

The Clerk shall forthwith, when so requested by Plaintiffs, issue a writ of injunction in conformity with the law and the terms of this judgment.

All relief sought by any party but not herein expressly given is denied.

This Final Judgment disposes of all issues and claims between the parties and is intended to be a final and appealable judgment.

SIGNED on March 18, 2020.


Jan Soifer, Judge Presiding