

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

**STEVEN SNYDER, H. ANDREW
DECKER, and R. GREGORY
BREETZ,**

Plaintiffs,

v.

**SECOND AVENUE NASHVILLE
PROPERTY, LLC, and THE
CONGRESS GROUP, INC.,**

Defendants.

Case No. _____

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT
& INJUNCTIVE RELIEF**

Plaintiffs Steven Snyder, H. Andrew Decker, and R. Gregory Breetz, (collectively the “Plaintiffs”), for their Verified Complaint against Second Avenue Property, LLC and The Congress Group, Inc., (collectively the “2nd and Peabody Developers” or “Defendants”), state as follows:

THE PARTIES

1. Plaintiff Steven Snyder is a citizen and resident of Davidson County, Tennessee, who resides at 20 Rutledge Street, Apartment 610, Nashville, TN 37210.

2. Plaintiff H. Andrew Decker is a citizen and resident of Davidson County, Tennessee, who resides at 20 Rutledge Street, Nashville, TN 37210.

3. Plaintiff R. Gregory Breetz is a citizen and resident of Davidson County, Tennessee, who resides at 20 Rutledge Street, Nashville, TN 37210.

4. Defendant Second Avenue Nashville Property LLC is a Delaware limited liability company, and its registered agent for service of process is the Corporation Service Company, 2908 Poston Avenue, Nashville, Tennessee 37203. Upon information and belief, Second Ave Nashville Property LLC is an affiliate or subsidiary of The Congress Group, Inc.

5. Defendant The Congress Group, Inc. is a Massachusetts corporation with its principal place of business at 33 Arch Street, Suite 1100, Boston, MA 02110.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction to hear this matter and declare rights, status, and other legal relations whether or not further relief is or could be claimed pursuant to Tenn. Code Ann. § 29-14-102.

7. This Court has personal jurisdiction over the Defendants pursuant to Tenn. Code Ann. § 20-2-223 because Defendants transact business within this state and have an interest in real property located in this state, and Defendants activities in this state give rise to Plaintiffs' causes of action.

8. Venue is proper because Plaintiffs' causes of action arose in this county.

FACTUAL BACKGROUND

A. An Overview of the Controversy.

9. Plaintiffs are residents of the City Lights Condominium Building, located at 20 Rutledge Street, Nashville, Tennessee 37210.

10. Defendants are real estate developers who seek to develop real property in Davidson County, located at 507, 509, 511, 519, 521 Second Avenue and 203 Peabody Street, to wit Map 93-11, Parcels 28, 29, 41, 32, 36-40 (hereinafter the "Subject Property").

11. On the Subject Property, Defendants seek to erect three buildings, specifically: (1) one residential building, thirty-six (36) stories in height; (2) a second residential building, thirty-two (32) stories in height; and (3) one hotel and commercial/coworking building, eighteen (18) stories in height (collectively the “2nd and Peabody Development”).

12. Each of the buildings comprising the 2nd and Peabody Development are taller than the legally permissible height generally allowable in the Downtown Code (the “DTC”) for the Lafayette Subdistrict.

13. Defendants have already requested and obtained a height modification which is the subject of a current case in the Tennessee Court of Appeals.

14. The City Lights Condominium Building is located one block away from the Subject Property in the Rutledge Hill neighborhood.

B. The 2nd and Peabody Developers’ Original Action Before the Planning Commission.

15. On January 27, 2021, Gresham Smith Architects filed an application (the “First Application”) on behalf of the 2nd and Peabody Developers, and their predecessors-in-interest, with the Metro Nashville Planning department (the “Planning Department”) relating to the development of the Subject Property. A true and correct copy of the First Application is attached hereto as **Exhibit A**.

16. The First Application sought a “major plan amendment” to the Downtown Community Plan (“Downtown Plan”) and “an overall height modification” for the Subject Property.

17. With respect to the major plan amendment, the First Application sought to change the Subject Property from T6 Downtown Neighborhood to T6 Downtown Core to take advantage of the much more liberal building height standards in the Downtown Core.

18. With respect to the overall height modification, the First Application also included a conceptual design for the 2nd and Peabody Development which included towers of thirty-eight (38) and thirty-four (34) stories in height. The applicable zoning ordinance for the Subject Property would otherwise only allow eight (8) stories, and three additional “bonus” stories subject to certain conditions, of height in the Lafayette Neighborhood.

19. The major plan amendment was placed on the March 25, 2021, agenda of the Metro Nashville Planning Commission (the “Planning Commission”).

20. However, prior to the March 25 Planning Commission meeting, the staff of the Planning Commission (the “Staff”) issued a report recommending disapproval or deferral of the major plan amendment.

21. As a result, the Planning Commission deferred the item.

22. Then, on July 19, 2021, Gresham Smith filed a second application (the “Second Application”) with the Planning Department, seeking only overall height modifications for the Property. A true and correct copy of the Second Application is attached hereto as **Exhibit B**.

23. The height modification sought in the Second Application mirrored the same request of that in the First Application, was assigned the same case number as the height modification request in the First Application (2021 DTC-008-001), and was placed on the Planning Commission agenda for its August 26, 2021, meeting.

24. The Second Application was subsequently continued until the September 9 Planning Commission meeting.

25. Prior to the September 9 Planning Commission meeting, the Staff prepared and circulated to the Planning Commission a report and recommendation that the Second Application

be approved (the “Staff Report”). True and correct copies of the March 25, 2021, Staff Report and the September 9, 2021, Staff Report are attached hereto as **Exhibit C**.

26. The Staff Report described the request as follows:

APPLICANT REQUEST

Modification of overall height standards of the DTC, Lafayette Subdistrict, to allow for residential buildings of 32 stories and 36 stories, and one hotel building of 18 stories.

27. The by-right building height standard in the Lafayette Subdistrict is eight (8) stories, with the ability to obtain three (3) “bonus” stories under certain conditions. *See* DTC, pp. 38-39.

28. As a result, the requested modification was for seven (7) stories to twenty-five (25) stories above the applicable height standards.

29. The Staff indicated in the Staff Report that the requested height modification could be granted under the DTC in the case of “exceptional design, including but not limited to unique architecture, exceptionally strong streetscape, and improvement of the project’s relationship to the surrounding properties.” *See* Ex. C, September 9, 2021, Staff Report, p. 98.

30. The Staff further recommended in the Staff Report that the Planning Commission should grant the requested height modification on the basis that the 2nd and Peabody Development provided “unique design characteristics and expression in its site and open space design, as well as the building massing and façade articulation” and further that “the project’s emphasis on residential use lays the groundwork for a vibrant urban neighborhood in this part of downtown.” *Id.*, p. 100.

31. Prior to the meeting, neighboring property owners, including the Plaintiffs, either directly or through counsel, filed written objections to the granting of the Second Application.

32. Neighboring property owners also appeared at the September 9 Planning Commission meeting to speak in opposition to the 2nd and Peabody Development.

33. Despite the foregoing, the Planning Commission granted the height modification request for the 2nd and Peabody Development on a vote of 6-2.

34. In doing so, its members relied upon the Staff Report and upon the oral statements of the Planning Department Director, Lucy Kempf, at the meeting, in which she stated that a policy decision had been made to allow large height modifications under the DTC on a site-by-site basis, instead of requiring an amendment to the Downtown Plan and rezoning the Property.

C. Plaintiffs' Petition for Writ of Certiorari & Appeal.

35. Based on the foregoing, Plaintiffs filed a Petition for Writ of Certiorari with this Court on October 28, 2021, (the "Petition"), requesting that this Court vacate and set aside the above-mentioned actions of the Planning Commission. *See Steven Snyder, et al. v. The Metropolitan Nashville Planning Commission et al.*, Davidson County Chancery Court Case No. 21-1077-II.

36. As a basis for this action, Plaintiffs alleged, *inter alia*, that the Planning Commission acted arbitrarily, capriciously, and illegally in approving the height modification request for the 2nd and Peabody Development.

37. Plaintiffs further alleged that the requested height modification for the 2nd and Peabody Development was inconsistent with the general plan's restrictions on height for the Lafayette Subdistrict.

38. Because of the similarity of issues raised in that action with another action in Part IV of this Court, the parties agreed to consolidate those matters. *See Steven Snyder, et al. v. The*

Metropolitan Nashville Planning Commission et al., Davidson County Chancery Court Case No. 21-0017-IV.

39. After consolidation and briefing by the parties, on May 2, 2022, this Court entered a *Memorandum and Order* in which it denied Plaintiffs' request for a Writ of Certiorari and affirmed the Planning Commission's approval of the height modification for the 2nd and Peabody Development. *See* May 2, 2022, Memorandum and Order, p. 23.

40. On May 31, 2022, Plaintiffs filed a Notice of Appeal of the May 2, 2022, Memorandum and Order (the "Appeal").

41. The Appeal is currently pending in the Tennessee Court of Appeals, Middle Division at Nashville. *See Steven Snyder et al. v. Metropolitan Nashville Planning Commission et al.*, Court of Appeal of Tennessee Case No. M2022-00722-COA-R3-CV.

42. On June 24, 2022, the Court of Appeals issued a *per curiam* Order, setting an expedited briefing process for the Appeal pursuant to Tenn. Code Ann. § 27-9-112(b) and as a result of a motion filed by the Appellees.

43. The Court of Appeals has further set oral argument on the Appeal for November 2, 2022.

D. 2nd and Peabody Developers' New Action Before the Planning Commission.

44. While the Appeal is currently pending, the 2nd and Peabody Developers have now submitted a third application to the Planning Commission concerning the Subject Property (the "Third Application"). A true and correct copy of the Third Application is attached hereto as **Exhibit D**.

45. This Third Application is a request for a Specific Plan ("SP") zone.

46. SP zones are authorized pursuant to Davidson County Metropolitan Code 17.40.105 and 106.

47. Metro Code 17.40.105 authorizes SPs and sets forth the general requirements for their usage:

The specific plan (SP) district is an alternative zoning process that may permit any land uses, mixture of land uses, and alternative development standards, of an individual property or larger area, **to achieve consistency with the general plan.** In return, a SP district requires the specific plan to be designed such that, at a minimum, the location, integration and arrangement of land uses, buildings, structures, utilities, access, transit, parking, and streets collectively avoid monotony, promote variety, and **yield a context sensitive development.**

(emphasis added).

48. Likewise, Metro Code 17.40.106 sets out the two-step procedure which governs the SP application process.

49. Subsection B of 106 sets out the requirements of the Application:

B. Application Submittal. An application shall be submitted by the property owner, the metropolitan planning commission, or a member of the metropolitan council and shall be accompanied by a development plan in a form and content established by the planning commission, along with all applicable processing fees. The development plan shall consist of written text, exhibits, and plans in a report format that describes existing conditions, the purpose and intent of the SP, the plan's consistency with the principles and objectives of the general plan, a list of allowable land uses, height and size of proposed building types, and development standards and a conceptual site plan, regulatory plan, or site-specific plan for the development. All items must be submitted, at the time of application, for the rezoning application to be deemed complete for review. Any omission of a required submittal item shall be identified, and its reason for omission explained in the development plan, including any application submittal waivers granted by the executive director of the planning department or designee.

Metro Code 17.40.106B.

50. After submission of the application, the first step under the SP regime is for an administrative review and recommendation by the Planning Commission:

- D. Metro Planning Commission Action. The planning commission shall review a proposed SP district application for **conformance and consistency with the development plan's stated purpose and intent and the principles and objectives of the general plan.** The planning commission shall act to provide a recommendation on the application. Within ten working days of an action, the commission's resolution shall be transmitted in writing to the applicant, the metro clerk, the zoning administrator and all other appropriate governmental departments.

Metro Code 17.40.106D (emphasis added).

51. After this administrative review and recommendation by the Planning Commission, the Metropolitan Council takes legislative action and “shall consider an ordinance establishing a SP district and its associated development plan according to the procedures of Article III of this chapter (Amendments to the Official Zoning Map).” Metro Code 17.40.106E.

52. In this case, the SP sought by Defendants is identical to the height modification granted in response to the Second Application. *Compare* Ex. B with Ex. C.

53. According to Dean Stratouly, the President and CEO of the Congress Group, Defendants are seeking this SP designation as a way to “supplement and overlap” the height modifications that were already granted by the Planning Commission in response to the Second Application.¹

54. The Third Application is currently scheduled to be considered during the July 28, 2022, Planning Commission meeting.

55. On July 18, 2022, Plaintiffs received notice, via U.S. Mail, of July 28, 2022, Planning Commission meeting. A true and accurate copy of this notice is attached hereto as **Exhibit E.**

¹ See Drew Hutchinson, *The Congress Group Pursues New Zoning to Hedge Against Fallout from 2nd & Peabody Legal Dispute*, NASHVILLE BUS. J. (Jun. 16, 2022) (<https://www.bizjournals.com/nashville/news/2022/06/16/2nd-peabody-zoning.html>).

56. Plaintiffs risk suffering irreparable harm if Defendants proceed with the Third Application, and this Court should enjoin Defendants' pursuit of the same.

COUNT I
(Declaratory Judgment & Injunctive Relief – Defendants are Barred from Pursuing the SP Application by the Doctrines of *Res Judicata* and/or Prior Suit Pending)

57. Plaintiffs restate and incorporate by reference the foregoing Paragraphs.

58. There exists a judicable case or controversy between Plaintiffs and Defendants.

59. Defendants seeks to obtain an SP for the Subject Property so that they may construct the 2nd and Peabody Development—a project that would otherwise be impermissible under the generally applicable height restrictions.

60. Likewise, Defendants' Third Application for an SP is identical to their request for a height modification which has already been granted by the Planning Commission and which is the subject of pending litigation between the parties.

61. Under Tennessee law, "*res judicata* and collateral estoppel are applicable to give conclusive effect to quasi-judicial determinations of administrative agencies." *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 566 (Tenn. Ct. App. 1991).

62. These claim preclusion doctrines preclude a party from obtaining the same or additional relief on the same grounds through a subsequent action, *i.e.* the Third Application in this case.

63. The actions taken by the Planning Commission with respect to the Second Application, and the actions required to be taken by the Planning Commission with respect to the Third Application are administrative and subject to these claim preclusion doctrines.

64. Plaintiffs seek this Court's declaration that the Planning Commission does not have subject matter jurisdiction to consider the Third Application, and/or that Defendants lack standing

to pursue the Third Application, pursuant to the doctrines of *res judicata* and/or the related claim preclusion doctrine of Prior Suit Pending.

65. The issuance of such declaration by the Court will eliminate the uncertainty and controversy between the parties as to their respective rights at issue in this portion of the litigation.

66. Plaintiffs have suffered, and will continue to suffer, an irreparable injury as a result of Defendants' conduct in this matter.

67. Remedies at law are inadequate to compensate Plaintiffs for the injury caused by Defendants' conduct.

68. Plaintiffs further seek injunctive relief in the form of an order prohibiting Defendants from prosecuting or pursuing the Third Application and an order of specific performance directing Defendants to withdraw the Third Application.

COUNT II
(Declaratory Judgment – The Height Modification Sought by Defendants is Inconsistent with the Principles and Objectives of the General Plan)

69. Plaintiffs restate and incorporate by reference the foregoing Paragraphs.

70. There exists a judicable case or controversy between Plaintiffs and Defendants with respect to Defendants' right to construct the 2nd and Peabody Development on the Subject Property.

71. Such case or controversy has not been resolved by the prior litigation because, as the Court noted, it was limited in its review of the Planning Commission's conduct.

72. Nashville Next is the general plan for Nashville and Davidson County, and it calls for the adoption of Community Plans for fourteen (14) neighborhoods of Metro Nashville/Davidson County. (Neighborhoods and Subdistricts are used to describe the specific

areas governed by the DTC and the Community Plan and likewise are used interchangeably herein).

73. The Community Plan for the Subject Property is the Downtown Plan. A true and correct copy of the Community Plan is attached hereto as **Exhibit F**.

74. A unifying theme and central purpose of the Downtown Plan is that each of Downtown Nashville's neighborhoods is unique, with its own character.

75. The Downtown Plan contains the following statements, among others, which are relevant to this case:

Community Profile
Description/Location

* * *

While Downtown is the most intense urban setting in Nashville/Davidson County, *it retains physical attributes that give it shape and add to its character and beauty. Three commanding physical features that dominate Downtown* are Capitol Hill to the north, *Rutledge Hill to the south*, and the Cumberland River.

* * *

The Downtown Community Plan calls for a strong emphasis on distinctive neighborhoods. Downtown thrives when residents and businesses feel that they are part of a neighborhood, supported by shared public spaces, including both walkable environments and open space and the services and amenities needed for daily life. For planning purposes, *Downtown, is considered to have 15 neighborhoods, each with its own unique character:*

* * *

- Core (Central Business District)

* * *

- SoBro (South of Broadway)
- Rutledge hill
- Lafayette

Within each of these defined neighborhoods, there are subdistricts with specific growth and development goals that complement the Downtown Code – the zoning that implements the Downtown Community Plan (discussed in the Community Character Policy Plan and Special Policies).

(Ex. F, pp. 7-8) (emphasis added).

76. Among the “goal and supplemental policies” for the Lafayette neighborhood is the restriction that “*building heights generally should not exceed mid-rise heights.*” (*Id.*, p. 42) (emphasis added).

77. These provisions further provide that:

Properties along Peabody Street: If properties south of Korean Veterans Boulevard (KVB) (on Peabody Street or numbered streets such as 1st through 6th Streets) are consolidated and developed with frontage on KVB, then the properties will be considered part of SoBro and the goals and objectives of SoBro and the T6 Downtown Core policy will apply. If properties south of KVB are developed without frontage on KVB, then they will be required to transition in height down from the T6 Core to T6 Downtown Neighborhood policy. *The actual height will take into consideration the colitext of the individual property and achievable heights in adjacent policy areas, but it is expected these heights will range between 8 and 20 stories, with higher heights seen closer to KVB and lower heights transitioning into the adjacent neighborhoods.*

(*Id.*) (emphasis added).

78. The Downtown Plan further provides that each of the Community Plans are guided by the Community Character Manual. A true and accurate copy of the Community Character Manual is attached hereto as **Exhibit G**.

79. For Downtown, Lafayette, and Rutledge Hill—the neighborhoods impacted by the 2nd and Peabody Development—the Community Character Manual provides the following:

Building Heights in the Downtown Community Plan

...within the Downtown Community Plan, building heights are classified by low, medium, or high. Below are the ranges for each category:

- Low-rise buildings are less than approximately eight stories, but in some cases, may be as high as 10.
- Mid-rise structures vary between approximately 10 and 20 stories.
- High-rise buildings are greater than approximately 20 stories.

(Ex. G, p. 245).

80. The Community Character Manual also establish “General Characteristics” that apply to the Subject Property:

T6-DN Downtown Neighborhood

General Characteristics

T6-DN areas have an established development pattern consisting of the following:

- High-density residential development located neighborhoods of diverse character. For example, the Gulch South neighborhood is characterized by modern, multistory, mixed use developments with residential above retail or office. Meanwhile, *the adjacent Lafayette, Rutledge Hill, and Rolling Mill Hill neighborhoods are also relatively high density, but the building form is mid-rise at most;*

(*Id.*, p. 249) (emphasis added).

81. As a result, the standards for the Lafayette Subdistrict, where the 2nd and Peabody Development is located, provide that “the neighborhood is primarily low-rise and should act as a transition from the height of the Core and Sobro to the single-family neighborhoods to the South.”

82. The Lafayette Subdistrict provides for a base height of eight (8) stories, with an additional three (3) stories available under the Bonus Height Program, for a total of eleven (11) stories.

83. Plaintiffs seek this Court’s declaration that the height modifications sought in Defendants’ Third Application for an SP are impermissible as being inconsistent with the principles and objectives of the general plan governing the Subject Property.

84. The issuance of such declaration by the Court will eliminate the uncertainty and controversy between the parties as to their respective rights at issue in this portion of the litigation.

COUNT III

(Declaratory Judgment – SPs Cannot Be Used to Obtain Height Modifications in the DTC)

85. Plaintiffs restate and incorporate by reference the foregoing Paragraphs.

86. There exists a judicable case or controversy between Plaintiffs and Defendants with respect to Defendants' right and ability to use the SP application process to obtain height modifications in the DTC.

87. The DTC, which was most recently revised on November 11, 2021, codifies height restrictions for each of downtown's neighborhoods and subdistricts.

88. The DTC height modification processes—which were enacted after the ordinances implementing the SP application process—overruled and superseded the SP process with respect to obtaining height modifications in the areas governed by the DTC.

89. Plaintiffs seek this Court's declaration that the subsequent enactment of the DTC, and its height modification process, overruled and superseded the SP process specifically with respect to applicant's right and ability to use the SP process to obtain height modifications with respect to the Subject Property.

90. The issuance of such declaration by the Court will eliminate the uncertainty and controversy between the parties as to their respective rights at issue in this portion of the litigation.

WHEREFORE, Plaintiffs demand judgment of Defendant as follows:

1. That this Court enter an Order declaring the following:

a. That the Planning Commission is without subject matter jurisdiction to review, recommend, or take any action with respect to the Third Application, and/or that Defendants lack standing to pursue the Third Application, pursuant to the doctrines of *res judicata* and/or Prior Suit Pending; and

b. That the height modifications sought by the Defendants in the Third Application for an SP are impermissible as being inconsistent with the principles and objectives of the general plan governing the Subject Property; and

c. That the subsequent enactment of the DTC overruled and superseded the SP process for obtaining height modifications in areas governed by the DTC; and

2. That this Court further enter an order enjoining Defendants and their agents, employees, or officers from prosecuting, pursuing, or taking any further action with respect to the Third Action and ordering specific performance that, not subject to the foregoing, Defendants take steps to withdraw the Third Application; and

3. That this Court enter an order temporarily enjoining Defendants from the same pending an outcome of this litigation on its merits; and

4. For such other and further relief as may be appropriate; and

5. For general relief; and

6. For the costs of this cause.

Respectfully submitted,

**SHACKELFORD, BOWEN
MCKINLEY, & NORTON, LLP**

s/Jay S. Bowen

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*Counsel for Plaintiffs Steven Snyder, H. Andrew
Decker, and R. Gregory Breetz*

VERIFICATION

I, R. Gregory Breetz, state that I have read the foregoing Verified Complaint, and that the information contained therein is true to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct, on this the 21 day of July, 2022.



R. GREGORY BREETZ

SWORN AND SUBSCRIBEDD BEFORE ME THIS THE

21 DAY OF July, 2022.



NOTARY PUBLIC

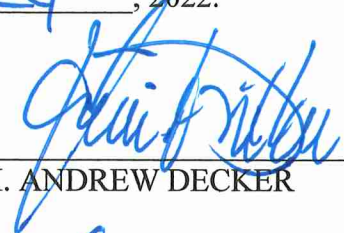
My Commission Expires: _____.



VERIFICATION

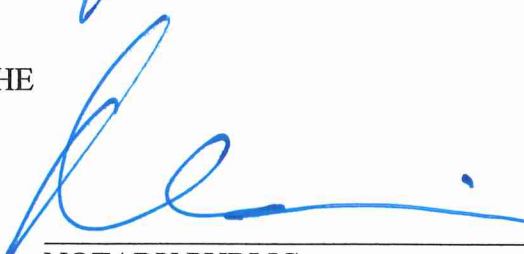
I, H. Andrew Decker, state that I have read the foregoing Verified Complaint, and that the information contained therein is true to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct, on this the 21 day of July, 2022.



H. ANDREW DECKER

SWORN AND SUBSCRIBEDD BEFORE ME THIS THE
21 DAY OF July, 2022.



NOTARY PUBLIC

My Commission Expires: _____



VERIFICATION

I, Steven Snyder, state that I have read the foregoing Verified Complaint, and that the information contained therein is true to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct, on this the 21st day of July, 2022.



STEVEN SNYDER

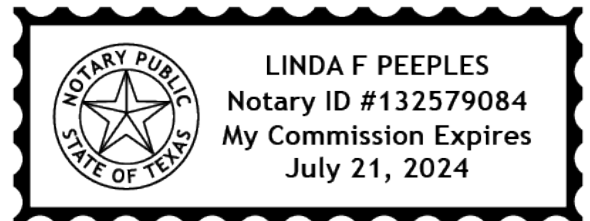
State of Texas
County of Harris

SWORN AND SUBSCRIBED BEFORE ME THIS THE

21st DAY OF July, 2022. By Steven Snyder.

Online Notary Public
NOTARY PUBLIC

My Commission Expires: 07/21/2024.



Produced Tennessee Driver License as identification along with multi-factor KBA authentication.

This notarial act was an online notarization via two-way webcam and audiovisual technology.