IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

FAMILY GOLF OF NASHVILLE, INC.	)	
	)	
Petitioners,	)	
	)	
v.	)	**Docket No. 95-3832-I**
	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
	)	
Respondent.	)	

MEMORANDUM OF LAW SUBMITTED ON BEHALF OF THE TENNESSEE CHAPTER OF THE AMERICAN PLANNING ASSOCIATION

I. Introduction

This memorandum of law is filed on behalf of the Tennessee Chapter of the American Planning Association (TAPA) by virtue of an order of this court granting permission to the TAPA to file a friend of the court brief. The TAPA strongly urges this Court to conclude that the zoning decisions of the Metropolitan Government must be consistent with the Comprehensive Plan adopted by the Metropolitan Planning Commission, and to the extent that they are inconsistent, they are illegal as being inconsistent with the Metro Charter. The TAPA submits that the history of land use planning in this state (and the country), the language of the Charter itself, fundamentally important public policies, and case law from other states, all require this result. Further, the zone change is also obviously unconstitutional.

II. Factual Background

On July 27, 1994, Robert S. Maxwell applied to the Metro Planning Commission for a zone change. He asked to change the zoning on his property located at the corner of Blue Hole Road and Bell Road (otherwise known as Parcel 62 on Metropolitan Property Map # 162) to CS (commercial services) so as to allow the use of the property as a recreational area to include such things as "bumper-boats and go-carts, as well as food service."[1] Staff Recommendation dated 25 August 1994. It is important to note

[1] Mr. Maxwell currently operates a miniature golf course on this property under a conditional use permit issued by the Metropolitan Board of Zoning Appeals.

here that while the plaintiff may use the property for the proposed use, there is no obligation that he do so. Once the zoning is legally changed, there is no requirement that the applicant use his property for the stated purposes. CS zoning allows a wide range of commercial activities, including health care clinics, transient habitation (motels and hotels), restaurants, undertaking, automotive repair, vehicle sales, automobile parking, wholesale sales, and even limited manufacturing activities, among others. COMZO § 17.60.020. The applicant may, once the zoning is legally passed, use the property for any of these purposes without any additional approval.[2] Some of these uses may be consistent with adjacent residential use of the property, but others are most certainly not.

A council bill was prepared by the MPC staff, #O94-1222, as is customary on all such requests. As required by law, the MPC met to consider this zone change request on 25 August 1994. The staff recommendation was that the zone change request be denied because it conflicted with the General Plan(GP) and the Sub-Area Plan for Area 12 (SP-12). The MPC unanimously adopted a resolution which disapproved the zone change as contrary to the General Plan in three particulars: first, the land use policy shows this area as medium density residential, not commercial; second, one objective of the SP-12 is to confine commercial uses to clearly defined centers of commercial

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COMZO §§ 17.24.030, 17.124.120, and 17.124.210.

[2] This is quite different from the usual cases heard by this court. Most of the time, the court is involved in disputes over aspects of a plan submitted by the applicant. The owner has specified the use to which the property will be put, and it is the details concerning the operation of the facility which are at issue. For example, a variance requires that the owner specify what the use to which the property will be put, as well as a large number of other important site plan details. COMZO §§ 17.132.020 & 17.132.120. Conditional use permits are the same (Id.). Taking several of this court's own cases: *Father Ryan v City of Oak Hill* involved a denial of a conditional use permit by the city board, and this court reversed, and was sustained on appeal; in *Hillsboro West End Neighborhood Association v Metro Board of Zoning Appeals*, a church applied for a variance. Both applications were very specific as to the actual use to which the property would be put. Finally, this court should also distinguish another type of land use planning technique, the planned unit development. Most recently, this court had occasion to review a PUD in *Hovenden v City of Gallatin and Wal-Mart Stores, Inc.* and this court's decision was affirmed by the Court of Appeals. Once again, the main point remains true: a detailed plan was submitted which specified to the utmost the use to which the property would be put.

activity; and third, because this area is subject to flooding, low impact uses should be encouraged. CS zoning permits very high impact uses, the very antithesis of the plan's policies. MPC Resolution 94-628.

The bill was introduced before the Metropolitan Council and passed first reading on 4 October 1994; there was a public hearing on 1 November and it passed second reading at that time.[3] Interestingly, there was no evidence submitted during the public hearing.[4] Even more telling, there appears to have been absolutely no consideration of the GP or SP-12 by the Metro Council or any of its members whatsoever.[5]

It nevertheless unanimously passed third and final reading on 15 November 1994. The bill was returned unsigned by the Mayor, and, if it had been consistent with the GP and SP-12, would have become law on 6 December 1994. Approximately one year later, this action for declaratory judgment was filed seeking to require the issuance of a building permit notwithstanding the inconsistency with the GP and SP-12. Evidently, no application for a building permit was ever filed.

III. A Little History

Some historical analysis may be helpful here. The first modern zoning ordinance was adopted by New York City in 1916. Within 5 years thereafter, zoning made its way to Tennessee. Chapter 165 of the 1921 TENNESSEE PRIVATE ACTS authorize Memphis to adopt zoning regulations. There is no requirement in this statute that the zoning regulations be consistent with any comprehensive or general plan.[6]

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[3]The Metro Charter requires three readings for passage. See Metro Charter § 3.05.

[4] On a change of zoning, the introduction of evidence is unnecessary, although certainly the applicant may choose to do so. Contrast this with an application for a PUD, where the applicant absolutely must present proof indicating compliance with all conditions.

[5] The failure of the Metro Council to even consider the GP or the SP-12 is probably violative of the law. See *Barrett v. Shelby County*, 619 S.W.2d 390, 394 (Tenn. App. 1981), (while the current local legislative body is not bound by the GP, it is an important element to consider).

[6] Section 4 of the Act does require the planning commission to make a recommendation and a report, but this does not depend upon or require any

On the national scene, in the mid-twenties, a blue ribbon panel advised the Federal Department of Commerce concerning enabling regulations for municipal zoning. This so-called Standard State Zoning Enabling Act (SSZEA) became the basis upon which a majority of the states enacted zoning enabling legislation, and under which thousands of local municipalities adopted zoning.[7] The language of this act was markedly different from the Memphis legislation passed in 1921. It expressly required that the zoning regulations be "in accordance with a comprehensive plan." See Section 3 of the SSZEA. It specifically requires that zoning be consistent with a comprehensive view of how the city will develop. Unfortunately, the SSZEA was not adopted with this language in Tennessee.

Nashville got into the act in 1925. Chapter 209 of the 1925 TENNESSEE PRIVATE ACTS authorized the City of Nashville to adopt zoning in a similar manner. A new charter for the City of Nashville was adopted by the Tennessee General Assembly via a private act in 1943 with similar provisions (and repealing Chapter 209 of the 1925 TENNESSEE PRIVATE ACTS). Again there was no provision for a comprehensive plan included in this legislation.

In 1935, the Tennessee Public Planning and Zoning Enabling Statutes were adopted, TENN. CODE ANN. §§ 13-4-101 et seq., and 13-7-201, et seq.[8] These were greatly influenced by the SSZEA but they do not contain the important language, "in accordance with a comprehensive plan." For reasons that have never been clearly explained, that language is omitted from the Tennessee Zoning Enabling Statutes

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consistency between the report and the zoning ordinance.

[7]See Daniel R. Mandelker, Land Use Law § 4.16 (3rd ed., 1993).

[8]There are several public versions of the planning and zoning enabling statutes in Tennessee. These include: regional planning enabling statutes, TENN. CODE ANN. § 13-3-101 et seq.; regional zoning enabling statutes, TENN. CODE ANN. § 13-7-101 et seq.; municipal planning enabling statutes, TENN. CODE ANN. § 13-4-101 et seq.; and municipal zoning enabling statutes, TENN. CODE ANN. § 13-7-201 et seq. For the purposes of this brief, no distinction will be made between the regional and municipal versions, although there are a number of differences. Those differences are not important in the context of this case. The planning enabling statutes will be referred to collectively as TPES (Tennessee Planning Enabling Statutes), and the zoning enabling statutes as the TZES.

(TZES). It is simply not there. The TZES simply did not make consistency with the plan a requirement for passage of zoning amendments in Tennessee. Thus, in any municipality in Tennessee which operates under the auspices of the TZES, there is no relationship between zoning and planning in any but the most fleeting of ways.

Instead, the planning commission is required under the TZES to "make and certify to the chief legislative body a zoning plan, including both the full text of a zoning ordinance and the maps, representing the recommendation of the planning commission . . . " TENN. CODE ANN. § 13-7-202. While the planning commission does, under the TPES have the authority to "make and adopt an official general plan," TENN. CODE ANN. § 13-4-201, the two documents (the official general plan and the zoning plan) are clearly not the same. The language in the TZES quoted above equates the zoning plan with the zoning ordinance itself. The defining clause which immediately follows the term "zoning plan" says that it "includes both the full text of a zoning ordinance, and the maps." In other words, while the TZES requires that the planning commission prepare the zoning ordinance for consideration and adoption by the local legislative body, there is no connection between the general plan of § 13-4-201 and the zoning plan/zoning ordinance referred to in § 13-7-202.

It is unclear again why the General Assembly chose to separate the planning function from the zoning function in this important 1935 legislation. This seems to be the very antithesis of planning: a comprehensive plan is developed for the future growth of the community and yet it has virtually no effect upon the actions of the local legislative body. Surely if the plan exists, there should be a connection as required by the SSZEA, that zoning be "in accordance with" the plan. If the local legislative body is permitted to willy-nilly ignore it, the plan is largely meaningless.

One can speculate that in Tennessee in 1935, there were a large number of rural communities which might adopt zoning but did not want to be tied to the planning concept. This partial explanation for the language of the TZES is not entirely satisfactory but it at least begins to explain the reticence of the members of the

General Assembly.[9] One can also speculate that since Memphis already had zoning legislation, perhaps the TZES was based upon the Memphis model, rather than changing to more closely fit the SSZEA. Since the Memphis legislation had no consistency requirement, the TZES also did not have one.

Now, fast forward to 1955 and concentrate on the City of Nashville, and Davidson County. In the decade following World War II, the suburban growth of the county outstripped its urban interior causing tremendous problems that ultimately were to find a solution the consolidated government we now know as Metro.[10] Water and sewerage services, fire, police, street lighting, and garbage collection were all inadequate to the growing county.[11] The lack of planning and control over the manner in which the region would grow was of primary concern. Out of these difficulties, the idea of Metropolitan Government was formed.

Interestingly, one of the participants on the Charter Commission was a lawyer named E.C. "Bud" Yokley. Mr. Yokley, now deceased, was known as an expert in land use planning issues. In fact, there is even today a nationally known treatise entitled "Yokley on Land Use Planning Law."[12]

As the court may know, the battle to consolidate the city and county governments was hard fought.[13] The goal was to make the planning and delivery of governmental services, not just zoning and subdivision approval, more efficient and effective. In large part, the history of Davidson County over the last thirty years is a testament to the planners of this consolidation. There are, to be sure, still some aspects of the consolidation that have yet to be ultimately decided; this case is one of them.

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[9]There were a number of other changes in these pieces of planning legislation which changed them considerably as well.

[10]See Don H. Doyle, Nashville Since the 1920s, (1985) at 204.

[11]Id.

[12]It is now edited by a professor at the University of Virginia Law School.

[13]See Doyle at 202-3.

The TAPA submits that the lack of a link between comprehensive planning and zoning from the TZES could not have been ignored by the Charter Commission; certainly not one which included as a member a lawyer noted for his land use planning expertise, Bud Yokley. The Charter corrects that omission by partially shifting responsibility to the Planning Commission and linking the comprehensive plan to the enactment of zoning regulations. It provides:

> Zoning regulations shall be enacted by the council only on the basis of a comprehensive plan prepared by the metropolitan planning commission in accordance with the applicable state laws and as provided in Section 3.05 of this Charter.

Metro Charter § 18.02. This provision makes it clear that in Metro Nashville zoning regulations must be adopted only on the basis of the comprehensive plan. It seems clear that if a proposed zoning regulation conflicts with the plan, even if it passes the council, it is void as being ultra vires this charter provision. Zoning regulations must be based on the general plan. If not, under the Metro Charter,[14] they are invalid.

Section 18.02 also makes clear that the plan is to be developed under the guidance of the provisions of the TPES, which specify to a great extent the manner in which a general plan is formulated, and the subjects it may cover. In fact, Charter § 11.504(e) requires that the planning commission "make, amend and add to the master or general plan for the physical development of the entire metropolitan government area." The MPC also has all of the powers of a municipal planning commission under the TPES, and a part of that power includes drafting a comprehensive plan. See Metro Charter § 11.504 and TENN. CODE ANN. § 13-4-201, et seq.

The TPES outlines the general contours of the plan itself. It includes a street plan, a public utilities plan, transportation plan, zoning plan, public facilities plan,

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[14]This linkage provision is not at all unusual. The Charter allocates responsibility for councilmanic redistricting to the Planning Commission. Metro Charter §18.06. The Council may not change the lines as drawn by the Planning Commission. If the Council dislikes the plan, it must submit it to public referendum. Here again, the Charter re-allocates responsibility for a function so as to preclude councilmanic changes on an ad hoc basis, much as the GP is intended to do in zoning.

and a housing plan. TENN. CODE ANN. § 13-4-201. Concept 2010, the most recently adopted GP for Metro Nashville, includes 5 major divisions which focus on economic development, residential, business, and natural environment, and urban structure. In addition there are 14 sub-areas for which specific plans have been prepared and adopted.

The planning commission drafts the comprehensive plan; the council adopts the comprehensive zoning ordinance. The Charter allocates the power to develop and change the plan to the Planning Commission. The Council holds all legislative power but it may not violate the plan. This leaves ample room for the exercise of discretion in determining what type of zoning should be placed on any individual property, so long as it is consistent with the plan. But the council may not enact a law which conflicts with the plan under the Metro Charter. Thus, the Metro Charter allocates to the Planning Commission authority for the plan, and requires zoning to be consistent with it. The historical anomaly separating planning and zoning in Tennessee was changed by the Charter's reallocation of authority.

Most of the time, the reallocation of authority by the Charter is entirely irrelevant to common zoning controversies. The Metro Planning Commission recommends approval the proposed zone change as a practical matter in about 90% of the cases. In those few cases where the Planning Commission recommends disapproval, it is for some reason other than inconsistency with the General Plan. For example, the Planning Commission might feel that the General Plan permits several different types of zoning districts, but strongly believes that only one of those zoning districts is the best alternative. This does not demonstrate inconsistency with the General Plan itself. Any one of two or three zoning districts would be consistent with the Plan. The Planning Commission may recommend against the particular district applied for only because it feels that another particular zoning district would be the best of the three that might be consistent with the Plan's objectives.

It is clear under the Charter that this kind of a recommendation can be overridden by a two-thirds majority of the Council. Charter §18.02. It is only in a very

small percentage of cases, about 1%, that the Planning Commission disapproves a proposed zone change by virtue of its inconsistency with the General Plan.

An example might be helpful. The General Plan, Concept 2000, includes a land use policy category called RCC (retail concentration community). The Court should be clear that there is no RCC zoning district or zoning category in any manner whatsoever in the zoning ordinance. This is in the plan only. The RCC land use policy category is only important to the General Plan and the SubArea plans themselves. In trying to decide the zoning for an area shown as RCC on the General or SubArea Plans, the Planning Commission generally will permit such zoning districts as CH (commercial highway), CS (commercial service), CSL (commercial service limited), OG (office general), and various planned unit developments.[15] As a result, a property owner whose property lies in an RCC land use policy category on the General or SubArea Plan might ask for CH, CS, CSL or OG zoning and the Planning Commission might very reasonably conclude that all of those zoning districts in the zoning ordinance would be consistent with the General Plan. The Planning Commission, however, might also feel that CSL zoning would be most appropriate at this particular location and recommend against a proposed zone change to CS, which would, in general, allow more intense use of the property. This recommendation would not be based on any inconsistency with the General Plan because both of the zoning districts being discussed would be consistent with the RCC land use policy category. Thus, the recommendation of the Planning Commission is not based on any inconsistency with the General Plan, but on more general planning concepts. The Metro Council is free, pursuant to the Charter, to ignore such general planning concepts. With a two-thirds majority, the Council could override the unfavorable recommendation of the Planning Commission, and enact a zone change which would allow CS zoning in this area rather than the recommended CSL.

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[15]PUDs afford greater control by the Planning Commission and the Metro Council over the manner in which the property will be developed. These are therefore attractive alternatives to straight re-zoning of the property.

On the other hand, if the applicant asked for a CF zone district in an RCC land use policy category, the Planning Commission most probably would recommend against the rezoning request based on its inconsistency with the General Plan. CF zoning allows absolutely the most intense use of property in the area of the Metropolitan Government. CF and CC zoning are primarily the zoning districts in the downtown area. It allows a huge floor area ratio, much greater than any other zone district in the City. As a result, the Planning Commission would most likely recommend against the CF zone change request based on its inconsistency with the Plan. Under that set of facts, the Council could not override the decision of the Planning Commission because it is based on the inconsistency with the General Plan.[16]

The point to be made here is that most requests for zone changes do not conflict with the General Plan. It is a rarity, much like challenging a state law or local ordinance on constitutional grounds: it happens from time to time, but not with a great deal of frequency. It is, nonetheless, extremely important because in those cases where the Council is attempting to rezone property in a manner inconsistent with the General Plan, there is an extremely significant stake in the outcome which the entire community has: Does the community develop on an ad hoc, hodgepodge, basis, much as it did after World War II in the late 40's and 50's; or does it develop in a pattern which is at least generally consistent with a long range plan for the rational and comprehensive development of the community as a whole?

IV. Public Policy

The linkage provision in the Metro Charter makes good sense from a number of perspectives. First, whereas the General Assembly had the entire state to be concerned about in 1935 at the time of the adoption of the TZES, including many rural areas, the Charter Commission only was concerned about one of the largest cities in the state of Tennessee. Where a rural community might not want the control linkage

[16]There is an interesting question here which has not been brought up: may the Planning Commission's decision that a zone change request is inconsistent with the General Plan be appealed? It would seem that such an appeal is possible and that it would be brought under the common law writ of certiorari.

to the comprehensive plan would provide, preferring instead to trust in a few locally elected legislators, a large complex urban environment, especially one which was suffering a political crisis arising from the inability of locally elected politicians to do the right thing, would very likely want some objective document, drafted by professionals, in accordance with highly specific enabling legislation at the state level,[17] to act as a mandatory parameter for developmental decisions.

Second, the link between planning and zoning in this way has always been the most desirable objective. The whole idea is to plan for future growth and development, and then give effect to the plan via several tools, the most important of which has always been zoning. Hence, if the local legislative body is free to ignore the plan entirely, as it clearly did in this case, then planning amounts to nothing.

The current General Plan[18] was adopted in 1992 and has been supplemented with the so-called sub-area plans. Each of these mini-plans focuses on a geographic region of the county, and applies the general principles of development announced in the 1992 General Plan. The GP contains approximately 23 different categories of land use activities which should not be confused with either the zoning districts (COMZO § 17.08.030) or the activity classifications (COMZO § 17.12.020) in the zoning ordinance itself.[19] To a great extent, the General Plan consists of definitional statements about these 23 different land use categories. In this case, the Planning

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[17]TENN. CODE ANN. § 13-7-202.

[18]The term "General Plan" is used on the document, but it specifically mentions that it is adopted in accordance the §§ 11.504(e) and 18.02 of the Metro Charter. The name, whether it be "general plan," "comprehensive plan," or "master plan," is not necessarily important. The function of long range planning is the important feature that sets it apart from the zoning ordinance and other land use documents.

[19]Activity classifications in COMZO are the legally enforceable means by which land use activity is regulated. To take but one example, general retail sales and service is an activity classification. Zoning districts are the mapped zone to which all property in Metro Nashville is assigned. A good example would be CS (commercial service) or AR2a (residential with a 2 acre minimum). The land use categories in the GP are different from the activities and zoning districts set up by the ordinance. They are more general, befitting a plan that must by definition change with the times. This flexibility allows for different zoning activities to be permitted in the same area on the plan, with a final decision based on other considerations.

Commission determined that the zone change requested was in violation of the policies announced in Sub-Area Plan 12.

The facts here underscore the importance of the policies implemented by comprehensive planning. The original zoning on the property was AR2a (agricultural and residential with a two acre minimum lot size -- the most rural zoning in Metro, see COMZO §§ 17.08.030 and 17.20.020), but was changed to CS (commercial service, COMZO §§ 17.08.030 and 17.56.080). CS is the fourth most intensive of 12 different categories of commercial zoning in Metro Nashville, and as noted above, permits very intense use of the property. The zone change therefore goes from one of the least intense residential districts to one of the most intense commercial districts all in one move.

The expression of legislative intent concerning the two zoning districts highlights the immense gulf between the residential zoning in AR2a and the commercial zoning in CS. An AR2a district is designed to provide for low density residential development. COMZO § 17.08.030. A CS zone district, on the other hand, is designed to provide for a wide range of commercial uses concerned with retail trade and consumer services, amusement and entertainment establishments, and so on. COMZO § 17.56.080. Surely, the two areas should not be confused.

All of the other properties in this general vicinity are zoned residential. None of them are zoned commercial. What the plaintiff seeks here is a special advantage to use his property in a manner different from everyone else in the same community. There is no justification other than he wants to make more money. The properties are all substantially similar. There is no reason why the plaintiff here should be granted this special privilege when no one else gets it. Why should he be able to race go-karts for profit or build a restaurant in a residential community and not his neighbors? Why weren't their properties rezoned so as to give them the same rights as this plaintiff? The council action certainly creates inequities and were it not for the requirement that the amendment be consistent with the plan, the incompatible uses would already be at work.

V. The Plan as Applied to this Property

There is a good reason that the subject property here is zoned AR2a -- it is clearly within a flood plain. AR2a has the effect of limiting the intensity of development so that flooding if it does occur would cause only minimal harm to the structures and occupants of the property. On the SP-12, the property is shown as "RD 0.5," a classification which indicates flood plain. SP-12 at Map 8. The basic idea behind this designation is to preserve these areas in an undisturbed state to the extent possible. SP-12 at 46. Mainly the plan looks to general low intensity non-structural recreational uses that offer some beneficial use of these areas without altering them or impeding flood water. Id. The miniature golf course/ driving range currently on this property seems a perfect fit. The zone change on the other hand, will allow not only the current owner but any future owner the right to build any of a very large number of commercial uses on this property. A restaurant, general retail sales, undertaking services, limited manufacturing are all permitted. These are simply incompatible with the surrounding uses.

In addition, this area is not too far away from Hickory Hollow Mall. Any commercial outlet needed is therefore already provided. Furthermore, the flood plain offers a convenient way to avoid the spread of commercial endeavors; to permit commercial here invites the spread along Bell Road so that it could become the next Gallatin Road.

The council evidently didn't consider any of these aspects of the plan at all in its deliberations -- not even, to give it lip service. It couldn't have considered it because it clearly calls for residential use of this property. Commercial is simply not countenanced in this location by the general plan. It is impossible to read the plan, and reach any other conclusion. The plan on its face, could not have been a basis for this rezoning because it calls for a completely different approach to the regulation of the property in this area of the county. This total abdication of responsibility is the reason that the Metro Charter, and the enabling legislation in many other states (but not here in Tennessee) require that zone changes be consistent with the general plan.

And if not for that requirement, the plan would mean nothing at all, and the council would ride roughshod over it at any and all times.

VI. Cases Outside Nashville

A. Other States

Metro is not the only jurisdiction to face this question. Many other states have similar provisions. As a general rule, if there is charter (or enabling act) language requiring consistency, and if there is a general plan in place,[20] then the courts give it effect. The zoning changes must be substantially consistent with the general plan. Some states seem to require an absolute match with the plan, but the majority seem to have opted for a lower standard of substantial consistency.

The best place to start is our neighbor to the north, Kentucky. Kentucky has an advanced view on land use planning law, and it is therefore instructive in considering how this Charter provision should be interpreted. In *Hines v Pinchback - Halloren Volkswagen*, 513 SW 2d 492 (Ky Ct App 1974), the court was faced with a situation similar to the one present here. The applicant for a zone change requested business zoning on his property. It had been residential. The local legislative body granted the zone change and even went so far as to make a factual finding that the change was "in agreement" with the comprehensive plan for the community.

The Kentucky Court of Appeals disagreed.

> The obvious purpose [of the consistency clause] was to require zoning to conform to the basic scheme of prior planning, and to prohibit indiscriminate ad hoc zoning changes which do not conform to the original comprehensive plan.

The zone change could not stand on that basis:

> The zoning of property for commercial or highway business usage is, on its face, in disagreement with a plan that designates residential usage for the property. Thus there was no evidence[21] heard by the fiscal court upon which it

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[20]If no general plan has been adopted, the provision is essentially ignored. *Kozenik v. Township of Montgomery*, 131 A.2d 1 (NJ 1957).

[21]This court should be aware that in Kentucky the decision of the local legislative body on a single parcel zone change is considered to be administrative in nature. In Tennessee, it is considered legislative. See *Fallin v Knox County*, 656

> could validly make a finding that the zoning change was in agreement with the comprehensive plan . . .

The court remanded with orders to reverse if there was nothing in the plan to justify business use at that location. This case, decided only a few miles from Nashville, is absolutely consistent with the position of the TAPA in this case. There was no reason for the council to re-zone this property then; there is no reason now. The Comprehensive Plan is designed to avoid just this kind of display of raw political power. This court should simply declare the purported ordinance invalid as not in agreement with the Comprehensive Plan. As such it is not only voidable, but also void.

The Nevada Supreme Court looked at this same issue in *Nova Horizon v City of Reno*, 769 P.2d 721 (Nev. 1989). In *Nova Horizon*, the owner sought a zone change which <u>was</u> consistent with the plan and the surrounding properties. The local legislative body refused to rezone the property. The court noted the state enabling legislation:

> "The zoning regulations shall be adopted <u>in accordance with the master plan</u> for land use. . . ." This suggests that municipal entities must adopt zoning regulations that are in substantial agreement with the master plan, including a land-use guide if one is also adopted by the city council. Other jurisdictions have construed their statutes as requiring strict conformity between master plans and zoning ordinances, even to the point of requiring changes in zoning after a modification in a master plan.

769 P. 2d at 723 (emphasis added). Notice that the Nevada enabling legislation uses the classic "in accordance with" straight from the SSZEA. The court, obviously uncomfortable with the "strict conformity" requirements of some states, most notably Oregon, continued:

> To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, <u>to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local government units are free to ignore it at any time? The statutes are clear enough to send the message that in reaching zoning</u>

S.W.2d 338 (Tenn. 1983). This however, works no substantive change in the analysis, because the legal standard in Tennessee is the same either way. See *McCallin v City of Memphis*, 786 S.W.2d 633 (Tenn. 1990).

> decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan).

Id. at 723-4 (emphasis added). In a similar manner, the Metro Charter is clear enough to send the message that the Metro council should "at least substantially comply" with the comprehensive plan. There is no requirement that the general plan become a straitjacket, nor should there be. But at the same time, to ignore the plan totally as the Council did in this case, eviscerates the whole idea of planning for future growth and development of the city. The Court concluded that

> no evidentiary basis exist[ed] for the Council's denial of appellants' zone change request. It is equally clear that no deference, let alone a presumptive applicability, was accorded Reno's master plan by the Council. In one instance, an expression of deference to a campaign promise was the stated basis for what was tantamount to a disregard for the master plan. The other expression offered as a specific basis for rejecting appellants' application was a pledge, presumably to constituents, to seek diversification in favor of higher employee wages.

Surely, neither of these issues is a proper substitute for basing the zoning decision on an objective, professionally researched and developed general plan. There was not even that much debated in the Metro Council: there was no debate; there was no discussion. Only the exercise of raw political power.

Finally, in a reversal of the situation here:

> Moreover, as noted above, the surrounding properties enjoyed the same zoning sought by appellants and no evidence, let alone reasoning, was presented to justify a denial of appellants' request for rezoning. We therefore are compelled to reverse the district court on this point.

In the case at bar, the surrounding properties are residential and will not get the benefit of this zone change to CS. This is just as unfair as denying a change to an owner where all the neighbors already enjoyed that advantage, the situation in the *Nova Horizon* case.

Texas has also looked at this issue. In *Mayhew v Town of Sunnyvale,* 774 S.W.2d 284 (Tex. App. 1989), the Court reviewed a case where a rezoning was denied based on what looks suspiciously like pure political opposition. The court favorably considered the comprehensive plan argument:

> Texas statutes require that zoning be "in accordance with a comprehensive plan" and have contained this requirement since 1927. The zoning enabling acts of most other jurisdictions also contain this requirement, which is derived from the Standard State Zoning Enabling Act (U.S. Dep't Commerce, 1924). Mayhew alleged that the town's zoning ordinance was not made in accordance with a comprehensive plan and that the ordinance itself is not a comprehensive plan. The town argues in response that article 1011c does not mean what it says, that the zoning map which is a part of its ordinance constitutes a comprehensive plan, and that the map and ordinance were "dispositive" of whether there was an existing plan. The thrust of Mayhew's challenge (and article 1011c), however, is not whether there was "an existing plan" but whether the zoning ordinance that was adopted was made in accordance with a comprehensive plan.

774 S.W.2d at 294. *Mayhew* recognizes that Texas courts, in responding to challenges that zoning is invalid because of a local government's failure to adopt a comprehensive plan, have found comprehensive, coherent, and logical zoning ordinances themselves sufficient to satisfy the "in accordance with" requirement. See, e.g., *Benners*, 485 S.W.2d 773 (geographic comprehensiveness); *Coffee City v. Thompson*, 535 S.W.2d 758 (Tex. Civ. App. 1976) (substantive comprehensiveness).

The court notes that if a municipality has not adopted a plan, under Texas law, the “in accordance with” language takes on a different meaning: coherent and logical ordinances by themselves are enough.

> But that is not the case where a municipality has a separately adopted comprehensive plan. In such a case, <u>the law is settled that the adopted comprehensive plan must, by statutory mandate, serve as the basis for subsequent zoning amendment</u>:

<u>Id</u>. At 294-5. Notice the similarity of the court’s language above (“the . . . comprehensive plan must . . . serve as the basis for . . . zoning amendments”) and the Metro Charter provision (“zoning regulations shall be enacted . . . only on the basis of a comprehensive plan . . .”). It is perfectly clear what the drafters of the Charter were trying to do, and what the people of the old City of Nashville and Davidson County did when they approved the Metropolitan Charter. They linked planning and zoning such that zoning which did not substantially agree with the long-range plan would be invalid. The Texas court continued:

> It is apparent that the town's ordinance fails to meet the requirements of article 1011c . . . because, on the record in this cause, it is clear that the town already had a separate comprehensive plan which it chose to ignore in adopting its 1983 zoning ordinance.

Id. at 295. The court concluded:

> We conclude that the 1973 amendment requiring a minimum lot size of one acre violated the requirement that zoning be made in accordance with the Comprehensive Plan. Nor can there be any doubt that the zoning applied to Mayhew's property is irrational and unsupported by a logical or coherent comprehensive plan.

Id. at 295. Once again, it is clear that the Texas court felt that the law clearly intended what it said, that zoning be consistent with a general or comprehensive plan.

Furthermore, it is certainly appropriate to refuse issuance of a building permit based on a zone change which violates the Comprehensive Plan. Other state courts have addressed this issue favor Metro's position that a building permit should not issue in violation of the Comprehensive Plan. In *Little v Flathead County*, 193 Mont. 334, 631 P.2d 1282 (Mont. 1981), the Montana Supreme Court recognized the evils of spot zoning which immediately proceed from violations of the comprehensive plan, and affirmed a trial court which prohibited the issuance of a building permit.

> By any definition, this case involves spot zoning of the worst kind. The commissioners were about to zone as commercial a 59-acre tract of land solely to accommodate the Developers, who wanted to build a regional shopping center. The land is surrounded on three sides by City of Kalispell boundaries, and this entire area is, by the trial court's findings, 99 percent residential. Further, the comprehensive plan in effect for this area recommends that the land involved be used for residential purposes. Zoning as was about to take place here is the very opposite of planned zoning.

631 P.2d 1289.

> Under [one of the] test[s] for spot zoning . . . the inquiry should involve whether the requested use "is in accord with a comprehensive plan." Although the cases cannot be harmonized completely because of the differences in statutes, zoning has been held invalid as spot zoning when it is not in accordance with a comprehensive plan. See, for example, *Hines v. Pinchback-Halloran Volkswagen, Inc.* (Ky. 1974), 513 S.W.2d 492; *Fasano v. Bd. of County Commrs.* (1973), 264 Or. 574, 507 P.2d 23; *Jablon v. Town Planning & Zoning Comm'n.* (1969), 157 Conn. 434, 254 A.2d 914. We cannot ignore this test when our zoning

> statutes place great weight on the comprehensive plan as a guide in zoning. For example, section 76-2-203, specifically states that zoning shall be conducted "in accordance with a comprehensive development plan." Applied here, a commercial regional shopping center can hardly be said to fit into a medium-density residential area recommended by the master plan.

Id. at 1290. This court therefore finds not only an inconsistency with the Comprehensive Plan, but also unconstitutional spot zoning.

> The vital role given the planning boards by these statutes cannot be undercut by giving the governing body the freedom to ignore the product of these boards--the master plan. We hold that the governmental unit, when zoning, must substantially adhere to the master plan.

631 P.2d at 1293.

> To require strict compliance with the master plan would result in a master plan so unworkable that it would have to be constantly changed to comply with the realities. The master plan is, after all, a plan. On the other hand, to require no compliance at all would defeat the whole idea of planning. Why have a plan if the local governmental units are free to ignore it at any time? The statutes are clear enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan). This standard is flexible enough so that the master plan would not have to be undergoing constant change. Yet, this standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan.

Id. The same argument applies in Metro Nashville. If the Metro Council is free to ignore the Comprehensive Plan, why have it? If the Comprehensive Plan could be amended every time the Council wanted to change zoning, it would similarly be worthless. Only be requiring consistency with the Comprehensive Plan, and allocating the authority to adopt the Plan to the Planning Commission, does the system make sense. The Metro Council is free to change zoning in any way it likes, provided only that it is substantially consistent with the Comprehensive Plan.

The *Little* Court went on and ultimately concluded:

> . . . city officials have the right to refuse processing of a building permit application because the proposed use is in violation of the use recommended in the comprehensive plan (master plan).

Another strong case in the same vein is *Lesher Communications v City of Walnut Creek*, 277 Cal. Rptr. 1, 52 Cal. 3d 531, 802 P.2d 317 (1990). In *Lesher*, a public initiative approved by the voters of Walnut Creek was found by the California Supreme Court to be a zoning amendment, but one which was inconsistent with the general plan. The question then became one of when it was invalid -- was it void ab initio or merely voidable? The California Court concluded that it was void ab initio.

> A zoning ordinance that conflicts with a general plan is invalid at the time it is passed. (*deBottari v. City Council*, 171 Cal.App.3d 1204, 1212; *Sierra Club v. Board of Supervisors*, 126 Cal.App.3d 698, 704.) The court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance.

In a like manner, this Court is not invalidating an ordinance; it is merely determining the existence of a conflict. For if there is a conflict between the General Plan and the zone change, the Metro Charter has the effect of invalidating the legislative enactment.

> A void statute or ordinance cannot be given effect. This self-evident proposition is necessary if a governmental entity and its citizens are to know how to govern their affairs. Thus, persons who seek to develop their land are entitled to know what the applicable law is at the time they apply for a building permit. City officials must be able to act pursuant to the law, and courts must be able to ascertain a law's validity and to enforce it.

The California court invalidated the initiative. The California Court of Appeals has recently held similarly in *Corona-Norco Unified School District v. City of Corona*, 17 Cal. App. 4th 985, 21 Cal.Rptr. 2d 803 (1993).

B. Memphis

There is only one case in Tennessee which purports to deal with this issue. In *Barrett v. County of Shelby*, 619 S.W.2d 390 (Tenn. App. 1981), a zone change was challenged because it was allegedly a spot zone and not consistent with the approved comprehensive plan. The lack of any statutory requirement of consistency preordained the result:

> The fact that the instant rezoning may or may not be in conformity with an approved comprehensive plan is irrelevant to the Court of Appeals. It is, however, an

> important element insofar as the legislative body's decision is concerned, but not for this forum. The legislative body is not bound by any comprehensive plan. If it were, there would no need for rezonings, as the plan would be "written in stone" and unalterable. The legislative body has the power to abolish the approved comprehensive plan or adopt a new one. Therefore, it certainly has the power to deviate from it if it chooses, and so long as it does not act unconstitutionally in so doing.

619 S.W.2d at 394. The court does not clearly specify which version of the Memphis Enabling Legislation is at issue in this case. But it makes little difference. As has been reviewed previously, the Memphis Planning and Zoning Enabling Legislation, as well as the Tennessee Public Planning and Zoning Enabling Legislation, do not include any requirement of consistency. The *Barrett* court therefore clearly reached an appropriate result given the enabling legislation pursuant to which judicial review was obtained. Clearly, absent any charter provision or enabling statute which requires consistency between zoning amendments and the general plan, the local legislative body is free to make such changes as it deems appropriate. Other than the constitutional requirements of substantive due process, the local legislative body has, under those circumstances, virtually boundless authority. The case at bar is, however, totally distinguishable from the *Barrett* case. Here, there is express authority requiring mandatory conformity to the General Plan. There was no such mandatory conformity in *Barrett* in any manner whatsoever.

Furthermore, in *Barrett*, it is instructive to review what actually happened. The applicant sought a rezoning of his property located at the intersection of Austin Peay Highway and Mudville Road from R-1 to C-1. The Land Use Control Board (the equivalent of our Metro Planning Commission) recommended the rezoning. The Board of County Commissioners accepted the recommendation and rezoned the property. In fact, the only proof which appears to have been placed in the record in opposition to the request was the report of a subsection of the staff of the Land Use Control Board which felt that the request was contrary to the recommendations of a study performed virtually 20 years earlier which did not view this property as commercially oriented.

Under those circumstances, it is easy to see why the Tennessee Court of Appeals concluded that the zoning was appropriate.

In this case, there is no recommendation of the Planning Commission in favor of the rezoning. There is no staff report which is in favor of the rezoning. All of the planning authorities which have reviewed this proposal have clearly concluded that it is not only inconsistent with the General Plan, but makes no rational sense whatsoever. Unlike the district study in *Barrett*, the SP-12 was adopted in April 1991, only four years before the application for this rezoning. It is seems clear that *Barrett*, interpreting the rules that apply in Memphis and Shelby County, is probably good law across the State of Tennessee except in those few areas which, like Metro Nashville, have express Charter provisions requiring substantial consistency with the General Plan.

In fact, it is interesting to note that the *Barrett* court finds that the Plan is important from the standpoint of the local legislative body's consideration of a rezoning. Even without mandatory consistency being required in the Enabling Legislation for Memphis and Shelby County, the court found that important connection. With the addition of an express charter provision, such as the one we have here in Metro Nashville, it is easy to see how the outcome in *Barrett* changes: If a rezoning request is substantially inconsistent with the General Plan, it is void.

VII. Constitutionality

There are two reasons that this zone change is not legally justified. First, it conflicts with the comprehensive plan adopted by the Metropolitan Planning Commission, as discussed above. Second it is unconstitutional. Both reasons are extremely significant. The second reason should not be overlooked.[22]

There is an interconnectedness between the constitutional analysis and consistency with the Comprehensive Plan. Generally speaking, if the zoning does not

[22]It seems inappropriate to discuss the unconstitutional nature of the zone change before discussion of the patent inconsistency with the Comprehensive Plan. Constitutional pronouncements should be avoided unless absolutely necessary. *Watts v. Memphis Transit Authority*, 224 Tenn. 721, 462 S.W.2d 495 (1971).

rationally relate to a legitimate governmental objective, then it probably is not consistent with the Comprehensive Plan. Certainly, we have demonstrated above the lack of such consistency.

The re-zoning involved here is clearly unconstitutional. As this Court knows, the legal test is whether there is a rational relationship between the legislation and a legitimate governmental purpose. *Euclid v. Ambler Realty,* 272 US 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926); *Spencer-Sturla v. City of Memphis,* 155 Tenn. 70, 290 S.W.2d 608 (1926); *Davidson County v. Rogers,* 184 Tenn. 327, 198 S.W.2d 812 (1947). Perhaps the most recent case of note is *Fallin v Knox County,* 656 S.W. 2d 338 (Tenn. 1983) where the court emphasized that if the ordinance was fairly debatable, or if there was a rational basis for its enactment, the constitutional test of substantive due process is met. Interestingly, in *Fallin*, the court pointed out that there were two commercial zones in the immediate area, as well as other multi-family zones, so that this agricultural land re-zoned to multi-family residential was clearly not a "spot" zone.

The opposite is true in the case at bar. There is no commercial zoning for a long way around the subject property. In fact, the very idea of the Comprehensive Plan is to keep the commercial from encroaching on the residential, a goal which would of course be defeated by virtue of this zone change. There is simply no rational basis for this zone change.

Fallin cites the quintessential Tennessee spot zoning case, a case from Nashville, and connecting to the earlier discussion of the Comprehensive Plan, a case in which Bud Yokley was himself involved.[23] Nashville rezoned a piece of property from Residential C to Commercial A even though the lots on both sides and behind the subject property were all zoned Residential C. The Planning Commission recommended against. But the City Council re-zoned the property anyway, probably because the applicant was a widow with an invalid son, who planned to sell "merchandise generally classified as varieties and notions" from the home. The

[23]Judge Thomas Shriver was the Chancellor who decided the case in the trial court; he in fact sat in Chancery Part I before there were any other parts, and is this Court's predecessor three times removed.

Supreme Court concluded that the ordinance was not enacted in furtherance "of any general plan or scheme of zoning," and declared it unconstitutional. While the intention of helping the widow was a good one, it gave her special benefits which were not available to others similarly situated.

Of special note is the fact that Yokley represented the challengers to the ordinance, and even without the benefit of a linkage requirement, he argued that the failure of the ordinance to fit into a "general plan or scheme" rendered it constitutionally infirm. The decision in this case was delivered in 1954, just before the big push to adopt a consolidated form of local government.

There is no legitimate urban planning purpose being served in the case at bar. It merely detracts from surrounding residential development, giving increased value to this property. Because surely his property value will dramatically increase as a result of the rezoning.

Jeff Browning, the Executive Director of the Metropolitan Planning Commission, an urban planner with years of experience and a Master's Degree in Science and Planning from the University of Tennessee, heads the planning staff which recommended that this rezoning makes no sense from an urban planning standpoint. There is no other CS zoning in the area; it is surrounded on all sides by residential zoning on the zoning map, and on all sides by residential uses on the General Plan. This will constitute a spot zone. It does not rationally relate to any legitimate governmental urban planning objective. This owner will get a benefit that no other owner in the immediate vicinity will get. He will get a cash windfall as a result of the commercialization of the property. It makes no sense at this time to place such an intense zoning category on the property. This rezoning amounts to nothing more than an exercise in greed and raw political power. Recall also, that if the current owner were to sell the property to another, that nothing would prevent the new owner (or for that matter, this owner) from using the property not as a go-cart race course, but as a hotel, restaurant, or any other use permitted in a CS zone district.

Many courts look at several factors to evaluate spot zoning. All the factors in this case augur in favor of a finding of unconstitutional action:

> There is no single, comprehensive definition of spot zoning applicable to all fact situations. Generally, however, three factors enter into determining whether spot zoning exists in any given instance. First, in spot zoning, the requested use is significantly different from the prevailing use in the area. Second, the area in which the requested use is to apply is rather small. This test, however, is concerned more with the number of separate landowners benefited by the requested change than it is with the actual size of the area benefited. Third, the requested change is more in the nature of special legislation. In other words, it is designed to benefit only one or a few landowners at the expense of the surrounding landowners or the general public.

Williams, 1 American Land Planning Law at 563; Hagman, Urban Planning. These three factors all serve to demonstrate the unconstitutionality of this zone change. First, the CS zoning is very different from the other zoning in this area. Second, the area which is being rezoned is rather small and involves only one property owner. If CS zoning is good, why didn't the Council re-zone a significant portion of the property out there? Why was only one parcel re-zoned? It certainly looks and smacks of political favoritism. Finally, this zone change seems to be special legislation benefitting only this property owner to the detriment of the other land owners. No matter what yard stick is used, the underlying constitutionality of this piece of zoning is inherently suspect.

It is clear that given these circumstances, there is no constitutional underpinning to this zone change. Even if it were not inconsistent with the Comprehensive Plan, it would be invalid because it is unconstitutional.

VII. Conclusion

Based upon the foregoing, the Tennessee Chapter of the American Planning Association urges this court to conclude that Section 18.02 of the Metropolitan Charter requires all zoning amendments to be substantially consistent with the General Plan and any SubArea plans adopted by the Metropolitan Government of Nashville and Davidson County. The historical development of planning and zoning in this country, in Tennessee, and in Nashville, support this interpretation of the Charter; there are

very powerful public policies which suggest that this is the most appropriate way to interpret the Charter; and other states have interpreted similar language in their enabling legislation in the same way as the Metropolitan Planning Commission and the Metropolitan Department of Codes Administration have interpreted this Charter provision.

Furthermore, it is abundantly clear that the rezoning here is lacking in any rational basis which would justify its existence and, as a result, is unconstitutional. The evils of spot zoning combated by Bud Yokley as long ago as 1954 in *Grant v. McCullough* are to a large extent curbed by Section 18.02 of the Metropolitan Charter. This court should so hold.

Respectfully submitted,

PARKER, LAWRENCE, CANTRELL & DEAN

By:_____

George A. Dean (#6737)
200 Fourth Avenue North, Suite 500
Nashville, TN 37219
615/255-7500

Attorneys for the Tennessee Chapter of the American Planning Association

CERTIFICATE OF SERVICE

I hereby certify that on this the _____ day of March, 1996, a true and exact copy of the foregoing instrument was hand delivered to:

Peter H. Curry, Esq.
Tuke, Yopp & Sweeney
NationsBank Plaza, Suite 1100
414 Union Street
Nashville, TN 37219

Thomas G. Cross, Esq.
Metro Nashville Legal Department
204 Metro Courthouse
Nashville, TN 37201

_____

George A. Dean