IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

HARDING ACADEMY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No 03-1717-II
	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON) COUNTY, acting by and through the BOARD OF FIRE AND BUILDING CODE APPEALS,	)	
	)	
Respondent	)	

MEMORANDUM and ORDER

Plaintiff, Harding Academy ("Harding"), seeks certiorari review of a decision by the Defendant Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), acting by and through the Board of Fire and Building Code Appeals ("Board"), which affirmed the revocation of demolition permits previously issued to Harding Academy

HISTORY

Starting in 1991, Harding Academy acquired 11 parcels of contiguous residential real estate with the expressed purpose of expanding its school campus, albeit across the street from the elementary school Harding completed its acquisition in January 2003 and on February 3, 2003 the school applied to Metro for a recreation center designation for its property Harding's application drew opposition from The Links Association and the Friends of Belle Meade Links, two neighborhood associations At the urging of local Metro Council Representative Lynn Williams ("Ms Williams"), Harding withdrew its application in an attempt to reach compromise with the two

associations

On April 10, 2003, Ms Williams filed a Request with the Metropolitan Planning Commission for an historic conservation overlay to be placed on the residential real property acquired by Harding On May 1, 2003, Harding requested demolition permits to raze the houses on the real property and on May 6, 2003, Metro issued the permits to Harding in accordance with Metropolitan Code § 16.04 120

By letter dated May 8, 2003, the Metro Codes Director, Terrence Cobb, notified Harding that the demolition permits had been issued in error and revoked them, based upon the "pending legislation" doctrine

On June 10, 2003, Harding appealed the revocation of the permits to the Board The Board denied Harding's appeal and this matter was set for argument and heard on July 8, 2004

STANDARD OF REVIEW

An action by a board of zoning appeals is an administrative, rather than a legislative, act which is reviewed by way of a common law writ of certorari T C A § 27-8-101, *et seq.; Weaver v Knox County Board of Zoning Appeals,* 2003 WL 21516218 at *1 (Tenn Ct App June 30, 2003) The Court may reverse the Board's decision if it finds that the Board acted illegally, arbitrarily, fraudulently or beyond its jurisdiction *McCallen v. City of Memphis,* 786 S W 2d 633, 638 (Tenn 1990), *Hoover Motor Express Co v Railroad and Public Utilities Comm* , 261 S W 2d 233, 238 (1953)

Under a common law writ of certiorari, a court may not substitute its judgment for that of the administrative tribunal *McCallen,* 786 S W 2d at 641 A reviewing Court does not weigh the evidence or determine whether the preponderance of the evidence supports a decision

Goodwin v Metropolitan Board of Health, 656 S W 2d 383, 386-387 (Tenn Ct App. 1983) It is only the **manner** in which the decision of the inferior board or tribunal is reached, and not the correctness of the decision itself, that is properly at issue *Powell v Parole Eligibility Review Bd.*, 879 S W 2d 871, 873 (Tenn Ct App 1999) If any material evidence is present in the record of proceedings below which supports the Board's decision, the court must affirm that decision *Davison v. Carr*. 659 S W 2d 361, 363 (Tenn 1983) Material evidence is defined as that evidence material to the question in controversy, which must necessarily enter into consideration of the controversy and which by itself, or in connection with the other evidence, is determinative of the case *Fuller v Tennessee-Carolina Transp. Co* , 471 S W 2d 953, 956 (Tenn App 1970)

The question whether there is any material evidence to support the findings and the order of the commission is a matter of law for the court to review *Hoover*, 261 S W 2d 239. However, the common law writ of certiorari permits a limited review of the fact findings of the administrative body, since the question of whether there was material evidence is itself a question of law *Id* , *see also, Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Mem St U L Rev 19, 28 (1973)

ISSUES AND ANALYSIS

On May 6, 2003, Metro issued permits allowing Harding to demolish the existing 11 single family residences, pursuant to Metro Code §§ 16 28 010 and 16 28 190 [1] Two days later,

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[1] **Metro Code § 16 28 010 Required when**
It shall be the duty of every person desiring to construct, alter, repair, enlarge, move or demolish any building or structure of part thereof or any appurtenances connected to attached thereto, or to install any heating, air conditioning or ventilating system or unit or any equipment, device, appliance or fixture, required or governed by this chapter, or to repair or replace any damage to a building or structure caused by termites, or to erect or construct any sign, billboard or similar structure governed by this chapter, or to do or cause any such work to be done, for which a permit is required, to first make application to the director of codes administration and obtain the required permits therefor, except as such

the Codes Director sent a letter to Harding, which revoked the demolition permits based upon legal advice that the revocation was

> consistent with 'pending legislation doctrine' established by the Tennessee Supreme Court in the *Konigsberg Case*, 838 S W 2d 430 (Tenn 1982) and consistent with *Gustafson v Calumet City*, 241 N E 2d 512 (Ill 1968), as legislation is pending in Metro Council placing a historic conservation overlay on the subject property

Harding argues that Metro acted illegally and arbitrarily by revoking the demolition permits, alleging that Metro had no basis for the revocation Harding contends that the permits were issued properly and without error Metro Code § 16 04 120 authorizes the Director of Codes to revoke a permit or approval as more fully stated below

> 16 04 120 **Revocation of Permits When.**
>
> > The Director of Codes Administration may revoke a permit or approval, issued under the provisions of Chapters 16 04 and 16 28 through16 56, in case there has been any false statement or misrepresentation as to a material fact in the application or plans on which such permit or approval was based, or when it is determined that a permit has been issued in error

Both parties agree that the provision regarding false statements or misrepresentation does not apply in this case The sole focus for the Court is whether the permit was issued in error.

Metro asserts that the request to the Metro Planning Commission for a conservation overlay by Ms Williams constitutes pending legislation Since the request was made to the Metro Planning Commission and public hearings were to be held, Metro submits that the "pending

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may be specifically excluded by Section 16 04 020 (Prior code § 11-1-31)

Metro Code § 16.28 190 Issuance.
If the director of codes administration is satisfied that the work described in an application for a permit and the drawings filed therewith conform to the requirements of this chapter and other pertinent laws and ordinances, he shall issue a permit therefor to the applicant (Prior code § 11-1-47)

legislation" doctrine applies and that the demolition permits were issued to Harding in error

Harding argues that it properly followed the existing Metro Code regulations to obtain the permits and that the Board misinterpreted the meaning of "error" Harding cites the case of *Chickering Ventures, Inc. v. Metropolitan Gov't of Nashville & Davidson County,* 1988 WL 133527 at *1 (Tenn Ct App Dec 16, 1988)(unpublished opinion) to demonstrate that an error within the meaning of the Code relates to a factual error, such as the failure to properly note the location of duplexes on a preliminary plat The landowners in *Chickering* secured a permit and began construction, but the court found that the permit was issued in error because the zoning administration did not have the power to issue the permit, since the zoning ordinance required a designation of the lot for construction of a duplex Likewise, Harding cites *Far Tower Sites, LLC v. Knox County*, 126 S W 3d 52 (Tenn Ct App 2003) to demonstrate that the term "error" relates to a factual mistake, not an individual's interpretation of a legal doctrine In *Far Tower,* the landowners failed to obtain a certificate of appropriateness as required by law In both *Chickering* and *Far Tower,* the error that justified cancellation of the permits was caused by the applicant's failure to do a legally necessary act Harding submits that it has fully complied with every applicable rule or regulation and it entitled to have its permits reissued

Although Harding does not concede the validity of "the pending legislation doctrine" in Tennessee, it argues in the alternative that if the doctrine does exist, the request by Ms Williams was too late and in the wrong forum, as the permits had already been issued Harding further contends that an administrative officer in the position of the Codes Director cannot rely upon a legal doctrine not found in the law, a statute, or an ordinance to deny a permit issued pursuant to a

regulation then in effect[2] Harding argues that no governmental body had passed legislation to allow the Codes Director to revoke the permit in contravention of the existing code regulations, unlike situations where legislation empowers the Director to defer action or to impose a moratorium on the issuance of permits It contends that the Codes Director thus had no authority to revoke the permits

Metro counters that the general police power allows a local government to act quickly to protect the status quo It contends that Ms Williams' request to the Planning Commission, and subsequent notices of public hearings to be held, are material evidence sufficient to support the Board's decision

To resolve this matter, the Court must determine if the "pending legislation" doctrine applies to the present facts If the request by Ms Williams and the notices of public hearings rise to the level of legislative action so as to constitute "pending legislation," the Court might end its inquiry here The request and notices, alone or in conjunction with other evidence, would be determinative of the outcome of the case, since the record would contain material evidence to support the Board's ruling However, the request and notices, while objective and factual, are not determinative of the legal issues that the Court must resolve The Court must determine whether the request and notices comply with the common law doctrine of "pending legislation" as interpreted by our state courts

PENDING LEGISLATIVE DOCTRINE

Tennessee has no statutory definition of "pending legislation" Thus, the court looks to

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[2] Absent the case law quoted by the Metro attorney, which arguably construed the request by Ms Williams as "pending legislation," the Codes Director gave no justification for revoking Harding's demolition permit

other authorities for assistance Generally speaking, users of real property acquire rights with respect to the particular use of their property and those rights may not be cut off by applying a new zoning regulation to the property *McQuillin Law of Municipal Corporation* (3d ed) § 25 155 So as a general rule, a zoning ordinance or a regulation is operative from its effective date and only from that date *Id.* If these basic principles are controlling, Harding's permits would be valid and should not have been revoked

However, some state courts have adopted the pending legislation doctrine to resolve conflicts that arises due to the time required by a city to amend zoning regulations *Id*[3] As a rule, the doctrine states that a municipality may deny issuance of a permit where the proposed use would conflict with a "pending" amendment ordinance 1 *Zoning & Plan Desk Book,* § 6 15 (2d ed) Douglas W Kmiec (February 2004) If the amendment is not pending, however, the permit must issue as a matter of right upon compliance with the existing ordinance *Id* In essence, these courts have relied upon the pending legislation doctrine to prevent property owners, developers or other parties from circumventing the effectiveness of legislation being crafted by a city's legislative body that would affect the future use of the real property As an example, Metro points to the case of *State ex rel SCA Chemical Waste Services, Inc v Konigsberg*, 636 S W 2d 430 (Tenn 1982), in which the city of Memphis and Shelby County passed a new zoning ordinance with an effective date two months after the ordinance was enacted The chemical company attempted to secure a clean air permit that would have evaded the effective date of the legislation and would have allowed the developer to proceed with building a waste disposal facility in Memphis not in compliance with

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[3] States adopting the rule include California, Connecticut, Illinois, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, Texas and Utah 1 *Zoning & Plan Desk Book* § 6 15 (2d ed) Douglas W Kmiec (February 2004)

the new zoning act The Tennessee Supreme Court explained that

> it takes much time to work out the details of a comprehensive zoning plan and it would be destructive of the plan if, during the period of its incubation and consideration, persons seeking to evade its operation should be permitted to enter upon a course of construction that would progress so far as to defeat, in whole or in part, the ultimate execution of the plan

Id at 435

Thus, it appears that Tennessee recognizes the doctrine of pending legislation through its common law But the court's inquiry does not end here At issue is whether legislation can be considered "pending" As the doctrine has evolved, courts in other states have different reached different conclusions *See* 1 *Zoning & Plan Desk Book, supra,* at § 6 15

The crucial inquiry as to whether an amendment or ordinance is actually *pending* centers on how to define the pending status *Id* Metro argues that a liberal and permissive definition of "pending" should be adopted According to Metro, "pending" does not require that the proposal be before the governing body, but only that the appropriate department of the city be actively pursuing it *See, Villa at Greeley, Inc v Hopper*, 917 P 2d 350, 357 (Colo App 1996) and 8 E McQuillin, *Municipal Corporations*, § 25 155 (3d ed 1983) Metro asserts that knowledge of any governmental action, such as an ongoing study like that conducted by the Uses Committee in the case of *State Ex Rel First American Bank v. City of Franklin Municipal Planning Commission*, 1996 WL 122182 (Tenn Ct App 1996), would constitute "pending legislation " In *Franklin*, the developers submitted a site plan for review and for approval that clearly met the existing zoning requirements Franklin's Planning Commission deferred consideration of the developers' application because the City and Mayor were concerned about development of the undeveloped corridors of the city The City's Uses Committee was charged with reviewing and recommending

permitted land uses and had developed recommendations The developers filed an action for *mandamus* when their application was repeatedly deferred, but the trial court rejected their petition because the developers knew of the ongoing study by the Uses Committee The Court of Appeals affirmed the trial court since deferral was intended to allow the board time to make a final determination on a pending ordinance

Some state courts have held that mere discussion by legislators would trigger the invocation of the doctrine *Smith v City of Clearwater*, 383 So 2d 681 (Fla 1980), while others have found that an ordinance is "pending" if an advertisement of consideration occurred prior to the application 1 *Zoning & Plan Deskbook, supra* §6 15 at FN8 And although some state courts hold that a city need not advise the property owners of a pending ordinance, the city may be estopped from denying the permit if the owner made substantial expenditures in good faith reliance upon the existing law *See,* 1 *Zoning & Plan Deskbook* at § 6 15 [4]

Some state courts have refused to apply the doctrine [5] Many others, though, have followed it with varying degrees of strictness in defining "pending" *Id.* Those courts are reluctant to allow the retroactive application of the city's police powers in order to permit the property owner stability in planning development *Id.* For instance, the Idaho Supreme Court strictly interpreted the doctrine of pending legislation and totally disregarded a new zoning ordinance that passed after the city council suspended its own rules *Payelle River Property Owners Ass'n v Bd of Comm'rs,* 976 P 2d 477 (Idaho 1999) The Court held that a vested property right is determined by the zoning ordinance in existence at the time of the permit application *Id* Both Metro and Harding agree that Harding

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[4] Here, however, Harding and Metro agree that an estoppel or "good faith" argument is not appropriate

[5] These states include Idaho, Indiana, Louisiana, Maine and Washington

had no vested property right in the demolition permits, but they disagree on whether the permits could be revoked once issued Harding argues that the retroactive application and use of the request and notices to revoke lawfully issued permits violates its due process and equal protection rights

Harding claims that its constitutional rights were violated by the inequitable application of the doctrine It states that the effort to secure the conservation overlay was directed specifically at stopping its use of its property and for no other purpose Metro acknowledges that other property owners in the neighborhood obtained permits to alter their structures despite the "pending" request for the overlay However, Metro asserts that those permits allowed for renovations and building small additions, while Harding sought a permit to demolish buildings, thus making the permits significantly different

Metro Code §17.36 10 states that the purpose of an historic conservation overlay is to address specific aspects of land use control or development design that transcend conventional zoning district provisions, included in this provision is an overlay that is intended to protect the historic attributes of the community Metro Code §17 36 10 While the Code authorizes Metro to protect historic attributes of property subject to the overlay, Metro must do so in an even handed manner Metro states that Harding is forbidden to demolish its houses during the time that the request for the overlay is pending, although Metro permits other home owners to make changes to their houses while the request for the overlay is pending Metro justifies this apparently inconsistent treatment, contending that demolition would forever frustrate the purpose of a conservation overlay while the small additions for which the permits issued were in keeping with the overall scheme of the neighborhood The Court notes that demolition generally is destructive, whereas alterations may or may not be destructive Here, the record does not reflect how significant the alterations at issue

would be The Court also notes that equal protection generally requires a facially-neutral application of the law, which would include the pending legislation doctrine

This Court, however, is not charged with re-weighing the factual findings of the Board, instead, it must determine the viability of the pending legislation doctrine as applied to the case before it In analyzing this issue, the Court looks first to Metro's authority to act in the present situation Metro relies upon its police powers in enforcing the status quo by revoking the permits Historically, courts have been averse to aesthetic-connected zoning laws because aesthetic considerations did not constitute a valid concern of municipal police powers *Redefining Trademark Alteration Within The Context of Aesthetic-Based Zoning Laws: A Blockbuster Dilemma,* 53 Vand L Rev 717, 732 (2000) Loosely defined, governmental police powers were consistently limited to laws that directly related to the safety, health, morals and general welfare of the public *Id* Gradually, this traditional view was replaced by a judicial posture favoring aesthetic concerns and courts have been more willing to embrace the notion that communities value the way they look *Id* Thus, Metro may be justified in exercising its police power to legislate aesthetic-connected zoning laws

The Court, however, must also be concerned with the proper exercise of the police power so that constitutional rights are not violated First, the Metro Codes Director believed that when he issued the permits, that they were issued appropriately "It is well established that the decision to or not to grant a building permit is an administrative determination" *Thompson v Dept of Codes Admin., Metropolitan Gov't of Nashville and Davidson County,* 20 S W 3d 654, 659, (Tenn Ct App 1999) In *McCallen, supra,* the Tennessee Supreme Court explained

Municipal legislative bodies may reserve to themselves, where they do so by an

> ordinance containing a rule or standard to govern them, the power to grant or deny license or permits This may be done in zoning matters, where it is not contrary to a state zoning or enabling act, and where the zoning ordinance likewise contains sufficient standards to govern the municipal council Thus, a zoning ordinance vesting in the municipal council the power to determine whether a building permit should be granted is regarded as administrative, rather than legislative in character

McCallen, 786 S W 2d at 639 (Tenn 1990) (quoting 8A E McQuillin, *The Law of Municipal Corporations*, § 25 217 at 160-61 (3d ed 1986)

The record reflects that the Director of Codes explained to the Board that both he and the Metro Department of Codes are authorized and responsible for the enforcement of building, plumbing, electrical, mechanical and zoning codes According to the Director, the permit process requires a review by all other governmental departments and agencies of their respective laws and ordinances, and requires each department or agency to indicate its approval or disapproval Here, the technical record demonstrates that the Metro Historical Commission requested referral for five of the nine permits requested by Harding, reviewed them and, according to the Codes Director, "they ignored the five applications which releases them [the applications] for issuance "

Second, the record reflects that the Metro attorney advised the board that anytime an historic zoning overlay was in process, that "everybody in the Metropolitan government needs to step back and take a strong look at it and think about maybe withholding demolition permits until the legislative process runs " When the attorney was asked to clarify what happens to building permits that are issued while legislation is pending in the Council, he further advised the Board that such situations would be analyzed on a case-by-case basis so that if circumstances arose

> where there is really going to be potential irreparable harm, you know, cutting some hundred-year-old trees or demolishing some — some homes that may be historic, if there's really that kind of potential, then perhaps the Metropolitan government needs to scrutinize those very closely And I'm with the Department of Law, I'm not going anywhere, so I'll help you scrutinize them

While the attorney may have offered his assistance to the Board in good faith, his response did not provide any objective standard that would allay the concerns of the Board members, that is, when does a permit validly issued by the Codes Director become invalidated by action taken by the legislative body His response indicates that any action could trigger withholding the issuance of permits and further, that he would assist the Board in determining, on a case by case basis, whether an action coming before the Planning Commission or the Metro Council would constitute potential irreparable harm or trigger the need for scrutiny

The doctrine of pending legislation may justify deferral of permit applications or a moratorium[6] on the issuance of permits under certain circumstances, it does not justify the imposition of vague standards as to when the doctrine might or might not be imposed No case law was submitted and none could be found to justify the proposition that a permit properly issued to a landowner pursuant to the regulations then in effect should be nullified solely on the filing of a notice that might later affect the use of the property The comment by the staff attorney quoted above reflects a lack of the definiteness necessary for an objective standard, while the colloquy between the Board members reflects concern that their authority may be eviscerated without notice This Court is mindful that

> Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary In enacting or amending zoning legislation, the local authorities are vested with broad discretion and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority If there is a rational or justifiable basis for the enactment and it does not violate any state

[6] Metro Code § 17 40 430 specifically states that a moratorium shall be placed on the issuance of permits for demolition, relocation, new construction, exterior alterations, additions or improvements on land recommended for historic landmark zoning This Code section applies solely to historic landmark districts The record does not reflect that the language regarding a moratorium applies to an historic conservation overlay No moratorium existed when Harding applied for its demolition permits

> statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination
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> In accordance with these principles, it has been stated that the courts should not interfere with the exercise of the zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws

Fallin v Knox County Bd of Comm'rs, 656 S W 2d 338, 342-343 (Tenn 1983)(quoting Am Jur 2d *Zoning and Planning* §338 (1976) at 913-14) *See also, Family Golf of Nashville, Inc v Metropolitan Government of Nashville*, 964 S W 2d 254-260 (Tenn Ct App 1997)

This principle does not charge the court to find that a zoning regulation, duly enacted, should not be enforced whenever a request is made to change the zoning regulation

Councilperson Lynn William suggested that Harding withdraw its application for a recreational center designation Harding did withdraw its application and within weeks, it met with the two neighborhood associations to discuss the situation Less than two weeks from that meeting, Ms Williams submitted an unsigned application for a zoning change to place an historic conservation overlay on the property acquired by Harding Such conduct appears to be primarily at the request of the neighborhood associations, singling out an individual owner to stop its lawful use of property pursuant to permissible code regulations Such targeted and tardy efforts are the very antithesis of planned zoning and do not constitute the deliberative and studied legislative processes to which the pending legislative doctrine is intended to apply

The Metro Code clearly states that no ordinance shall become effective until it shall have passed by a majority vote on three different days, and is signed by the county mayor (or become law without his signature as otherwise provided) Metro Code §3 05 Further, no ordinance shall take effect until twenty days after its passage, unless the ordinance states that the welfare of the

metropolitan government of Nashville and Davidson County requires that it should take effect sooner *Id* Any revision, modification or change in the zoning regulations of the Metropolitan government shall be made only by ordinance Metro Code § 18 02 The Metro Council has the authority to determine if the doctrine of pending legislation should ever apply at any procedural stage of revising, modifying or changing a zoning regulation Such a provision should not be imposed by this court as a matter of law, absent a clear and compelling standard

The Board acquiesced to the Metro attorney's opinion that the request and notices constituted "pending legislation" that warranted the revocation of Harding's demolition permits However, an examination of the rationale for the pending legislation doctrine and the technical record below do not support a conclusion, as a matter of law, that the request and notices were of sufficient moment to constitute pending legislation, or that the Codes Director erred when he issued the demolition permits Instead, the Codes Director properly issued the demolition permits and was without authority to revoke the permits once they had been properly issued Such a revocation based upon the "pending legislation doctrine" was arbitrary and capricious The Board erred in affirming the decision

Accordingly, the Board's decision and the revocation of the demolition permits by the Codes Director shall be and is hereby reversed The Codes Director shall reissue the demolition permits to Harding Costs are assessed against the Metropolitan Government

IT IS SO ORDERED

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