IN THE CHANCERY COURT FOR WILLIAMSON COUNTY, TENNESSEE
At Franklin

THE JONES LAND COMPANY, LLC Petitioner v. THE WILLIAMSON COUNTY BOARD OF ZONING APPEALS, AND WILLIAMSON COUNTY Respondent	DOCKET # 28249

MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF THE PETITIONER, THE JONES LAND COMPANY, LLC

I. Introduction

The petitioner, the Jones Land Company, LLC, hereby submits this memorandum of law in support of its appeal from the decision of the Williamson County Board of Zoning Appeals, denying a variance in the rear yard setback provisions of the Williamson County Zoning Ordinance (ZO), as applied to a parcel of property located at 401 Doe Ridge. Petitioner contends that the denial of the variance was illegal given that there is a "REQUIRED OPEN SPACE" parcel, approximately 50 feet in width immediately to the rear of the subject property, serving precisely the same purpose as the rear yard would in any event. The sheer economic waste of destroying a building which has been almost entirely completed under an approved and recorded subdivision plat and an approved building permit augurs for a different result. This is especially true where the plan upon which the permit was issued clearly showed the exact rear yard line to which the building was in fact built.

Two sets of documents have been submitted to the Court by the Board pursuant to the writ of certiorari: a set of materials submitted either before or at the time of the hearing before the Board, hereinafter referred to as the Record and the transcript of the testimony at the zoning board (Transcript). Although this is an unusual case, Jones Land Company is entitled to relief based both on equitable and

legal considerations.

II. Factual Background

On July 5, 2001, the Jones Land Company applied for a hearing before the Williamson County Board of Zoning Appeals to request a variance in the rear yard for the property located at 401 Doe Ridge Road in Williamson County. The hearing was held on July 26, 2001. Dan Crunk submitted a letter to the board dated June 28, 2001, and appeared in support of the application. A number of neighboring property owners appeared in opposition.

During the pendency of the appeal to the Board, the petitioner approached the Ivy Glen Homeowners Association offering to purchase the reserved parcel for $10,000. Obviously, if the reserve parcel, roughly 50 feet wide, was added to the lot at 401 Doe Ridge Road, the rear yard setback (30 feet) would be easily complied with. The offer included restrictions on the use of the reserve parcel. The offer was not accepted.

The parcel of property was created by subdivision plat, approved by the Williamson County Planning Commission and recorded on October 16, 1996 in the Williamson County Register's Office at p. 128 of Plat Book 23.[1] Some notes concerning the approval of both the preliminary plat and final plat are contained in the record (at 40-1), and it is clear that the submitted plats were meticulously reviewed. As Mr. Sanders, the Codes Enforcement Officer for the County noted at the board meeting however, the building envelope approved on the plat is in error. Not realizing this, the builder placed the home within the building envelope as shown on the plat. Transcript at 3; Staff Report at 2.

The building permit was issued on May 5, 1999 (Record at 16), based in part upon a plot plan submitted showing the same building envelope as on the subdivision plat. Record at 12 & 76. It is true that the building permit on its fact indicates that the rear setback is 30 feet, but the very plot plan on which the

[1] A copy of the approved plat (two pages) is attached to the record.

issuance of the permit was based clearly shows a rear yard of 12 feet, 5 inches.

After the building permit is issued, under the provisions of the Standard Building Code, there is a required foundation inspection and a required framing inspection. Once again, the County had the opportunity to detect the error, but did not do so.

A separate suit instituted by the neighboring property owner, concerning the design of the home and the covenants in the development, was filed and a temporary injunction entered by Judge Heldman on July 12, 1999. Further construction was held in abeyance until May 24, 2001, when Judge Heldman dismissed the lawsuit and dissolved the injunction. Record at 17.

Sometime after the foundation had been laid, the neighbors asked Williamson County Codes about the home's compliance with the zoning requirements. Mr. Willer says that Mark McMillen, the building code official for Williamson County, that he was "sure it was within codes as long as it was being built within the building envelope that the county had approved for the Ivy Glen subdivision." Record at 57.

A stop work order was placed on the property on June 15, 2001, based on the complaint of Mr. Willer. Record at 5, 42, 43 & 58.

The petitioner appealed to the Board of Zoning Appeals but the application was denied, as memorialized by the minutes dated September 27, 2001. Record at 6. This appeal by way of the common law writ of certiorari was filed on September 24, 2001.

At no time, did the petitioner mislead or attempt to misrepresent this matter to the county. Clearly, the various submissions by the petitioner to the county included and referenced the very building envelope into which this home was actually constructed.

III. Legal Argument

A. Rebound v. Goodlettsville Board of Zoning Appeals

There are two principal reasons requiring that the decision of the zoning board be reversed: first, the petitioner is entitled to the variance by estoppel under the rule announced in Rebound, Inc. v. Goodlettsville Board of Zoning Appeals, and second, the rear yard requirement here makes very little common sense and serves no practical purpose given that the county has required a 50 foot wide open space buffer immediately behind it. To the extent that the rear yard setback had some rational governmental objective, those are ably met by the even larger "REQUIRED OPEN SPACE" parcel mandated by the subdivision plat.

Ordinarily, there must be some exceptional physical feature of the subject property in order to obtain a variance from a zoning board in Tennessee. TENN. CODE ANN. § 13-7-109 (Williamson County ZO § 9601 essentially mimics the statute) requires that there be some "exceptional narrowness, shallowness, or shape ... exceptional topographic condition, or other extraordinary and exceptional situation or condition . . ."[2] The subject property clearly does not qualify as to the first four possible physical features (narrowness, shallowness, shape, or topographic condition).

However, the final clause, "other extraordinary and exceptional situation or condition" does fit, and was employed by the Tennessee Court of Appeals in a similar case. In Rebound, Inc. v. Goodlettsville Board of Zoning Appeals, 1989 WL 150670, the Middle Section Court of Appeals reversed a zoning board that denied a variance because the "proposed use did not meet the definition of a 'family boarding house'" as set out in the zoning ordinance.

In that case, a facility which provides care for individuals who suffer traumatic head injuries met with and discussed the potential use of the property as

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[2] The Tennessee provision is, in this respect, very different from the Standard State Zoning Enabling Act, the substance of which was passed into law by a majority of the states. The Standard Act did not restrict the board's discretion in that way.

a long-term residential care facility. After describing the use of the property, the Codes Administrator for the city concluded that the definition of "family boarding home" would cover the use of the property as Rebound intended.

Based upon the representations of the Codes Administrator, Rebound entered into a lease and began renovation of the structure located on the property. The building permit was issued by the Codes Administrator. Later, after substantial construction had taken place, the city officials indicated that they learned that the property would be used as a residence for adults whereas the definition under which Rebound had been classified covered only the use of the property for a group home for children.

On December 3, the City Manager sent a letter to Rebound indicating that the use was not permitted. Between the date of purchase of the property and the letter from the city, Rebound had spent approximately $700,000 improving the property.

After the ruling by the city, Rebound applied for a variance to the Goodlettsville Zoning Board. At the board, Rebound indicated that it would not have leased the property nor expended any sums in its renovation if it had known that the zoning ordinance prevented use as a long-term care facility for adults.

A number of citizens appeared in opposition to the variance request. Those citizens expressed concerns and fears that the residents of Rebound would create a disturbance and could present a risk to the community. The lower court concluded that "in balancing a hardship imposed on petitioners by denial of the variance against the potential for detriment to the public good, the Court finds the hardship borne by petitioners to be greater. Given this holding, regarding the lack of substantial and material evidence, the Court finds it unnecessary to rule on the issue of equitable estoppel." At *3 (copy attached).

The Court of Appeals noted the lower court's findings with approval and emphasized that the denial of the variance bore no substantial relation to the public health, safety or general welfare of the community. "The record establishes that the

persons residing in the home do not pose a threat of danger to the community. They are medically and mentally stable and receive constant supervision." Id. at *4. The court concluded that there was nothing in the evidence upon which the board could rely to deny the variance request by the plaintiff.

Judge Ben Cantrell, concurred in result but based his decision on the doctrine of equitable estoppel. Judge Cantrell indicated that where a public body induces a private party to act to his or her detriment, that equitable estoppel would apply and did apply in this case.

The petitioner in this case urges the court that under either of the theories adopted by the Court of Appeals in Rebound, it is entitled to the variance or other relief which was denied to it by the Williamson Counting Board of Zoning Appeals. Either there was no legitimate basis upon which the variance could be denied, or, adopting Judge Cantrell's theory of the case, the actions of the city were such that it should now be estopped to argue that a larger rear yard is necessary. In fact, a combination of the two theories is certainly instructive and determinative in this case.

The property owner was given approval to build in just the very area in which the home now sits. There were several steps which gave rise to the this misunderstanding. It is clear that the Williamson County Planning Commission approved a final subdivision plat showing the exact building envelope which now exists on the property. In other words, the plat itself indicated what turns out to be the wrong size of the rear yard. This plat must be and was approved by the Williamson County Planning Commission before it can be recorded in the Register's Office for Williamson County. TENN. CODE ANN. § 13-3-404. In fact, generally speaking, a preliminary subdivision plat is ordinarily presented to the planning commission before final approval is ever granted. And, in this case, we know that in fact, the Planning Commission did have and approve a preliminary plat for the subdivision. Record at 40-1. Thus Williamson County approved the final plat, permitting it to be placed of record, and in addition approved a preliminary plat as

well.

In addition, the county also issued the building permit based on a plot plan that shows the same building envelope. That permit, issued on May 5, 1999, certainly does indicate that the rear setback must be 30 feet wide. Record at 16. However, as the permit itself also indicates, the home was to be "located as shown on the accompanying plot plan." Id. Mr. Crunk, of Jones Land Company, indicates that the "plat plan" was submitted with the building permit application, and there is not dispute about that. Transcript at 12; Record at 6 & 10. That plan (be it "plat" or "plot") is found in the Record at 76. There is no disagreement about this point: Mr. Sanders also said the same thing at the hearing before the zoning board (Record at 6) and the staff report also so indicates. Record at 10. This plan shows the rear setback very clearly at 12' 5" wide. Mr. Crunk also clearly indicates that the plan submitted with the application was based on the subdivision plat. It is therefore clear again that approval of building permit by the County was itself an error and mistakenly misled the applicant: if Jones Land Company had been informed of the error the layout could easily have been re-designed at that juncture.[3]

This is very much on point with the situation in Rebound. If, at the time of the issuance of the building permit, the city had informed Rebound that the use intended was a violation of the ordinance, the renovation expenses could have been avoided. Unfortunately in that case, as here, the permit was issued.

As mentioned earlier, it is also clear that the petitioner did not attempt to misrepresent the situation to the County. This rear yard was part of the plat submission and the application for a building permit. There was no effort by the petitioner at all to misled the county codes administration.

Based upon the issuance of the building permit, Jones Land Company began

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[3] Petitioner recognizes that it bears responsibility as well: if either the County or the petitioner had recognized the difficulty, the problem could have been rectified easily. The point however is that the same thing is true in Rebound: the owner had responsibility for the mistake there as did the city, but in the end, the exceptional circumstances justified the variance, just as they do here.

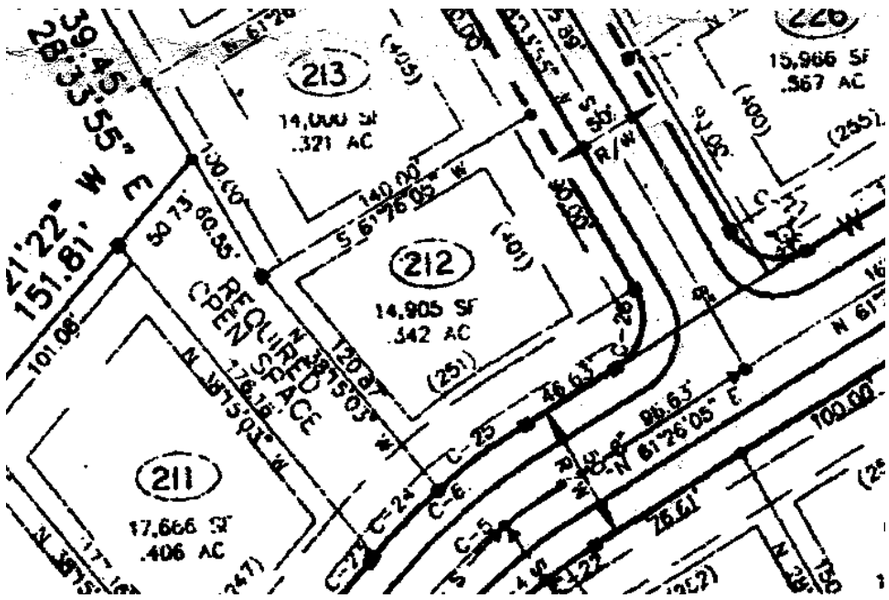
construction. The foundation was constructed; the framing was put up; the plumbing was installed and the home was partially bricked when a lawsuit was filed by the neighboring property owners, alleging a violation of the restrictive covenants applicable to the property. A temporary injunction was issued on July 12, 1999.

During the pendency of that other litigation, the neighbor asked codes about the setback restrictions. The Building Code Official indicated that the subject property complied with the codes requirements. Record at 50 & 57; (letter from Willer dated July 10, 2001 & statement to zoning board dated July 26, 2001). On June 15, 2001, the Building Code Official wrote concluding that the original building permit was issued in error as to the rear yard setback. Record at 19. In fact, Mr. Willer called the Building Code Official (Mark McMillen), shortly after the issuance of the building permit, to check specifically about the yard regulations and compliance with those regulations. "Mr. Mark McMillen informed me that he was sure it was within codes as long as it was being built within the 'building envelope' that the County had approved for the Ivy Glen subdivision." Record at 57 (page 2 of the statement submitted by the Willers to the Zoning Board). Of course, we now know that the platted building envelope was not correct: the County Planning Commission approved the subdivision with a building envelope on this parcel which was incorrectly aligned.

Two other small matters warrant attention. Under the provisions of the Standard Building Code, after the issuance of a building permit, there are several inspections that properties ordinarily must undergo. A minimum of two inspections, one for the foundation and the other for the framing, would have been done before the stop work order was posted in this case. 1994 SBC § 105.6. That means that a county inspector visited the property and inspected the construction on at least two other occasions.

Finally, there is the matter of the required open space area immediately adjacent to the subject property. A partial copy of the plat is displayed here; the

subject parcel is #212.



As can be easily seen, immediately adjacent to the subject property, there is a small parcel clearly marked as "REQUIRED OPEN SPACE." That parcel, approximately 50 feet wide and 175 feet long, serves the same purpose as the rear yard would serve in any event. Generally, the purposes of setback requirements are to increase the availability of light and air and improve the attractiveness of residential areas.[4]

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[4] Mandelker, Land Use Law at § 5.61; the United States Supreme Court expressly based its decision upholding the general constitutionality of setback requirements on those public policies, and in the case of a front yard setback, a desire to separate the residences from the noise of the street, Gorieb v. Fox, 274 US 603 (1927).

Gorieb seems also to have anticipated this case:

> The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds.

274 US at 607.

Because of the existence of the open space lot, those governmental concerns are met even though the rear yard is technically deficient. It makes little sense indeed to deny this variance[5] when the very purpose of the setback requirement is furnished by the overall design and layout of the subdivision itself.

The ZO requirements basically parrot the state statutory requirements.[6] ZO § 9601A is the state statue almost verbatim. ZO § 9601(A)(1)(a) requires an exceptional situation or condition of the property as the basis of the variance. The immediate proximity of the open space parcel easily satisfies this requirement. In addition, the special situation or condition of the property cannot apply generally to other properties in the same zoning district.[7] Clearly, the "REQUIRED OPEN SPACE" parcel is adjacent only to rear of the subject property and not to any other, except that it does of course also run along the rear of the Willers' property line for about ⅔ of the way. The point is that an administrative adjustment such as a variance is the correct means of handling this exceptional situation, not a zoning change. In fact, it may be that the zoning as it applies is not reasonable, given the presence of the "REQUIRED OPEN SPACE" parcel.

ZO § 9601(A)(1)(b) requires that substantial property rights cannot be enjoyed by the applicant without the issuance of the variance. In this case, of course, the applicant is being required to tear down a perfectly good home, because of the rear yard violation. No other property owner is being required to do this. And this in a situation where because of the exceptional location of the open space parcel, there is absolutely no benefit derived from the rear yard setback in any event.

ZO § 9601(A)(1)(c) requires that the variance not be of substantial detriment

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[5] Or otherwise enforce the rear yard setback.

[6] Indeed, most likely, the local government can neither shrink nor expand the authority of the zoning board since it is given to it directly by state statute.

[7] The point of this requirement is that if there are many properties subject to the same difficulty, then a legislative change to ameliorate the impact is more appropriate.

to adjacent property owners and not be contrary to the purpose of the ordinance. Certainly, if the side yard had been compromised or invaded, the Willers would have cause to complain. But that is not the case here. Although they naturally contended otherwise before the zoning board, it is clear that the rear yard is not the problem: they are really upset that the side yard (10 feet) is too small from their perspective. The rear yard issue has no effect on proximity of the subject structure in terms of the side yard.

Subsection (c) also says that the variance must not be contrary to the purpose of the zoning ordinance. This seems to be a shorthand form of the so-called "negative criteria" present in the Tennessee statute.[8] As demonstrated elsewhere in this brief, the open space parcel, immediately to the rear of the subject property, amply conforms to the purpose of the ordinance. Certainly, there is no substantial (or any) detriment to the public good, and no substantial (or any) impairment to the zoning ordinance and the zoning map, to paraphrase the language of the state statute. TENN. CODE ANN. § 1307-109 (3).

ZO § 9601(A)(1)(d) finally requires that the variance will not "entirely void" the environmental provisions of Divisions 7100 and 7200. Insofar as the petitioner is aware, not only will the variance not "entirely void" the environmental provisions of the ordinance, but the petitioner fully complies. There is nothing in a rear setback variance which would necessarily require any impact whatsoever on storm water management, historic preservation, and so forth.[9]

As a result, the petitioner here fully complies with the requirements and is entitled to a variance just as Rebound was entitled to a variance in its case.

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[8] TENN. CODE ANN. § 13-7-109 concludes "provided, that such relief may be granted without substantial detriment to the public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance."

[9] Mostly likely, the draftors of the Williamson County ZO wanted to ensure that the zoning board could not grant a variance in the environmental provisions in such a way as to eliminate them entirely. The prohibition of a use variance in § 9601(A)(1)(b) is in the same vein.

B. Self-Created Hardship

The Williamson County Zoning Board clearly felt that the hardship in this case was self-created and that it was therefore barred. Transcript at 43; Minutes of July 26 BZA Meeting at 6. The difficulty of course with that approach is that Rebound presented that same exact situation: if either Rebound had told the city that they would be housing adults and not children, or if Rebound had simply read the zoning ordinance, it would have been very clear that it could not locate the adult residential facility it proposed at that particular location. Rebound constructed that facility, thereby creating its own hardship, just as in this case. But the Court of Appeals nevertheless concluded that the variance was improperly denied. Bear in mind that in Rebound, the variance applied for was a use variance, the most disrespected type of zoning variance recognized. One of the reasons use variances are not liked is because there is little or nothing that can be done to ameliorate the impact of the use on surrounding properties.

In this case, the variance is known as a bulk (or area) variance. Generally speaking, area variances are not viewed as being as negative as a use variance. And again, this case provides an example of why: here, thanks to the existence of the "REQUIRED OPEN SPACE" parcel, the rear yard is largely irrelevant and most likely irrational when applied under the circumstances here.

Furthermore, this difficulty was not entirely self-created. Yes, the subdivisions plat was prepared at the request of Jones Land Company, but it was approved by the County Planning Commission. Yes, the building permit recited the correct rear yard setback, but the plot plan submitted at the same time, showed the same building envelope as on the subdivision plat. In fact, the yard specifications on the building permit appear to be computer generated, and appropriate for virtually any property, whereas of course, the plot plan was specific to the subject property. In addition, there were foundation and framing inspections performed by the County; the hardship here was created because no one, including the county, recognized the error. Even in the face of specific complaints by the neighbors, the

county maintained that the construction was correct.

While certainly the petitioner should also have picked up on the problem, the fact remains that it was induced by the affirmative actions of the county: approval of the plat, both preliminary and final (so that it could be filed as an official document in the Register's Office); approval of the building permit, with the attached plot plan; foundation and framing inspections; and representations to the neighbors that construction within the approved building envelope was consistent with the land use regulations. If at any point the county had recognized the problem, the situation could easily have been rectified.

Most likely, the members of the Board of Zoning Appeals were not aware of the Rebound case; that is certainly understandable. On the other hand, just a common sense approach to the problem here makes it clear that either the applicant is entitled to a variance or the rear yard is arbitrary under the circumstances of this case, as described more fully immediately below.

C. Rational Basis

Even without the variance or estoppel theory of Rebound, the petitioner believes that there is no basis to require compliance with the rear yard setback where there is a 50 foot wide "REQUIRED OPEN SPACE" parcel in the rear of the property. As indicated earlier, the rear yard requirement doesn't make much sense when there is a dedicated open space behind the rear year itself.

It is of course difficult to argue that any zoning provision is irrational on its face. The granddaddy case, Euclid v Ambler Realty, 272 US 365 (1926) established that proposition.[10] The petitioner's position here is however only that as applied in this very unusual circumstance, the 50 foot setback requirement lacks a rational basis. The Euclid Court even anticipated such an argument:[11]

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[10] The Court held that it could not say that the zoning ordinance, on its face, had no substantial relation to the public health, safety, morals, or general welfare. 272 US at 395.

[11] Id.

> It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

The Euclid case is of course very well known. Somewhat less well known is Nectow v. City of Cambridge, 277 US 183 (1928) decided approximately two years after Euclid. In that case, the Court applied its caveat in Euclid, concluding that the provision of the ordinance at issue there did "not bear a substantial relation to the public health, safety, morals, or general welfare." 277 US at 189.

This case is much like Nectow. The 50 foot rear yard requirement does not do anything that the "REQUIRED OPEN SPACE" parcel does not do. The rear yard may preserve access of light and air; the open space parcel does exactly that, too. The existence of the open space parcel also enhances the attractiveness of the lot, and decreases the noise from the street, to the extent that that is an issue in a low density residential neighborhood.

As applied in this case, therefore, it is difficult to see what the justification is for the required rear yard. What substantial public purpose is being advanced under the circumstances presented here? There simply is none.

D. Civil Rights, Equal Access to Justice and Attorneys' Fees

The petitioner has also sued under the Civil Rights Act of 1871 (42 USC § 1983) and the Equal Access to Justice Act, TENN. CODE ANN. § 29-37-101, et seq., requesting attorneys' fees in this case. In Wimley v. Rudolf, 931 S.W. 2d 513 (Tenn. 1996), the Supreme Court of Tennessee expressly concluded that an application for attorneys' fees under 42 USC §§ 1983 and 1988 was not inconsistent with an application for judicial review (in that case, the review was pursuant to the State APA). Just as in Wimley, the petitioner here suggests that it was denied a variance where Rebound required that one be granted, or alternatively, the rear yard requirement itself lacks a rational basis and is invalid on that ground. Either way,

the decision was arbitrary and capricious, and the petitioner is entitled to its fees.

Under § 1983, the petitioner must demonstrate two elements: (1) a violation of some right, (2) under color of state law. The state law requirement, of course is easily met here since the alleged violation was performed by the Williamson County Zoning Board. Further, it seems abundantly clear that the petitioner either has a right to the variance under the very similar fact pattern found in Rebound, or alternatively, the rear yard requirement is unconstitutional as applied to this property because of the location of the "REQUIRED OPEN SPACE" parcel immediately to the rear of the subject property. Either way, the failure of the county to recognize this is a violation of the petitioner's rights.

In a similar case, involving a subdivision application in Pennsylvania, Woodwind Estates v. Gretkowski, 205 F. 3d 118 (3rd Cir. 2000), the Court held that where the applicant meets the requirements but is nevertheless denied, there is a violation of the applicant's substantive due process rights. The Court recognized that "federal courts are reluctant to sit as appeal boards for disputes between land developers and a Township's planning body. On the other hand, developers have a due process right to be free from arbitrary and irrational zoning actions." 205 F. 3d at 121. It is perhaps important to note that there is no qualified immunity which attaches to any action of the municipality under federal law. Owens v. City of Independence, 445 US 622 (1980). Individual municipal officials may be entitled to a qualified immunity, Harlow v. Fitzgerald, 457 US 800 (1982), but of course, in this case, because the suit is in the nature of a request for judicial review, no allegations have been made with regard to any local official. Thus, there can be no claim of any type of official immunity.

In the case at bar, the petitioner has demonstrated that the decision of the board either in denying the variance or in applying the rear yard requirement simply lacks any substantial relations to a legitimate governmental interest. As a result, the petitioners are entitled to prevail on the Civil Rights and Equal Access claims. The petitioner will submit a documented request if the court concludes that

the request for attorneys' fees is well taken.

IV. Conclusion

For all of the foregoing reasons, the decision of the Williamson County Board of Zoning Appeals should be reversed; the variance must be granted or the rear yard setback as applied specifically to this exceptional situation declared modified by the construction of the home.

Respectfully submitted,

PARKER, LAWRENCE, CANTRELL & DEAN

BY:_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by postage-paid, U.S. Mail to:

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on December 21, 2001.

_____
George A. Dean

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