IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

THE JACKSONIAN FOUNDATION, INC.; HILLSBORO-WEST END NEIGHBORHOOD ASSOCIATION, INC., BELMONT-HILLSBORO NEIGHBORS, INC., EUCLID COURT HOMEOWNERS ASSOCIATION, HOUSTON'S RESTAURANTS, INC., DAVID H. SMITH, JOHN PATTON, WILLIAM D. KENNER, M.D.,, VANDYLAND, INC., KATHLEEN ROWAN D/B/A WHITE TIGER GALLERY, COMPTON FOODS, INC., FLEMINGS WEST END, INC., ASHLEY CALDWELL, KENDRICK HAMILTON and SUSAN GROOM, D/B/A HAMILTON AND GROOM SALON, TIN ANGEL, INC., THOMAS A. GROOMS, CLAIRE PETERSON AND CORRINE CHAMPIGNY.

PETITIONERS,

VS. **NO. 98C-1755**

WALGREEN CO. AND METROPOLITAN BOARD OF ZONING APPEALS, JERE COBB TATE, DIANNE ROCHFORD SIMS, DONALD FRANK ROCHFORD, JOHN COBB ROCHFORD, SARA ANN-ELIZABETH ROCHFORD, ANNETTE KOMORNIK, JERRY BLACKMON, AND W.L BLACKMON,

RESPONDENTS.

TRIAL BRIEF SUBMITTED ON BEHALF OF RESPONDENTS, THE METROPOLITAN BOARD OF ZONING APPEALS AND OTHERS

Introduction

The respondents, Russell Morris, Walgreens Company, Inc., and the heirs of John Cobb (the owners of the property), hereby submit this memorandum of law pursuant to Rule 30.01 of the Local Rules of Practice for the Courts of Record for Davidson County.

This case is before this Honorable Court to review an Order of the

Statement of the Facts

On March 20, 1998, Russell Morris filed an application for a building permit with the Metropolitan Department of Codes Administration seeking permission to construct a new Walgreen's Store located at 3010 West End Avenue (Metro Map and Parcel # 104-2-317). Record at 2. The property is zoned CS (commercial service) and does not permit the residential use of property.[1] CS zoning does permit a wide range of commercial activities as an absolute right (without obtaining any type of approval from anyone). MetZo § 17.08.030.[2] Across West End from the subject property is a First American Bank, and Rio Bravo's. The property is also bounded on the west by 31st Avenue and across 31st is a large commercial office space. Just down West End, on the same side of the street is Houston's Restaurant, as well other commercial stores and shops. The property is bounded on the rear by a public alley and on the fourth side, adjacent to Houston's is another alley.

The original application for a building permit was denied because of its failure to comply with parking, setback, and landscape buffer requirements. Record at 2. Morris appealed the decision of the Department of Codes Administration to the Board of Zoning Appeals, initially requesting a variance from the parking, setback, and landscape buffer requirements of the Metropolitan Zoning Ordinance (MetZo). Record at 1 and copy attached.[3] While the appellant was listed as Walgreens, the appeal form specifically recited that the "undersigned hereby appeals" from the decision of the Zoning Administrator . . ." The only signature (undersigned) was

---

[1]Mr. Lon West, the Zoning Administrator for the Metropolitan Government was asked precisely this question during the hearing. He clearly indicated no. Record at 81. MetZo's requirements speak just as well for themselves; § 17.08.030 clearly prohibits residential use. The former use of the property for an apartment complex was legally non-conforming. In fact, not only is the use non-conforming,

that of Russell Morris. Mr. Morris also executed a form giving permission to Metro to post signs on the property (property owned by the heirs of John Cobb) to give notice of the hearing before the zoning board. Record at 4.

The case was placed on the Board's docket and designated as Appeal Case No. 98-086. On April 23, 1998, a hearing was held before the Board of Zoning Appeals. However, because the applicant was informed shortly before the hearing that the Department of Public Works had not had sufficient opportunity to consider the traffic and parking issues relating to the development of the subject property, a continuance was requested. Transcript at 36. After discussion, the Board granted the continuance and reset the case for May 21, 1998 with the understanding that the case would be ultimately and finally decided on that date. Transcript at 36.

On May 21, 1998, a hearing was held before the Board of Zoning Appeals. Transcript at 38. Before the hearing, the application was amended, eliminating the request for a parking or landscape buffer variance; the Board was asked only to consider the issue of whether a setback variance should be granted. Record at 40 (statement of Rick Shepherd that only one variance is proposed)[4].

The specific request for consideration was a 17 foot setback variance. A setback of sixty-nine feet would ordinarily be required because West End is considered a U6 arterial. MetZo § 17.12.030B; record at 47-8. The property owners proposed to provide a setback of 52 feet. Transcript at 47-8. Hence, the variance requested amounted to 17 feet.

The express reason for the variance was the shallowness of the lot combined with the four public rights-of-way surrounding the lot. Record at 51. Mr. White, on behalf of the property owners and Russell Morris, clearly told the Board that:

What we intend to show today is that we have got a lot that is

> the other two sides by an alley. And our proof will show you tody there is no other piece of property that we know of that is zoned CS in this area that has that shallowness and has two streets and two alleys. That clearly is the predicate for the relief that's here.

Record at 51.

The Board heard evidence from the applicant, including the testimony of a landscape architect and urban land planner, one of the owners of the subject property, and a representative of Walgreens. The proof presented by Bill Lockwood, a landscape architect and urban planner with Barge Waggoner Sumner & Cannon indicated that the lot was very shallow, 116 feet in depth at one end and 110 feet in depth at the other. Record at 58. Mr. Lockwood clearly indicated that this was the most shallow piece of property in the vicinity zoned CS. Record at 62. In addition, the property is surrounded by public rights-of-way. Record at 73 & 74.

Another way of looking at this, is to see how much of the property is taken by the setback. Because the setback is now measured from the center of the street (West End),[5] it does not come across clearly in the record how much of the lot is taken by the required setbacks. Rick Shepherd, the Secretary of the Zoning Board, and a Codes Department official, notes that the setback is basically 17 feet from the property line. Record at 64.[6] The rear setback is met, but it is another 20 feet required for setback. MetZo § 17.12.020C and Table 17.12.020C. Even on the deepest end of the property then, the required front and rear setbacks deprive the owner of the right to use 23% of the property at that end.[7] This is certainly a severe restriction on the use of the property.

At one point in the hearing, Lon West, the Metropolitan Zoning Administrator was asked if if was unusual to have two alleys and the configuration

of this property. He said that it was a little unusual. Record at 87. In fact, one of the opponents, John Teselle, says the same thing: "I think essentially, although there is no other piece of property as the proponents of this plan have suggested, there is no other piece of property that is exactly like the property on which the Jacksonian is located." Record at 122. Mr. Teselle's real point was that all of the properties in this area are unsusal[8]; however, the Board's consideration of course, here was only on the corner lot.

The opponents presented a number of witnesses, most of whom seemed clearly opposed to the loss of the residential apartments, as opposed to the variance. Anne Reynolds, the Executive Director of the Metro Historical Commission spoke against, primarily from the standpoint the historical interest in the apartments. Record at 92. Mike Lawson, one of the attorneys for the petitioners in this case, presented a letter from an engineer. Record at 108. The concerns raised however were related to commercial development itself, rather than to the variance requested. Id.

Stephen Tocknell,[9] a transportation planning consultant, also testified that the drug store would increase traffic.[10] He compared the number from residential use to commercial (rather than a commercial site with the variance to one without). Record at 113. In fact, one member of the board asked exactly about that: assume a service station with a food service section. Would the traffic impact be higher of lower? Mr. Tocknell testified that it would be higher. Record at 114.

Nancy Ray, a real estate broker testified that the construction of the Walgreens would decrease the value of surrounding properties. Record at 115. The

board was concerned about her credentials,[11] but again the type of commercial development rather than the variances per se seemed to be the difficulty. John Teselle, a local homeowner also spoke against the variances. Record at 120. Interestingly, he admitted that the there was no other piece of property like subject property. Record at 122. He went on to emphasize that all the properties in that area were unusual.[12] Id. Tom Grooms, an attorney, also testified against the variance. Record at 120, and 125. Interestingly, Mr. Grooms testified that all beneficial use had to be removed before a variance could be obtained. Record at 125.[13] Both Teselle and Grooms testified that their main objective was to avoid the loss of the apartments. Record at 132-3. Bill Kelly, a resident at the apartments, also testified in opposition to the variance. Record at 138. Again, this witness was primarily motivated by a desire to keep the apartments. Record at 140. The final witness for the opponents, Keith Lightsey testified about the rents from the apartments. Record at 144. Finally, there was discussion about a $1.9 million dollar estimate that the opponents presented indicative of the cost of repairing the then-existing building. Record at 148.

The proponents presented a brief rebuttal. Record at 152.

Based upon this proof, the Board granted the requested setback variance by a vote of four to three. Record at 172-5; 308-11. On June 5, 1998, the Board entered an order memorializing its grant of the variance, basing its decision primarily on the shallowness of the property in accordance with the mandatory standards for granting variances set out in Section 17.40.370 of the MetZo. Record at 308-11.

Statement of Case

A petition for a common law writ of certiorari was filed with the Circuit Court on June 26, 1998. It named Walgreens, the MBZA, and the owners of the property as respondents and alleged that the decision of the MBZA was flawed for a number of reasons. Mr. Morris was later added as a respondent on his motion to intervene. The record was filed on January 13, 1999.

Issues

1. Whether the evidence amply supported the decision of the Board of Zoning Appeals granting the setback variance?

2. Whether the loss of all beneficial use is a necessary prerequisite for a variance under Tennessee law?

3. Whether the applicant had an appropriate interest in the property giving standing to apply for the variance?

Argument

A. The variance granted by the Board in this case was in all respects appropriate and evidence supporting the Board's decision was ample.

1. The Standard of Review

The standard of review for a court in determining the correctness of administrative zoning decisions such as those made by the MBZA in this case is extremely limited. In McCallen v City of Memphis, 786 S.W. 2d 633, 641 (Tenn. 1990) the Supreme Court held that:

> The fairly debatable, rational basis [test], as applied to legislative acts,[14] and the illegal, arbitrary and capricious" standard relative to administrative acts[15] are essentially the same. In either instance, the court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. An action will be invalidated only if it constitutes an abuse of discretion. ***If any possible reason*** exists

of proof rests upon the shoulder of the party who challenges the action. [emphasis added]. As the Supreme Court held in McCallen, if there is ***any*** possible justification for the action of the zoning board, then this court must uphold the decision. Here, there is ample reason for the board's decision.

MetZo § 17.132.080 sets forth the appropriate scope of review:[16]

> The judgment and finding of the Board on all questions of fact that may be involved in any appeal, cause, hearing, or proceeding under this chapter shall be final and subject to review only for illegality or want of jurisdiction.

The foregoing standard of review is simply a codification of well-established case law, such as McCallen. See also, e.g., Putnam County Beer Board v. Speck, 201 S.W.2d 991, 993 (Tenn. 1947); and Boyd, 330 S.W.2d 13, 17 (Tenn. 1959). If there is any material evidence to sustain the finding of the hearing tribunal under such circumstances, and there is no illegal, fraudulent, or arbitrary action therein, the court must sustain the finding of the hearing tribunal. City of Memphis v. Sherwood Building Corporation, 343 S.W.2d 869, 871 (Tenn. 1961); Reddoch v. Smith, 214 Tenn. 213, 379 S.W.2d 641, 645 (Tenn 1964) (holding that in review of a zoning variance by common law writ of certiorari, the courts are limited to deciding whether the administrative board acted fraudulently, illegally, or in excess of its jurisdiction; if, upon examination of the evidence before the board, the court finds that there is any material evidence to sustain the Board's decision, its action should be affirmed).

Furthermore, it is also clear that the zoning board has a wide discretion when ruling on matters of this nature. The Tennessee Supreme Court has stated that the Board is "vested with a wide discretion and the courts will not interfere with that discretion unless it is abused." Reddoch v. Smith, 214 Tenn. 213, 379

expertise and discretion vested in the Board, and the substantial amount of proof presented to the Board justifying a variance, there can be no doubt but that the Board acted properly in granting a variance on this property.

It is axiomatic that the courts will give full consideration to the intention of the legislature and the interpretation of statutes by the administrative board, whose duty it is to enforce them. The courts must also construe zoning ordinances in favor of a property owner's free use of his or her property. Lionshead HOA v Metro Board of Zoning Appeals, 968 SW 2d 296, 301 (1997).

In Stevenson v. Palmer, 448 S.W.2d 67, 69 (Tenn. 1969), the Supreme Court emphasized a doctrine which runs through all of Tennessee land use planning law:

> The grant of broad powers to a Board of Adjustment in zoning matters is necessary in order to have the needed flexbility to properly function. No [two] pieces of land are alike and cannot be treated as the same for zoning purposes.

The board has broad powers and great discretion because it is not possible to clearly demarcate when and where zoning adjustments may be necessary. The Board must be and is given the law of this state and most other states wide latitude to make land use choices.

2. Variance Standards

A variance may be granted in land use planning law when some physical or topographical characteristic of the land would make it impractical to conform to the existing zoning requirements. McClurkan v. Metropolitan Board of Zoning Appeals, 565 S.W.2d 495, 497 (Tenn. App. 1977).[17] Both the state enabling statute, **TENN. CODE ANN**. § 13-7-207(3) and MetZo § 17.40.370 support this proposition.

TENN. CODE ANN. § 13-7-207 gives the Metropolitan Board of Zoning Appeals

> regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this chapter would result in peculiar and exceptional practical difficulties to or exceptional or undue hardship upon the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict applications so as to relieve such difficulties or hardship, provided such relief may be granted without substantial detriment to the public good, or without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

MetZo now follows these requirements somewhat closely, as follows:[18]

> § 17.40.370 Review standards.
>
> In accordance with Tennessee Code Annotated Section 13-7-207, the board shall not grant a variance without an affirmative finding of fact on each of the following standards based on evidence presented by the applicant.
>
> A. Physical Characteristics of the Property. The exceptional narrowness, shallowness or shape of a specific piece of property, exceptional topographic condition, or other extraordinary and exceptional condition of such property would result in peculiar and exceptional practical difficulties to, or exceptional or undue hardship upon the owner of such property upon the strict application of any regulation enacted by the ordinance codified in this title.
>
> B. Unique Characteristics. The specific conditions cited are unique to the subject property and generally not prevalent to other properties in the general area.
>
> C. Hardship Not Self-Imposed. The alleged difficulty or hardship has not been created by the previous actions of any person having an interest in the property after the effective date of the ordinance codified in this title.
>
> D. Financial Gain Not Only Basis. Financial gain is not the sole basis for granting the variance.
>
> E. No Injury to Neighboring Property. The granting of the variance will not be injurious to other property or improvements in the area, impair an adequate supply of light and air to adjacent property, or substantially diminish or impair property values within the area.
>
> F. No Harm to Public Welfare. The granting of the variance will not be detrimental to the public welfare and will not substantially impair the intent and purpose of this zoning code.

activities or facilities within an approved planned unit development. (Ord. 96-555 §§ 10.8(E), 1997)

The appellant clearly presented evidence which would permit the Board to grant a variance according to the standards set out above. In particular, the record in this case contains substantial evidence of the shallowness of the lot and the difficulties associated with the four public rights-of-way, based upon which the Board could and did legally grant a setback variance.

A. Exceptional Physical Characteristics of the Property

This first requirement is sometimes referred to as the threshold requirement. Many considerations may go into a decision by a zoning board as to whether a variance should be granted. But, this requirement of some unusual physical feature must be present. The applicant in this case clearly demonstrated the exceptional shallowness of the subject property. Record at 51. Furthermore, the lot is bounded on two sides by public streets and on the remaining two sides by public alleys. Record at 51. The property is zoned CS (commercial service) (transcript at 51; see also the Application for the Building Permit at 2), and there is no other property in that area of the city which is subject to these conditions in that type of zoning district. Record at 51. Even the testimony of the opponents to the variance admitted as much. Mr. Teselle clearly indicated the exceptional shallowness of the lot himself. "I think essentially, although there is no other piece of property as the proponents of this plan have suggested, there is no other piece of property that is exactly like the property on which the Jacksonian is located." Record at 122. To be sure, Mr. Teselle said that <u>all</u> the properties in the area were unusual and that by its very nature, all real property is somewhat different from one parcel to the next: each is unique.

be treated as the same for zoning purposes." 448 SW 2d at 69. Mr. Teselle merely put, in lay words, the holding of the Supreme Court. But the importance of the Court's holding is that the board must be given sufficient deference by the judiciary to do its job. The courts cannot sit in judgment about the similarities or dissimilarities of a string of properties on West End Avenue. That is the job of the zoning board. And as long as there is some evidence from which the Board could conclude that the subject property was shallow, then the decision of the board must be upheld. Shallowness is after all, one of the five physical characteristics expressly noted in the enabling legislation (TENN. CODE ANN. § 13-7-207(3)) as being a good reason for a variance.

The members of the board earnestly inquired of the opponents whether this lot did not meet the narrowness standard easily. The opponents could not respond. Transcript 136-7. Ultimately, whether this property is exceptionally situated is a question within the province only of the board of zoning appeals. In this case, the board felt that the combination of the shallowness of the lot, and the four public rights-of-way which surround the property were an ample basis upon which to premise the variance.

In the opponents brief, they argue that "most of the properties in the midtown area have similarly shallow or unusual lot shapes . . ." Petitioners Brief at 10. First, it is by no means clear that the witness said this. It is not a quote certainly. Second, it is not clear where these properties are that he refers to. They do not appear to be zoned CS. In fact, most of the properties in the "midtown area" are not zoned CS. Yet, only a comparison to other properties similarly zoned is relevant here. Finally, the testimony of the Mr. Lockwood was accepted by the zoning board, based on the GIS maps. Arguing about the facts is not appropriate

Knoxville Zoning Board granting a variance because of the shallowness[19] of a commercial lot. The variance allowed for the expansion of a commercial use closer towards a residential zoning district located on the rear of the property. The Court found that the variance was appropriately given based primarily on the board's finding that the lot was shallow.

In another case, this one from Davidson County, Belmont-Hillsboro Neighbors v Metro Board of Zoning Appeals, 81-1540-I, copy attached, Chancellor Kilcrease affirmed a decision of the zoning board based on the unusual shape of the property and topography. The court concluded that "it is readily apparent that the Board's decision is supported by substantial and material evidence." Slip Opinion at 4.

On the other hand, most of the cases where variances have been reversed in this state, are cases where absolutely no proof was presented to the board concerning the shallowness, narrowness, or other significant physical feature of the property. For example, in Baker v Metro Board of Zoning Appeals, 1989 Tenn. App. Lexis 36,[20] the only proof concerned that fact that the developer could build a much bigger single building, but wanted to build several smaller ones. The idea was that the developer would forego some use of the property in return for the variances. The difficulty was that those are not reasons for a variance. Nowhere in the enabling legislation is that a proviso which allows a variance for an applicant who is willing to give up a part of the use of the property.[21] There was simply no proof in that record of any physical condition of the property which would justify the variance.

The other case, Metro Historical Commission v Colony Associates,[22] is a case in which undersigned counsel represented the petitioners. Again, there was

absolutely no proof in the record that indicated that there was any unusual physical feature of the property. No proof whatsoever was submitted.[23] Under those circumstances, the Court of Appeals had no choice but to reverse. There was no proof of anything.

B. Physical Characteristics not Shared by Other Properties

Second, because the property involved has unusual physical features, the property itself was unlike the other properties in the surrounding area and in the same zone district. This is the only property in this area which is as shallow and bounded on all four sides by public rights of way. In fact, one of the members of the zoning board, Richard Fletcher, asked one of the opponents to show him, on the witness'exhibit, another site so situated, and the answer was only that there was one other site *in another zoning district.* Transcript at 128. Mr. Lawson, on behalf of the opponents, admitted that there was not similar property in the same zone district. Transcript at 128. Clearly here, this requirement is easily met, even by the opponents proof.

It is also worthy of note here, that the zoning board must have some discretion and flexibility in making this kind of decision. If all properties were nearly the same, cut from a cookie-cutter subdivision pattern, then the decision-making process would be easier. But that is not the way modern cities are laid out. There is a hodge-podge of uses and lot sizes. The board must draw on its experience and background, along with its accumulated knowledge of the city and its land uses, to make a final decision. This is a finding of fact that cannot be overturned.

C. Hardship Not Self-Imposed

did not create the property in such a way as to have it surrounded on all four sides by public rights of way. Neither did they cause the narrowness or shallowness of the property. Furthermore, the owners cannot be held responsible for the widening of West End Avenue over the years which resulted in this property becoming the most shallow strip of property surrounded by two public streets and two public alleys in this area of the CS zone district. Record at 60-1. Because the respondents did not create these conditions, which were the basis for the subject variance, the Board acted appropriately in concluding that there was no self-created difficulty which served as the basis for the request for this variance. In essence, the city itself caused these difficulties and it is only right that the city grant the relief necessary to enable the proposed plan to become functional. Record at 61.

D. Financial Gain Not Only Basis

The fourth requirement, that financial gain alone not be the only basis for a variance, is actually not in the enabling legislation. However, generally, it is used to emphasize that there must be that threshold showing of some unusual physical features before looking at other factors. Once the board concludes that there is a physical feature which might justify a variance, it then is free to consider other relevant factors. Financial considerations are one of those. The expense the respondents would have to bear otherwise was not the only basis upon which the Board granted the variance. It is certainly true that pecuniary loss is not, standing alone, a sufficient basis upon which to grant a variance. See McClurkan,565 SW 2d 495, 497 and Houston v. Memphis and Shelby County Board of Adjustment, 488 SW 2d 387, 388-389 (Tenn. App. 1972). That is not to say, however, that pecuniary loss may not be considered if other factors are found to exist as well. Again, once

case granted the variance to the widow); however, once the threshold requirement has been met, other factors such as the financial impact may be considered. Certainly, in this case, financial considerations were of only a minor consideration. The Board's order in fact clearly indicates that the primary reason for the variance were the physical characteristics of the property. Record at 310.

E. No Injury to Neighboring Property

There will be no injury to any of the other properties in this area because the variance was granted. This variance does not change the uses which can be made of the property. The property is zoned CS (commercial service) which allows for a wide range of commercial uses. Nothing more than a quick glance at the Zoning District Land Use Table, MetZo § 17.08.030, verifies this assertion. Such things as medical offices, clinics, business schools, furniture stores, motels, and of course, drgustores, are all permitted in the CS zone district. The list of permitted uses goes on and on. These permitted uses are not dependent upon the action of the zoning board; they are simply uses which are absolutely permitted by the ordinance.

This variance does not give the property owners any right to do anything differently save the single item of setting the new structure 17 feet closer to the street than would otherwise be permitted. Certainly, the new Walgreens building will be a lot smaller and shorter than the apartments were, and as a result, the supply of light and air will not be impeded at all. In fact, the plan approved by the Board will actually increase the amount of light and air accessible to all surrounding parcels. Record at 25, 176. Finally, there is ample evidence that this is a heavily commercialized area of the city. Record at 180.

There is no proof in this record that this variance will in any way harm the

generated by a drug store would be more than those generated by an apartment building. Record at 112. Well, certainly there would be no dispute about this.[24] But obviously, the Metro Council when it zoned these properties in this area CS recognized the traffic implications of the zoning. The issue before the zoning board was not whether a drug store would increase traffic, but whether this 17 foot variance would increase traffic. There is no proof in the record indicating that the variance would cause any increase, and for good reason: there is no increase associated with this variance, especially if you consider that there are already about 49,000 trips generated along West End already. When this area was zoned commercial, that fact was considered.

Mr. Spann, a member of the Board, made this clear when he asked if a service station with a fast food restaurant would cause more of less traffic than the drug store. Transcript at 113-4. Of course, the answer is that the service station would. The point is that the impact on the surrounding properties is driven by the use, not by the variance in the setback. There is no proof that the *variance* would cause any harm to the neighboring properties.

The opponents also presented a witness to testify about property values, but again, the thrust of her testimony was not that the variance would have an effect on the value of surrounding properties, but that the use of the subject property would have an impact. For example, the witness testified that the Jacksonian gave stability to the area, and its loss would erode residential population in that area of town. Transcript at 115. She also says that the residential uses would be "substantially adversely affected by the proposed variances." But she gives no reason why a 17 foot setback would adversely affect those values. If you begin with the assumption that the use is absolutely permitted, there would seem to be no

seems to be comparing residential use of the subject property with commercial,[25] rather than commercial use with a 17 foot variance as opposed to a commercial use without a 17 foot variance.

Another difficulty pointed out by the members of the zoning board with this testimony, is that there are virtually no residentially zoned properties in this area. Most of the surrounding property is zoned commercially. Transcript at 118-9. Certainly, like the subject site, some of these properties are in fact used for residential purposes, but the board has to make a judgment: since the owners of those properties could at any time choose to shift to commercial use, should the impact not be weighed in terms of the actual zoning on the property.

Finally, the variance granted in this case will actually increase the supply of light and air to adjacent property since the Walgreens drug store would be a substantially smaller and less dense facility than the bulky old Jacksonian Apartment building. Lon West testified that under existing zoning laws, a similar facility could not be rebuilt on the property due to its current size. Record at 81. Granting the variance in this case will actually diminish the danger of fire and will enhance the public safety and property values within the area. Certainly, it will not cost $500,000 to bring the new construction into codes compliance. It will be built according to the Standard Building Code.

F. The Negative Criteria [No Harm to Public Welfare]

Sixth, the granting of the variance will not be detrimental to the public welfare and will not substantially impair the intent and purpose of the zoning code. The Petitioners assert that the granting of the variance would increase the likelihood that the Jacksonian building will be torn down, and suggest that factor is

was not whether the owners should be granted a demolition permit, but rather whether a variance should be granted allowing a 52 foot setback, instead of a 69 foot setback. There was testimony by a neighbor in the area who asserted that he would enjoy having a drug store closer to his residence.

The ordinance and the statute also require that there be no substantial impairment to the intent and purpose of the zoning code. In fact, since residential zoning no longer exists on this property, and because the setback variance will not cause the new building to be out of line with the other buildings in this same corridor, the variance is absolutely within the intent and purpose of the current MetZo. It was the use of the property for residential which was inconsistent with the intent and purpose of MetZo.

G. Integrity of the Master Development Plan

This section is not applicable to the variance applied for. This requirement applies to planned unit developments, a special type of zoning approval technique, not at issue in this case. Record at 78.

After a careful review of the standards for variances set out in COMZO Sec. 102.20, the only logical conclusion is that the applicant in the case at bar presented more than enough evidence to justify the issuance of the variance in question here. In this case, "it is the peculiar circumstances of the land that [are] the primary consideration." McClurkan v. Board of Zoning Appeals for the Metropolitan Government of Nashville and Davidson County, 565 SW 2d 495, 497 (Tenn. App. 1977).

In the instant proceeding the Petitioners attempt to characterize the decision

requests. TENN. CODE ANN. § 13-7-205. Thus, its consideration and determination of such a request is obviously neither illegal nor in excess of its jurisdiction.

What the plaintiff is obviously unhappy with is the result reached by the MBZA, but this disappointment does not in any way suggest "illegality" or "want of jurisdiction." The Petitioners attempt to concoct the argument of "illegality" and "want of jurisdiction" by alleging that the Board made no finding of fact based upon material evidence to support the conclusion that the applicant should be granted the variance requested. However, as the record filed in this case as well as the affidavits of Board members reveal, that allegation is simply untrue. The MBZA did in fact make factual findings, based upon the evidence presented, that the applicant had satisfied all of the requirements for a zoning variance set forth in section 17.132.060 of the Metropolitan Code, and that specific finding was memorialized in the Order entered by the MBZA on June 5, 1998. Record at 308. The record of the proceedings before the MBZA plainly demonstrate that ample material evidence of the appropriateness of the zoning variance requsted by the owners was presented and considered by the MBZA, and that its findings were based on that evidence.

This court, in accordance with the case law cited above, is not to substitute its judgment for that of the MBZA, but rather is to determine whether any material evidence was presented to support its finding and decision, and, if that is the case, to affirm that decision absent a clear showing of fraud, illegality or want of jusrisdiction.

B. There is no requirement that an applicant for a variance demonstrate that there is no economically viable use of the property in the absence of the variance.

The opponents seem to believe that the applicant must demonstrate that

First, if there is no economically viable use of the property, there is no need to ask for a variance. The property owner can simply sue for the loss of use via inverse condemnation.[26] The United States Supreme Court has specifically ruled that over-broad zoning , depriving the owner of any beneficial use of the property, is subject to suit under the Federal Civil Rights Statute, 42 USC § 1983. See First English Lutheran Church v County of Los Angeles, 482 US 304 (1987).

Second, one of the main distinctions between the Standard State Zoning Enabling Act[27] and the Tennessee enabling statutes is the addition of the phrase "practical difficulty." Under the SSZEA, undue hardship must be shown; but under Tennessee law, the Board may conclude either that there is a practical difficulty or an undue hardship. Although it is not clear, certainly it would seem that the former term is a little less burdensome.

The opponents rely on an unreported case, Baker v Metro Board of Zoning Appeals, 1989 Tenn. App. Lexis 36. In turn, that case relies on a statement made in 101A Zoning and Land Planning § 239 to the effect that "the test is whether the property could be used in a reasonable manner . . ." which is actually somewhat different from the test urged by the petitioners. The statement made in CJS is supported by several cases from around the country.

This area of the law can get very confusing quickly, mainly because there are some many pronouncements by so many courts. However, some basic rules can quickly appear. First, zoning is not an area of the common law, like negligence in tort, or assault and battery. This is an area of law controlled primarily by statutory

---

[26]Suit also allows recovery of additional forms of damages including attorneys'fees. However, the owners do not in this case even claim that there is a

provisions. Second, the enabling legislation across this country is different, sometimes very different, *especially* with regard to variances. As a result, it is important to know the text of the applicable statute if one is attempting to apply the law from another state. Applying these basic precepts to this case and the citation to CJS leads quickly to the observation that the states referenced there have diametrically different enabling legislation, much different from that which we have here in Tennessee.[28]

The state with the greatest number of cases on this point (in CJS) is Pennsylvania. And truly, there is no doubt but that the cases all indicate that the "test is not whether the desired use of the property by its owner is the more desirable or even the best use. Rather, in a variance case, the question is whether the property may be used in a reasonable manner within the restrictive provisions of the zoning ordinance or regulation." Maple Gardens v Zoning Board, 303 A. 2d 239, 242-3 (Pa. Cmwlth 1973). But the more interesting questions is whether the statutory provision requires this showing – and it certainly appears to be directly a function of the Pennsylvania statute.

That statute, 53 Penn. Statutes § 10910.2 provides:

> The board may grant a variance, provided that all of the following findings are made where relevant in a given case:
>
> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Subsection (2) of the Pennsylvania statute makes it very clear that the applicant must prove that there is no possibility that the property can be developed in conformity with the provisions of the zoning ordinance and further that the authorization of a variance is therefore necessary to enable the reasonable use of the property. Under Pennsylvania law, if the applicant can not prove that the variance is necessary to enable reasonable use of the property, no variance may be granted.

There is however no provision similar to 53 Penn. Statutes § 10910.2(a)(2) under the Tennessee Public Zoning Enabling Statutes. The two provisions, with regard to this particular point, are very different. As a result, the Pennsylvania cases are not very helpful in analyzing Tennessee law.

Another important zoning state is represented in the CJS roundup. That state is New Jersey, and the New Jersey cases have a more than passing interest to those of us who live in Tennessee. The New Jersey statute seems to have been written by the same author as our legislation. The language of the New Jersey statute was at one point almost identical to our own – except for one small difference. The New Jersey statute always has had a second provision, called a "d" variance (as opposed to the "c" variance which is the provision very similar to our

statutes similar to Tennesse. The point is that with regard to the CJS citations, the New Jersey case is a "d" variance; again, enabling legislation which is very different from the Tennessee version. Any discussion of New Jersey variance law emphasizes this distinction between the "d" variance (with almost no statutory criteria) and the "c" variances (with criteria similar to those here in Tennessee). See William Cox, New Jersey Zoning and Land Use Administration, §§ 6-1 and 7-1 (1996).

Certainly, the respondents do not contend that all beneficial use has been removed from this property. But the real question is whether the owners of the subject property can use their property in a reasonable manner consistent with the surrounding properties, including Houston's, McDonald's, and the recently closed Circuit City. And once again, this is an issue that the zoning board must review and make a discretionary judgment upon. It is simply not a mathematical computation. In the mix of land uses along this corridor, is the fact that these owners cannot construct, under the current zoning regulations, a small (10,000) square feet drugstore a practical difficulty? The owners earnestly submit, that when if the incredible density of development along this West End corridor is considered, any decision contrary to granting this variance would have been arbitrary. Even the smaller uses along this commercial alley make very intense use of almost of their property. To deprive the owners of the subject property of a way to utilize their property, in a manner similar to, but not necessarily to the same extent or intensity, as the other properties along the corridor, would be unfair. The owners of this property are not asking for the highest and best use of the property. Certainly, there are many other uses which this property is zoned for that would be financially more remunerative. The owners are only asking that they get a reasonable return on the value of the property consistent with what others in the same area alreay

C. **Russell Morris acted on behalf of the property owners when he applied for the variance.**

1. The petitioners waived this issue by failing to raise that issue at the zoning board.

The petitioners argue that Walgreens had no standing to apply for a variance under MetZo § 17.40.350, since Walgreens was not the ower or the owner's agent. The respondents disagree for two reasons: first, because this issue was never presented to the board (who could easily have disposed of it during the hearing on the application)[29] and second because on a substantive basis, it is clear that Mr. Morris, the person who signed the application, did so at the request of and on behalf of the property owners as well as Walgreens.

Procedurally, the first point to make is that this issue was never raised at the zoning board and it was therefore waived by the opponents. Some of the property owners were at the hearing before the zoning board; if any issue concerning the proper applicant had come up, it would certainly been easy to demonstrate that the property owners considered that Morris acted on their behalf, and that they were supportive of this submission. At this late date, proceeding under the common law writ of certiorari, that option is gone.

2. Russel Morris signed the application for the variance and did so as an agent for the property owners.

The application for the variance was signed by Russ Morris, on a blank space on the form provided by Metro Codes, immediately below the name of the property owner. Record at 1. Mr. Morris signed the application as the agent of the owners of the property, with their full consent and permission. In fact, several of the owners were at the hearing before the zoning board, and Trey Rochford testified. Record at

support of the variance application by Dianne Sims. Record at 181-2. Ms. Sims, in her letter, says: "In requesting a variance in the setback requirements, we are asking nothing more than that the property conform with the setbacks that already seem to be the norm in the area." Certainly, at least some of the owners thought *they* were requesting the variance. That is because Mr. Morris acted on the owners' behalf with regard to this variance.

While certainly it is true that Russ Morris, the person who signed the application for this variance, did not list the owners as the applicant (on the appropriate blank on the form), it is also true that he signed the form himself. In fact, the form actually says:

> The undersigned hereby appeals from the decision of the Zoning Administrator, wherein a Zoning Permit/Certificate of Occupancy was refused . . .

Record at 1. There is only one "undersigned" on the form: Russ Morris. Given the way the form is presented, the signature easily represents the owners (as well as Wal-Greens).

The actual ownership of the property was certainly clearly represented at the hearing. Mr. White indicated that "the family will continue to own the property. It will be leased to Walgreen's on a long term lease." Record at 79. Mr. White further indicated that he did not in fact represent Walgreens, but he represented the ***applicant***. Record at 79. Mr. White represented the owners indirectly through Mr. Morris' agency relationship. See Record at 57 ("My clients are paying commercial taxes.")

Mr. Morris, who is not an attorney, identified the applicant as the ultimate user of the property, Walgreens. Certainly, it is hard to complain about that. Would the neighbors and other interested parties simply want to know that the

ultimate user was not identified.

It is also interesting to note that Mr. Morris signed the forms permitting Metro to post the required signs on the property giving public notice of the hearing. Record at 4. He obviously felt as if he had the permission of the property owners to do that; furthermore, the signs show up in the pictures of the site. Record at 176. The owners did not tear them down; they did not remove them once posted. It seems absolutely clear that the owners considered themselves as a part of the application process. However, to the extent that Walgreens did make this application, it was fully supported and agreed to by the owners. That is all that is necessary.

Conclusion

It is the contention of this respondent that the factual findings made by the Metropolitan Board of Zoning Appeals are fully and amply supported by the record filed in this case. Further, there can be no doubt but that, given those factual findings, the Board was well within its discretionary power in granting the variance at issue. The Board has not exceeded its jurisdiction, and there was certainly no fraudulent activity engaged in by any member of the Board. In any event, fraud has not even been alleged by the Petitioners. Therefore, under the common law writ of certiorari, this Court must affirm the decision of the Metropolitan Board of Zoning Appeals. Respondents respectfully request this Court to affirm the decision of the Board.

Respectfully submitted,

TUNE, ENTREKIN & WHITE

By: _____

Thomas V. White (2727)
Twenty-First Floor
First American Center
315 Deaderick Street
Nashville, TN 37219
615/244-2770

PARKER, LAWRENCE, CANTRELL & DEAN

By: _____

George A. Dean (6737)
200 Fourth Avenue, North
5th Floor, Noel Place
Nashville, Tennessee 37219
(615) 255-7500

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **C. Michael Lawson**, Attorney at Law, 4205 Gallatin Road, Nashville, TN 37207, **G. Brian Jackson**, Trabue, Sturdivant & Dewitt, 2500 Nashville City Center, 511 Union Street, Nashville, TN 37219, and **Anna L. Pace**, Attorney at Law, 6820 Charlotte Pike, Nashville, TN 37209, on this ____ day of _____, 1999, via U.S. Postage Pre-Paid Mail.

_____
George A. Dean