

Nashville Bar Association

Land Use for the General Practitioner

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by George A. Dean

I. Intro

A. Most important aspect of land use planning law: it's statutory in nature. Ultimately, many of the legal issues turn on an interpretation of the statutory provisions.

1. Local governments must have some authority to do whatever it is they are trying to do. This is Dillon's Rule of Municipalities.
2. City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988)
 - a. "In the almost 200 years of this state's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes."
 - b. "When a municipality fails to act within its charter or under applicable statutory authority, the action is ultra vires and void or voidable."
3. Southern Constructors, Inc. v. Loudon County Board of Education, 58 S.W. 3d 706 (Tenn. 2001)
 - a. Local governments are creatures of the state and possess no more authority than has been conferred upon them by the General Assembly. At 714, n. 9.

B. The Statutes

1. Municipal Zoning – TENN. CODE ANN. § 13-7-201 et seq.
2. Municipal Planning – TENN. CODE ANN. § 13-4-101 et seq.
3. County Zoning – TENN. CODE ANN. § 13-7-101 et seq.
4. Regional Planning – TENN. CODE ANN. § 13-3-101 et seq.

5. Historic Zoning – TENN. CODE ANN. § 13-7-401 et seq.
6. Private Acts may also be involved.
7. SmartGrowth Statute – TENN. CODE ANN. § 6-58-101 et seq.

C. Special Provisions

1. Telecommunications Act
 - a. Fed: 47 USC § 332(c)
 - b. State: TCA § 13-24-301
2. Mobile Homes, TCA § 13-24-201 et seq
3. Modular Homes, TCA § 68-126-304(b)
4. Group Homes, TCA § 13-24-101 et seq
5. Religious Land Use Act, 42 USC § 2000cc

D. Web Sites

1. Many local governments now have their own web sites and many of the local zoning ordinances are posted.
 - a. Try Yahoo! (www.yahoo.com) and drill down to the community you are interested in.
 - b. Or www.google.com, and just type in the name of the local government and see what hits you get.
2. The Metro Zoning Ordinance:
<http://ordlink.com/codes/nashvill/ DATA/TITLE17/index.html>
3. The Metro Zoning Board: <http://www.nashville.org/codes/bza/>
4. Metro Zoning Board Rules:
<http://www.nashville.org/codes/bza/rules.html>
5. Metro Zoning Board Dockets:
<http://www.nashville.org/codes/bza/dockets.html>
6. PLCD Land Use Web Site: www.plcd.com/landuse
7. Dan Mandelker: www.landuselaw.edu

II. The Zoning Board

A. Variances

1. Exceptional relief based upon exceptional physical condition of land; TENN. CODE ANN. § 13-7-207(3)
2. See attached list of requirements.
3. General Rule: If granted, can almost always be challenged; if denied, almost never can be challenged.
4. McClurkan v Metro Board of Zoning Appeals, 565 SW 2d 495 (Tenn. Ct. App. 1977)

B. Conditional Use Permits

1. A use permitted in a particular area if it meets specified conditions; TENN. CODE ANN. § 13-7-207(2)
2. General Rule: If denied, can almost always be challenged; if granted, usually will be sustained.
3. Father Ryan v City of Oak Hill, 774 S.W.2d 184 (Tenn. App. 1988)

4. Special federal provisions:

- a. Religious Land Use and Institutionalized Persons Act of 2000, 42 USC § 2000cc

"No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest."

- (1) We don't have much idea of where this will end up; no decisions from the 6th Circuit.

- b. Telecommunications Act of 1996, 47 USC § 332(c)(7)(A)

- (1) Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
- c. 47 USC §332 (c)(7)(B)(iii) requires:
 - (1) Board must give reasons for its decision
 - (2) Board must issue decision in writing
 - (3) Board must have record of proceedings
- d. 47 USC § 332(c)(7)(B)(i)(I) & (II) prohibit discrimination among carriers and exclusion of service.
- e. Originally, the Act was seen as having a drastic impact on tower approvals; I am not sure that such has been the case.

C. Non-conforming Properties

1. In General

- a. A use of property which pre-exists the effective date of the applicable zoning regulation; TENN. CODE ANN. § 13-7-207(1) and § 13-7-208
- b. Discontinuation and abandonment
- c. Amortization: ordinance requirement that a NCFU be terminated within a specified time frame.
- d. Cases
 - (1) Rives v City of Clarksville, 618 S.W. 2d 502 (Tenn. App. 1981)
 - (2) Boles v City of Chattanooga, 892 SW 2d 416 (Tenn. App. 1994)

2. The Tennessee Non-Conforming Property Act, TENN. CODE ANN. § 13-7-208

- a. Special provisions which allow the continuation, expansion, and total replacement of non-conforming uses.
- b. Amortization not legal where it applies

- c. Does it apply to counties? Chadwell v Knox County, 980 SW 2d 378 (Tenn. Ct. App. 1998) says it does apply to counties.
 - (1) But Fields v White, 1989 Tenn. App. Lexis 64 is to the contrary and it was decided by the Middle Section (Judge Ben Cantrell)
- d. Outdoor West v Johnson City, 39 SW 3d 131 (Tenn. Ct. App. 2000)

D. Misc Admin Relief

- 1. Legal interpretations of the code; TENN. CODE ANN. § 13-7-207(1)
- 2. General Rule: With some exceptions, as you might expect, the Board's interpretation of the zoning ordinance is normally upheld.
- 3. A contra line of cases: The zoning ordinance, since it is in derogation of the common law right to the unrestricted use of property, is interpreted strictly against the government.

E. Practice Pointers

- 1. Timeline for process may be valuable. Sample attached.
- 2. No ex parte contact with members of the Board.
- 3. Letter brief should be sent to members of the board detailing how your client meets the legal requirements (sample attached).
- 4. Court reporter (unless you're sure the meeting is recorded)(not necessary for example in Metro)
- 5. Make sure all your proof is in the record before the board – usually nothing else will come in at the courthouse on appeal.
- 6. Common sense arguments orally – rely on letter for legal basis
- 7. Always prepare the board's order if you prevail (you'll do a lot better job than the staff can do – they simply have too many things to do to craft a good order for each case.) (Sample attached)

III. The Planning Commission & Council

A. General Plan

- 1. General Rule: Matters not one whit. The General Plan in Tennessee is for the most part absolutely irrelevant to the entire

process.

- a. See Barrett v Shelby County, 619 SW 2d 390 (Tenn. Ct. App. 1981)
2. In the briefs both counsel use terms such as "spot zoning" and "approved comprehensive plan". We are unmoved by such terms. These are terms of professional planners and are largely undefined. Whether the zoning in question be termed "spot zoning" or contrary to an "approved comprehensive plan" is not the issue before this Court or the Trial Court.
3. Actually, those terms for the most part were made up by attorneys!
4. TENN. CODE ANN. § 6-58-107 (the SmartGrowth Act) requires:
 - a. After a growth plan is so approved, all land use decisions made by the legislative body and the municipality's or county's planning commission ***shall be consistent*** with the growth plan.
 - (1) This is of limited impact because the plans are all very vague and usually don't include land use details.
 - b. The growth plan shall include, at a minimum, documents describing and depicting municipal corporate limits, as well as urban growth boundaries, planned growth areas, if any, and rural areas, if any, approved in conformance with the provisions of § 6-58-104.
 - c. The purpose of a growth plan is to direct the coordinated, efficient, and orderly development of the local government and its environs that will, based on an analysis of present and future needs, best promote the public health, safety, morals and general welfare.
 - d. A growth plan may address land-use, transportation, public infrastructure, housing, and economic development.
 - (1) In my experience so far with the act, no one is

really doing this. All of the plans are vague and designed to comply with the absolute minimum requirements of the statute.

- (2) Metro has opted out so that the act does not apply in Nashville.

B. Subdivisions

1. Defined: Division of larger tracts into smaller ones for sale and development.
2. TENN. CODE ANN. § 13-4-301 offers the technical definition:
 - a. the division of a tract or parcel of land into two (2) or more lots, sites, or other divisions ***requiring new street or utility construction***, or any division of less than five (5) acres, for the purpose, whether immediate or future, of sale or building development, and includes resubdivision and when appropriate to the context, relates to the process of resubdividing or to the land or area subdivided
 - (1) Notice that potentially, if land is divided into 5 acres per lot or more, than the developer may avoid the subdivision process.
 - (2) However, if new street or utility construction is required, subdivision approval is required.
 - (3) When does a subdivision not need new street or utility construction? Most likely, never.
 - (4) See *Thompson v. Metro Governnemt*, 20 SW 3d 654 (Tenn. App. 1999) for further discussion of this statutory provision.
3. Procedure:
 - a. A plat showing the proposal is filed
 - b. Planning Commission has a hearing to determine if subdivision regulations are met
 - c. If the regs are met, preliminary approval is given (or in the case of a bond, final approval is given)

- d. Planning Commission must make its decision within 30 days (60 for county government).

4. Cases

- a. State ex rel Byram v. City of Brentwood, 833 S.W.2d 500 (Tenn. App. 1991)(road grade; MPC wins)
- b. City of Church Hill v. Taylor, 1996 WL 605247 (Tenn. Ct. App. Eastern Division)

5. Exactions and Constitutional Implications

- a. Nolan v Cal. Coastal Commission, 483 US 825 (1987)
- b. Dolan v. City of Tigard, 512 US 374 (1994)

- c. Three part test:
 - (1) Does the permit condition seek to promote a legitimate state interest?
 - (2) Is there an *essential nexus* between the legitimate state interest and the permit condition?
 - (3) Is there a required degree of connection between the exactions and the projected impact of the development (*rough proportionality*)?

- d. Sample application:
 - (1) Exaction required for subdivision, 50 foot frontage but no plans to actually build any extension of the highway.
 - (2) The governmental interest is legitimate but there is no essential nexus between the subdivision and the expanded highway.

C. Site Plan Review

- 1. Review of basic lay-out of property. No enabling legislation.
- 2. No case law although several cases seem to indicate that they involve site plan review.

D. Planned Unit Developments

1. A blend of a zone change and site plan review. No enabling legislation.
2. Cases
 - a. *McCallen v City of Memphis*, 786 S.W.2d 633 (Tenn. 1990)
 - b. *Davis MC v Metro Nashville*, 912 SW 2d 178 (Tenn App. 1995)

E. Zone Changes

1. This is a change in the underlying base zoning for any property.
 - a. For example, a change from RS40 to CG in Metro Nashville, indicates generally that the property has been rezoned from single-family residential to general commercial.
2. Spot Zoning:
 - a. Defined: the practice of singling out a piece of property for a use classification totally different from that of the surrounding area. See *Lafferty v City of Winchester*, 46 SW 3d 752 (Tenn. Ct. App. 2000) (footnote 2). Usually, the “spot” is a small parcel of property zoned in a manner inconsistent with the other properties in the surrounding vicinity.
 - (1) This is a slippery concept and hard to pin down in practice.
 - (2) All challenges to zoning changes allege “spot zoning” but virtually none prevail.
 - b. *Grant v. McCullough*, 196 Tenn. 671, 270 S.W.2d 317 (1954) is the only case on point.
3. Cases:
 - a. *Euclid v Ambler Realty*, 272 U.S. 365 (1926).

- b. *Spencer-Sturla v City of Memphis*, 155 Tenn. 70,290 S.W. 2d 608 (1926) Tennessee’s first important zoning case.
- c. *Fallin v City of Knoxville*, 656 S.W. 2d 338 (Tenn. 1983) – this is currently the most important case on zone changes.
- d. *Concerned Citizens of Johnson City v Johnson City*, 2001 WL 766997

(1) Courts are not "super" legislatures. They do not decide whether a challenged legislative action is wise or unwise. It is not the role of judges to set public policy for local governments, nor do we decide if a municipality has adopted the "best," in our judgment, of two possible courses of action. That is not our role. The concept of separation of powers precludes such an activist role on our part. As the *Fallin* case points out, ours is a "quite restricted" role. 656 S.W.2d at 342. When we exercise that limited role in this case, we find a fairly debatable issue and, hence, no arbitrary or capricious action. Consequently, we find no error in the trial court's action.

- e. *Varner v. City of Knoxville*, 2001 WL 1560530 (Tenn. Ct App. Eastern Div.)

(1) Is the term “arbitrary and capricious” different from a lack of rational basis?

- 4. The Courts do need to be more aggressive in identifying and correcting land use decisions by the legislative decision-makers which are inappropriate.

IV. The Common Law Writ of Certiorari and Supercedeas

A. TENN. CODE ANN. § 27-8-101, et seq., and §27-9-101 et seq.

B. Four documents (sample attached)

- 1. Petition
- 2. Writ

3. Fiat
4. Bond

C. Petition

1. Who to sue?
 - a. If developer: sue local government and board (not members); plus any neighborhood group actively involved (not all the neighbors – if they want in, you can agree to intervention later)
 - b. If neighbors: sue local government, board and applicant.
 - c. See *Levy v Williamson County Board of Zoning Appeals*, 2001 WL 1141351
 - (1) No need to sue everyone who appears before zoning board; if a significant party is omitted, the petition for writ of certiorari may be amended to add additional parties.
2. When to sue?
 - a. Within 60 days of administrative decision; TENN. CODE ANN. § 27-9-102
 - b. Begin 60 days on date of the hearing (not date of entry of order or minutes); see *Advanced Sales v. Wilson County*, 1999 WL 336305.
3. Where to sue?
 - a. In any county where petitioner resides, or where any respondent resides or has principal office
 - b. TENN. CODE ANN. § 27-9-101.
4. Must allege that petitioner is aggrieved by the administrative decision; TENN. CODE ANN. § 27-9-101
5. Must allege that this filing is the first application for relief; TENN. CODE ANN. § 27-8-106.

6. State Basis of claim
 7. Must be sworn, at least by an agent (attorney appears to be ok); TENN. CODE ANN. § 27-8-106.
 8. Optionally, ask for fees under Tennessee Equal Access to Justice Act; TENN. CODE ANN. § 29-37-101 et seq.
 - a. Up to \$10,000 in fees recoverable
 - b. Must prove government acted arbitrarily and capriciously (but you've got to do that in land use anyway!)
 9. Optionally, ask for fees and/or relief under the Federal Civil Rights Claim, 42 USC § 1983 & 1988
 - a. Wimley v. Rudolf, 931 SW 2d 513 (Tenn. 1996).
- D. Writ
1. Simply orders production of the record (and transcript if available)
 2. Specify a time frame (30 days) for the filing of the record.
- E. Fiat
1. An order requiring that the writ be issued
- F. Bond for costs
- G. Supersedeas
1. Supersedes the action of the board and keeps the status quo (in effect, an injunction pending the final decision). See TENN. CODE ANN. § 27-8-112 and § 27-9-106.
 2. Requires a bond for potential damages. Often, in neighbor cases, this is not worth the effort.
- H. Procedure and Practice Pointers
1. Generally:

- a. Usually there is no discovery.
- b. Usually there is no testimony.
- c. Just an argument on the record
- d. Don't pay any attention to TENN. CODE ANN. § 27-9-111(b) or (d); in these kinds of cases, those provisions are not applicable.
- e. The judge must affirm the decision unless it is arbitrary or capricious, illegal, or beyond the jurisdiction of the board.

2. Procedure

- a. The writ of cert should require that the transcript of the proceedings be filed within 30 days (extensions are often agreed to)
- b. In Davidson County, Local Rule 22 applies and requires that the petitioner's brief be filed within 30 days after the transcript is filed.
 - (1) I usually get a date for the hearing when I file my brief. Often, a Friday afternoon is best here in Nashville.
- c. Within 30 days of petitioner's brief, respondent must file a brief; 15 days for a reply brief by petitioner.

3. Court can only reverse if decision of the board is arbitrary or capricious, illegal or wanting in jurisdiction.

- a. Nevertheless, you can often overturn land use decisions
- b. If the zoning board or planning commission denies an application (CUP, PUD, site plan, subdivision) which meets all the requirements, that is arbitrary and capricious – and it happens a lot.
- c. If the zoning board or planning commission grants an application that doesn't meet the requirements, that is also illegal.

I. Cases

- 1. Hoover Motor Express Co v Public Utilities Commission, 195 Tenn. 592,604-5,261 S.W. 2d 233,238 (1953).

2. *Lafferty v City of Winchester*, 46 SW 3d 752 (Tenn. Ct. App. 2000)

V. Codes Enforcement Issues

A. Standing

1. TENN. CODE ANN. § 13-7-208: “any adjacent or neighboring property owner who would be specially damaged, may, in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding . . .”
2. *Simmons v. City of Lexington*, 11 SW 3d 136 (Tenn. Ct. App. 1999) Even when zoning board has acted, neighbors may sue for injunctive relief wholly outside common law cert.

- a. This may not be such a great decision.

B. Non-conforming Properties

1. Non-conforming status may be a complete defense to alleged violation.
 - a. If property was there before effective date of zoning regulations, then there is no violation.
 - b. Usually don't want to go to zoning board.
 - c. *Sanders v. Angie Properties*, 834 SW 2d 232 (Tenn. Ct. App. 1992) Owner always may raise NCFP as defense even if never went to zoning board.

C. Vested Rights and Estoppel

1. These two concepts are not exactly alike but close enough for our purposes.
2. Three Characteristic Situations
 - a. Permit issues and then law changes: if substantial construction has been accomplished, then the permit cannot be revoked. Otherwise, it may be.

- (1) *Howe Realty v City of Nashville*, 176Tenn. 405, 141 S.W. 2d 904 (1940)

- b. Intentional misrepresentation to get the permit: applicant loses: building permit cannot give what law does not allow
- c. Negligent misrepresentation by both government and applicant
 - (1) Rebound v City of Goodlettsville, 1989 WL 150670
 - (a) Ostensibly a variance case, but I believe that the result is easier to explain using Judge Cantrell's concurring opinion: estoppel
 - (2) The customary case, where the permit has issued incorrectly, and the home is built with only a 15 foot sideyard instead of a 20 foot sideyard usually will not prevail.
 - (a) Some additional factor must be present, such as the lack of harm found by the Court in Rebound.

3. Bright Line Rule (Utah)

- a. Once permit is issued (lawfully), subsequent changes are irrelevant
- b. Problem here is that every time you change the code, developers will want permits to preserve a theoretical right to build
- c. This is probably a good middle ground: the developers have to pay for the permits after all, and if they wish to do so and then not build, that's fine.

D. Intergovernmental Immunity

- 1. Harpeth Valley Utilities District v. Metropolitan Government
- 2. Adelphia Coliseum is a good example of this type of immunity.

E. Preemption

- 1. Mobile Homes – TENN. CODE ANN. § 13-24-201
 - a. TMHA v Metro, 798 SW 2d 254 (Tenn. Ct. App. 1990)
- 2. Modular Housing – TENN. CODE ANN. § 68-126-304 (building

- code only)
3. Groups Homes – TENN. CODE ANN. § 13-24-101
 - a. Nichols v Tullahoma Open Door, 640 SW 2d 13 (Tenn. Ct. App. 1982)

F. Injunctive Relief

1. Supercedeas/Injunction – Worth the effort?
2. Bond required
3. Pinecrest Lakes v. Shidel, 795 So. 2d 191 (Fla. App. 4th 2001)

G. Fines

1. Article VI, Section 14 (the Fifty-Dollar Fines Clause) of the Tennessee Constitution says:
 - a. No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars.
2. City of Chattanooga v. Davis, 54 SW 3d 248 (Tenn. 2001).
 - a. The primary issue presented by these consolidated cases is whether Article VI, section 14 of the Tennessee Constitution, which prohibits the laying of fines in excess of fifty dollars unless assessed by a jury, applies to proceedings for the violation of a municipal ordinance. ***We hold that Article VI, section 14 does apply to such proceedings when either the intended purpose or the actual purpose or effect of the monetary assessment is to serve as a punitive measure.*** To the extent that O'Dell v. City of Knoxville, 54 Tenn. App. 59, 388 S.W.2d 150 (1964), would compel a contrary conclusion, it is expressly overruled.
 - b. The consolidated case (Metro v. Barrett) had to do with building code violations in Davidson County and is therefore especially interesting in the context of this presentation.
 - c. One would surmise therefore, that virtually all zoning

enforcement actions are within the ambit of the new rule and fines cannot exceed \$50.

H. Jury Trials

1. City of Chattanooga v. Myers, 787 S.W. 2d 921 (Tenn. 1990)
 - a. Jury trial is available for codes violations

VI. Takings Cases

A. Zone changes do not usually involve takings under the Constitution.

1. If there remains some legitimate use to which the property can still be put, then there is no take.

B. Cases

1. Pennsylvania Coal v Mahon, 260 US 393, 43 S Ct 158, 67 L Ed 322 (1922)
 - a. "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such charge in the general law ."
 - b. "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."
2. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)
3. Williamson County Regional Planning Commission v Hamilton Bank, 473 US 172 (1985)
4. Procedural Requirements
 - a. Applicant must have a definite plan
 - b. Applicant must request any available administrative relief
 - c. There must be a final administrative decision
 - d. Applicant must sue in state court before seeking federal relief

VII. Conclusion

VIII. Attachments

- A. List of Statutory Variance Requirements in Tennessee
- B. Timeline for Zoning Appeals Process
- C. Sample Letter to Zoning Board
- D. Sample Zoning Board Order
- E. Certiorari Documents
 - 1. Petition for Writ of Certiorari
 - 2. Writ of Certiorari
 - 3. Fiat

Variances in Tennessee
T.C.A. §§ 13-7-109(3) & 207(3)
Outline of Tennessee Statutory Provision
by George A. Dean
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The board has the power to:

1. Authorize upon an appeal a variance
2. Where there existed,
3. at the time of the enactment of the zoning regulations,
4. exceptional:
 - a. narrowness;
 - b. shallowness;
 - c. shape;
 - d. topographic conditions; or
 - e. other extraordinary and exceptional situation or condition
5. of a specific piece of property; and
6. the strict application of the ordinance would result in
 - a. peculiar and exceptional practical difficulties to or
 - b. exceptional or undue hardship upon
7. the owner,
8. so as to relieve such difficulties or hardship;
9. provided that such relief may be granted [negative criteria]
 - a. without substantial detriment to the public good
 - b. without substantially impairing
 - i. the intent and purpose of the zone plan
 - ii. and zoning ordinance.

Zoning Appeals Process

U	Date	Activity
		Initial Meeting with Client -- Review basic legal requirements -- Discuss factual setting of specific property -- Obtain copies of all important documents -- Discuss timetable -- Assign responsibilities -- Neighbors -- client -- Council -- client -- Mayor -- client -- MPC -- PLCD -- Codes -- PLCD -- Written Docs -- PLCD
	60 days (before hearing)	Collect complete documentation needed for application to Metro Board of Zoning Appeals (variance, conditional use, or NCFP)
		File application with Metro Board of Zoning Appeals
	21 days	Get list of neighbors notified from Codes; send letter to each
	8 days	Chk w/ Planning Commission staff on recommendation
	Thur before	Planning Commission meeting for recommendation
	Fri before	Meet w/ client; file letter brief to meet legal requirements
	Mon before	Check on board members availability with staff
	Wed before	Staff review
	Thur	Meeting of Metro Board of Zoning Appeals
	Fri aft hearing	Draft Order of the Board