Planners Network 2011 Conference
May 20, 2011

A Quick Review:
Traditional Zoning Techniques

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Contents

1. Introduction

   a. We will very quickly review several basic areas of land use planning and zoning law as it is practiced here in Tennessee.

   b. The discussions will be far from exhaustive; we will just go over the basic ideas important in daily practice.

   c. If you need more detail, my book *Tennessee Zoning Boards: Practice and Procedure*, available on Amazon, might be helpful.

   d. The larger cities in the state all have their own quirks: special statutes, charter provisions, local practices, and so forth. Some of the deadlines I discuss may not be applicable in Memphis; I'm trying to address the general rule across the state.

   e. One area of emphasis is relatively new across the country – religious freedom restoration statutes – and almost brand-new here in Tennessee; our statute was passed about two years ago.

   f. I'm going to begin with that statute just to be sure that Tennessee practitioners are aware of the new law. It is not only different from the federal statute (RLUIPA), but startlingly different from Tennessee common law.

2. The Tenn Religious Freedom Restoration Act (Tenn. Code Ann. §4-1-407) (copy attached)

   a. Let's begin by emphasizing the common ground:

      i. Applies to all varieties of governmental action not just land use and zoning.

      ii. The Tennessee statute requires no proof of actual religious discrimination, much like the federal RLUIPA / RFRA

      iii. The test is:

         (1) Substantial burden on religiously motivated practice?

         (2) If so, is there a compelling governmental interest justifying that substantial burden?

         (3) If so, is the method chosen the least restrictive means of accomplishing the governmental objective?

   b. The substantial burden analysis is well known and based largely on constitutional doctrine first established by the United States Supreme Court in the 1960's.

   c. But the Tennessee statute goes quite a good deal further

   d. First and most important, under the federal act there is no definition of the term "substantial burden."

      i. The Tennessee act defines this term at a very low threshold:

anything that inhibits or curtails religiously motivated practice is a substantial burden under §407(a)(7)

ii. That might be just about any governmental regulation!

iii. Contrast with 6th Circuit in Living Water v Charter Township, 258 Fed Appx 729 (6th Cir 2007).

iv. Living Water, declined to establish a "bright line test" for determining a substantial burden. It held that the Supreme Court's Free Exercise jurisprudence provides the appropriate analytical framework. The Sixth Circuit emphasized that in the Free Exercise context, the Supreme Court has made clear that the substantial burden hurdle is high.

v. "[A] 'substantial burden' is a difficult threshold to cross." A substantial burden must place more than an inconvenience on religious exercise. See Kimbrel v. Caruso, 2010 WL 1417746 (W.D.Mich. 2010) ("RLUIPA was not intended to create a cause of action in response to every decision which serves to inhibit or constrain religious exercise, as such would render meaningless the word 'substantial.' "

e. Second, once a substantial burden is found, not only is the burden of proof on the state or local government, but unlike most other cases, the

Tennessee act requires "clear and convincing" proof of a compelling governmental interest. §407(a)(7)

i. Customarily, in civil matters, a preponderance of the evidence (over 50%) is necessary in order to carry the burden of proof.

ii. It is difficult to quantify "clear and convincing" proof, but certainly it is something significantly greater than the preponderance of the evidence.

iii. The Tennessee Pattern Jury Instructions defines clear and convincing evidence as evidence of a highly probable nature with no serious or substantial doubt about the correctness of conclusions drawn from the evidence. §2.41.

iv. Of course, this standard is not as high as beyond a reasonable doubt.

f. Third, the federal and most state statutes simply require that the substantial burden be in furtherance of a compelling governmental interest.

i. The state act here in Tennessee requires a showing that the substantial burden is "essential" to a compelling governmental interest. §407(c)(1)

ii. Gonzales v O Centro Espirita, 546 US 418 (2006)

(1) Church observed religious ceremony using sacramental tea made in part from a controlled substance

(2) The US Supreme Court found that the department of justice did not carry its burden to demonstrate a compelling governmental interest

(3) If prevention of the use of a toxic hallucinogen is not compelling, what zoning interest is?

g. Think about the impact of this in the context of specific situations:

i. Zoning changes – in a church applies for a zoning change, can we ever turn it down?

(1) Church of the Foursquare Gospel v. City of San Leandro, 2011 WL 505028 (9th Cir. 2/15/2011); amended 4/22/2011 at 2011 WL 151890; failure to grant ZC (from Ind to Res may be violation)(realtor's testimony)

ii. Conditional use permits – same idea – if a church applies, how do we deny its application even if there are legitimate land-use planning concerns?

(1) Unless those concerns rise to the level of compelling governmental interests, and I submit that most land-use planning concerns are frankly not compelling, the

application most likely must be approved.

iii. Permits with required off-site improvements; suppose ordinarily a left-hand turn lane would be required to access the property at the cost of the applicant. Is this compelling? Can we require the improvement as a condition of the permit?

(1) But don't most of these requirements seem merely like a rational basis, and not a compelling governmental interest?

iv. Miscellaneous

(1) Caps v Nashville Union Mission – Tenn Court of Appeals says that homeless shelter with small sanctuary is a church for zoning purposes

3. Administrative Appeals to the Zoning Board
(TENN. CODE ANN. §13-7-207(1)(city) and § 13-7-109(1)(county))

a. The most common of these relates to non-conforming properties but other appeals are also possible. For example, what is a church under the terms of the applicable zoning ordinance? Questions as to whether a particular use is within a particular definition under the terms of the ordinance are within the board's jurisdiction.

b. We will concentrate on non-conforming properties.

c. In Tennessee, we have specific statutory protection for commercial and industrial nonconforming properties at Tenn. Code Ann. §13-7-208.

d. Remember, a non-conforming property legally preexists the effective date of the zoning ordinance.

e. Also, although not expressly protected by the terms of the statute, most zoning ordinances protect noncomplying lots, sometimes referred to as lots of record.

   i. These lots are created prior to the adoption of the zoning ordinance or prior to the adoption of a specific regulation concerning minimum lot size.

   ii. Most ordinances have some safety valve which permits such substandard lots some way of using the property in order to avoid takings claim.

   iii. Recently, I have been involved in litigation involving a 2.5 acre agricultural property which preexisted the effective date of the zoning ordinance but where the County authorities were evidently unaware of the zoning regulations in their own ordinance which allowed the use of the property for a single-family dwelling (or a single wide manufactured home).

f. Non-conforming use cases are particularly factual: the board must

make a decision as to whether or not the particular land use activity was in operation before the effective date of the applicable zoning regulation. In addition, the use of the property must not have been discontinued any longer than permitted under the terms of the discontinuation clause of the applicable zoning ordinance.

g. Amortization

i. Amortization is the specification of a particular time frame during which the owner of the non-conforming property may attempt to recoup his investment. After that time expires, the non-conforming property must revert to a conforming use.

ii. Unfortunately, under the Tennessee Non-Conforming Property Act, amortization is not permitted. TENN. CODE ANN. § 13-7-208 (b) expressly allows non-conforming commercial and industrial uses to continue operations. As a result, amortization of non-conforming commercial or industrial uses is not within the power of local governments under the state statutes.

iii. *Rives v City of Clarksville*, 618 SW 2d 502 (Tenn. App. 1981), involved in amortization provision which was enacted prior to the adoption of the Tennessee Non-Conforming Property Act. The Tennessee Court of Appeals specifically found amortization

provisions constitutional, and ruled in favor of the city of Clarksville in this particular case.

(1) However, as mentioned above, after the adoption of the Tennessee Non–Conforming Property Act, amortization provisions now are inappropriate as to commercial and industrial properties. Take a look at National Auto/Truck Stops v Williamson County, where the counties 10 year amortization sign provision was invalidated.

h. Discontinuation

i. If the use of the property is discontinued for a specific period of time, the use of the land is deemed abandoned.

ii. Under the Tennessee Non-Conforming Property Act, it takes 30 months to work discontinuation. Remember, this applies only to commercial and industrial properties.

(1) There's also the continuing dilemma that it is unclear as to whether there must be also an affirmative act of abandonment.

(2) Subsection (g) for example initially provides that the non-conforming provisions do not apply if the "industrial, commercial, or other business establishment ceases to

operate for a period of thirty (30) continuous months."

(3) But subsection (g) (4) further provides that the discontinuation provisions only "apply if the property owner intentionally and voluntarily abandons the nonconforming use of the property. In any contested matter on the use of such property, the government has the burden of proving an overt act of abandonment in such matter."

(4) It is obviously much more difficult to prove intentional abandonment of the nonconforming property as opposed to simply demonstrating the discontinuation of the use or cessation of activities on the site.

iii. Residential discontinuation provisions are set by local zoning ordinances and the state statute does not apply. Anything from two months to two years is common.

i. If the zoning board rules against the appellant, it is very difficult to prevail in a court of law because most courts will accept the facts as found by the zoning board.

j. As I will mention later in more detail, the mechanism by which these appeals are taken is pursuant to a common-law writ of certiorari. The

common-law writ does not allow additional evidence to be introduced before the court, and as a result it is fundamentally important to make sure that all the evidence bearing on the issue of nonconformity be submitted to the board.

i. As a practical matter, it is very difficult to overturn a decision of a local zoning board (whichever way it may rule) with regard to the existence of a non-conforming property.

4. Special Exceptions/Conditional Use Permits
(TENN. CODE ANN. § 13-7-207(2)(city) and § 13-7-109(2)(county))

a. Special Exceptions generally are applied to land uses which have some undesirable characteristics. Landfills, rock quarries, football stadiums, day care centers, private schools and the like, are all often required to have permission from the zoning board based on a set of special conditions.

b. If the applicant demonstrates compliance with all of the special conditions, then he or she is presumptively entitled to the permit. However, if there are opponents who demonstrate to the zoning board that some or all of the special conditions have not been met, then the board may deny the application.

c. These cases are many times won by the developer/applicant. Usually,

the developer has studied the special conditions applicable to the land use, and has made arrangements to have the relevant expert witnesses in attendance at the meeting of the zoning board.

d. On the other hand, the neighbors are usually much less well prepared and they usually wind up complaining about general factors which often are not a part of the special conditions relating to that particular land use. For example, the complaints frequently heard are an increase in traffic, a decrease in property values, and an increase in noise.

e. Without getting too technical, lay testimony about these factors is usually simply inadmissible. For example, even if there is an increase in traffic, virtually any new land use may cause an increase in traffic congestion. The question is not whether traffic will be increased, but whether it will be increased significantly. This is not a question on which a layperson can express an opinion.

f. The Tennessee courts have uniformly held that lay testimony as to these issues is inadmissible and should not be considered by the boards of zoning appeals.

g. As a result, many denials of special exceptions/conditional use permits are overturned because they are based entirely upon lay testimony

which has no basis in fact.

h. The landmark case is *Sexton v Anderson County*, 587 SW 2d 663 (Tenn App 1979)

i. Landfill operator appeals decision of Board of Zoning Appeals denying conditional use permit for a sanitary landfill.

ii. FACTS:

(1) Property is zoned A-2 rural residential zoning.

(2) As a "special exception," the ordinance allowed "sanitary landfill operations, subject to the approval of the Anderson County Health Department and the Tennessee Department of Mental Health."

(3) Applicant requested a special exception to allow the operation of the sanitary landfill.

(4) Board conducted a public hearing in an informal manner and the procedure followed was, to some extent, irregular.

(5) The Court drops a footnote and notes that, while the Zoning Board is a quasi-judicial body charged with finding facts and required to conduct an orderly proceeding appropriate to the case, cross-examination of the witnesses was virtually non-existent at the hearing.

(6) In addition, none of the witnesses were administered an oath which is mandatory according to the Court.

(7) Immediately following the hearing, the Board voted 3-1 to deny the application.

iii. Judgment for Plaintiff affirmed (landfill wins).

(1) Reasoning:

(a) The Board argues that the sanitary landfill would likely be injurious to the public health and safety, and would be detrimental to the character of the neighborhood.

(b) The Court of Appeals holds that this general statement is not a condition precedent to the granting of a special exception, but is a prohibition of "such activity by an owner of occupier of land."

(c) The LLB has previously determined that sanitary landfill operations will be permitted subject to two conditions.

(d) This property does lie in the appropriate zone district. It is also clear that both of the conditions imposed pursuant to the ordinance have been met.

(e) "While it is true that many residents expressed before the Board of Zoning Appeals their fears about future conditions which might develop, the zoning ordinance . . . states that it would be unlawful to carry on activity that is harmful to the general health, safety, and welfare. By the exclusion of a sanitary landfill as a special exception, obviously the County Court did not consider that a landfill *per se* would be harmful to the general health, safety and welfare. If, during the course of operation of a landfill, such conditions develop, a remedy is available to abate such conditions as would be harmful to the general health, safety and welfare."

(f) The neighbors also complained about possible pollution of the water table, offensive odors from the landfill, damage to the roads from increased traffic, and a decrease in property values in the general area.

(g) "Various members of the community express beliefs

and opinions that the presence of the landfill would create noxious odors and result in falling property values; they also thought that trucks delivering refuse to the site of the fill would cause additional damage to local roads. These statements were offered on the issue of whether the intended use is 'potentially dangerous, noxious or offensive.' None rises to the dignity of being material evidence on the issue. In each instance, the statement amounts to an expression of opinion on the ultimate issue, unsubstantiated by factual premises. Speculations, expression of fears and considerations of an aesthetic or political nature do not form a basis to support a decision made by an administrative body charged with adjudicatory responsibility."

(h) "The opponents of the landfill attended the public hearing conducted by the Board in substantial numbers and voiced strong and sincere beliefs that the operation would have an adverse impact on their community, but none of their suggestions

were supported by facts. No witness purported to have any knowledge of any odor problems at a landfill, either operated by Waste Management or operated in the same manner as the one proposed. No witness attempted to outline the composition of the roads in question and the affect upon the roads from the increased traffic."

(i) "In the absence of material evidence on these issues, the expression of fears by members of the community alone, however sincere, will not support the determination of the Board of Zoning Appeals."

5. Variances (TENN. CODE ANN. § 13-7-207 (3)(city) and § 13-7-109(3)(county))

a. Variances are designed to serve as a safety valve to allow the zoning board to exempt particular properties from the strict application of the zoning laws.

b. Whether for good or bad, the language of the variance provision here in the state of Tennessee is extraordinarily restrictive compared to the language of the Standard State Zoning Enabling Act, or for that matter, the language of most of the other state enabling legislation

across our country.

c. Under Tennessee law, a variance can only be granted where there is some exceptional physical feature of the property, such as narrowness, shallowness, or shape, or some topographic condition of the property which causes a practical difficulty or an undue hardship.

d. I have sat through literally hundreds of zoning board cases, and it is the rare case indeed where anyone even mentions any exceptional physical feature of the property.

e. Most zoning board cases involving variances have some personal slant, such as the mother-in-law is sick and needs to be closer to her daughter, but there's no room in the house and they want to put a mobile home in the backyard for her use.

f. The other prime reason for a variance is that the developer can't quite make enough money if he has to design the building the way the zoning ordinance requires, so he needs to get a variance to make it a little bit bigger so they can make a profit on the construction.

g. Under the Tennessee zoning variance provisions, specifically §13-7-207 (3), neither of these hypotheticals are grounds for a variance. My guess is that approximately 95% of the variances granted in the state of Tennessee today are illegal.

h. As a result, it is usually easy pickings for an attorney challenging a variance issued by the board. In the old days, before the advent of video of most of the zoning board meetings, when I was hired, I would usually estimate my chances of winning a case the variance was granted at around 90%.

    i. I've had lawyers scoff at my evaluation, saying that there's no way that any case can be evaluated at 90% chance of a win, but in the case of a variance in the state of Tennessee if you are appealing to reverse a board which has granted a variance, most of the time, you probably have a greater chance than 90% of winning.

    ii. It is the rare case where a zoning variance can be supported by the record before the zoning board.

i. Tennessee law dictates that:

    i. pecuniary factors alone do not serve as a basis for a variance;

    ii. The hardship may not be self-created (as by subdivision); and

    iii. The personal circumstances of the applicant do not serve as a basis for a variance.

j. Memphis as an example

9.22 VARIANCE

9.22.1 Applicability

A. The Board of Adjustment may vary certain requirements this development code that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the certain provisions of this development code, will, in an individual case, result in practical difficulty or unnecessary hardship. In granting a variance, the Board of Adjustment shall ensure that the spirit of this development code shall be observed, public safety and welfare secured, and substantial justice done.

9.22.6 Findings of Fact

The Board of Adjustment must make specific written findings of fact on each variance request. In granting any variance, the Board of Adjustment shall make the following findings:

A. That special or unique circumstances or conditions or practical difficulties exist which apply to the land, buildings or uses involved which are not generally applicable to other land, buildings, structures, or uses in the same zoning districts;

B. Granting the variance requested will not confer upon the applicant any special privileges that are denied to other residents of the district in which the property is located.

C. A literal interpretation of the provisions of this development code would deprive the applicant of rights commonly enjoyed by other residents of the district

in which the property is located.

D. The requested variance will be in harmony with the purpose and intent of this development code and will not be injurious to the neighborhood or to the general welfare.

E. The special circumstances are not the result of the actions of the applicant. [No self-created hardship]

F. The variance requested is the minimum variance that will make possible the legal use of the land, building, or structure.

G. The variance is not a request to permit a use which is not otherwise a permitted use in a particular zoning district. [No use variance]

H. The variance is not granted simply because by the granting the variance, the property could be utilized more profitably or that the applicant would save money. [Financial hardship alone is insufficient]

k. Perhaps the leading case in the state is *McClurkan v Metro Nashville*, 565 S.W. 2d 495 (Tenn. App. 1977).

i. Application to use residential structure for 4 separate units in violation of use restriction limiting to duplex

(1) Ruling:

While the Board is vested with broad discretion in the variance area, we do not

believe it is authorized to grant a variance when the only hardship to the owner in complying with the zoning regulations is the result of a condition existing not in the land itself, but in a structure which was created or altered by an owner of the property in violation of the zoning ordinance. Also, the case for a variance here is made even weaker by a lack on any evidence of hardship other than pecuniary loss, which has been held insufficient by itself to justify a variance.

ii. Time limit or restriction on continuing the variance likely impermissible; original decision of the zoning board limited the variance to use by the prior owner. The Court of Appeals found that limitation unlawful.

iii. Quick rule of thumb: If granted, appeal challenging the variance is likely to succeed.

iv. If variance is denied, virtually impossible to appeal successfully.

l. The Memphis triumvirate are, to my way of thinking, somewhat tarnished and of little precedential value. Those three cases are as follows:

i. *Reddoch v Smith*, 214 Tenn. 213, 379 S.W. 2d 641 (1964).

(1) Variance upheld under very loose statutory provision.

ii. *Glankler v Memphis and Shelby County*, 481 S.W. 2d 376 (Tenn. 1972).

(1) Application for a variance to construct apartment buildings on a 13.7 acre tract of land; there were no unusual physical features of the property justifying the variance.

iii. *Houston v Memphis and Shelby County*, 488 S.W. 2d 387 (Tenn. App. 1972).

(1) Application for a variance to allow the use of residentially zoned property as automobile service station.

(2) The Memphis Board granted the variance, and the trial court affirmed that decision. The Tennessee Court of Appeals finally reversed a variance case.

(3) The reasoning was based on the fact that an apartment building already existed on the property and that ample return on the investment was being made.

(4) This is probably not the best analysis; the best being that there was no unusual physical feature which justified a variance. Nevertheless, the court did overturn a variance which was, to my way of thinking, illegally granted.

6. Zoning Changes

a. Ordinarily, zoning changes are extraordinarily difficult to challenge successfully in court.

b. The leading case in the state is *Fallin v Knox County Board of Commissioners*, 656 S.W. 2d 338 (Tenn. 1983)

i. This is a case brought by a neighbor challenging the decision of the Knox County local legislative body rezoning 10.6 acres from Agricultural to Residential B, which would permit the construction of 275 apartments on the property.

ii. All of the adjacent property was zoned either Agricultural or Residential A, which permits the construction of single-family homes at a density of one per acre.

iii. For the lawyers out there, the Supreme Court here first resolved an issue of some continuing interest by concluding that a declaratory judgment action, rather than a petition for writ of certiorari, is the proper remedy to be employed when seeking to invalidate an ordinance enacting or amending zoning legislation.

(1) Recently, the Tennessee Court of Appeals entertain the case under the common law writ of certiorari which appeared to be an ordinary zoning change. Somewhat

surprisingly, none of the attorneys involved in the case raised this issue of procedure.

iv. On the merits of the challenge itself, the court had relatively little difficulty.

v. The court noted that County legislative bodies are vested with broad powers to enact and amend zoning regulations governing the use of land, and noted the restrictive scope of judicial review of such actions.

vi. The court adopted the traditional deferential scope of review: whether there was any possible reason to justify the zoning change, that is, whether the legislative classification was fairly debatable.

vii. First the court seemed to think the fact that both uses on the subject property as well is the adjacent properties or residential (multifamily and single-family) was important.

viii. Second, the court noted that there was some evidence of a need for additional apartments in this area of the county.

ix. Finally, the court concluded that the legislative classification had a rational basis and was fairly debatable and upheld the zoning change.

c. Grant v McCullough, 196 Tenn. 671, 270 S.W. 2d 317 (1954)

i. This is the leading "spot zoning" case in the state.

ii. It is clear from the facts and the discussion by the Supreme Court, that the only reason that the zoning change was adopted was to help a widow maintained some income based on her residency at a particular property.

iii. The court easily found this to be without any reasonable basis and struck it down a spot zoning.

iv. I question whether given the current posture of deferential review, whether we will ever see another spot zoning quite like this one.

(1) Over the last 10 or so years, I believe there has been a marked shift to even greater deference to the decisions of local legislative bodies.

d. *Family Golf v Metro Nashville*, 964 S.W. 2d 254 (Tenn. App. 1987)

i. This is a decision by the Tennessee Court of Appeals, but written by one of our current Supreme Court Justices, Bill Koch.

ii. There are two interesting points here.

(1) first, the argument was that the Metro Charter required consistency with the general plan for the city of Nashville.

(2) second, the zoning change was attacked based on a lack of a reasonable basis. Although the court did not mention, the only urban planner to testify in the case was the executive director of the Metropolitan planning commission who felt that changing the zoning on this particular property made little or no sense whatsoever.

(3) in fact, perhaps even more interestingly, only one of the four corners of this particular intersection was changed; why the other corners of the intersection did not deserve a zoning change, it is hard to imagine.

(4) the zoning change was from AR2a to CS (commercial services) to allow for the construction of a "co-cart track and an arcade."

(5) It would have seemed reasonable to allow CS on all parts of that intersection.

e. *Barrett v Shelby County*, 619 S.W. 2d 390 (Tenn. App. 1981)

i. This case has to do with the appropriate use of the general plan under the Tennessee land use and zoning enabling statutes.

ii. The short answer is that there is virtually no relationship between the adoption of the zoning ordinance and long-term

general planning. At least, not from the standpoint of a legally enforceable prerequisite. That is, if the zoning ordinance or any change to it is not consistent with the General Plan, a challenge to the zoning ordinance or the change would not prevail simply because of the inconsistency.

iii. Another way of saying this is to emphasize that there is no required consistency between the General Plan and the zoning ordinance under Tennessee law.

iv. In the briefs, both counsel used such terms such as "spot zoning" and "approved comprehensive plans". We are unmoved by such terms. These are terms of professional planners that are largely undefined. Whether the zoning in question be termed "spot zoning" or contrary to an "approved comprehensive plan", it is not the issue before this court or the trial court.

v. As stated by Judge Matherne, when speaking for this court in the unreported case of Vandyke v. City, released November 17, 1975, certiorari denied June 1, 1976, the issue is "whether the legislative enactment violated the constitutional rights of the people governed thereby" and the over use and repeated citations of such phrases as "the general plan for the community

as a whole," "use, suitability," "uniformity of the use within a division," "'comprehensive plan for the good of the community," and so on, merely beg the question.

vi. The legislative body is duly constituted to enact legislation governing the people involved. The only function of this court is to determine if the enactment violates any provision of the State and Federal Constitution, and whether the enactment is an arbitrary, capricious and illegal use of legislative authority.

vii. The courts are not to apply terms used by professional planners so as to invade the prerogatives of the legislative branch. When we so restrict our approach to the issue, we may or may not agree with the particular ordinance and the change affected by it. We are, however, firmly convinced that we have thereby fulfilled the mission of appellate review.

viii. The Court cited Grant v. McCullough, a spot zoning case from Nashville, discussed above.

ix. Under our tripartite system of government, the judicial branch may in no way interfere with the exercise of lawful powers of another branch of government. In zoning matters, if the zoning regulation be fairly debatable, it must be upheld, [cite in

Davidson County v. Rogers].

x. Unless the legislative act "is wide of any reasonable mark, [it] must be accepted."

xi. The fact that the instant rezoning may or may not be in conformity with "an approved comprehensive plan" is irrelevant to the Court of Appeals. It is, however, an important element insofar as the legislative body's decision is concerned, but not for this forum.

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

xiii. The Court here holds that commercial zoning along what will soon be a major intersection with the widening of Mudville Road, is perfectly logical and constitutionally consistent. The trial court decision is reversed. The rezoning is allowed to stand.

f. Edwards–Terry General Plan Amendment TENN. CODE ANN. § 13-4-202(b) – interesting new statute that allows local legislative body to adopt general plan and requires all land use decisions made thereafter to comply with the plan.

(1) Not too sure that it has been put into effect anywhere but maybe Columbia, TN

g. Vested Rights

i. Although this doctrine is frequently a subject of much concern, usually, it is so difficult to prove that it rarely applies.

(1) There are three basic situations in which it might up.

ii. Zoning regulations in effect, but no application for building permit

(1) *Westchester v Metro Nashville* (Tenn. App. 2005)

iii. Zoning regulations changed after building permit issued

(1) Without substantial construction: *Howe Realty v. City of Nashville*, 176 Tenn. 405, 141 S.W. 2d 904 (Tenn. 1940)

(2) With substantial construction: theoretically, the developer should prevail under these circumstances, but it is such a rare circumstance that there are no reported cases in Tennessee.

iv. Zoning regulations changed after building permit mistakenly issued

(1) *Parkview Associates v City of New York*

v. Summary: in order for the developer to prevail in these cases, a building permit which complies with all of the applicable regulations must have been issued, and substantial construction done under the terms of the permit. Otherwise, there are no vested rights.

7. Planned Unit Developments / Specific Plan Zoning

a. The leading case in this area is *McCallen v City of Memphis*, 786 SW 2d 633 (Tenn. 1990)

b. This is a flexible type of zoning which allows a varied arrangement of buildings, and even uses, with the idea ultimately of preserving open space for use by the inhabitants.

c. One of the chief difficulties, particularly here in Tennessee, is the lack of enabling legislation. While model legislation was promulgated in the 50s and 60s, it was not uniformly adopted across the states, and certainly not here in Tennessee.

d. Typically here in Tennessee, the process involves three steps:

preliminary approval by the planning commission of a general concept plan; approval by the local legislative body of the plan and a zoning change of necessary (sometimes an overlay, and sometimes a base district zoning change); and final approval by the planning commission of the final detailed plan.

e. While a zoning change is a legislative process, no matter how small the change, a PUD is an administrative process, governed by special rules and restrictions which guide the exercise of discretion by the planning commission and the local legislative body.

f. As the *McCallen* Court said:

"While an argument nonetheless exists that the reservation by a local governmental legislative body to grant permits for zoning purposes is tantamount to a legislative act of rezoning, the overriding issue is whether the enabling ordinance provides sufficient standards to preclude the exercise of unbridled discretion. In order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the government body must be exercised within existing standards and guidelines."

g. Therefore, common law cert is the means by which an appeal is taken from a decision of the local legislative body concerning a PUD; and declaratory judgment is the means to challenge a zone change.

h. Perhaps some explanation of the difference between the two methods and the importance of the difference is worthwhile.

i. A declaratory judgment action always seems much easier to me to defend. Remember, if the challenge is to a zoning change, then all the local legislative body has to do at a hearing concerning the legitimacy of the changes to demonstrate that the changes somehow rationally related to a legitimate governmental objective.

    i. With a declaratory judgment action, after the complaint has been filed, the government can hire an expert who will appear at the trial to testify that there was some planning rationale which supported the zoning change. Expert witnesses are usually pretty plentiful, and not that difficult to find.

j. The common law writ of certiorari on the other hand requires that all of the evidence that the administrative body (and in this case, the legislature is acting as an administrative body) intends to rely upon at the hearing, must be presented to the administrative body and must be in the record which is later transmitted to the trial court.

    i. Additional evidence is not permitted. As a result, under the common law writ of certiorari, even if arguably the local legislative body did the right thing, if the evidence isn't in the

record at the time that the decision is made, the court will nevertheless be forced to reverse the decision.

k. As a result, it has always seemed to me easier to defend a declaratory judgment action concerning a zoning change then to respond to a common law writ of certiorari regarding a planned unit development.

8. Subdivisions (Tenn. Code Ann. § 13-4-304)

a. Statutory Basis

i. Tennessee Municipal Planning Enabling Legislation TENN. CODE ANN. § 13-4-302

(1) Authority to regulate begins only after a major street plan has been adopted by the MPC.

(a) But the PC does not need to have adopted the entire General Plan. Only the major street plan is necessary for subdivision control

(b) As you might expect, there are a lot of major street plans adopted and nothing else.

(2) A certified copy of the major street plan must be filed in the office of the county register.

(3) Thereafter, no plat of a subdivision of land may be filed or

recorded unless its been approved by the MPC.

ii. But what is a subdivision?

(1) Subdivision means . . . the division of a tract of or parcel of land into two or more lots, sites, or other divisions requiring new streets or utility construction, or any division of less than five 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 resubdiving or to the land or area subdivided.

iii. *Thompson v. Metro Government*, 20 SW 3d 654 (Tenn. App. 1999)

(1) Developer sues Metro concerning definition of subdivision (does the installation of any utilities require MPC approval as a subdivision?)

(2) Facts:

(a) On December 14, 1995, Mr. Thompson and his friend Dan Barge, an engineer, met with Sonny West, the zoning administrator for the Department, to discuss the division of this property.

(b) Mr. West advised the petitioner that if each lot had five or more acres of land, fifty feet of public road frontage per lot, and no water or utility extensions, the petitioner would receive building permits.

(c) In other words, if these criteria were met, Mr. Thompson would not have to obtain the MPC's approval to subdivide his property.

(d) Sonny confirmed his advice on 4 separate occasions in 1996 (over the phone and in person).

(e) Informal legal opinion issued by Metro Legal on March 28, 1997, changed the ground rules.

(i) In pertinent part, the informal opinion concluded that the division of land into lots, regardless of size, does constitute a subdivision pursuant to Tennessee Code Annotated sections 13-3-401(4)(B) and 13-4-301(4)(B) if any new utility extensions (e.g., water, sewer, electric power, or cable) or new road construction is necessary.

(ii) Hence, subdivision regulations would not

apply if each planned lot has the required frontage along and direct driveway access to an existing public street and will obtain utilities only through individual service lines connecting directly to existing mains.

(iii) However, where proposed divisions of land show access from new lots to a public street through a new road or common easement or new utility lines serving more than one lot, the statute mandates subdivision review.

(iv) Before this opinion, Codes applied the advice given by West. After the opinion, they would not.

(f)

It is not disputed that after receiving the initial advice from Mr. West, Mr. Thompson began the process of preparing his land for development which lasted for the next 18 months. He prepared a declaration of restrictive covenants and maintenance agreement, an access easement and a declaration of sanitary sewer and sewer service easement and had each recorded at the Register's office. He obtained legal street and postal addresses for the lots. He purchased water taps for

the lots. He had a road constructed. He contracted with NES to install telephone poles. In addition, Mr. Thompson made physical improvements to the land. Mr. Thompson testified that as of December 31, 1997, he had spent about $88,795 on developing this property.

(g) Mr. West would not issue the permits based on the new legal interpretation.

(h)

Walter Davidson, the engineer who calculated the cost estimates of preparing Mr. Thompson's property in different ways, testified that it would have cost Mr. Thompson approximately $300,000 more to develop a public road meeting the standards in the subdivision regulations rather than the private road that was already developed. He testified in detail as to the reasons for this increased cost. He agreed that a public road was more durable and safe. It was Mr. Davidson's opinion that in order to comply with subdivision regulations, Mr. Thompson would have to spend $2000 or $3000 more per lot and only get $1000 more for the purchase price of each lot.

(i) The property owner filed a common law writ of cert but never went before the Metro Board of Zoning Appeals.

(3) Result: Judgment for Metro.

(4) Reasoning:

(a) Common law writ not properly before the court because zoning board never heard the case. However, because (buried in) the requested relief was a count for a declaratory judgment, the court will consider the interpretation of the statute, equitable estoppel, and constitutional issues.

(b) Property owner conceded that interpretation by Metro was correct. Is there another way to look at that?

(c) The opinion determined that the construction of a private driveway/street which served as a common easement in a "flag development" qualified as a "new street" for purposes of the subdivision definition. There is no dispute that the development proposed by Mr. Thompson is a flag development with a private driveway/street easement through which all lots are reached. Therefore, we can only conclude that this proposed division amounts to a subdivision as defined by the

Tennessee Code.

(d) No constitutional violation.

(i) Equal protection: Property owner not treated differently: others were required to comply once opinion came down even if in the midst of development.

(ii) Substantive due process: Rational basis.

(e) Equitable estoppel

(i) The courts are clear that "[p]ublic agencies are not subject to equitable estoppel or estoppel in pais to the same extent as private parties and very exceptional circumstances are required to invoke the doctrine against the State and its governmental subdivisions." Bledsoe County v. McReynolds, 703 S.W.2d 123, 124 (Tenn. 1985); Paduch v. City of Johnson City, 896 S.W.2d 767, 772 (Tenn. 1995).

(ii) After a review of the case law, the court in Bledsoe County observed "that in those

Tennessee cases where estoppel was applied, or could have been applied, the public body took affirmative action that clearly induced a private party to act to his or her detriment, as distinguished from silence, non-action or acquiescence. " Bledsoe County, 703 S.W.2d at 125.

(iii) The court goes on to explain the distinction between affirmative conduct and inaction. I question whether the distinction really makes a whole lot of sense.

(iv) Isn't what is happening here really that you can't work an estoppel against a government?

(5) Comment: Virtually every division of land must be approved by the MPC as a subdivision.

iv. City of Church Hill v. Taylor, 1996 WL 605247

(1) Leased mobile home lots not subject to subdivision requirements.

b. Adoption of Regulations

i. TENN. CODE ANN. § 13-4-303 requires the adoption of subdivision regulations and procedural regulations (under § 13-4-102).

(1) Most MPCs have adopted sub regs but very few have adopted procedural regs.

(a) These would govern the manner in which the various types of items are considered by the MPC.

(b) Zone changes, PUDs, subdivisions, street naming, general plan amendments, capital improvements budget items and so forth.

(c) Must also be filed with the city recorder's office or sometimes called the city clerk's office (Metro clerk here in Nashville)

ii. As to the sub regs:

(1) A public hearing must be held and of course the Open Public Meetings Act applies.

(2) The regs can be very flexible and in particular the statute allows the regs to provide for a bonding system in lieu of actual completion of improvements.

(3) The subdivision regulations are the key part of the

process.

(a) The Tenn enabling legislation is very general (as is true in most other states), and so most of the real requirements are contained in the subdivision regulations.

(b) Can the Planning Commission issue variances to the subdivision regulations?

c. Procedure on Submission TENNESSEE CODE ANNOTATED § 13-4-304)

i. By whom submitted?

(1) Statute requires application by property owner TENN. CODE ANN. § 13-4-302 (b)

(a) legal or beneficial owner or owners

(b) Optionee

(c) Contractee

(d) Attorney (or authorized representative) for any of the above

ii. Suppose only one owner files (but there are others who have joint title)

(1) Culbert v. Carter County, 1998 WL 910194

(2) Failure to join all owners is a facial deficiency

(a) Case involves a mobile home park.

iii. MPC must approve or disapprove within 60 days after initial consideration by the commission or plat is deemed approved; staff can only review for 30 days. Applicant can agree to extend both times. TENN. CODE ANN. § 13-4-304.

(1) Question when is the plat deemed submitted?

(2) Take a look at "Automatic Approval Statutes: Escape Hatches and Pitfalls," 29 Urban Lawyer 439 (1997)

(a) Good review of problems with these kinds of statutes.

iv. If disapproved, grounds of disapproval must be stated on the records of the MPC.

(1) Plats submitted to the MPC must contain name and address of person to whom notice of hearing shall be sent.

(a) Notice that there is no statutory provision for notice to surrounding property owners.

(b) Some cities, notably Metro, have remedied this oversight either in the sub regs, or in an ordinance.

(c) State of Tennessee ex rel. C & S Builders v. City of Fairview Municipal Planning Commission

(i) Court orders issuance of approval.

v. The MPC must hold a public hearing on each submitted plat.

vi. Notice of the hearing must be given at least 5 days before the date of the hearing.

(1) These hearings also fall within the scope of the Open Public Meetings Act TENN. CODE ANN. § 8-44-101)

d. Substantive Controls

i. B & B Enterprises v City of Lebanon, 2004 WL 2916141

(1) Subdivision application which seemed to comply with the regulations was denied for failure to comply with alleged conditions imposed by the planning commission.

(2) The record was clearly deficient:

This appeal focuses on the planning commission's actions at four meetings: June 26, 2001, July 24, 2001, January 22, 2002, and February 26, 2002. To comply with Tenn.Code Ann. § 27-2-109(a), the commission should have filed with the court transcripts of each of these proceedings. Regrettably, the commission failed to discharge its statutory obligation. It did not file transcripts of the portions of its June 26, 2001, July 24, 2001, and January 22, 2002 proceedings dealing with the Chaparral subdivision. While the record contains two transcripts of the February 26, 2002 proceedings, neither of these transcripts have been certified by the

commission or its staff as representing a full, accurate, and complete account of what transpired during those hearings. In addition, the transcripts are inconsistent, and one transcript contains many material omissions.

To compound the problem, the minutes of the four meetings provided by the planning commission do not comply with Tenn.Code Ann. § 13-4-304(b). The commission declined to approve Phases Two and Three of the Chaparral subdivision at its January 22, 2002 and February 26, 2002 meetings. While the minutes of these meetings record the fact that the commission did not finally approve Phases Two and Three, the reasons for the commission's action are conspicuously absent from the minutes.

On February 27, 2002, the day following the commission's meeting, two commission members attempted to cure this oversight by preparing and signing a "memorandum" purporting to explain the reasons for the commission's action on February 26, 2002. They instructed the commission's staff to provide copies of the memorandum to the "appropriate parties" and to include it in the commission's record. This memorandum is a nullity. Despite the fact that it is included in the planning commission's files, it is not an authoritative reflection of the commission's actions at the February 26, 2002 meeting. Therefore, it cannot be used to supplement the minutes which are the official records of the commission's actions on February 26, 2002.

The commission had the obligation to provide both the trial court and this court not only with official minutes meeting the minimum statutory requirements but also with a record of its proceedings that contained a full, accurate, and complete account of what transpired with regard to the issues being presented to the courts for review. It must, therefore, bear the responsibility and suffer the consequences of its oversights.

e. Mandatory Exactions and Dedications

i. Nollan v. Cal. Coastal Commission

(1) Homeowner sues Cal Coastal Comm to remove condition of permit approval requiring beach access be provided to public by homeowner.

(2) This is really a permanent physical occupation. The rt to exclude others is a customary aspect of property rts.

(3) The test is substantial advancement of legitimate state interests.

(4) Problem here is that the reasons advanced by the Comm do not relate to any legitimate state interest; no *"essential nexus"* between the condition imposed on the permit (easement) and any legitimate governmental interest.

ii. Application here in Tennessee

(1) The basic question is whether the required exaction or dedication is necessary to the construction of the particular project before the Planning Commission.

(2) Example: suppose the proposed subdivision lies along a street which the city anticipates will need to be widened in the next 10 years or so. The city requires the developer to dedicate enough land on his side of the street to allow for the anticipated widening.

(3) There is no essential nexus and this condition is invalid.

(4) There is no direct relationship between the development of this property and the need for a widened highway 10 years from now.

iii. Dolan v City of Tigard

(1) Property owner sues city for declaration that required dedication is unconstitutional as being unrelated to proposed use of the property.

(2) Essential Nexus

(a) The court first determined whether an "essential

nexus" existed between the "legitimate state interest" and the permit condition exacted by the city.

(b) This is the part of the test that Nollan failed.

(i) The court concluded easily that there was such a nexus.

(ii) "Undoubtedly, the prevention of flooding along Fanno Creek and the reduction of traffic congestion in the Central Business District qualify as the type of legitimate public purposes we have upheld."

(iii) It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100 year floodplain.

(iv) Petitioner proposes to double the size of her retail store and to pave her now gravel parking lot, thereby expanding the impervious surface on the property and increasing the amount of stormwater runoff

into Fanno Creek.

(c) The same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation.

(i) In theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers. The court cited urban planning studies demonstrating this effect.

(d) Thus, as to both conditions, there was an essential nexus between the legitimate governmental concern, and the conditions which the city sought to impose upon the applicant.

(3) Rough Proportionality

(a) Next, the court looked to see if the essential nexus was close enough to justify the governmental conditions.

(b) The city made the following specific findings relevant to the pedestrian/bicycle pathway:

(c) "In addition, the proposed expanded use of this site

is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation ***could*** offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion."

(d) The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit.

(e) No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

(f) As to the stormwater:

(i) In this case, it is obvious that the increase in the amount of impervious surface will increase the storm water run-off.

(ii) The city properly could and did require by legislation (the CDB plan) that no construction take place in that area of Dolan's property.

(iii) But the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system.

(g) As to the bicycle path way:

(i) The court did not doubt that the larger store would draw more traffic.

(ii) City estimated 435 add'l trips per day.

(iii) Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.

(iv) But on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle

trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.

(v) The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."

(vi) "[t]he findings of fact that the bicycle pathway system `could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand."

(vii) No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

iv. BAM Development v Salt Lake County, 2008 UT 74, ¶ 8

(1) Of course, the Court did not mean rough proportionality at all. While 1 to 1 is a proportion, so is 1 to 1000, as any fifth grade student will be happy to tell you. Any two numbers, measured by the same units, form a proportion. So to be roughly proportional literally means to be roughly related, not necessarily roughly equivalent, which is the concept the Court seemed to be trying to describe. The proportion of 1 to 1.01 is roughly equivalent, while the proportion of 1 to 3 is not, for example. Unfortunately, by using the phrase "rough proportionality," the Court has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property. In this instance, rather than adopting the name chosen by the United States Supreme Court, we will use the more workable description of rough equivalence, on the assumption that it represents what the Dolan Court actually meant.

9. Site Plan Review and Design Review

a. Site Plan Review

i. A typical definition of site plan review is a"zoning technique that allows local governments to exercise control over the site details of a particular development." Typically, the applicant submits a detailed plan and approval is required before development may proceed. Generally, it applies to non-residential multifamily development on individual lots.

ii. This technique is frequently part of an application for other types of zoning approvals, such as planned unit developments or conditional use permits.

iii. Generally speaking, only on site improvements are the subject of site plan review standing alone. That includes ingress and egress,in traffic circulation on-site, but does not include off-site traffic considerations.

(1) When a planning commission begins to discuss off-site traffic considerations with regard to site plan review, I begin to think of zoning change rather than site plan review.

iv. Additionally, I have frequently seen planning commissions disagree with the type of land use although permitted expressly

by the zoning ordinance. Under those circumstances, I have seen planning commissions disapprove site plan review simply because of the use which was proposed on site. Obviously this is totally illegal.

(1) The use of the property is controlled by the terms of the zoning ordinance, and the fact that the planning commission may disagree with the provisions of the zoning ordinance does not give a grounds to deny an application for site plan review.

(2) TENN. CODE ANN. § 13-3-413 and § 13-4-310

b. Design Review

i. Authority: §§6-54-133 and 6-2-201 (33)

ii. Any municipality may create a design review commission (DRC) having the authority to develop general guidelines for the exterior appearance of nonresidential property, multiple family residential property, and any entrance to a nonresidential development within the municipality. The municipal governing body may designate the planning commission as the DRC. When the municipality creates a separate DRC, the mayor shall appoint the members of the DRC from residents of the

municipality and shall strive to ensure that the membership is representative of the municipality as a whole, including, if possible, members with either architectural or engineering knowledge, or any other person having experience in nonresidential building. Any property owner affected by the guidelines may appeal a decision of the DRC to the municipality's planning commission or, if there is no planning commission or if the municipality has designated the planning commission as the DRC, to the municipality's governing body.

iii. Does not apply to single family, or two family residential

iv. Does appeal to local legislative body go up de novo or on appeal?

(1) No one knows.

v. Question whether most local governments understand the difference between design review and site plan review. Site plan reviews layout and interconnection of uses; design review governs exterior appearances.

vi. I continue to have serious reservations about design review in governmental regulations.

10. Historic Zoning

a. TENN. CODE ANN. § 13-7-401

b. Very broad powers to adopt zoning provisions and grant/deny certificates of appropriateness

c. Ransom School example

d. Appeal by statutory writ of certiorari

i. TENN. CODE ANN. § 13-7-209 (statutory writ is found at TENN. CODE ANN. § 27-9-101 et seq)

ii. Few cases; is the statutory writ legal?

iii. Probably specified by General Assembly because of perceived level of interference with private property rights

11. Common Law Writ of Certiorari (TENN. CODE ANN. § 27-8-101 & 27-9-101 et seq.)

a. The common law writ of certiorari is an extraordinarily complicated and hypertechnical form of pleading. We will examine here only the most basic issues because I believe that it is important for land use planning professionals to understand the judicial system into which an appeal from the zoning board or planning commission will be taken.

b. There are two important concepts which may make it easier to give

advice to local administrative boards such as the zoning board or the planning commission.

i. First, the board can only be reversed if it acted arbitrarily, capriciously, beyond its jurisdiction or illegally. To put that legal standard into layman's terms, only if the action of the board is not only out of bounds, but entirely out of the ballpark, can the reviewing court reverse the decision.

ii. Generally the court will do everything in its power to affirm the decision of the local zoning board because most often the courts simply believe that the zoning board is closer to the controversy, understands more about the controversy, and is in a better position to decide the controversy, then are the courts.

iii. There are of course exceptions. If there is absolutely no evidence in the record to support the decision of the zoning board, then the zoning board's decision is illegal, and the court has no choice but to reverse. This is what happens in many conditional use permit/special exception cases. The zoning board relies on the testimony of the neighbors concerning traffic, property values, and noise, and usually that information is entirely irrelevant and the witnesses are not qualified to give it in the first place.

As a result, there is no real evidence in support of the decision of the board denying the conditional use permit, and the court must reverse.

iv. The second significant aspect of the, all writ of certiorari is that ordinarily no additional proof is allowed into the record before the trial court. This means that all of the proof that will be considered by the judge must be introduced before the zoning board and the judge can read about it in the transcript of the proceedings on appeal.

v. I don't know how many attorneys I've talked to who call me on the eve of the zoning board meeting, with a plan to essentially keep mum during the zoning board meeting, appeal its decision and only then on appeal put in the evidence which justifies their application. There are certainly many court proceedings where this strategy is acceptable. But it is certainly not acceptable in zoning board proceedings. If the evidence is not put into the record before the zoning board, it will never get in because the chances are that the trial court will not allow any new evidence to be admitted once the appeal is taken from the zoning board.

vi. In net effect, most decisions reviewing a zoning board action

uphold the decision of the zoning board.

vii. The leading case in land use planning law is McCallen v City of Memphis, 786 SW 2d 633 (Tenn. 1990)

c. Two other more modest observations should also be made here.

i. First, the zoning board is required to prepare a transcript of all of the evidence which is introduced at the time of their hearing. This means that a court reporter, or someone, must type up all of the oral proof and testimony which was offered during the hearing before the zoning board. Most zoning boards record their meetings by audio or videotape. The courts ordinarily will not accept the audio or videotape and insist that the transcript of the proceedings be typed up by an administrative assistant or court reporter.

ii. Second, although it is not required by Tennessee common or statutory law, I think that it is always a good idea for the zoning board to make findings of fact and reach conclusions of law for each case.

(1) There are certain cases where findings of fact are required such as for example under the federal telecommunications act where the failure to make

findings of fact will wind up having the zoning board sued in federal court. It's not so hard to make those findings and I think it goes a long way towards successfully defending the board if and when an appeal is taken.

(2) My suggestion is for the zoning board to hear all of the evidence in the case, and at the conclusion of the case to debate the issues among themselves and when appropriate consider a motion to approve or deny.

(a) Frankly, I do not think that it is necessary at that particular time to include findings of fact to be considered within the text of the motion to approve or deny. My suggestion is that the standing procedure of the zoning board should be to have the staff draft findings which will be considered at the next meeting as part of the approval of the minutes. That way, the staff can put the findings together in a logical manner, distribute the minutes to the members of the zoning board, and that draft of those findings can be reviewed, considered, and amended if appropriate.

d. By the way, in most jurisdictions here in Tennessee, any appeal from the decision of the board of zoning appeals must be taken within 60 days of the approval of the minutes. The losing party does not have much time to decide whether it wants to appeal or not.

i. I mentioned above that the common law writ is a hypertechnical form of pleading. This is one of those areas. If you are considering an appeal from a decision of a local zoning board or planning commission (or from the local legislative body ruling on a PUD application), talk to the lawyer sooner rather than later.

ii. There are a number of different cases construing the statutory provision for the 60 day timeframe TENNESSEE CODE ANNOTATED § 27-9-102), and in at least one of them, Advanced Sales v Wilson County, the court held that the 60 days began to run from the date of the decision itself, rather than from the date when the minutes were entered and approved.

iii. The technical requirements for filing a petition for writ of certiorari have become so complicated and arcane, without any real basis in policy, that it is important to have an experienced lawyer representing both sides, but the petitioner, in particular.

12. Conclusion