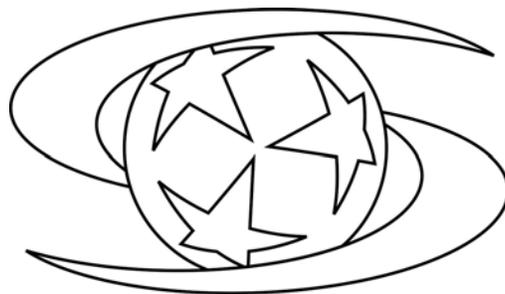


**Tennessee Planning
Commissioner Training
Handbook:
*“A Closer Look at Zoning”***



**DEPARTMENT OF ECONOMIC & COMMUNITY
DEVELOPMENT
LOCAL PLANNING ASSISTANCE OFFICE**

**Tennessee Planning Commissioner Training
Handbook:**

“A Closer Look at Zoning”

**Tennessee Department of Economic
and Community Development
Local Planning Assistance Office**

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CHAPTER I BACKGROUND OF ZONING

Zoning, in the context of community planning and development, can be described as the legislative process of dividing a community into distinct districts for the purpose of regulating building bulk and location, and the use of buildings and property.

Modern zoning evolved from nuisance laws, sanitary and housing codes, European law and English common law. Even early Roman law addressed a need for protection against encroachments in certain areas and the spatial relationships of certain buildings to other structures. Acceptability of land use controls in the United States was not immediate or universal. Numerous reasons for its slow development could be noted, but perhaps the most significant reason was the tendency of the courts to go to great lengths to assure that individual property rights were protected from arbitrary control of government. Public control of private land was not only uncommon; it was contrary to the independent, agrarian and enterprising values of that time.¹

Early municipal planning was associated with relief from poor sanitary conditions associated with large cities and dense populations. Inadequate waste disposal, lack of sunlight, and visual grimness were all associated with urban development. As the idea of public sewers came about, the physical locations of structures became important, as did development patterns. Building height and location became important as they related on a human scale. A response to the “ugliness” of urban life resulted in various urban reform movements that eventually converged into the City Beautiful movement, an outgrowth of the 1893 Columbian Exposition in Chicago. However, although City Beautiful was a definite forerunner of municipal planning, its efforts focused on the public space, not private property. Late in the nineteenth century, various municipal efforts to control private property, and the resulting litigation, began to lay the groundwork for modern municipal zoning. Slowly, then with increasing traction, zoning was embraced in various parts of the country.

One of the first key decisions in the United States upholding the validity of zoning was a New York decision know as Lincoln Trust Company v. Williams Building Corporation, 229 N.Y. 313, 128 N.E. 209, 1920. The decision upheld the validity of the resolution of 1916 of the Board of Estimate and Apportionment of New York City. Simply stated, the court said the conduct of an individual and the use of his property may be regulated.

The first United States Supreme Court decision testing the validity of zoning involved the right of a municipality to enact a comprehensive zoning ordinance. The case grew out of a test of the validity of an ordinance adopted by the City of Euclid, Ohio a suburb of Cleveland. The ordinance was adopted on November 13, 1922 by the Village Council, and upheld by the United States Supreme Court on November 22, 1926. The landmark case is cited as Village of Euclid v. Ambler Realty Company 272 US 365, 47 S. Ct. 115, 71 L. Ed. 303, 1926.

The Euclid v. Ambler case quickly had an influence on state courts. Within a few months, the Supreme Court of Tennessee upheld the validity of a municipal zoning ordinance in the City of Memphis, Tennessee (Spencer-Sturla Co. v. City of Memphis, Tennessee, 155 Tenn. 70, 290 S.W. 608, 1927). The Memphis case decided the applicability of the zoning ordinance to exclude a funeral home from a residential district. Supported by the Euclid v. Ambler case, the State court held that such an exclusion was not unreasonable.ⁱⁱ

Tennessee's planning legislation, which includes zoning authority, was adopted in 1935 and was patterned after model legislation drawn up by the Federal government in the 1920's. The planning legislation delegates to municipalities and counties the power to adopt and enforce zoning regulations, based on the concept of "police powers". Police powers are the powers a community has to control the activities of private parties in the name of the public good. Public "health, safety, and welfare" is often cited to enforce police powers.

Zoning continues to generate litigation, with State and Federal courts continuing to define what is and what is not appropriate to regulate using zoning and police powers. The Constitution's 5th and 14th amendments curb zoning authorities although interpretations of the constitution, as well as State law, have resulted in conflicting opinions over the years. Still, a body of case law has emerged that provides guidance and places sometimes-shifting boundaries on acceptable zoning regulations.

Recent court decisions, such as Dolan v. City of Tigard (114 S. Ct. 2309, 1994) and Lucas v. South Carolina Coastal Council (112 S. Ct. 2886, 1992) have dealt with the issues of "takings" and "exactions" in relation to land use regulations. The regulation of land to the point that the owners may be left with no economic benefit, the preconditioning of permit approvals with required dedications of public easements are matters that have risen to the level of U.S. Supreme Court scrutiny, with the Court concluding that municipalities may have over-reached in their regulations to the point that compensation is due. Planners must be careful in crafting zoning regulations so that the various triggers the Court have identified are not tripped, thus detracting from the credibility of an over-all zoning scheme and casting doubt on a municipality's motives. Terms such as "investment-backed expectations" and "rough proportionality" are ones that planners and zoning administrators should be aware of.

CHAPTER II ZONING IN A PLANNING CONTEXT

Development Goals, Objectives, and Policies: Implementing the Comprehensive Plan

While most planners might agree that the presence of an up-to-date Comprehensive Plan for a municipality, or at least the Land Use portion of a Plan, provides the best rationale for zoning decisions, Tennessee law does not mandate that a community adopt a Plan before enacting zoning regulations. Yet a Comprehensive Plan and its associated goals, objectives and policies provide the best context within which to view zoning decisions. It is a long-held axiom that zoning is a tool used to accomplish larger community objectives.

The *Tennessee Planning Commissioner Handbook*, compiled by the Local Planning Assistance Office, has been used as a general explanation of the planning process to train new Planning Commissioners and contains a good overview of the comprehensive planning process and its relation to zoning. The *Handbook* contains a list of the basic structure of a comprehensive plan, as follows:

“The comprehensive plan is a compilation of policy statements, goals, standards and maps for guiding the physical, social, and economic development, both private and public for the development of the community. It usually contains the following sections:

1. Introduction.
2. Background for Planning.
3. Economy and Population.
4. Land Use and Transportation Plan.
5. Community Facilities Plan.
6. Public Improvements Program.”ⁱⁱⁱ

Each of these sections contains information that leads to a policy plan that in turn provides guidance and reasoning to the zoning ordinance. Given that the **Tennessee Code Annotated** states that zoning is intended to promote the “health, safety, and ...general welfare”^{iv}, a zoning ordinance should indeed promote each of these ideals. A comprehensive plan is the best place to provide background and explanation of **why** a particular zoning regulation or district may be needed and what goal it seeks to promote. The planning process is one of data gathering and analysis in an attempt to ascertain the community’s development picture, its issues and problems, and the social, environmental and economic characteristics of the area. Then, a set of general goals and objectives are

prepared that, through a public review process, become specific policies and plans for problem-solving.

A common plan element in the past has been what can be called a “future land use map”. This map, intended to illustrate generalized land use policies, has often become a de facto zoning map. Since a zoning map is a highly specific, legal document the connection between the two should not be over-emphasized, however, in practice the two distinct maps are often seen as interchangeable. Confusion can be avoided if the plan omits the map altogether and relies on the text of the goals and policies to guide development decisions.

Zoning Ordinance District Intent Statements

As stated earlier, an effective zoning ordinance gets its authority and direction from a comprehensive plan that expresses clear goals and policies. The zoning becomes one of the tools by which those goals and policies are achieved. The tie between a land use policy and a specific zoning regulation or zoning district is not always clear, and indeed may not even exist. This is not necessarily a fatal problem, legally, as courts give latitude to communities in most cases, as long as the zoning meets a “reasonableness” test. However, in general terms the more that a zoning ordinance can be justified through the comprehensive planning process and community goal-setting, the better both legally and in terms of community acceptance. The common municipal zoning ordinance contains a multitude of districts, often with very little actual difference separating them. Residential areas, for example, can be split between several zoning districts that may vary either through the use lists, or the densities established. A decision to rezone or not rezone from one level of residential zoning to another can be complicated when the zones themselves have few differences between them. At this point, the effectiveness of the zoning is diminished and the zoning becomes the point, not the land use policy behind it.

One way to help make sure zoning districts contain standards based on clear land use goals is through the **Intent Statement**. The zoning district intent statement may be the single most overlooked part of a zoning ordinance, yet it can go a long way in defining the local zoning code and placing it into context. A well-crafted intent statement serves several purposes: The intent statement defines and defends the presence of a zoning district, the uses allowed or prohibited, and the specific standards contained within it; the intent statement can help identify unneeded or duplicative zones, or provide incentive to combine zones to make the zoning less cumbersome and more understandable; the intent statement reminds the zoning administrator, the planner, the public, and others of the underlying land use principles involved in crafting zoning and how the process of land use planning works.

CHAPTER III ZONING ORDINANCE CONSTRUCTION

Zoning Ordinance/Map Adoption Process

The grant of power and the process for adoption of a municipal zoning ordinance and map are found in Tennessee Code Annotated 13-7-201 through 13-7-203. First, it must be noted that the power to zone, as with the power to plan in general, is not mandatory. Communities are free to decline the grant of power and choose not to adopt zoning. However, if a community does choose to go forward with the zoning process, the procedures outlined in TCA must be followed. The legislation first notes the purposes of zoning, which are “promoting the public health, safety, morals, convenience, order, prosperity and general welfare”.^v The legislation then describes the various aspects of physical development that zoning may control, including “location, height, bulk, number of stories and size of buildings and other structures, the percentage of the lot which may be occupied, the sizes of yards, courts and other open spaces, the density of population, and the uses of buildings, structures and land for trade, industry, residence, recreation, public activities and other purposes.”^{vi}

The enabling legislation thus sets forth both the purpose and to some extent the structure of municipal zoning. As for process, the legislation mandates that a planning commission prepare the initial zoning plan for certification to the chief legislative body.^{vii} The Commission prepares both the text and the map of the ordinance. However, the act of adoption is the sole province of the legislative body. The legislative body must hold a public hearing, advertised 15 days in advance. The legislative body also must not make a change in the zoning proposal without sending it back to the planning commission for a recommendation.^{viii} This process places responsibility for the adoption of zoning squarely on the municipal body, but only after having heard from the planning commission and, if necessary, overriding the planning commission.^{ix} The zoning is then adopted, by ordinance, through the number of readings required by the municipality’s charter. This process gives zoning its legal force.^x

District Development and Standards

The specific contents of a zoning ordinance vary by community and will be discussed in detail throughout this material. However, several basic sections appear in all zoning ordinances: Legal language regarding adoption authority and conflicts with other ordinances; definitions; general provisions relating to all properties; zoning districts and their use lists and dimensional requirements; the appeal and amendment process.

Definitions

Zoning definitions, while often an afterthought, can be a definite help or hindrance in the interpretation and enforcement of zoning regulations. Most zoning ordinance definitions

are “borrowed” or “inherited” from other ordinances. Indeed, most ordinances are written in this way. If a planner is particularly astute, early on he or she will start collecting definitions; adding, discarding or modifying as the planner comes across new definitions or finds old ones not working.^{xi} Definitions should be periodically reviewed for usefulness, and lists purged of out-dated definitions. The zoning should contain enough definitions that Boards of Zoning Appeals or Zoning Administrators are not forced to render interpretations that begin to encroach on the actual legislative process.

Zoning definitions should serve several purposes: They simplify the zoning text; they precisely establish the meaning of a word or term which may be subject to differing interpretations; they translate technical terms into usable and understandable terminology. What they should *not* do is attempt to contain the elements or standards which regulate the intensity or bulk of the defined use. Also, while a definition should, using the purposes cited above, define otherwise common words or phrases as they take on a specific meaning in a zoning document, they should not as a rule run counter to the generally accepted meaning of words and phrases. “If it quacks like a duck, walks like a duck, etc.”^{xii}

Some words of advice on definitions include: Don’t define it if it is not used in the ordinance; use federal, state or county definitions if available; use nationally accepted definitions if available.^{xiii}

General Provisions

A typical zoning ordinance will contain standards that apply to all parcels of land in the city, regardless of their specific zone. Common items would be how non-conforming uses are dealt with, parking standards, or procedures for dealing with substandard lots. The general provisions should not attempt to set forth zoning standards specific to any one zone.

Dimensional Requirements

One of the stated purposes of zoning is to regulate the “location, height, bulk, number of stories and size of buildings and other structures, the percentage of the lot which may be occupied, the sizes of yards, courts and other open spaces, the density of population...”^{xiv} This is accomplished through dimensional requirements: minimum lot size, setbacks, percent of yard occupied, and height limitations. Each zoning district is intended to promote a specific purpose, as noted in the Intent Statement section of this narrative, therefore, the size and shape of lots and the buildings on those lots will differ depending on the zone’s purpose. A “building envelope” is created that shows the allowable building area and the minimum separations between buildings on the same or adjoining lots and between the building and the street. That envelope can extend upward by regulating the height of structures. While access to sunlight was an early reason for applying height limitations, today the limitations of a municipality’s fire-fighting capabilities may have more bearing. Care must be taken while adequate setbacks and

yard requirements should be established, that those standards are not so excessive that a court could actually declare a taking.^{xv}

Use Lists

One of the most influential and hotly debated sections of a zoning ordinance will be the list of permitted uses, or “use by right” in each district. This list will truly define the zoning district character and goes a long way toward fulfilling the district intent and purpose. The use lists should closely reflect whatever land use policy prompted its creation in the first place. One of the balancing acts in creating use lists is “cumulative” vs. “non-cumulative” zones. In cumulative zoning, sometimes called pyramid zoning, “higher” uses are allowed in “lower” zoning districts.^{xvi} Many communities consider this undesirable, as it can affect a municipality's intention to create zones solely for commercial or industrial uses if a residential use is also allowed in the zone. Yet, non-cumulative zones can also be a problem if the zone is *too* exclusive. Courts have ruled, for example, that zoning that allows only single-family residential development can be discriminatory, not through the zone's stated purpose, but simply by its effect of effectively restricting low- and moderate-income housing.^{xvii} This is known as *exclusionary zoning*.

Publications such as the *North American Industry Classification System*, which replaced the OMB's *Standard Industrial Classification*, or the American Planning Association's *Land Based Classification Standards*^{xviii} provide lists of uses grouped together by type that can be helpful in establishing use lists. Problems arise when a zoning ordinance attempts to define each and every individual use that a zone can allow, since over time new uses or variations of uses develop that may not be expressly allowed in a zone. The same is true with a list of prohibited uses.

Statutory Provisions

Zoning ordinances contain sections that are necessary from a legal standpoint. The authority to adopt zoning is cited, and a formal title is given. The zoning map is made an official part of the regulations as well, as courts have ruled that zoning consists of both text and a map. A statutory purpose is cited, often using the wording from the State enabling legislation. Amendment procedures are spelled out, often with sample rezoning forms included. Also, statements are included to note that any conflict between a zoning standard and an applicable standard in another ordinance will be decided in favor of the higher standard. A “severability” clause is common, that being a statement that a finding by a court that any section of the ordinance is invalid or unconstitutional will not affect any other section of the ordinance. An effective date of the ordinance is noted, and often the dates of passage of the various readings are included.

The Amendment Process

The zoning amendment process can be looked at in two respects: the administrative aspects and the substantive aspects. Administratively, the *Tennessee Code Annotated* spells out the process for a zoning ordinance or map amendment. TCA 13-7-203 and 13-7-204 note that the ordinance and map may be amended, but that the proposed amendment is not effective unless it is first submitted to the planning commission for approval. If the planning commission disapproves the amendment, the legislative body must override it by a vote of a majority of the entire membership. Also, a public hearing with fifteen days' advance notice must be held. Courts have held zoning amendments invalid when either of these conditions are not met.

Substantively, a zoning amendment can either advance a legitimate land use interest, or it can place the community in legal trouble. The issue of "spot zoning" is often mentioned, even if it is hard to define. Generally, spot zoning is an "upzoning" of property to a more intensive use than before, with the effect of allowing development inconsistent with the surrounding area and transferring benefit to the property owner to the detriment of others.^{xix} A zoning's reasonableness is fairly debated in this circumstance, and can be construed unreasonable by a court, especially where a comprehensive plan provides little or no guidance on the rezoning.

Zoning Trends & Topics

Mixed Use/PUD's

Developers sometimes wish to combine single and multi-family residential uses, or blend residential uses with non-residential ones. In other cases a mix of light industrial and commercial might be desirable at a particular location. A large scale development may include all of these uses. None of these combinations is easily accommodated by traditional zoning. A property with troublesome natural features or an odd shape may also not be easy to develop by following the criteria of a regular zoning ordinance. In such cases improvement of the property may not be economically feasible at all. These problems are met by use of planned unit developments (PUDs). Planned unit developments provide a flexible approach to zoning with the opportunity to shift density to developable portions of a property or to mix residential, commercial, and even industrial uses. PUDs allow development of land as a unit where it is desirable to apply regulations more flexible than those pertaining to other zoning classifications and to grant diversification in the location of structures and other site qualities. In a planned unit development land is developed free from most specific zoning regulations and usually as a separate zoning district.^{xx}

Planned unit developments generally find judicial approval where reasonably related to the public welfare and where full protection is afforded surrounding areas of more restrictive classification.^{xxi} Using a PUD to accommodate a developer's plans requires careful consideration of infrastructure (traffic, parking, utilities) as well as a recognition

that it is a departure from the traditional zoning scheme, referred to as “Euclidean Zoning”, that segregates uses. PUDs should be supported by land use policies that direct when, where, how, and why a PUD is deemed desirable. PUDs often receive intense scrutiny, or even outright opposition, from neighbors and others, therefore a municipality must be certain of its reasoning in allowing PUDs.

TND (Traditional Neighborhood Design)

The saying “Everything old is new again” is true even in the planning world. One of the hot topics in urban development today is Traditional Neighborhood Design (TND), or New Urbanism, or neo-traditional design among other names. The New Urbanist development and TND design movements have several objectives, but with the overall design aiming for a return to the pedestrian-scaled communities of yesterday, and away from the heavily segregated use structure present in most contemporary zoning ordinances. TND developments have been proposed that create self-contained communities on the fringe of larger urban areas, or even in rural areas. TND can achieve community-building where a community did not exist previously, assuming infrastructure can be installed to support the planned densities and use mixes. Developments either exclusively residential or mixed-use in nature can contain elements of New Urbanism.

Another aspect of interest to municipalities is that this concept seeks to return an urban area, especially downtowns, back to the mixed-use, pedestrian-oriented communities of yesteryear. Related to the concept of Smart Growth, which seeks to restrict urban expansion into outlying rural areas, New Urbanism would intensify development in the existing municipality, increasing density in some respects, and seeking to establish a balance of residences, work, shopping, recreation, and cultural enhancement in one tightly-knit area. Many older communities have a history of a downtown areas that had residences, retail establishments, and maybe some light industrial uses all within easy reach of each other. As suburbs grew, downtowns lost their appeal, despite the presence of infrastructure. Now, seeking to hold down urban expansion, planners are promoting the idea that downtowns again hold appeal for development and re-development. Streets, utilities and other development necessities are in place, holding down initial start-up costs. However, New Urbanism also seeks to create “atmosphere”, or a feeling of participation through more human-scale buildings, more pedestrian-friendly access and transportation, and multi-use buildings. In Tennessee, with the availability of grant monies from various entities for downtown improvements, and the presence of many small towns with unique charm and appeal, New Urbanism could help a community’s revenue picture by holding down utility and street expansion and maintenance costs, increasing commercial traffic downtown, and attracting new residents, especially empty-nesters, retirees and childless couples, who want the feel of a small town but with amenities nearby. These developments, when included as part of the overall range of developments offered to homebuyers and business owners, can make a community attractive to developers and potential residents.

Overlay Zones

A community is divided into zones that regulate uses and structures, with the standards used to enforce the zone's intent being consistent throughout the zone and applying to all uses and properties. Sometimes however, special conditions exist that require an extra level of regulation over and above the base level provided by the general zoning. Perhaps there are conditions or situations that cross traditional zoning boundaries. In these cases, an "overlay" zone can be used. For example, areas prone to flooding, usually determined by the NFIP's Flood Insurance Rate Maps, may encompass properties that are part of several different zones. Yet the flooding potential is the same regardless of the underlying zoning. In these cases, floodplain management regulations are applied on those properties that add to the requirements already in place for that zone. Another example might be airport zoning. Airport zoning is usually height-restrictive and is tied to the physical location around the airport. Historic zoning is another example. While the underlying zoning in these cases controls use and lot requirements, the special circumstances present mean that an extra level of review is necessary to make sure development is proper and does not interfere with, for example, a pilot's vision, or that development of whatever kind does not worsen a potential flooding situation, or degrade an established historic district.

Transfer of Development Rights (TDR)

Recently, the Tennessee General Assembly has expanded an established zoning technique known as Transfer of Development Rights from a tool that only a metropolitan government may use to one that all Tennessee municipalities and counties may use. The intent of transfer of development rights is to concentrate development in areas where it is wanted and to restrict it in areas where it is not. To do so, a sending and a receiving area are designated. Property owners in the sending areas who do not develop their properties to the full extent permitted by the law may sell their unused rights to property owners in receiving areas. The technique might be used to preserve open space, to limit development in an ecologically fragile area, or to achieve historic preservation goals, among others. Presumably a market in development rights will develop the price, moving to a position high enough to motivate owners in the sending area to sell, yet low enough to make purchase profitable for property owners in the receiving area. The technique is relatively new and a matter of some controversy. One way in which it could be misused would be if development rights were to be assigned to areas where the actual possibility of development is small. If one gives the owner of a property in a "bottomless swamp" or "rocky promontory" a development right, it is just a windfall since he or she could not realistically expect to develop anyway. But a developer in an area of high land values may still be willing to buy that right. The possibilities for abuse seem to be considerable.^{xxii}

The transfer is accomplished by contract, and the *Tennessee Code* requires that the contract or plat notation be filed in the office of the register of deeds for the affected county. The law allows that a not-for-profit conservation or preservation organization may purchase development rights, as well as potential developers.

CHAPTER IV AREAS OF CONCERN

State/Federal Exceptions and Exemptions

It has also been established that if the constitution of a state gives no authority to enact a zoning ordinance, then the authority to enact zoning ordinances must be granted by statute. The Supreme Court of Tennessee in a decision in 1944, Miller v. City of Memphis, 181 Tenn. 15, 178, S.W. 2d. 382, 151 A.L.R. 1172, 1944, observed the statutory role of the state as follows:

A municipality has no inherent authority to enact ordinances whose validity and enforcement rest on general police powers. All powers of a municipality are derived from the state, but it cannot be doubted that the state may delegate its authority or some portion of it. The police power primarily inheres in the state, but if the state constitution does not forbid, the legislature may delegate a part of such power to the municipal corporation of the state, either in express terms or by implication.

By the same token, the State may, without offering rationale, withhold or limit its delegation, and over the years the General Assembly has modified the activities which localities may regulate through zoning. Among the pre-emptions and exemptions which modify the broad delegation are:

1. Agricultural land and/or buildings - TCA Title 13, Chapter 7, Section 13-7-114 (counties only). TCA 6-54-126 (a part of the Comprehensive Growth Management Law) restates the agricultural exemption found at Title 13 and extends the prohibition to cities also.
2. Historic zoning - TCA Title 13, Chapter 7, Section 13-7-401 through 13-7-410.
3. Airport zoning - TCA Title 42, Chapter 6, Section 42-6-101 through 42-6-115.
4. Solid waste facilities - TCA Title 68, Chapter 211, Part 7.
5. Residences of retarded or handicapped persons - TCA Title 13, Chapter 24, Section 13-24-101 through 13-24-104.
6. Manufactured residential dwellings - TCA Title 13, Chapter 24, Section 13-24-201 through 13-24-202.

7. Telephone and telegraph facilities - TCA Title 13, Chapter 24, Section 13-24-301 through 13-24-303. (Federal Corollary: Section 704 of the Federal Telecommunications Act of 1996).
8. Tellico River Development Authority - TCA Title 64, Chapter 1, Part 7 (pre-empts local zoning control over lands owned or leased by TRDA).
9. Transfer of development rights - TCA Title 13, Chapter 24
10. Contract zoning - TCA Title 13, Chapter 24 (Hamilton County and municipalities therein).

In addition to state proscriptions cited above, there are several federal statutes and regulations that pre-empt local zoning controls. Among these are federal regulations that prohibit local governments from unreasonably restricting licensed amateur radio communication structures and facilities. A more far reaching preemption is contained in the Religious Land Use and Institutionalized Persons Act passed in August 2000 that exempts from any zoning or other land use regulation religious organizations and structures if the regulation would place any substantial burden on the practice of religion.^{xxiii}

Administrative Issues

Special Exceptions/Uses on Appeal

Each zoning district allows certain uses, and excludes others. Generally, these uses fall into one of two categories: uses by right and uses on appeal. A use by right was discussed earlier. Uses on appeal, also known as special exceptions or conditional uses, are a category intended to provide flexibility and cope with situations where a particular use or class of uses, although not inherently inconsistent with the intent and purpose of a particular zone, could well create special problems or hazards if allowed to develop and locate as a matter of right in a particular zone.^{xxiv}

The decision to allow or deny a use on appeal is given to Boards of Zoning Appeals, specifically the power to hear and decide requests for special exceptions.^{xxv} While the broader powers of a BZA will be discussed later, this specific power deserves explanation. A BZA, acting administratively, will hold a public hearing and determine whether a particular use is consistent with a zones intent and purpose. How this determination is made can be crucial to fulfilling the zoning intent and preventing a successful challenge in court. A decision on a special exception should be made deliberately, with a review of the use against stated criteria or conditions that must be met for approval. Many zoning ordinances are over-broad in this area, providing only that the use be “compatible” with other uses, or similar generic language. A decision made on this basis could well be challenged as having been arbitrary, possibly a reaction to a neighborhood’s opposition to a use rather than a true review of the facts. A better

method is for the zoning ordinance to provide, in some level of detail, the conditions under which the particular use would be acceptable. Limitations on building size, parking, buffering, noise, odors, vibrations are all acceptable conditions for approval and give a BZA specific grounds to review the request. They also provide for an honest explanation of a uses effect on its surroundings to better inform residents of what to expect. Determining a use on appeal should not be confused with other BZA functions, such as granting variances. A variance is an exception to a zoning rule in cases where a literal interpretation would result in unnecessary hardship for the applicant, while a use on appeal is a determination to allow a use that is acceptable under certain qualifying conditions.^{xxvi} Using the BZA to *add* a use that is not listed either by right or on appeal is not a valid exercise of either of these functions, but is instead in effect a rezoning of the property that can only be accomplished by the legislative body.^{xxvii}

Non-Conforming Uses

Non-conforming uses (or “grandfathered” uses) present challenges to zoning administration in any community. Under most zoning regulations a non-conforming use, as opposed to an illegal use, is one that was established according to the zoning rules in effect at the time of the uses inception, but would not be allowed under current zoning regulations. Non-conforming status can also apply to a piece of property itself that does not conform to current standards of size and shape, or to a building that may contain a conforming use, but the building itself is in violation of a current zoning standard. The U.S. Supreme Court has ruled in past decisions that zoning standards can be applied retroactively to eliminate an existing use.^{xxviii} However, many states, including Tennessee, have adopted legislation to protect certain non-conforming uses from direct elimination. *Tennessee Code Annotated* Section 13-7-208 gives protection to industrial and commercial uses, and even provides for their expansion or reconstruction under certain conditions. While this protection recognizes the investments made in these uses that were legal at their inception, an obvious conflict with the intent of zoning is generated, since zoning would seek to bring all uses and land into eventual compliance with the zoning standards. A protected non-conforming use would lose its status if the use changes. Many zoning ordinances also take the extra step of revoking non-conforming status if there is an abandonment or discontinuance of a use for a specific period of time. A transfer of ownership does not revoke non-conforming status, as the non-conformity runs with the land, not the owner.^{xxix}

One tool used to eliminate non-conforming uses is amortization. Amortization seeks to allow an owner of a non-conforming use to recoup his investment financially leading toward its elimination. It appears that amortization programs are most successful when applied to billboards and land-intensive uses, such as junkyards.^{xxx} However, applying non-conforming rules to billboards and other signs has generated much litigation and conflicting rulings. A local community is well-advised to consult with its attorney before attempting to apply amortization rules to any non-conforming use, especially signage.

Extraterritorial Jurisdiction/Planning Regions

Extraterritorial (or regional) planning and zoning powers, essentially the power to apply municipal ordinances outside the corporate limits, is granted by statute to municipalities. *Tennessee Code Annotated* 13-7-301 through 13-7-306 details regional zoning procedures and requirements. The legislation is intended to allow a municipality to deal with uses or developments on a community's fringe that could adversely affect residents inside the municipality. It allows a municipality to ensure that developments within a designated planning region are compatible with zoning standards inside the city, especially if annexation is intended, or even if no annexation is imminent, if the city provides services to the area. The presumption is made that a municipality with zoning is better able to provide development guidance outside its immediate corporate limits than a county with no zoning is able to provide. While there have been recent legislative developments that complicate this issue, to be discussed later, the basic intent is still intact. The municipality must have had a planning region designated by the State, with the planning commission having been simultaneously designated a municipal-regional planning commission.

Procedurally, it must be noted that where a county has zoning, a municipality may adopt extraterritorial zoning only if the county agrees to allow it. Otherwise, a municipality is prohibited from exercising regional zoning. Even if a municipality has adopted regional zoning properly in a county without zoning, if a county decides at a later time to zone the area, the municipal zoning is automatically repealed. However, when a county has no zoning, and a municipality follows the procedural requirements to adopt regional zoning, the zoning has the full force of law and the municipality may actively enforce its regulation. Despite arguments that extraterritorial zoning presents a problem because residents in the affected area cannot vote in municipal elections or on the specific zoning ordinance itself, courts have upheld this legislative delegation.^{xxxii}

A separate zoning ordinance for a planning region is preferable, based on specific development goals and objectives for the unincorporated area. The procedures for adoption of regional zoning are almost identical to the procedures for adoption of municipal zoning. As noted above, an un-zoned county must grant approval for the municipality to proceed with regional zoning. The municipal-regional planning commission prepares a zoning plan and certifies it to the municipal legislative body, who then holds an advertised public hearing before adoption. At that point, the regional zoning map and ordinance are enforced the same as the municipal map and ordinance. *TCA* 13-7-304 requires that a Board of Zoning Appeals be formed that includes a majority of members residing in the territory subject to the regional zoning regulations. This would imply that an existing municipal BZA, whose members reside in the city and are subject only to municipal zoning regulations, would not fulfill the requirements of the law.

P.C. 1101/Title 13 Consistency

When growth management became part of the *Tennessee Code Annotated* with the passage of Public Chapter 1101 in 1998, most communities viewed the legislation primarily as an annexation-related bill. Certainly, the provisions regarding Urban Growth Boundaries and the justifications that went into creation of those boundaries dealt primarily with population growth and the ability of a city to annex. Now, however, several years later, more far-reaching impacts of 1101 are becoming clear. Specifically, the problems that 1101 has initiated regarding extraterritorial regulation by cities, and the so-called “consistency clause” in the legislation.

Since 1935 when the original planning enabling legislation was passed by the General Assembly, priority has been given to municipalities to plan not only for the area within their corporate boundaries, but also in those areas designated as planning regions. The ability to adopt subdivision regulations that control land development and infrastructure was a right to be exercised at will by a planning commission once it has been designated a municipal-regional planning commission by the State. The ability to zone, while differing from subdivision regulations in that zoning is a legislative function, was also granted in favor of municipalities within a planning region, despite that area being unincorporated. A municipality could simply notify the county of its intent to zone, and while a county could co-opt the authority by adopting its own zoning for the region, it could not simply stop a municipality from zoning that region altogether. Public Chapter 1101 changed that landscape by now requiring that where a planning region is granted in a county with no zoning, the municipality must now receive the county’s permission to both zone and adopt subdivision regulations, certainly a regression in municipalities’ ability to plan for the future. Given that 1101 also required the establishment of Urban Growth Boundaries, presumably intended as those areas where a municipality influences growth through provision of services, it seems short-sighted that the same municipality would be severely restricted in its ability to adopt any land management tools within those boundaries. The statutory characterizations of an "urban growth boundary" declare that these are areas in which the municipality is expected to "efficiently and effectively provide urban services; and ...to manage and control urban expansion." Clearly an urban growth boundary is a municipal planning region requiring implementation tools and processes associated closest with zoning and subdivision regulation. "Timing of development and provision of public services" is synonymous with public infrastructure planning. Without the tools of plan implementation, the likelihood that cities and counties will "minimize urban sprawl" is merely wishful thinking.^{xxxii}

Another potential zoning issue concerning Public Chapter 1101 is the so-called “consistency clause”. *TCA 6-58-107* states: “After a growth plan is so approved, all land use decisions made by the legislative body and the municipalities or county's planning commission shall be consistent with the growth plan.” How land use decisions would be considered “consistent” is hard to gauge. Given 1101’s emphasis on curbing “sprawl” and on encouraging development on lands already in the municipality, should any proposal that increases density within the town be approved? How would a court view a challenge to a zoning denial? These questions have no answers at the moment.

However, there is clearly now an incentive for a municipality to engage in long-range planning to determine the relationships between development, infrastructure and future growth to provide a rational basis for zoning and other land use decisions.

Sensitive Topics

Adult Uses

In recent years, zoning for adult uses has become a hot topic, as communities have struggled to balance residents' complaints with the legal protections afforded adult uses as protected commercial speech. Zoning has emerged as the leading tool to deal with this issue, with the courts providing direction as cases are brought before them. Zoning for adult uses has essentially broken into two methodologies: restricting locations for adult uses through dispersal requirements that prohibit them from locating within a certain distance of each other, and which may also prohibit their location within a certain distance of residential areas and sensitive uses such as hospitals, schools and religious uses; or, less frequently, is to concentrate adult uses in specified areas of the community.^{xxxiii} In many local communities, adult uses may be relegated to industrial zones, or even intensive commercial districts. Ordinances adopting adult use regulations often refer to the need to mitigate the "secondary effects" of adult uses, including crime, prostitution, etc. The courts have held that communities do not necessarily have to document these effects on their own, but can rely on studies prepared by other communities.^{xxxiv}

A concern in dispersing adult uses is whether, once all distance and other requirements are met, there are actually any locations where the uses could locate. The requirements cannot effectively preclude an adult use from locating in the community.^{xxxv} Defining an adult use can also be a problem. Again, case law is the best guide, and communities in Tennessee often use ordinances and definitions from other towns that have previously been successfully defended.

Signage

Sign regulations can be one of the most contentious portions of a zoning ordinance. As with adult uses, a balancing act is in order: the rights of a business or other entity to communicate information vs. the concerns of the city to control visual clutter and driving distractions. Zoning deals with signage by regulating the height, size, and location of signs. Signs are grouped into categories, such as free-standing pole signs, or roof signs, or wall signs, with various restrictions placed on each. Signs are also distinguished by being either permanent or temporary. It is regulating signs based on their content that can lead a city to an unfavorable judgement in court.

Billboards, also known as off-premises signs, are often the most hotly-debated types of signs. Known for their size, they are highly visible and have been frequent targets of regulation and litigation. Billboards are often classified as such based on their content,

that is, advertising a product or service not offered on the same location as the sign. Local communities have attempted various restrictions on these signs, with results generally in favor of the signage. It may be helpful for a community to keep in focus exactly what it is that they are trying to regulate: the sign's effects, which are not based on the content of the sign. Thus, any rational examination of the legal authority for sign regulations suggests that any distinctions among sign types based on content are highly suspect on simple factual grounds. The aspects of signs that affect traffic safety and aesthetics are sign size, scale, height, location, material, lighting, color and motion, or lack thereof – not content.^{xxxvi} Communities may wish to keep their regulations as simple as possible, focusing on how many signs any one piece of property may have, and the maximum height and size of signage allowed. An inventory of existing signs and a permit system to keep track of new signs is a good idea if the community has sufficient enforcement personnel.

Parking Standards

Another topic of concern in a zoning ordinance is parking standards, both the size and configuration of individual parking spaces and parking lots, and the number of spaces required for individual uses. Zoning for off-street parking assists a municipality in lessening street congestion by requiring that any traffic generated by a specific use be supported by on-site parking. Exceptions may be found in downtown areas, or Central Business Districts, where buildings are generally built to the property line and off-street parking cannot be accommodated. A community may wish to provide parking lots in areas adjacent to CBD's, while in larger communities, parking lots and garages are common commercial enterprises. In any event, parking standards attempt to match anticipated traffic with specific uses.

Varying standards are used, sometimes with the result being a sea of asphalt that may or may not be fully utilized. Current zoning trends include sharing of parking facilities where peak demands for adjacent uses are at different times, and altering parking lot design to break up asphalt and provide shading. Altering parking lot design can also contribute to a community's storm water control plans by designing parking lots to handle run-off on site better. The required widths of parking stalls and the widths of parking aisles have varied over the years as the sizes of vehicles has changed, however a standard of ten feet by twenty feet for individual parking spaces remains common.

Mobile Homes and Mobile Home Parks

Mobile home regulations is another area of zoning that generates intense interest. Many small communities still allow mobile homes on individual lots, while the trend has been to confine mobile homes to mobile home parks. A common reason cited is preservation of property values, as there is a traditional perception that mobile homes have negative effects on residential areas. Mobile home parks provide a centralized location for these residences, with most zoning ordinances including site design criteria regarding utilities, access, buffering and screening, and density. Courts have over the years rejected many

zoning ordinances that completely exclude mobile homes as being discriminatory, on the grounds that mobile homes provide much-needed affordable housing.^{xxxvii}

Tennessee law included a local preemption in the matter when, in 1980, the General Assembly recognized a shift in the mobile home industry to include the production of “manufactured residential dwellings”, commonly known as “double-wides”. These structures share many of the same characteristics with site-built homes and often cost nearly as much. Communities are allowed to impose standards guaranteeing an appearance similar to site-built homes, but they can no longer exclude these dwellings from any zone that allows site-built homes. The definition of a traditional “mobile home” has been altered so that it depends largely on the production date of the structure (pre-1976). Communities are advised to approach the issue with an eye toward providing a place for mobile homes and mobile home parks as part of a full-range of residential uses, while recognizing the inherent conflicts and tailoring the regulations to address integration of the mobile home parks into the community and how to deal with non-conforming mobile home parks.

Design Review

Since its inception, zoning has operated under a variety of intents, beginning with the most basic health and safety issues, and advancing toward urban renewal and redevelopment. Zoning for aesthetic concerns was rejected for many years, but slowly courts have allowed aesthetic considerations to be a motivator behind zoning restrictions, even a prime motivator in some cases.^{xxxviii} The idea of using zoning to reinforce or even require a certain standard of appearance requires careful consideration and a firm statement of intent from the local community. Architectural controls in residential neighborhoods, for example, can become an exercise in arbitrary decision-making without a firm sense of what standards are being enforced and why. Communities appear to be most successful when they tie design review to historic preservation and the preservation of specific architectural types and styles.

Regulations on signs, especially billboards, or junkyards and similar uses are often based on a sense of what is visually appealing. The federal *Highway Beautification Act* even codifies this notion as it relates to billboards. Tennessee law prohibits the location of junkyards and billboards along the designated parkway system.^{xxxix} While this authority is not located within the zoning enabling statutes, the concept is similar.

Home Occupations

Regulating home occupations can be a difficult exercise. On the one hand, home occupations provide an incubator for new business, and help people enter or stay in the work force who might otherwise be unable to work. On the other hand, home occupations can be intrusive on a residential neighborhood and can cross the line to actual nuisance. A zoning ordinance that takes into consideration the effect of a home occupation on traffic patterns, parking availability, aesthetics, and nuisances in general is a reasonable ordinance for maintaining residential character. Ordinance preferences

based on personal traits or lifestyles could be scrutinized severely by courts as unequal treatment of individuals. Home occupations provide jobs for the elderly, for those who do not wish to work in a conventional work setting, and for those for whom a conventional work setting does not exist.^{x1}

Most home occupations are approved by the Board of Zoning Appeals. To avoid charges of arbitrary action, the zoning should provide specific standards that the proposed home occupation must meet. Some ordinances attempt to list acceptable home occupations, although the use list is incomplete and cannot handle variations. Some ordinances list examples of home occupations that have been approved in the past. Other ordinances list specific activities that will not be approved. The best ordinances require the BZA to judge the proposed use based on criteria that includes limitations on floor area, employees, nonresidents, outdoor storage and sales, visibility from the street, maintenance of the home and neighborhood's residential character. Enforcement generally follows neighbors' complaints.

CHAPTER V ENFORCEMENT AND ADMINISTRATION

Zoning Compliance and Permits

A zoning ordinance is useless without enforcement. That enforcement must be consistent and in keeping with the provisions of the ordinances of the municipality. Most municipalities issue “building permits”, which denote compliance with a building code. Fewer communities issue separate “zoning compliance” permits or certificates of occupancy that specifically address zoning. A community’s building permit may also function to document compliance with applicable zoning standards. Building setbacks, the use of the structure and other zoning regulations are noted on the form or in conjunction with it.

Specifically for zoning, a permit system is a critical step in the administration process. All standards that must be met should be openly documented and discussed before construction begins, with follow-ups throughout the construction process and a final review before the use commences. Revocation of a building permit is a drastic and unfortunate step, but one that courts have held as a valid move to assure zoning compliance.^{xli} At the same time, the law is clear that a permit must be issued where the applicant is in compliance with all regulations, despite any local hesitation for political or other purposes.^{xlii} An appeal of a decision by a building inspector or other zoning authority is one of the rights of a citizen and is handled by the community’s Board of Zoning Appeals, to be discussed later. An obvious way to avoid unnecessary appeals is to assure proper training for enforcement officers and to have them included in the zoning process during adoption and amendment phases.

A zoning violation is a misdemeanor, punishable as allowed by law for a Class C misdemeanor. A municipality is empowered, through its building official, to seek an injunction or other action to halt building construction or prevent building occupancy until the zoning violation is corrected.^{xliii} Again, the keywords for zoning enforcement are consistency and fairness.

The Board of Zoning Appeals

The state enabling law that permits cities to adopt zoning ordinances also contains a provision for the creation of Boards of Zoning Appeals. In Tennessee, Boards of Zoning Appeals are permitted by the Tennessee Code Annotated under Sections 13-7-304 and 13-7-305 for municipalities exercising zoning power within planning regions, and 13-7-205 through 13-7-207 for municipalities having zoning within their corporate boundaries. The powers of Boards of Zoning Appeals are strictly limited to the language enumerated within these enabling statutes.

A zoning ordinance cannot provide for all conceivable situations to which it must apply. Provision must be made to temper the strict application of the ordinance and yet achieve the purposes of the various development policies cited within the comprehensive plan or land use plan, which the ordinance effectuates.

For all practical purposes the Board of Zoning Appeals is the safety valve by which the development problems of the community may be met within the provisions of the zoning ordinance. Without this body to decide on such matters, solutions to development problems could only be accomplished through the legislative process by amendment of the ordinance.

Accordingly, amendments designed strictly to meet individual situations often result in piecemeal considerations of zoning problems which are often detrimental to the health, safety, and welfare of the citizenry. A front yard is reduced; a single lot is rezoned from residential to a commercial use. While such changes are small, when taken cumulatively, they often result in running counter to and defeating the goals, objectives and policies of the adopted land use or comprehensive plan.

The Board of Zoning Appeals can be further described as an administrative device through which local governments may provide for special cases on a use by use or lot by lot basis. Moreover, it provides a mechanism to review the decisions of the enforcing officer (building inspector, commissioner, and/or zoning administrator) of the zoning ordinance.

Under the aforementioned enabling statutes, municipal and municipal designated regional Boards of Zoning Appeals must contain either three or five members, these members being appointed by the chief legislative body. Membership terms are arranged in a staggered manner such that one member's term shall expire each year. As an option, the chief legislative body may appoint the municipal planning commission as the Board of Zoning Appeals, if the Board is enacted strictly under the auspices of municipal zoning. If however, the Board of Zoning Appeals is established under regional zoning provisions the statute requires that a majority of the membership reside in the territory that is subject to these regional zoning provisions. This requirement often necessitates that two separate Boards of Zoning Appeals be established, as it is unlikely that a majority of the membership of the planning commission (designated Board of Zoning Appeals) operating solely under the umbrella of municipal zoning will reside outside the corporate boundaries of the municipality in question. This is a requirement that is not always followed. Another common error pertains to the appointment of the membership of Boards of Zoning Appeals by chief executive officers rather than chief legislative bodies.

While the Tennessee Code Annotated is silent as to specific public notice and public hearing requirements associated with the meetings of Boards of Zoning Appeals, Section 13-7-205 does allow chief legislative bodies to specify within the zoning ordinances rules governing the organization, procedure, and jurisdiction of these Boards as long as they are consistent with all other enabling requirements. Further, this section authorizes Boards of Zoning Appeals to adopt supplemental rules of procedure as well. In this

respect most municipal zoning ordinances require that all Board of Zoning Appeals meetings are public hearings in accordance with the Tennessee Public Meetings Act, and that reasonable public notice of the meetings of the Board be placed in a newspaper of general circulation. In Tennessee, a rule of thumb exists to state that reasonable public notice is no less than seven days between said notice and the specified date of the Board of Zoning Appeals meeting. As the quasi-judicial actions of the Board of Zoning Appeals constitute the final and ultimate local review of a zoning related controversy or problem, (preceding a judicial appeal to the courts,) while not legislatively required, it is imperative that all pertinent public notices specify not only the time and place of the meeting, but also a brief description of the items scheduled for review. At this point, it is necessary to emphasize that previous case law clearly stipulates that in those cases which the Board of Appeals is authorized to consider and an appeal is made to the courts, absent a proper review by the Board, such cases are typically mandated back to the Board for consideration. In this circumstance, all available remedies have not been exhausted.^{xliv}

A common procedural misconception or pitfall concerns a spurious review of the findings of Boards of Zoning Appeals by chief legislative bodies which the courts have clearly found to be illegal. Another common error pertains to the review of planning commission decisions (such as the approval or denial of site plans) by Boards of Zoning Appeals which exceeds their delegated authority. The Tennessee Court of Appeals in *Whittemore v. Brentwood Planning Commission*, 835 S.W. 2d 11 in 1992 clearly ruled such arbitrary actions to be illegal.

What are the legal powers of the Board of Zoning Appeals? The state enabling statutes as cited in Section 13-7-207 of the Tennessee Code Annotated delimit the responsibilities of Boards of Zoning Appeals. A listing of these responsibilities in conjunction with a brief narrative thereof are as follows:

- 1. The first enumerated power is to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, permit, decision, or refusal made by the municipal building commissioner or other municipal official in the carrying out or enforcement of any provision of the zoning ordinance.**

This power concerns the Board's authority to review the actions of the building official in relation to the specifics of the zoning ordinance. Most such cases involve the building permit application in its capacity to demonstrate or fail to demonstrate whether the zoning ordinance allows a specific construction or use of the land, and the building official is found to be in error in denying the permit. Before proceeding, it should be understood that any action taken by the local enforcement official pursuant to the zoning ordinance that is outside the scope of the zoning ordinance, or contrary to any of its provisions will "not generally stand muster" either by the Board of Zoning Appeals, or by the court system.

Court cases have demonstrated that an aggrieved property owner must reside in the general vicinity of the property in question such as adjacent to, in front of, or behind said property.

In all cases falling under this power, the burden of proof is on the applicant to prove that the administrative official or building inspector's actions are not in conformance with the provisions within the zoning text.

2. The second specified power within the Tennessee Code Annotated is to hear and decide, in accordance with the provisions of the zoning ordinance, requests for special exceptions (conditional uses) or for interpretation of the zoning map.

Each zoning district allows certain uses, and excludes others. Generally, these uses fall into one of two categories: uses by right and uses on appeal. A use by right was discussed earlier. Uses on appeal, also known as special exceptions or conditional uses, are a category intended to provide flexibility in an effort to cope with situations where a particular use or class of uses, although not inherently inconsistent with the intent and purpose of a particular zone, could create special problems or hazards if allowed to develop and locate as a matter of right.

Earlier, Uses on Appeal were discussed to highlight the importance of specific standards used to judge conditional uses. It is the Board of Appeals that must use whatever tools have been given to them by the legislative body in making determinations on these uses. In the absence of any standards, Boards will customarily fill the void with their own opinions and preconceptions, often with the result of a legal challenge to the decision rendered with a charge of being arbitrary or unfair. Accordingly, the Father Ryan High School, Inc. v. the City of Oak Hill (774 S.W. 2d 184) decision which was adjudicated in 1988 by the Tennessee Court of Appeals ruled that Boards of Zoning Appeals have no authority to make decisions on issues that are not granted by Tennessee's enabling statutes. More to the point, this case declared that conditions not specifically cited within the zoning ordinances as special exceptions cannot be arbitrarily required or enforced by Boards of Zoning Appeals. Thus, to be legally defensible, precise conditions must be incorporated within the zoning text as special exceptions. Thus, the proper method is for the zoning ordinance to provide, in some level of detail, the conditions under which the particular use would be acceptable. Limitations on building size, parking, buffering, noise, odors, and vibrations are all acceptable conditions for approval and give a BZA specific grounds to review the request. They also provide for an honest explanation of what off-site impact a particular type of use may have on surrounding land uses.

Requests coming before Boards of Zoning Appeals pertaining to the clarification of the location of zoning district boundary lines, as shown on official zoning maps, (the interpretation of the zoning map) constitute another valid exercise for such Boards.

3. The third power delegated to Boards of Zoning Appeals by way of Tennessee's enabling laws is as follows: Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of

the enactment of the zoning regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulations would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, to authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided such relief may be granted without substantially impairing the intent and purpose of the zoning plan and zoning ordinance.

This is the most difficult of the duties of the Board of Zoning Appeals. Unfortunately, many requests that reach the Board of Zoning Appeals are based on the personal plight and interest of the applicant and have nothing to do with the statutory enabling legislation. One of the most serious issues in zoning is the breakdown of the zoning plan and its enforcement, with the indiscriminate practice of granting variances based on an applicant desiring some personal relief and not on the law.

In essence, there are two valid reasons for a Board of Appeals to grant a variance. One is for a pre-existing condition inherent in the land and one is for a current condition inherent in the land. It is crucial to note that variances may not be given based on conditions that are not inherent in the property itself. Nor may variances be given based on some future condition.

Conditions under which a Board may grant a variance are due to the exceptional narrowness, shallowness or shape of a specific piece of property at the time of enactment of the zoning ordinance, as well as to other related topographical problems or unusual circumstances that render the property such that it cannot be reasonably used without the granting of a variance. Some examples of types of variance requests that comply with these conditions include the following examples: (1) due to the acquisition of a portion of one's property for a public purpose such as for the widening of a public street, the residual lot size is no longer sufficient to comply with minimum lot size provisions; (2) while one has a sufficient acreage to comply with minimum lot size provisions, the shape of the lot at the date zoning was adopted is such that minimum building setbacks cannot be satisfied; (3) while one's lot is large enough to comport with minimum lot size requirements the topographic profile of the lot is such that it is not reasonable or feasible to grade the subject lot in a manner that satisfies minimum yard requirements; (4) a stream running through the middle of a lot of record effectively prohibits one from meeting minimum building setback requirements.

Additional criteria that should be considered by members of Boards of Appeals when reviewing variance requests are as follows:

1. Was the hardship created by the owner of the property? As ruled in McClurkan v. Board of Zoning Appeals, 565 S.W. 2d. 495, 1977. The Tennessee Court of Appeals opined that Boards of Appeals are not authorized to grant a variance when the noncompliance is created by the owner of the property, and is not a characteristic of

the land. Hence, self created hardships do not rise to the threshold of justifying the granting of a variance.

2. Is the sole hardship on which a variance request is based pecuniary? In McClurkan v. Board of Zoning Appeals, 565 S.W. 2d 495, the Tennessee Court of Appeals also ruled that monetary loss is not in itself an impelling reason for the granting of a variance request.
3. Is the variance request contrary to the intent and purposes cited within the comprehensive plan or the zoning ordinance? The courts have resoundingly declared that use variances are illegal and constitute an improper intrusion into the legislative prerogatives of the chief legislative body. Such requests when wrongly granted in effect nullify the purposes of the comprehensive plan which are illustrated and implemented by way of the community's official zoning map.
4. Is the variance request made by the owner of the lot in question or via an authorized representative of the owner? Legal precedents mandate that in order to have the necessary standing before the Board of Zoning Appeals, only the owner of the subject property, or a documented representative of the owner may legally place a variance request with the Board of Zoning Appeals.
5. Is the variance request addressed to the property in question, or to the owner of the subject property? The need for all variance requests must be inherent in the land itself. Properties qualifying for the approval of requested variances must contain exceptional topographical conditions, or extraordinary and exceptional characteristics. All such variances once granted run with the land and not with an individual property owner. A common mistake that is often made by Boards of Zoning Appeals is to ascribe variances to specific property owners and not to the land in question.
6. Has ample material evidence substantiating the facts of the request been presented to the Board of Zoning Appeals? As cited in a 1972 case entitled, Glankler v. City of Memphis, 481 S.W. 2d 3716 whenever there is a paucity of material evidence of facts necessary to justify a variance request, such a request when granted is arbitrary and unwarranted, and subject to reversal by judicial review.
7. Is the variance request unique to the subject property, or is it indicative of a prevalent or widespread condition? Any valid variance request should be representative of a unique, peculiar characteristic of the land that is not prevalent throughout the applicable zoning district. If however, a variance request illustrates a characteristic of the land that fails to constitute a peculiar, isolated condition this generally indicates that in lieu of granting this request, a comprehensive analysis of the problem is necessary, culminating in a corrective amendment of the applicable zoning provisions by the chief legislative body.

To summarize, Board of Zoning Appeals decisions must be in strict accordance with the state's enabling statutes as well as the provisions of the local zoning ordinance. Administrative review of the actions of a building official and special questions tend to be more easily made with less serious long-range ramifications than are other types of requests that come before the Board. Special exceptions are intended to be allowed only if the zoning ordinance permits and definitive criteria are met. Variances tend to be the more "clear cut" issues that come before

the Boards of Zoning Appeals in Tennessee; yet, variances are the more abused. The state's enabling statutes are strict and the courts will continue to compare the actions of the BZA with those statutes.

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- ⁱ State of Tennessee, Local Planning Assistance Office, **Tennessee Planning Commissioner Handbook**, 2003, p. 42.
- ⁱⁱ *Ibid*, pp. 43-44.
- ⁱⁱⁱ *Ibid*, p. 27.
- ^{iv} State of Tennessee, **Tennessee Code** (Charlottesville, Virginia: The Michie Company, 2003), vol. 3B, Section 13-7-201.
- ^v *Ibid*.
- ^{vi} *Ibid*.
- ^{vii} *Ibid*, Section 13-7-202.
- ^{viii} *Ibid*, Section 13-7-203.
- ^{ix} *Ibid*.
- ^x Levy, John M., **Contemporary Urban Planning**, Prentice Hall, Inc., Englewood Cliffs, NJ, 1994, p. 111.
- ^{xi} Moskowitz, Harvey S. and Lindbloom, Carl G., **The Illustrated Book of Development Definitions**, Rutgers University, New Brunswick, NJ Center for Urban Policy Research, p.9.
- ^{xii} *Ibid*, pp. 12-13.
- ^{xiii} *Ibid*, pp. 14-15.
- ^{xiv} **Tennessee Code**, Section 13-7-201.
- ^{xv} Mandelker, Daniel R., **Land Use Law**, 5th ed., Matthew Bender and Co., Newark, NJ, 2003, Section 5.71.
- ^{xvi} *Ibid*, Section 5.43.
- ^{xvii} Southern Burlington County NAACP v. Township of Mt. Laurel, 405 A.2d 381 N.J., 1979.
- ^{xviii} Jeer, Sanjay. 2001. *Land-Based Classification Standards*, American Planning Association: Chicago, Illinois.
- ^{xix} Mandelker, op. cit. Section 6.28.
- ^{xx} Yokley, E.C., **Zoning Law and Practice**, 4th ed., Matthew Bender and Co., Newark, NJ, 2000, Section 6-1.
- ^{xxi} *Ibid*, Section 6-2.
- ^{xxii} Levy, op. cit., pp. 124, 125.
- ^{xxiii} Local Planning Assistance Office, op. cit. pp.43-44.
- ^{xxiv} Yokley, op. cit. Section 21-1.
- ^{xxv} **Tennessee Code**, Section 13-7-207(2).
- ^{xxvi} Yokley, op. cit. Section 21-2.
- ^{xxvii} Mandelker, op. cit. Section 6.43.
- ^{xxviii} Yokley, op. cit. Section 5.78.
- ^{xxix} *Ibid*, Section 5.81.
- ^{xxx} *Ibid*, Section 5.82.
- ^{xxxi} Mandelker, op. cit. Section 4.23.
- ^{xxxii} Local Planning Assistance Office, op. cit. p. 28.
- ^{xxxiii} Mandelker, op. cit. Section 5.58.
- ^{xxxiv} *Ibid*, Section 5.62.
- ^{xxxv} *Ibid*, Section 5.63.
- ^{xxxvi} Kelly, Eric Damien and Raso, Gary, J., **Sign Regulation for Small and Midsize Communities: A Planners Guide and A Model Ordinance**, American Planning Association, Chicago, Illinois, PAS Report #419.
- ^{xxxvii} Mandelker, op. cit. Sections 5.21-5.26.
- ^{xxxviii} *Ibid*, Sections 11.01-11.05.
- ^{xxxix} **Tennessee Code**, Sections 54-17-108.
- ^{xl} Butler, JoAnn and Getzels, Judith, **Home Occupation Ordinances**, American Planning Association, Chicago, Illinois, PAS Report #391.
- ^{xli} Yokley, op. cit. Section 14-8.

^{xlii} *Ibid.*, Section 14-3.

^{xliii} **Tennessee Code**, Section 13-7-208.

^{xliv} *Williamson County Regional Planning Commission v. Hamilton Bank*, 476 U.S. 172 (1985).