

**BOARD OF ZONING APPEALS
MUNICIPAL CENTER COUNCIL CHAMBERS**

March 10, 2009

6:00 p.m.

Chairman Boyd called the meeting to order at 6:00 p.m. The secretary called the roll to establish a quorum.

COMMISSION PRESENT:

Chairman Elizabeth Boyd; Mr. Henry Evans; Alderman Carole Hinely; Ms. Patricia Sherman; Mr. David Klevan; Mr. Lee Henwood.

DEVELOPMENT STAFF PRESENT:

Mr. Jerry Cook, Director of Economic & Community Development; Mr. Josh Whitehead, Director of Planning; Mr. Alan Strain, Attorney; Mr. Wade Morgan, Chief Planner; Ms. Katie Graffam, Economic Development Coordinator; Ms. Carmen Richardson, Secretary.

Interested Individual(s) present:

Mr. Edward R. King – 2440 Clandon Cove, Germantown, TN 38139

Ms. April Gorham – 1800 Magnolia Tree Road, Germantown, TN 38138

Chief Dennis Wolf – Germantown Fire Department

Chairman Boyd called the meeting to order and established a quorum.

ROLL CALL: – Mr. Evans – present; Mr. Henwood – present; Ms. Sherman – present; Mr. Klevan – present; Alderman Hinely – present; Chairman Boyd – present

Chairman Boyd reminded those in attendance that the Board of Zoning Appeals is a Quasi-Judicial body and as such, the latitude for acting on applications is somewhat limited by State Statute and City Ordinance. She also reminded those appearing before the Board that the meeting is recorded and they would need to identify themselves, give their address and be sworn in for the record. She then swore in the staff.

Chairman Boyd stated that she would like to make note that the motions made in all meetings are of an affirmative nature. She stated this does not necessarily mean that the motion will be approved, but that the language will be in an affirmative nature when the motion is made.

Approval of February 10, 2009, Minutes

Mr. Evans made a motion to approve the minutes from the February 10, 2009, meeting that was seconded by Mr. Klevan.

ROLL CALL: -- Mr. Henwood – absent; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – yes; Chairman Boyd – abstain

MOTION PASSED

SUBJECT: 2440 Clandon Cove – Request a Variance to Allow the Principal Structure to Encroach into the Required Rear Yard

BACKGROUND:

DATE SUBDIVISION APPROVED: The Board of Mayor and Aldermen approved Farmington East subdivision as Development Contract no. 227 on June 26, 1978. The same request was on the February,

2009, BZA agenda. The applicant withdrew the request to address board-members' questions about the plans for the roof.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: 1983

PREVIOUS VARIANCES: None on file.

DISCUSSION:

NATURE OF VARIANCES REQUESTED: The applicant proposes to construct a hip roof above an existing flat roof over a portion of the dwelling that extends into the required rear yard. The required rear yard setback for the lot is 31 feet, and the dwelling is 22.5 feet from the rear property line. Therefore, the proposed addition will encroach 7.5 feet into the required rear yard.

SPECIFIC SECTION OF ZONING ORDINANCE:

Sec. 23-232 (3) Rear Yard. There shall be a required rear yard of not less than 40 feet or 20 percent of the average lot depth, whichever shall be less, but not to be less than 25 feet.

APPLICANT'S JUSTIFICATION: The applicant bases the variance request on the **other extraordinary and exceptional situation or condition of the piece of property**, resulting in **undue hardship upon the owner**. According to the applicant, the previous homeowner built the portion of the dwelling into the setback, and that he is trying to correct a chronically leaking roof. The applicant states "previous owner was allowed to build into the setback. A portion of this room has a flat roof with a deck built on top. The flat roof leaks and has caused damage to the room below. Allowing me to build a hip roof over this existing deck will not increase my heated square footage nor will it extend further into the set back....".

STAFF COMMENTS:

1. According to the applicant, a previous owner built the addition that encroaches into the rear yard setback. There is no record of a variance for the encroachment.
2. The requested variance will allow a hip roof to be built over the existing flat roof over the addition, but will not increase the amount of the encroachment into the rear yard.
3. The applicant has provided sketches of the existing and proposed construction.

Edward King, Owner
2440 Clandon Cove
Germantown, TN 38139

Mr. King stated that the basic problem is where the roof is flat and the master bedroom comes out; the french doors come out onto deck. He said that he has replaced the roof a couple of times, and each time he has had to "rip" the deck off. Last time there was quite a bit of rot. He feels the solution to this problem is to go to a hip roof connected to the house. Chairman Boyd asked Mr. King if he had consulted a professional to see if there is a certain material that he could use to help stop the leakage. Mr. King said the people that came out put down some really wide, shingle like material that was overlapped. When the roof was repaired with this material, it was not done correctly. Once caulked and after a while, the caulk cracks causing rain to run down the side of the house. According to Mr. King, it is a constant battle, caulking and re-caulking...roofing and re-roofing. Alderman Hinely advised that the concern here is that we have to consider if these requests for variances are true hardships. She said that we [Board] will need to look at this in two different pieces; one being to make a motion to make your existing structure legitimate; and the second is to allow the roof over the addition. Mr. King stated that he could guarantee that it is a severe hardship and a true inconvenience. He further advised that furniture has to be moved constantly because of the leaks. Mr. Evans said that because of the legislature that this body operates we

are limited in what we can approve. It needs to be a real hardship, not just something that you want. For that reason I will be voting for the variance that will allow your existing house to remain, but I will be voting “no” on the second motion.

PROPOSED MOTION 1: Mr. Evans moved to approve a variance to allow the existing sunroom addition to the principal structure to encroach into the required rear yard, subject to the comments contained in the staff report and the site plan filed with the application. Alderman Hinely seconded the motion.

ROLL CALL: Mr. Henwood – yes; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – yes; Chairman Boyd – yes

MOTION PASSED

PROPOSED MOTION 2: Mr. Evans moved to approve a variance to allow the construction of a hip roof above the existing flat roof over a portion of the principal structure that encroaches into the required rear yard, subject to the comments contained in the staff report and the site plan filed with the application. Ms. Sherman seconded the motion.

ROLL CALL: Mr. Henwood – yes; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – no; Chairman Boyd – yes

MOTION PASSED

SUBJECT: **1800 Magnolia Tree Road - Request a variance to allow an accessory structure to be located closer to the side property line than the height of the structure in the “R” Residential zoning district.**

BACKGROUND:

DATE SUBDIVISION APPROVED: The Board of Mayor and Aldermen approved Project Development Contract 142 for the development of Germantown Meadows 1st Addition on July 13, 1973.

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: The house was constructed in 1975.

PREVIOUS VARIANCE REQUESTS: On December 9, 2008, the applicant withdrew his request before the Board of Zoning Appeals (BZA) after concerns were raised regarding the size of the structure. The applicant has amended his application for the BZA, which now involves a smaller structure requiring one less variance.

DISCUSSION:

NATURE OF VARIANCE REQUESTED: The specific request by the applicants are to allow a variances for an accessory structure that is 9’ in height at the midpoint of the roof to be located 6.5’ from the side property line. The primary purpose of the structure is to serve as a one-car garage.

SPECIFIC SECTIONS OF ZONING ORDINANCE: The specific request is for a variance from § 23-236(2), of the Code of Ordinances, which states, “Such buildings may extend into the required rear yard but shall be located a distance from the rear and side lot line equal to at least the height of the structure and not closer than five feet to any recorded easement.”

APPLICANT'S JUSTIFICATION: The applicants are requesting the variance due to exceptional narrowness of the property that results in peculiar and exceptional practical difficulties. According to the applicants, the location of the accessory structure is limited because the "safety fence around the pool prohibits the garage from being built anywhere else."

STAFF COMMENTS:

1. The applicants are requesting a **2.5' variance** to allow an accessory structure to be located closer to the side property line than the height of the structure.
2. The applicants originally requested a variance for a 12' x 20' structure that was 11'6" in height for a total of 240 sq.ft. This revised application reflects a variance request for an 11' x 19' structure that is 9' in height to the midpoint of the roof for a total of 209 sq.ft.
3. Should the variance request be granted, the applicants must apply for a building permit through the Department of Economic and Community Development.

Ms. April Gorham
1800 Magnolia Tree
Germantown, TN 38138

Ms. Gorham started off by saying that she and her husband would like the proposed detached structure to be symmetrical, angling up the driveway. She said this would look like a structure that meets the high standards of Germantown. She explained that the proposed garage will match the principle structure exactly—from brick, to shingles, the color, etc. She further stated that she and her family want to protect their teenager's cars, motorcycles, and other valued possessions. She assured the Board that she would do everything in her power to make the structure look like a additional part of the principle structure versus a detached storage shed.

Gary Gorham
1800 Magnolia Tree
Germantown, TN 38138

Mr. Gorham said that he would like add just one more thing. He advised that structure itself had already been approved; they were just asking to move it over. Alderman Hinely replied saying that they [Board Members] understood.

William Walker
1790 Magnolia Tree
Germantown, TN 38138

Mr. Walker said that they are the neighbors to the north of Mr. and Mrs. Gorham and are very supportive of the Gorham's moving the proposed building to the center of the driveway. From talking with the Gorhams and the builder, Mr. Walker understands it to be a hit roof with cross work on the front. He further stated that they have talked at length and he has no problem with it.

PROPOSED MOTION: Alderman Hinely moved to approve a variance at 1800 Magnolia Tree Road to allow an accessory structure to be located closer to the side property line than the height of the structure, subject to staff comments and the site plan filed with this application. Mr. Henwood seconded the motion

ROLL CALL: Mr. Henwood – no; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – no; Chairman Boyd – yes

MOTION PASSED

SUBJECT: Fire Station no. 4, 3031 Forest Hill-Irene Road – Request a Variance to Allow the Principal Structure to Encroach into the Required Side Yard

BACKGROUND:

DATE PRINCIPLE STRUCTURE APPROVED/BUILT: 1991

PREVIOUS VARIANCES: None on file.

DISCUSSION:

NATURE OF VARIANCES REQUESTED: The new fire station building is to be located 9.58 feet from the north property line, which is an encroachment of 10.42 feet into the side yard setback area.

SPECIFIC SECTION OF ZONING ORDINANCE:

Sec. 23-376 (2)c. - There shall be a required rear yard of not less than 20 feet on the side of each lot when adjoining all other business uses (C-1, C-2, SC-1, O).

APPLICANT'S JUSTIFICATION: The applicant bases the variance request on the **other extraordinary and exceptional situation or condition of the piece of property**, resulting in **undue hardship upon the owner**. There is an existing Wireless Transmission Facility (WTF) immediately west of the existing fire station building, whose location necessitates the requested variance. The City and its consultants are in the process of designing a new fire station building to replace the current out-dated facility. The new building is planned to have 3 apparatus bays, a training room, a police dispatch office plus living and sleeping quarters for the firefighters.

The existing WTF consists of a 100 foot-tall monopole tower, cellular telephone antennas and communication antennas for Germantown Fire and Police Departments. It is located approximately eight feet from the existing building. The City's design consultants investigated several options for the configuration of the new building in relation to the WTF:

- 1) *Removal/relocation of the tower* would also remove the City's communication antennas and compromise its emergency communications capability.
- 2) *Constructing the new building around the WTF* is possible would but hamper the security of the building, since WTF maintenance crews need 24 hour access to the tower. A location within the building would also compromise the layout of the building interior.
- 3) *Reduce the size of the building by eliminating one of the apparatus bays* so as to meet the 20-foot side yard setback requirement. However, 3 bays are needed to house the City's emergency response trailers and for planned additional equipment to respond to new development within the eastern portions of Germantown.
- 4) *Maintain the WTF in its existing location and shift the building northward* into the 20-foot sideyard setback area, which requires a variance from the standard setback requirements. City staff and the consultants concluded that shifting the building is the best option and requires a variance from the standard setback requirements.

STAFF COMMENTS:

4. There are two WTFs on the City's property: a tree-shaped tower in the southwest corner of the property and the monopole tower adjacent to the fire station. The monopole tower was recently proposed to be removed as part of a plan to construct a new tower on the western portion of the fire station property.

5. The fire station abuts the rear yard of lot 1A within the Forest Hill-Irene Commercial subdivision. That lot is zoned "C-1" Neighborhood Commercial, is currently undeveloped and has a fifteen foot rear yard setback.

Chief Dennis Wolf
Germantown Fire Department

Chief Wolf acknowledged that he was present and would be happy to answer any questions.

PROPOSED MOTION: Mr. Henwood moved to approve a variance to allow the principal structure to encroach 10.42 feet into the required side yard, subject to the comments contained in the staff report and the site plan filed with the application. Mr. Evans seconded the motion.

ROLL CALL: Mr. Henwood – yes; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – yes; Chairman Boyd – yes

MOTION PASSED

OLD BUSINESS

Mr. Evans made a motion for the memo from Josh Whitehead, dated December 12, 2008, and the report entitled "Tennessee Planning Commissioner Handbook: A Closer Look at Zoning" to be incorporated into the minutes of the meetings. It was seconded by Alderman Hinely.

ROLL CALL: -- Mr. Henwood – yes; Ms. Sherman – yes; Mr. Klevan – yes; Alderman Hinely – yes; Mr. Evans – yes; Chairman Boyd – yes

MOTION PASSED

Meeting Adjourned at 6:35 p.m.



CITY OF
GERMANTOWN

TENNESSEE

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December 12, 2008

To: Members of the Board of Zoning Appeals

From: Josh Whitehead, AICP, Planning Division Director

Subject: Statutory Basis for Variances

At its December 9, 2008, Executive Session, the Board of Zoning Appeals and Planning Division staff discussed the legal authority upon which the Board may grant variances. I indicated that I would put together a memo to assist Board members on "terms of art" that Tennessee courts look to in their review of BZA decisions. After doing some research on Tennessee case law, it appears that our courts simply refer to the language of Section 13-7-207 (3) of Tennessee Code Annotated, which is virtually identical to Section 23-49 (a)(4) of the Germantown Code of Ordinances. I have paraphrased that language below:

Where, by reason of

1. **exceptional narrowness, shallowness or shape of a specific piece of property OR**
2. **by reason of exceptional topographic conditions of a specific piece of property OR**
3. **other extraordinary and exceptional situation or condition of such piece of property,**

the strict application of any regulation would result in

1. **peculiar and exceptional practical difficulties to
OR**
2. **undue hardship upon the owner of such property,**

the BZA may authorize a variance from such strict application so as to relieve such difficulties or hardship.

Tennessee courts look to a BZA's articulation of the colored terms, particularly the bottom two, in affirming or overruling BZA decisions. In addition, I have attached an excellent tool for BZA members created by the Local Planning Assistance Office of the Tennessee Dept. of Economic and Community Development. Extracted from their *Tennessee Planning Commission Training Handbook: "A Closer Look at Zoning"* published in May, 2004, the attached document highlights seven common questions that may arise in your review of variance applications (pp. 24-25).

Finally, and perhaps most importantly, I will now ensure that my staff reviews each application thoroughly, especially with respect to the language cited above. We will implore applicants to either comply with state law or withdraw their application.

As always, thank you for your continued service to the City of Germantown.

**Tennessee Planning Commissioner Training
Handbook:**

“A Closer Look at Zoning”

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

May, 2004



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.^{xlii} 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.^{xliii} 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.^{xliiii} 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*.
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- ^{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.
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- ^{xvii} Southern Burlington County NAACP v. Township of Mt. Laurel, 405 A.2d 381 N.J., 1979.
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- ^{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.
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- ^{xxxv} *Ibid*, Section 5.63.
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