

IN THE CHANCERY COURT FOR KNOX COUNTY TENNESSEE

WAYNE & JANIS WAGGONER, *et al*

Plaintiffs

v.

No. 167896-3
Transferred to Honorable
Daryl R. Fansler

**KNOX COUNTY, TENNESSEE and
THE KNOXVILLE-KNOX COUNTY
METROPOLITAN PLANNING COMMISSION
and THE DEVELOPMENT CORPORATION OF
KNOX COUNTY**

Defendants

**PLAINTIFFS MEMORANDUM OF LAW
IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Come your Plaintiffs by and through counsel and respectfully submit this memorandum of law in opposition to Defendant MPC's motion to dismiss the Writ of Certiorari.

Defendant's Motion:

In this case the Defendant Metropolitan Knoxville-Knox County Planning Commission (MPC) seeks a Judgment on the Pleadings (T.R.Civ.P., Rules 12.02, 12.03, and 12.04) dismissing Plaintiffs' Writ of Certiorari. Defendant asserts that this Court has jurisdiction to hear only those actions of MPC which are final judgments or orders under T.C.A. § 27-9-101. Further, Defendant asserts that the actions taken by the MPC were not "final judgments or orders" and that the Court does not, therefore, have jurisdiction to hear the matter.

Standard for Judgement on the Pleadings:

The standard is set out succinctly in *Cherokee Country Club v. City of Knoxville*, 152 S.W. 3d 466 at 470 (Tenn. 2004).

“ A motion for judgment on the pleadings may be filed "after the pleadings are closed but within such time as not to delay the trial." Tenn. R. Civ. P. 12.03. In reviewing a trial court's ruling on a motion for judgment on the pleadings, we must accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion. *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991) . In addition, "conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment."

The Amendment to the Sector Plan was a final action by MPC

There were two actions taken by the MPC with regard to the properties at issue. MPC voted to

1. Amend its East Sector plan
2. Recommend the zoning ordinance be amended re-zoning the affected properties from A-1 to B-1 for the purpose of later again re-zoning the same property to I-1 (see report of MPC)

The creation and adoption of a sector plan is clearly within the sole province of the planning commission. Likewise, the amendment of the sector plan is the sole province of the MPC. *Family Golf of Nashville, Inc. vs. The Metropolitan Government of Nashville and Davidson County*, 964 SW2d 254 (1997 Tenn App) LEXIS 6881997. The legislative body has no authority over the sector plan.

“[Z]oning and planning are complementary pursuits that are largely concerned with the same subject matter. They are not, however, identical fields of municipal endeavor. See 1 E. C. Yokley, *Zoning Law and Practice* §§ 1-2, at 2 (4th ed. 1978) ("Yokley"). Planning involves coordinating the orderly development of all interrelated aspects of a community's physical environment as well as all the community's closely associated social and economic activities. [citations omitted]

[Z]oning, on the other hand, involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses. [citations omitted] *Family Golf of Nashville, Inc. vs. The Metropolitan Government of Nashville and Davidson County, supra*, 964 SW2d 254 at 257, 258.

[T]he state enabling legislation places the authority to plan and the authority to zone with different local governmental entities. Planning is entrusted to appointed municipal or regional planning commissions. [emphasis added] See Tenn. Code Ann. §§ 13-3-101 , 13-4-101 (1992 & Supp. 1996).”

The statutes (both municipal and county or regional planning) provide that it is the sole duty of the planning commission to create and approve plans.

13-3-301. Regional plan — Municipality adopting. —

(a) **It is the function and duty of a regional planning commission to make and adopt a general regional plan for the physical development of the territory of the region.** [emphasis added] Any such plan shall include the planning of municipal territory to the extent which, in the commissioner's judgment, the same is related to the planning of the region as a whole

13-3-303. Procedure of commission in adopting plan. —

A regional planning commission may adopt the regional plan as a whole by a single resolution, or, as the work of making the plan progresses, may from time to time adopt a part or parts thereof. The commission may from time to time amend, extend or add to the plan or carry any part of the plan into greater detail. The adoption of the plan or any part, amendment or addition shall be by resolution carried by the affirmative votes of not less than a majority of the membership of the commission. [emphasis added] The resolution shall refer to the maps and descriptive matter intended by the commission to form the whole or part of the plan, and the action taken shall be recorded on the map or maps and descriptive matter by the identifying signature of the secretary of the commission.

13-4-201. General plan for physical development. —

It is the function and duty of the commission to make and adopt an official general plan for the physical development of the municipality, including any area outside of its boundaries which, in the commission's judgment, bears relation to the planning of the municipality. The plan, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the commission's recommendations for the physical development, and may include, among other things, the general location, character and extent of streets, bridges, viaducts, parks, parkways, waterways, waterfronts, playgrounds, airports and other public ways, grounds, places and spaces, the general location of public buildings and other public property, the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, light, power, sanitation, transportation, communication and other purposes; also the removal, relocation, widening, extension, narrowing, vacating, abandonment, change of use or extension of any of the foregoing public ways, grounds, places, spaces, buildings, properties or utilities; also a zoning plan for the regulation of the height, area, bulk, location and use of private and public structures and premises and of population density; also the general location, character, layout and extent of

community centers and neighborhood units; also the general location, character, extent and layout of the replanning of blighted districts and slum areas. **The commission may from time to time amend, extend or add to the plan or carry any part of subject matter into greater detail.**
[Emphasis added]

Zoning Is Dependent upon the Existence of the Planning Commission’s Plan:

Under the statute, the sector plan is the *sine qua non* that governs all actions of the planning commission and the County Commission in making re-zoning decisions. Indeed a legislative body has no power to make any zoning determinations **until and after** the planning commission has prepared its general plan (and sub plans such as sector plans).

13-7-102. Regional zoning plans — Execution by county legislative body. —

From and after the time when the regional planning commission of any planning region defined and created by the state planning office makes and certifies to the legislative body of any county located in whole or part in such region a zoning plan.....
.....then the county legislative body may, by ordinance, exercise the powers granted in § 13-7-101 and, for the purpose of such exercise, may divide the territory of the county which lies within the region but outside of municipal corporations into districts of such number, shape or area as it may determine and within such districts may regulate the erection, construction, reconstruction, alteration and uses of buildings and structures and the uses of land.

Likewise the County Zoning ordinance is “linch-pinned” to the Plan approved by the MPC. No amendment to the County’s zoning is able to be accomplished without being consistent with the General Plan and its elements (including the Sector Plan). In order for the County to Re-zone the subject property, the MPC was required to amend its own Sector Plan to make it consistent with the Development Corporation’s Request to re-zone. Had the MPC not arbitrarily and capriciously amended its own Sector Plan, the re-zoning could not have legally passed before the County Commission. The Knox County Zoning Ordinance regarding re-zoning is set out below:

6.31.01 Standards for Amendments

A proposed amendment shall be considered on its own merits using the following criteria as a guide.

Text or Map Amendments [emphasis added]

The following conditions shall be met for all amendments:

A. The proposed amendment shall be necessary because of substantially changed or changing conditions in the area and zones affected, or in the County generally.

B. The proposed amendment shall be consistent with the intent and purposes of this resolution.

C. The proposed amendment shall not adversely affect any other part of the County nor shall any direct or indirect adverse effects result from such an amendment.

D. The proposed amendment **shall be consistent with and not in conflict with the General Plan of Knoxville and Knox County including any of its elements**, [emphasis added] Major Road Plan, Land Use Plan, Community Facilities Plan, and others.

It must therefore be concluded that the action of the Planning Commission in amending its sector plan is subject to review upon a writ of certiorari.

There Is No Finality Requirement under the Common Law Writ of Certiorari

The common law writ of certiorari as set out in T.C.A. § § 27-8-101 has no wording requiring that an action of a Board be “final.”

27-8-101. Constitutional basis. —

The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

Plaintiffs respectfully submit that the action of the MPC, in approving the re-zoning of the subject property was an administrative act subject to review under a writ of certiorari. *See*

Generally, *McCallen v. Memphis*, 786 S.W.2d 633, 1990 Tenn. LEXIS 103 (Tenn. 1990).

Additionally, the action of MPC in the approval of the re-zoning must be considered a final action by that body. Once MPC makes its recommendation, it is a final action by that agency. Once it goes to the city commission for a legislative re-zoning, the commissioners rely upon the administrative action of the MPC. In fact if the legislative action (whether to grant or deny a re-zoning request) is appealed to the Chancery Court under the “arbitrary and capricious” standard, one of the bases always argued by the governmental entity is “We relied upon MPC recommendation.” If the recommendation is legally flawed or arbitrary, then, by definition, the legislative body’s reliance on the recommendation would be flawed. Under MPC’s argument, the citizenry would have no recourse to test the legal validity of the underlying commission action.

Wherefore, Plaintiffs, respectfully pray this Honorable Court to deny the MPC motion and to proceed with a hearing on the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the forgoing pleading was mailed to all opposing counsel by United States Mail, postage paid, or was hand-delivered to opposing counsel this _____ day of _____, 2007.

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