

SM

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT  
OF NASHVILLE AND DAVIDSON COUNTY,  
TENNESSEE,

Petitioner,

v.

THE BOARD OF ZONING APPEALS  
OF NASHVILLE AND DAVIDSON  
COUNTY, TENNESSEE,  
CBS OUTDOOR, INC.,  
FELIX Z. WILSON II  
REVOCABLE LIVING TRUST, AND  
EQUITABLE TRUST COMPANY

Respondents.

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MAY 07 2013

Davidson Co. Chancery Court

F8-9  
Case No. 12-910-II

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DAVIDSON CO. CHANCERY CT

FILED

ORDER OF DISMISSAL WITH PREJUDICE

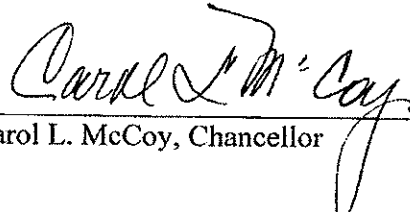
This cause came to be heard on the 19<sup>th</sup> day of April, 2013 on the Motion to Dismiss filed by Respondents CBS Outdoor, Inc. and Felix Z. Wilson II Revocable Living Trust. Counsel for these Respondents represented at the hearing that he would serve as counsel of record for Respondent Equitable Trust Company when that party has been served with process. The Court finds that Equitable Trust Company has since signed a Waiver of Service of Summons and is now a proper party before the Court.

The Court finds, based on the Motion and documents filed before the Court in support of and objections to the Motion, all the documents presently before the Court in this matter and argument of counsel in open Court, that the Motion to Dismiss is well taken and should be granted. The Court finds that the Metropolitan Government of Nashville and Davidson County, Tennessee, does not have standing to bring this matter before this Court and that the Petition for

Writ of Certiorari should be dismissed in its entirety with prejudice. Tennessee Code Annotated Section 26-9-101 requires that a party who files a petition for Writ of Certiorari be an aggrieved party. The Court finds that, in this instance, Petitioner is not such an aggrieved party. The full opinion of the Court is contained in the transcript of the bench ruling attached to this Order and is incorporated into this Order by reference.

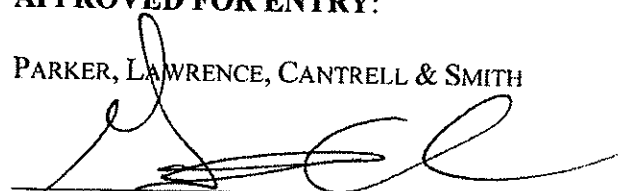
Accordingly, it is hereby **ORDERED, ADJUDGED AND DECREED** that the Petition for Writ of Certiorari in the above-styled matter is dismissed in its entirety with prejudice. Costs shall be taxed to the Metropolitan Government of Nashville and Davidson County, Tennessee, which let execution issue, if necessary.

**ENTERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

  
\_\_\_\_\_  
Carol L. McCoy, Chancellor

**APPROVED FOR ENTRY:**

PARKER, LAWRENCE, CANTRELL & SMITH

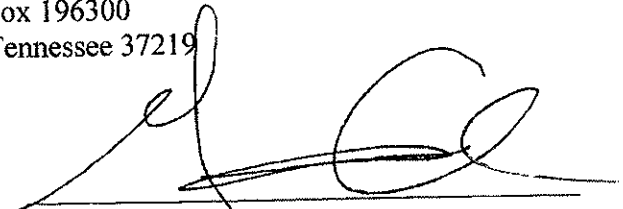
  
\_\_\_\_\_  
Garrett E. Asher (15977)  
201 Fourth Avenue North, Suite 1700  
Nashville, Tennessee 37219  
(615) 255-7500  
[gasher@plcslaw.com](mailto:gasher@plcslaw.com)

*Attorney for Respondents*  
*CBS Outdoor, Inc., Felix Z. Wilson II Revocable Living Trust*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the foregoing document has been served by U.S. Mail, first class, postage prepaid, this 7<sup>th</sup> day of May, 2013 to:

Lora Fox, Esq.  
Assistant Metropolitan Attorney  
Metropolitan Courthouse, Suite 108  
P.O. Box 196300  
Nashville, Tennessee 37219



Garrett E. Asher

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT  
OF NASHVILLE AND DAVIDSON  
COUNTY, TENNESSEE,

Petitioner,

vs.

Case No. 12-910-II

THE BOARD OF ZONING APPEALS  
OF NASHVILLE AND DAVIDSON  
COUNTY, TENNESSEE, CBS  
OUTDOORS, INC., FELIX Z.  
WILSON II, REVOCABLE LIVING  
TRUST, and EQUITABLE TRUST  
COMPANY,

Respondents.

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**Excerpt of the transcript of the proceedings**

**THE HONORABLE CAROL L. MCCOY**

**April 19, 2013**

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PATRICIA R. DAVIS, RPR, LCR, CCR  
Accurate Court Reporting  
The Pilcher Building  
144 Second Avenue North, Suite 230  
Nashville, TN 37201  
(615) 244-DEPO or 244-3376  
[www.ACR-Nashville.com](http://www.ACR-Nashville.com)

A P P E A R A N C E S

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For the Petitioner:

Lora Fox, Esquire  
Metropolitan Department of Law  
Metro Courthouse  
Suite 108  
Nashville, TN 37201

For the Respondent CBS  
Outdoors:

Garret E. Asher, Esquire  
Parker, Lawrence, Cantrell &  
Smith  
201 Fourth Avenue North  
Suite 1700  
Nashville, TN 37219

1 \* \* \* \* \*

2 THE COURT: This is the matter of the *Metro*  
3 *Government versus the Metro Board of Zoning Appeals of*  
4 *Nashville and Davidson County*. The Defendant CBS  
5 Outdoor, Inc.; the Defendant Felix Z. Wilson, II,  
6 Revocable Living Trust; and the Defendant Equitable  
7 Trust Company, which, at this point, has not been  
8 properly served, but I understand that will be remedied  
9 shortly.

10 In this instance, I am going to refer to a  
11 summary of facts contained in the memorandum of law  
12 submitted by CBS Outdoor and Felix Wilson.

13 I should say for the record that there is no  
14 attorney representing the Metro Board of Zoning Appeals  
15 of Nashville. So to the extent there's an argument that  
16 is made on behalf of the BZA, it is done by virtue of  
17 the attorney representing the individual or corporate  
18 entities.

19 CBS Outdoor, Inc., is in the business of  
20 building and managing billboards. It applied for  
21 building permits on March 7, 2012, to remove old  
22 billboards on two properties, replacing them with  
23 digital signs. The two properties are owned by the  
24 Felix Z. Wilson Family Trust and the Equitable Trust  
25 Company, both of which are located in Davidson County,

1 Tennessee.

2           The Department -- the Metro Department of  
3 Codes and Administration denied those permits. The  
4 denial was based on the Codes understanding, that to  
5 replace the old signs with digital ones, the billboards  
6 would not meet the present zoning regulations of the  
7 Metro Government, primarily with regards to spacing with  
8 other billboards and residential lots.

9           CBS Outdoor, Inc., filed an appeal with the  
10 Metro Board of Zoning Appeals. A hearing was held on  
11 April 19th, 2012, before the Metro Board of Zoning  
12 Appeals. The Defendant CBS argued before the BZA that  
13 the billboards preexisted the enactment of the zoning  
14 laws and were grandfathered in. The board of zoning  
15 appeals voted to overturn the zoning administrator,  
16 granting CBS the building permits to replace the old  
17 billboards with new digital ones.

18           The Metropolitan Government disagreed with the  
19 Metropolitan Board of Zoning Appeals on this issue and  
20 filed an action to have the Court invalidate the Board's  
21 vote.

22           On behalf of the board of zoning appeals, CBS  
23 has taken the position that Metro lacks standing to  
24 initiate this action and that this matter should be  
25 dismissed. It relies upon a decision from the Middle

1 Section, in which the appellate court states that a  
2 county cannot be aggrieved by a decision of its own  
3 board of zoning appeals. In this instance, this Court  
4 concurs.

5 I have read the decision that was issued by  
6 Chancellor Bonnyman. I have a different understanding  
7 of the case law and the statutes. Mr. Asher has  
8 properly stated that the issue of whether a party has  
9 standing is a question of law. And that is specifically  
10 what is before the Court today, whether Metro has  
11 standing to seek review of a decision by its own board  
12 of zoning appeals.

13 I have looked at the cases that have been  
14 submitted by both parties. I do not find the support  
15 that the Metropolitan Government points me to to  
16 demonstrate that Metro has standing. In the Tatum case,  
17 there was a statement made by Judge Todd that Metro  
18 could have appealed but decided not to. It is -- is  
19 that the right case?

20 MR. ASHER: I don't know, Your Honor. I'm  
21 getting old, and I don't remember names.

22 MS. FOX: I think it was Judge Cottrell.

23 THE COURT: Oh, Judge Cottrell.

24 As I read that case and I looked at it, I did  
25 not think that she meant that to be controlling with



1 regards to the posture of this lawsuit. I think by  
2 clarifying in her opinion in *Cheatham County Tennessee*  
3 *versus Cheatham County Board of Zoning Appeals*, she was  
4 very straightforward. And it is clearly articulated  
5 that she does not believe the Metropolitan Government  
6 can sue itself, its own board of zoning appeals.

7           And the reason that I think this is true,  
8 unlike the situation in the pension case where there's  
9 going to be dipping into the purse strings of the  
10 governmental entity, we do not have that. This is a  
11 general allegation that Metro says they have to enforce  
12 their zoning laws. That's the entire structure of the  
13 board of zoning appeals. It is set up in a statutory  
14 manner.

15           I concur with Mr. Asher that if Metro  
16 disagrees with what its own board of zoning appeals  
17 likes or dislikes, it can decide on an ad hoc basis of  
18 which of those decisions it's going to enforce, which of  
19 those decisions it disagrees with and will seek to  
20 overturn. There are plenty of avenues by which  
21 decisions of the board of zoning appeals are subject to  
22 the council's decision. Which, in essence, represents  
23 the Metropolitan Government's authority to control what  
24 happens in Nashville. They pass all sorts of  
25 enactments.

1           In Mr. Asher's response to Metro's position,  
2 he says, "Metro cannot be aggrieved by a decision of its  
3 own BZA. There is no authority for it to do this." And  
4 I concur. That does not appear in any of the statutes  
5 that I see. His reasoning as to why it was omitted has  
6 some weight.

7           Metro says the fact that the language contains  
8 "any party" is broad enough to cover the Metropolitan  
9 Government. The history of that uniform act, though,  
10 would not support that.

11           The second basis on which he says Metro cannot  
12 proceed is that there has been no showing as to why it  
13 has standing. The case law says that in order to have  
14 standing, there must be a distinct and palpable injury,  
15 a specific injury. The pension case had a specific  
16 injury. As you read the analysis in that case, it's  
17 very clear that the governmental entity would have been  
18 harmed by the retroactive action that the pension board  
19 took to the tune of about a million dollars.

20           As I read through the complaint, the injury  
21 that I am focused on is that Metro is obligated to  
22 enforce its own zoning regulations. There may be a  
23 zoning regulation as to how far a billboard can be set  
24 up or not set up. The structure for that is through the  
25 board of zoning appeals. If they make a mistake, Metro

1 has set them up to be the one to determine that Codes  
2 properly issues permits or properly denies permits.  
3 They are the entity to which an applicant has recourse.

4 Mr. Asher says if Metro felt that it was not  
5 being properly presented to the board of zoning appeals,  
6 they could have, at any time, submitted proof at the  
7 hearing before the BZA as to what their injury was going  
8 to be. But it's very strange that you would do that  
9 since the BZA is set up to ensure that all of the rules  
10 and regulations, the code, is enforced properly.

11 Metro doesn't get a second chance to come in  
12 and say, "You didn't do it right this time. You do it  
13 right most of the time, but you didn't do it right this  
14 time." That's the whole structure of the BZA.

15 I was persuaded by the analysis done by  
16 Mr. Asher <sup>in</sup> and his reply, that there is a need to show a  
17 specific injury that will result in order to give any  
18 party, including the Metropolitan Government, standing,  
19 and that the complaint failed to do that.

20 I'm also persuaded by the analysis of the  
21 various cases as to why Metro is in a different posture  
22 than other instances where some metropolitan governments  
23 are granted standing. Sometimes it's one governmental  
24 entity versus another governmental entity in a  
25 neighboring county. The pension case certainly affected

1 the pecuniary interest. A very specific injury. That's  
2 lacking in this instance.

3 Now, having said that, I would like to be sure  
4 that before this order is entered, that Equitable Trust  
5 is properly a party. So we're going to suspend the  
6 entry of an order dismissing this action until Equitable  
7 is a party so that it's in the proper format for the  
8 court of appeals and for Judge Cottrell to definitively  
9 say what she thinks she said before, whether or not  
10 Metro can sue the Metro Board or Zoning Appeals.

11 MR. ASHER: Your Honor, in that case, I will  
12 waive any objections to service of process.

13 THE COURT: You're just going to jump in after  
14 I asked you if you had to get permission from your  
15 client?

16 MR. ASHER: Let me get permission from  
17 my client first, Your Honor.

18 THE COURT: As soon as you provide a document  
19 to Ms. Fox that you have permission to accept service  
20 for Equitable and you've received it, I will then take  
21 an order. So you'll have a little bit longer to get the  
22 order in, but I'm thinking less than a week.

23 MR. ASHER: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Proceedings concluded 10:20 a.m.)

1 STATE OF TENNESSEE )  
2 COUNTY OF DAVIDSON )

3 I, PATRICIA R. DAVIS, RPR, LCR, CCR, Notary  
4 Public in and for the State of Tennessee at Large,  
5 DO HEREBY CERTIFY the foregoing proceedings  
6 were taken at the time and place set forth in the  
7 caption thereof; the witness therein was duly sworn on  
8 oath to testify the truth; the proceedings were  
9 stenographically reported by me in shorthand; and the  
10 foregoing proceedings constitute a true and correct  
11 transcript of said proceedings to the best of my  
12 ability.

13 I FURTHER CERTIFY I am not a relative or  
14 employee or attorney or counsel of any of the parties  
15 hereto, nor a relative or employee of such attorney or  
16 counsel, nor do I have any interest in the outcome or  
17 events of this action.

18 IN WITNESS WHEREOF, I have hereunto affixed my  
19 official seal and signature this 7th day of March, 2013,  
20 at Nashville, Davidson County, Tennessee.

21 /Tricia Davis/  
22 Tricia R. Davis, RPR, LCR, CCR  
23 Notary Public at Large  
LCR# 478  
State of Tennessee

24 My Commission Expires: September 9, 2014  
25