

IN THE COURT OF APPEALS OF TENNESSEE

BILLY G. GREGORY, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. ) NO. 01-A-01-9009-CH-00331  
 )  
 METROPOLITAN BOARD OF ZONING ) ON APPEAL FROM THE CHANCERY  
 APPEALS OF THE METROPOLITAN ) COURT FOR DAVIDSON COUNTY,  
 GOVERNMENT OF NASHVILLE AND ) TENNESSEE  
 DAVIDSON COUNTY, )  
 )  
 Defendant-Respondent. )

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BRIEF OF APPELLANT

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PARKER, LAWRENCE, CANTRELL & DEAN

George A. Dean  
S.Ct.Reg. 6737  
Fifth Floor  
200 Fourth Avenue North  
Nashville, Tennessee 37219  
Telephone: (615) 255-7500  
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ATTORNEY FOR APPELLANT

ORAL ARGUMENT REQUESTED

**TABLE OF CONTENTS**

	<u>Page :</u>
I. TABLE OF AUTHORITIES . . . . .	iv
II. INTRODUCTION . . . . .	1
III. STATEMENT OF THE ISSUES . . . . .	2
IV. STATEMENT OF THE CASE . . . . .	3
V. STATEMENT OF FACTS . . . . .	4
VI. SUMMARY OF LEGAL ARGUMENT . . . . .	9
VII. LEGAL ARGUMENT . . . . .	10
A. MR. GREGORY MET ALL OF THE REQUIREMENTS TO USE HIS PROPERTY AS A DEMOLITION LANDFILL . . . . .	10
1. The Nature of a Conditional Use Permit . . . . .	10
2. The Requirements in this Case . . . . .	15
(a) Compatibility Under § 103.323(a) . . . . .	16
(b) Traffic Generation Under § 103.323(b) . . . . .	17
(1) Traffic Accommodated Along Major Streets . . . . .	18
(2) Safety . . . . .	20
(3) Satisfaction of Traffic Requirements by Recommendation of Other Metro- politan Agencies . . . . .	22
[A] Quantum of Proof Required . . . . .	23
[B] Function and Purpose of Traffic and Parking Commission . . . . .	27
[C] Function and Purpose of Metro- politan Planning Commission . . . . .	28
[D] The Evidentiary Effect of Approval by Other Metro Agencies . . . . .	34

(c) Basic Community Function under § 103.323(c) . . . . . 39

(d) Fencing and Screening under § 103.323(d) . . . . . 40

(e) Off-Street Parking under § 103.323(e) . . . . . 45

(f) Variances under § 103.323(f) . . . . . 45

(g) Recommendation of Metropolitan Planning Commission under § 103.323(g) . . . . . 45

(h) Approval of a Sanitary Landfill by Resolution of the Metropolitan Council under § 103.323(h) . . . . . 46

B. THE BOARD MUST ISSUE A CONDITIONAL USE PERMIT WHERE THE APPLICANT HAS INTRODUCED PROOF SHOWING COMPLIANCE WITH EACH AND EVERY REQUIREMENT AND THERE IS NO COMPETENT EVIDENCE SUBMITTED IN OPPOSITION TO IT . . . . . 46

C. THE METROPOLITAN BOARD OF ZONING APPEALS MUST BE REVERSED IF IT HAS ACTED ILLEGALLY, ARBITRARILY, FRAUDULENTLY, OR BEYOND ITS JURISDICTION . . . . . 51

D. THE BOARD ACTS ILLEGALLY, ARBITRARILY, OR BEYOND ITS JURISDICTION WHEN IT SUBMITS A LAND USE APPLICATION TO A REFERENDUM IN PUBLIC HEARING . . . . . 54

E. AN AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER THE TENNESSEE EQUAL ACCESS TO JUSTICE ACT . . . . . 57

VIII. CONCLUSION . . . . . 58

CERTIFICATE OF SERVICE . . . . . 59

**EXHIBITS**

Exhibit One: Stone Man v. Rutherford County, 10 T.A.M. 5-7 (Tenn.App. 1983)

**EXHIBITS (Continued)**

- Exhibit Two: NOISE v. Metropolitan Board of Zoning Appeals ,  
15 T.A.M. 5-8 (Tenn.App. 1989)
- Exhibit Three: Eatherly v. Board of Zoning Appeals , 14 T.A.M.  
51-14 (Tenn.App. 1989)
- Exhibit Four: Holt v. Metropolitan Employee Benefit Board ,  
10 T.A.M. 39-18 (Tenn.App. 1985)
- Exhibit Five: Metro Charter §§ 11.504, 11.505, 11.901,  
11.903 and 20.02

**I. TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>Page :</u></b>
<u>Anderson v. Carter</u> , 512 S.W.2d 297, 307 (Tenn.App. 1974) . . . . .	24
<u>Arch Diocese of Portland v. County of Washington</u> , 458 P.2d 682 (Or. 1969) . . . . .	13
<u>Baxter v. Gillespie</u> , 60 Misc.2d 349, 303 N.Y.S. 2d 290 (N.Y.S.Ct. 1969) . . . . .	14
<u>Big Fork Mining Company v. Tennessee Water Quality Control Board</u> , 620 S.W.2d 515, 521 (Tenn.App. 1981) . . . . .	23
<u>Bray v. Zoning Board of Adjustment</u> , 410 A.2d 909 (Pa.Cmwlt. 1980) . . . . .	13
<u>Century State Bank v. State Banking Board of Missouri</u> , 523 S.W.2d 856, 859 (Mo.App. 1975) . . . . .	53
<u>City of Chattanooga v. Tennessee Alcoholic Beverage Commission</u> , 525 S.W.2d 470, 478 (Tenn. 1975) . . . . .	24
<u>City of Elizabethton v. Sluder</u> , 534 S.W.2d 115, 118 (Tenn. 1976) . . . . .	24
<u>City of Knoxville v. Peters</u> , 183 Tenn. 93, 191 S.W.2d 164, 166 (1946) . . . . .	18
<u>Coastal Ready Mix v. Board of Commissioners</u> , 299 N.C. 620, 265 S.E.2d 379 (1980) . . . . .	13
<u>Dietrich v. District of Columbia Board of Zoning Appeals</u> , 320 A.2d 282, 285 (D.C.Ct.Apps. 1974) . . . . .	56,57
<u>Draper v. Haynes</u> , 567 S.W.2d 462, 464-5 (Tenn. 1978) . . . . .	27
<u>Eatherly v. Board of Zoning Appeals</u> , 14 T.A.M. 51-14 (Tenn.App. 1989) . . . . .	19,20,31,46
<u>Father Ryan v. City of Oak Hill</u> , 774 S.W.2d 184 (Tenn.App. 1988) . . . . .	13,34,47

<u>Fulton County v. Bortenfeld</u> , 257 Ga.766, 363 S.E.2d 555 (1988) . . . . .	14
<u>Goodwin v. Metropolitan Board of Health</u> , 656 S.W.2d 383, 391 (Tenn.App. 1983) . . . . .	25
<u>Harrell v. Hamblin County</u> , 526 S.W.2d 505 (Tenn.App. 1975) . . . . .	13,47,55,56
<u>Hay v. Grow Township</u> , 296 Minn. 1, 206 N.W.2d 19 (1973) (1973) . . . . .	13,14
<u>Holt v. Metropolitan Employee Benefit Board</u> , 10 T.A.M. 39-18 (Tenn.App. 1985) . . . . .	24,25,52,53
<u>Homecraft v. MacBeth</u> , 148 N.E.2d 563, 566 (Ind. 1958) . . . . .	56
<u>Hoover Motor Express Company v. Railroad and Public Utilities Commission</u> , 195 Tenn. 592, 604-5, 261 S.W.2d 233, 238 (1953) . . . . .	51
<u>Kent v. Zoning Board</u> , 58 A.2d 623, 624 (R.I. 1948) . . . . .	56
<u>Levy v. State Board of Examiners for Speech Pathology and Audiology</u> , 553 S.W.2d 909, 911-12 (Tenn. 1977) . . . . .	53
<u>Lindsey v. Miami Development Corporation</u> , 689 S.W.2d 856, 861-2 (Tenn. 1985) . . . . .	19
<u>Lower Marion Township v. Enokay, Inc.</u> , 427 Pa. 128, 233 A.2d 883 (1967) . . . . .	21
<u>McCallen v. City of Memphis</u> , 786 S.W.2d 633, 640 (Tenn. 1990) . . . . .	24
<u>McClurkan v. Metropolitan Board of Zoning Appeals</u> , 565 S.W.2d 495 (Tenn.App. 1977) . . . . .	12
<u>Merritt v. Wilson County</u> , 656 S.W.2d 846 (Tenn.App. 1983) . . . . .	13,21,47,56
<u>Metropolitan Government v. Shacklett</u> , 554 S.W.2d 601, 605 (Tenn. 1977) . . . . .	27
<u>Nance V. City of Memphis</u> , 672 S.W.2d 208, 212 (Tenn.App. 1983) . . . . .	10,44

<u>NOISE v. Metropolitan Board of Zoning Appeals</u> , 15 T.A.M. 5-8 (Tenn.App. 1989) . . . . .	14,34,46
<u>One Hundred Two Glenstone v. Board of Adjustment</u> , 572 S.W.2d 891, 893-894 (Mo.App. 1978) . . . . .	12
<u>Pace v. Garbage Disposal District</u> , 390 S.W.2d 461, 463 (Tenn.App. 1965) . . . . .	23,24,28
<u>Porter v. Green</u> , 745 S.W.2d 874, 877 (Tenn.App. 1987) . . . . .	19
<u>Reddoch v. Smith</u> , 214 Tenn. 213, 379 S.W.2d 641 (1964) . . . . .	52
<u>Robert Lee Realty v. Village of Spring Valley</u> , 61 N.Y.2d 894, 474 N.Y.S.2d 475 (N.Y. 1984) . . . . .	56
<u>Rogers v. Atlanta</u> , 110 Ga.App. 114, 137 S.E.2d 668 (1964) . . . . .	25,26,56
<u>Sexton v. Anderson County</u> , 587 S.W.2d 663 (Tenn.App. 1979) . . . . .	13,38,39,47 48,49,55
<u>Shell Oil Company v. Manchester</u> , 101 N.H. 76, 133 A.2d 501 (1957) . . . . .	14
<u>State ex rel. SCA Chemical Services v. Sanidas</u> , 681 S.W.2d 557, 562 (Tenn.App. 1984) . . . . .	39
<u>State ex rel. Schmittou v. City of Nashville</u> , 345 S.W.2d 874, 878 (Tenn. 1961) . . . . .	27
<u>Stone Man v. Rutherford County</u> , 10 T.A.M. 5-7 (Tenn.App. 1983) . . . . .	13,38,46,57
<u>Tennessee Cartage Company v. Pharr</u> , 199 S.W.2d 119, 120 (Tenn. 1947) . . . . .	24
<u>Toohey v. Kilday</u> , 415 A.2d 732 (R.I. 1980) . . . . .	13,21,22
<u>Topanga Association for a Scenic Community v. County of Los Angeles</u> , 113 Cal.Rptr. 836, 522 P.2d 12 (1974) . . . . .	52
<u>Tullo v. Township of Milburn</u> , 54 N.J.Super. 483, 490-1, 149 A.2d 620, 624-5 (N.J.App.Div. 1959) . . . . .	12

Value Oil Company v. Town of Irvington , 152 N.J.Super.  
354, 377 A.2d 1225 (1977) . . . . . 14

Wayne County v. Tennessee Solid Waste Disposal Control  
Board , 756 S.W.2d 274, 280 (Tenn.App. 1988) . . . . . 24,34,38,39

Williams v. American Plan Corp. , 216 Tenn. 435, 392 S.W.2d  
920 (1968) . . . . . 18

**STATUTES**

T.C.A. § 4-5-101 . . . . . 23

T.C.A. § 4-5-102(2) . . . . . 23

T.C.A. § 7-82-301 . . . . . 23

T.C.A. § 13-4-201 . . . . . 30

T.C.A. § 13-4-203 . . . . . 30,31

T.C.A. § 13-4-302 . . . . . 31

T.C.A. § 13-7-203 . . . . . 31

T.C.A. § 13-7-206 . . . . . 44

T.C.A. § 13-7-207(1) . . . . . 10

T.C.A. § 13-7-207(2) . . . . . 10,11

T.C.A. § 13-7-207(3) . . . . . 10

T.C.A. § 27-8-101 . . . . . 51

T.C.A. § 29-37-101 . . . . . 57

N.J.S.A. § 40:55D-70b (1975) and 40:55-39 (1942) . . . . . 11

**ORDINANCES**

COMZO § 101.25 . . . . . 33,53

COMZO § 101.27(a) . . . . . 10

COMZO § 101.27(b) . . . . . 10

COMZO § 101.27(c) . . . . . 10

COMZO § 102.20 . . . . . 10

COMZO § 103.00 . . . . . 10

COMZO § 103.71 . . . . . 19

COMZO § 103.311(j) . . . . . 19

COMZO § 103.313(1) . . . . . 19

COMZO § 103.316(g) . . . . . 19

COMZO § 103.323 . . . . . Passim

**TREATISES**

D.R. Mandelker, Land Use Law , (2 Ed. 1988) . . . . . 10,13

N. Williams, 5 American Land Planning Law , (1985) . . . . . 10,32,35

Rohan: Zoning and Land Use Control , (1990) . . . . . 10,13,50

Ali: Model Land Development Code , Section 2-207 (1975) . . . . . 10

McCormick on Evidence , Section 342, note 4 (3rd Ed. 1984) . . . . . 23

4 Anderson, Law of Zoning , Section 23.26 (3rd Ed. 1986) . . . . . 33

4 J. Stein, G. Mitchell & B. Mezines, Administrative Law , Section 28.06 (1988) . . . . . 34,36,37

**PLANNING TEXTS**

Frank S. So and Judith Getzels: The Practice of Local Government Planning , (2nd Ed. 1988) . . . . . 32

William C. Johnson: The Politics of Urban Planning , (1989) at 143 . . . . . 32,33

**LAW REVIEW ARTICLES**

B. Cantrell: Review of Administrative Decisions by Writ of Certiorari in Tennessee, 4 Memphis State University Law Review, 19, 30 (1973) . . . . . 25

Variance Administration in Indiana -- Problems and Remedies, 48 Indiana Law Journal, 240, 245 (1972) . . . . . 35,36

Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances, 20 Connecticut Law Review, 669, 703-4 (1988) . . . . . 36

**METROPOLITAN CHARTER**

§ 11.504 . . . . . 29,30

§ 11.505 . . . . . 30

§ 11.901 . . . . . 27

§ 11.903 . . . . . 27

§ 20.02 . . . . . 31,32

## II. INTRODUCTION

The Petitioner-Appellant, Billy G. Gregory, hereby submits this Appellate Brief to the Tennessee Court of Appeals, Middle Section, pursuant to the Tennessee Rules of Appellate Procedure, specifically Rules 27, 28 and 29.

Throughout this Brief, the parties will be referred to as in the Trial Court. T.R.A.P. 27(f). Since this case involves a governmental entity, the Metropolitan Board of Zoning Appeals will be referred to as "Board," "Zoning Board," or "MBZA."

The record is made up of one volume of papers filed in the Trial Court which will be referred to as "Trial Court Papers;" one volume of the proceedings before the Metropolitan Board of Zoning Appeals which will be referred to as the "Transcript;" and finally the Zoning Regulations of the Metropolitan Government of Nashville and Davidson County, hereinafter referred to as "COMZO."

III. STATEMENT OF THE ISSUES

1. Whether Billy Gregory submitted sufficient evidence regarding each requirement for a conditional use permit under COMZO?

2. Whether the Board must issue a conditional use permit where no competent evidence is submitted in opposition to it?

3. Whether the denial of a permit based on incompetent proof is arbitrary, illegal or beyond the jurisdiction of the Board subject to reversal under the Common Law Writ of Certiorari?

4. Whether the Board may submit to a vote of the neighbors an application for a conditional use permit?

5. Whether Mr. Gregory is entitled to an award of attorney's fees under the Tennessee Equal Access to Justice Act?

**IV. STATEMENT OF THE CASE**

A Petition for Writ of Certiorari was filed in this case on 2 April 1990 by Billy G. Gregory against the Metropolitan Board of Zoning Appeals alleging that the Board had arbitrarily and illegally denied him a conditional use permit so as to allow the use of his property for an intermediate impact community facility activity under Metro's Comprehensive Zoning Ordinance. (Trial Court Papers at 1-2). Mr. Gregory sought to use his property as a "demolition landfill." The Petition alleged that there was no material and competent evidence upon which the Board could deny the application for a permit. (Trial Court Papers at 3).

The case was brought to trial on 17 August 1990 (Trial Court Papers at 17), and a Memorandum and Order was filed and entered on 20 August 1990. (Trial Court Papers at 21-2). In the Memorandum and Order, the Chancellor ruled that Mr. Gregory failed to meet two requirements of COMZO. The first requirement related to the traffic generated by the intermediate impact community facility activity and the second one dealt with fencing and screening. The record could not be more clear that Mr. Gregory already had the site fenced and Metro itself has approved the layout as it now exists. Mr. Gregory submits that the decision of the Court below should be reversed because he met all of the conditions under COMZO and because there was no competent proof to the contrary.

## V. STATEMENT OF FACTS

Billy G. Gregory filed an application on 24 January 1990 for a permit so as to use the property located at 1345 Whites Creek Pike in Nashville, Tennessee as a landfill for demolition materials, an intermediate impact community facility activity under COMZO. Mr. Gregory already was utilizing the property as a landfill for topsoil and dirt. (Transcript at 51). That use was permissible under the zoning ordinance. Id.

However, in order to use the property for a demolition landfill, to permit filling with materials obtained through the demolition process, Metro required that a permit for an intermediate impact community facility activity be applied for and granted. (Transcript at 14).

The property is located in an R-6 (residential, 6,000 square feet minimum) zone district. (Transcript at 1 and 2). See also COMZO §§ 21.15 and 23.211. Under the provisions of COMZO, an application for an intermediate impact community facility activity may not be approved as of right by the Metropolitan Zoning Administrator, but rather may only be granted by the Metropolitan Board of Zoning Appeals. COMZO § 103.00 et seq. Specific standards for intermediate impact community facility activities are set out at COMZO § 103.323. Inasmuch as the Zoning Administrator could not approve the issuance of the conditional use permit, Mr. Gregory applied to the Metropolitan Board of Zoning Appeals on 24 January 1990 and a hearing was scheduled for 22 March 1990 before that board. (Transcript at 2 and 24).

At the hearing, Mr. Gregory spoke in support of the proposal along with Mr. Roy Dale, a civil engineer retained specifically to assist with the development of this landfill operation. (Transcript at 50-53). The Metropolitan Health Department approved the application pending a zoning permit. (Transcript at 14 and 17). The local zoning map showing the nearby street system was introduced, (Transcript at 28), the site plan was presented (Transcript at 29-31) and a vicinity sketch and aerial view of the subject property were filed. (Transcript

at 32). The Metropolitan Planning Commission recommended approval. (Transcript at 21). The Metropolitan Traffic and Parking Commission approved. (Transcript at 20). The proposal was consistent with the General Plan for Nashville, 1980-2000, this particular area having been designated as an industrial, warehousing or wholesale area. (Transcript at 51). There are virtually no other demolition landfill operations in the county and a tremendous need for additional space. (Transcript at 61-2). Mr. Gregory clearly distinguished a demolition landfill from other types of landfills, including sanitary fills. A demolition landfill would allow the applicant to place demolition materials, such as lumber, concrete, bricks, and so on into the property as fill. He would not be permitted, pursuant to Health Department approval, anything which would decompose, such as food, chemicals, medications and so on. (Transcript at 51). Mr. Gregory has been operating a landfill, albeit not a demolition landfill, at this same location since 1987. Id. The landfill would be open from 7:30 in the morning to 5:00 in the evening, five days a week, and a paid attendant would be on duty to make sure that only appropriate types of fill material were placed in the landfill. Id. The Health Department requirements concerning private landfills require an employee to be present at the site at all times during operating hours. (Transcript at 18). Mr. Gregory agreed to this requirement. (Transcript at 8). There is no Health Department requirement (or any other requirement), mandating the presence of an employee 24 hours a day, although the opinion of the Court below intimates that there is. (Trial Court Papers at 22). Mr. Gregory estimated that in the four months preceding the hearing, he had taken in 20 or 30 trucks. (Transcript at 61).

The opposition to this application came mostly from members of the National Baptist Convention U.S.A., Inc. Sometime after Mr. Gregory was initially permitted in 1987, the church built a structure approximately one-half mile from the landfill. In fact, the dirt and rock excavated from the church site was put in Mr. Gregory's landfill. The topsoil placed around the building came from the landfill. Id. at 54. Notwithstanding this historical connection, the church

clearly was opposed to the application upon grounds not relevant to the application itself. For example, Mr. Jemison of the church speculated that traffic would be too heavy out on Whites Creek Pike (Transcript at 64), although Whites Creek Pike is clearly a major highway (it is a United States Highway number 431; Transcript at 54 and 28) and not a "local minor street." COMZO § 103.323(c). Mr. Jemison suggested that the traffic would actually come out Trinity Lane. (Transcript at 66). There was no proof that Mr. Jemison had any expertise in traffic regulation, unlike the Traffic and Parking Commission. Even so, Trinity Lane is also a major street, not a local minor street. Mr. Jemison also speculated that the landfill would become a landfill for "just anything." (Transcript at 66). Ms. Cecelia Adkins, the executive director of the National Baptist Convention for the State of Tennessee, felt that the landfill would not only "damage our image but would damage the image of Nashville." (Transcript at 68). Despite the fact that a civil engineer had made hydraulic calculations on the property, they continued to be concerned about drainage problems. The engineer clearly said the filling of the property would have no effect on raising the flood water elevations on properties adjacent to the landfill either up or downstream. (Transcript at 53). Public Works has approved all of this by way of issuing a grading permit. (Transcript at 51 and 53). So far as the site having any detrimental flooding effects, "there is [sic] none." (Transcript at 53).

There was no discussion by the Board of Zoning Appeals on any issue presented by this case. Immediately after the public hearing was closed by the Secretary of the Board, Mr. Demonbreun, the vice-chairman, Mr. Hoover, asked:

Do we have a show of hands of those who are in favor of this? Do we have a show of hands of those who are opposed to this? Of those who are opposed, how many of those live in the immediate area, say one mile? All right, thank you. If you are for it, would you stand, if you live within a mile of it? Thank you.

(Transcript at 73). Immediately following that, Mr. Grizzard, another board member, moved to deny and without further discussion, it was immediately seconded by Mr. Roland Jones. The vote was unanimous: the Board denied the application. (Transcript at 73-74). The Order of the Board was entered on 28 March 1990. (Transcript at 76). The Petition for Common Law Writ of Certiorari was filed by Mr. Gregory on 2 April 1990. (Trial Court Papers at 1).

There can only be one conclusion in this case: there was significant public opposition, none of which rose to the level of competent proof, but the Board, reacting politically, nevertheless denied an otherwise valid application for a conditional use permit. 0

VI. SUMMARY OF LEGAL ARGUMENT

- A. MR. GREGORY MET ALL OF THE REQUIREMENTS TO USE HIS PROPERTY AS A DEMOLITION LANDFILL.
  
- B. THE BOARD MUST ISSUE A CONDITIONAL USE PERMIT WHERE THE APPLICANT HAS INTRODUCED PROOF SHOWING COMPLIANCE WITH EACH AND EVERY REQUIREMENT AND THERE IS NO COMPETENT EVIDENCE SUBMITTED IN OPPOSITION TO IT.
  
- C. THE METROPOLITAN BOARD OF ZONING APPEALS MUST BE REVERSED IF IT HAS ACTED ILLEGALLY, ARBITRARILY, FRAUDULENTLY, OR BEYOND ITS JURISDICTION.
  
- D. THE BOARD ACTS ILLEGALLY, ARBITRARILY, OR BEYOND ITS JURISDICTION WHEN IT SUBMITS A LAND USE APPLICATION TO A REFERENDUM IN PUBLIC HEARING.
  
- E. AN AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER THE TENNESSEE EQUAL ACCESS TO JUSTICE ACT.

## VII. LEGAL ARGUMENT

### A. MR. GREGORY MET ALL OF THE REQUIREMENTS TO USE HIS PROPERTY AS A DEMOLITION LANDFILL.

#### 1. The Nature of a Conditional Use Permit

The legal issues in this case are very simple: the zoning ordinance specifies the conditions for a demolition landfill (an intermediate impact community facility activity); the applicant in this case met those conditions; the board must therefore issue the permit. In this case, the Metropolitan Board of Zoning Appeals refused to issue the permit even though all of the conditions were satisfied.

We should first begin with an overview of the powers of a zoning board. There are three primary powers with which a zoning board is endowed: (1) the power to review any decision of the zoning administrator, T.C.A. § 13-7-207(1), and COMZO § 101.27(a); (2) the power to issue conditional use permits, T.C.A. § 13-7-207(2),<sup>1</sup> COMZO §§ 101.27(c) and 103.00; and (3) the power to issue variances, T.C.A. § 13-7-207(3), COMZO §§ 101.27(b) and 102.20. These second and third powers are inherently different and distinguishable. New Jersey's Judge Frederick Hall, one of the most respected jurists in the country with regard to land use planning matters, described the difference this way:

In order that our subsequent discussion of the issues in this case may be viewed in their proper legal perspective, we interrupt the factual narrative to comment on the true nature of a "special exception" under our

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<sup>1</sup>T.C.A. § 13-7-207(2) is the state enabling legislation authorizing the board to grant conditional use permits. That legislation speaks in terms of "special exceptions," but COMZO specifically recognizes that the terms "special exception" and "conditional use permit" are the equivalent of one another. § 103.00. At least one Tennessee case has also recognized the equivalency of these terms, see Nance v. City of Memphis, 672 S.W.2d 208, 212 (Tenn.App. 1983), and it is also recognized in the field generally. N. Williams, 5 American Land Planning Law, Section 148.07 (1985); D. Mandelker: Land Use Law, Section 6.49 (2 Ed. 1988); Rohan: Zoning and Land Use Control, Section 44.01[1]; Ali: Model Land Development Code, Section 2-207 (1975).

statute.<sup>2</sup> The term might well be said to be a misnomer. "Special use" or "special use permit" would be more accurate. The theory is that certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community and its citizenry or substantial segments of it, are entirely appropriate and not essentially incompatible with the basic uses in any zone (or in any particular zone), but not at every location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint, such as traffic congestion, safety, health, noise and the like. The Enabling Act therefore permits the local ordinance to require approval of the local administrative agency as to the location of such use within the zone. If the Board finds compliance with the standards or requisites set forth in the ordinance, the right to the exception exists, subject to such specific safeguarding conditions as the agency may impose by reason of the nature, location and the incidence of the particular use.

The point is that such special uses are permissible in the particular zone under the ordinance and neither non-conforming nor akin to a variance. The latter must be especially clearly distinguished.

(Emphasis added). Tullo v. Township of Milburn, 54 N.J. Super. 483, 490-1, 149 A.2d 620, 624-5 (N.J. App. Div. 1959). Somewhat closer to home, the Missouri Court of Appeals has spoken similarly. See One Hundred Two Glenstone v. Board of Adjustment, 572 S.W.2d 891, 893-894 (Mo. App. 1978). This Court has heard many variance cases and as it knows, a variance may be granted only upon a showing of unique physical features of the property. A variance is exceptional; it should only be issued under the most extreme of circumstances. See McClurkan v. Metropolitan Board of Zoning Appeals, 565 S.W.2d 495 (Tenn. App. 1977).

A conditional use permit is, on the other hand, specifically envisioned by the local legislative body as being permitted in its own district subject to

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<sup>2</sup>Both then and now, the New Jersey enabling legislation was very similar to that which we have here in Tennessee. Compare N.J.S.A. § 40:55D-70b (1975) and 40:55-39 (1942) with T.C.A. § 13-7-207(2).

certain conditions. If the conditions are met, compatibility with other uses in the area is established and the permit must issue. So, whereas a variance is an exceptional relaxation of the regulations of the zoning ordinance based on some unique physical feature of the particular property in question, a conditional use permit is a use permitted in the particular zone district if it meets the specific criteria established by the ordinance. Whereas the need for a particular variance cannot be foreseen, conditional uses are not only specifically foreseen by the local legislative body when drafting the ordinance but are encouraged to the extent that they comply with the specifications set out therein.

For these reasons,

[M]ost courts hold that the zoning agency's discretion to deny an application for a conditional use is narrow. The courts often reverse denials when the applicant has complied with the standards provided in the ordinance for conditional use applications.

D.R. Mandelker, Land Use Law, Section 6.53 (2 Ed. 1988). See also 6 P. Rohan: Zoning and Land Use Controls § 44.02[2][e] at pp. 44-46 through 44-47. Professor Mandelker cites Arch Diocese of Portland v. County of Washington, 458 P.2d 682 (Or. 1969) to explain this rule of law:

Because . . . [conditional] uses are generally compatible with the design of the zone, the possibility that a permitted use will not comport with the comprehensive plan is not as great as it is when a variance or an amendment is sought . . .

[T]he ordinance itself reveals the legislative plan . . . The suspicion which is cast upon the approval of a change involving an incompatible use . . . is not warranted where the change has been anticipated by the governing body.

Therefore, many states, including Tennessee, have ruled that once compliance with the applicable requirements has been demonstrated, the applicant has a right to the permit. The Tennessee cases include: Father Ryan v. City of Oak Hill, 774 S.W.2d 184 (Tenn. App. 1988); Meritt v. Wilson County, 656 S.W.2d 846 (Tenn.App.

1983); Sexton v. Anderson County, 587 S.W.2d 663 (Tenn.App. 1979); Harrell v. Hamblin County, 526 S.W.2d 505 (Tenn.App. 1975); and Stone Man v. Rutherford County, 10 T.A.M. 5-7 (Tenn.App. 1983) copy attached as Exhibit One). See also Bray v. Zoning Board of Adjustment, 410 A.2d 909 (Pa.Cmwlth. 1980); Toohey v. Kilday, 415 A.2d 732 (R.I. 1980); Coastal Ready Mix v. Board of Commissioners, 299 N.C. 620, 265 S.E.2d 379 (1980); Hay v. Grow Township, 296 Minn. 1, 206 N.W.2d 19 (1973); Shell Oil Company v. Manchester, 101 N.H. 76, 133 A.2d 501 (1957); Baxter v. Gillespie, 60 Misc.2d 349, 303 N.Y.S.2d 290 (N.Y.S.Ct. 1969); Value Oil Company v. Town of Irvington, 152 N.J.Super. 354, 377 A.2d 1225 (1977), aff'd 164 N.J. Super. 419, 396 A.2d 1149 (App.Div. 1978); Fulton County v. Bortenfeld, 257 Ga. 766, 363 S.E.2d 555 (1988).

The most recent Tennessee case, one which in fact involved this same provision of the Metropolitan Zoning Ordinance and was decided by this Court, said of conditional use permits:

. . . the zoning ordinance permits development of extensive impact facilities as conditional uses in these [residential] zone classifications and posits such uses may legitimately co-exist under certain circumstances . . .

Cases have repeatedly demonstrated a protested activity may be deemed compatible although the consequences may be objectionable to adjoining landowners, and, once the applicant meets all of the zoning requirements, a permit must be issued.

NOISE v. Metropolitan Board of Zoning Appeals, 15 T.A.M. 5-8 at 6 (Tenn.App. 1989) (opinion by Judge Franks) (application for extension of airport runway) (attached at Exhibit Three). As in the case of the airport, so too does this landfill meet all of the requirements. There was no proper reason for denial.

## 2. The Requirements in this Case

COMZO provides many different sets of "special conditions" applicable to different types of conditional uses. The set of eight "special conditions" set out by COMZO § 103.323 regulates the conditions under which intermediate and extensive impact community facility activities may be granted by the Board. It is this section which governs in this case and it provides as follows:

Section 103.323 - Special Conditions for Intermediate and Extensive Impact Community Facility Activities.

(a) The location, size, and design of such facilities shall be such that the proposed development shall be compatible with the development within the surrounding area, thus reducing the impact upon the surrounding area.

(b) The traffic generated by such facility shall be safely accommodated along major streets without traversing local minor streets.

(c) The proposed facility shall provide a basic community function or essential service necessary for a convenient and functional living environment in order to be located on the proposed site.

(d) Fencing, screening and landscaping shall be provided as appropriate to protect the surrounding areas.

(e) The off-street parking requirements shall be based upon a recommendation from the metropolitan traffic engineer.

(f) Notwithstanding the aforescribed provisions, the board may be permitted to vary the height regulations for radio and television transmission stations, including towers, based upon the plan and the surrounding environs.

(g) The site plan for such facilities shall first receive a recommendation from the metropolitan planning commission taking into account the above conditions as well as any other pertinent factors related to the use and operation of such facility.

(h) In the case of an airport runway or runway extension designed for airplanes transporting more than twenty (20) persons, a

garbage dump or a sanitary landfill, the specific location shall first be approved by a resolution adopted by the metropolitan county council prior to the board hearing the specific application in public hearing. In the event the metropolitan council does not act within ninety (90) days of the filing and notification thereof by the zoning administrator, council approval shall be waived and the board may proceed to hear the application.

All of these conditions have been met by the Appellant. The Board did not discuss any specific reasons for its ultimate denial. (Transcript at 73). It simply denied the application after hearing the opposition and asking for a show of hands of those opposed to the application. Id. Contrary to the Chancellor's conclusions below, Mr. Gregory demonstrated compliance with each and every requirement.

(a) Compatibility Under § 103.323(a)

Subsection (a) of COMZO § 103.323 requires that the location, size, and design of the facilities be such that the development will be compatible with the development within the surrounding area. First, Mr. Gregory's own testimony demonstrated that the use to which this property would be put after the permit was granted is not any different than the use to which the property had already been put for the last three years as a dirt and rock landfill. (Transcript at 51). The use of the property as a dirt and rock landfill is absolutely permitted. See Transcript at 12.

Furthermore, the Metropolitan Planning Commission also recommended approval of this application for a demolition landfill. (Transcript at 21). Under COMZO § 103.323(g), the Metropolitan Planning Commission must give the Board a recommendation taking into account all of the conditions listed under § 103.323 "as well as any other pertinent factors related to the use and operation of such facility." The Metropolitan Planning Commission recommended without reservations approval of the application of Mr. Gregory. (Transcript at 21).

(b) Traffic Generation Under § 103.323(b)

Section (b) requires that traffic be safely accommodated along major streets. Mr. Gregory testified that:

Most traffic generated would come from uptown because that is where the buildings are being torn down. They would probably come across Jefferson Street or Cowan Street or White Creek Pike. It is at the edge of commercial development . . .

(Transcript at 51). Of course, the Metropolitan Planning Commission also approved the application, "taking into account" the traffic generation characteristics of this site, (Transcript at 21 and COMZO § 103.323(g)), and the Metropolitan Traffic and Parking Commission approved also. (Transcript at 20).

While the MPC did not specifically address each subsection of § 103.323, only giving a general recommendation, the Court must nevertheless presume that the municipal agency complied with the law and did its duty unless proof to the contrary is present. Williams v. American Plan Company, 216 Tenn. 435, 392 S.W.2d 920 (1968); City of Knoxville v. Peters, 183 Tenn. 93, 191 S.W.2d 164, 166 (1946). There is no contrary proof and the Court must presume that the MPC considered subsection (b) in its favorable recommendation.

The Court below concluded that there was "no proof" of compliance with subsection (b). (Trial Court Papers at 22). The Court noted that Mr. Gregory had testified that most of the traffic would come from downtown, that there would be an increase in traffic, (Trial Court Papers at 21; transcript at 59-60), possibly as high as 100 to 200 percent, and concluded there was no proof that traffic would be safely accommodated along major streets. (Trial Court Papers at 22). The Chancellor ruled that approval by the Metropolitan Traffic and Parking Commission or the Metropolitan Planning Commission did not of itself satisfy that condition. (Trial Court Papers at 22).

(1) Traffic Accommodated Along Major Streets

The Chancellor's conclusions on this point seem at odds both with the proof in the record and with the law. Mr. Gregory did testify that he was "sure there

would be more vehicles coming in and out . . ." (Transcript at 59).<sup>3</sup> He also said it would be on Jefferson or Cowan Streets or Whites Creek Pike. (Transcript at 51). Presumably the Traffic and Parking Commission and the Planning Commission would know whether these are major streets. See, e.g., Eatherly v. Board of Zoning Appeals, 14 T.A.M. 51-14 at 4-5 (Tenn.App. 1989) ("The major street plan is a document prepared by the Planning Commission . . . depict[ing] most of the roads in Davidson County [and] . . . highlight[ing] certain roads as freeways, expressways or arterials.").<sup>4</sup>

Thus, the combination of Mr. Gregory's testimony concerning which streets would accommodate the traffic and the two commissions' recommendation of approval lead directly to the conclusion that the traffic generated by the landfill would be accommodated along major streets.

(2) Safety

There is ample proof in the record tending to show that the traffic along these major streets would be safely accommodated. The Health Department

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<sup>3</sup>Despite the Chancellor's impression, mentioned in his written Memorandum and Order, (Trial Court Papers at 21), Mr. Gregory did not testify that the increase could be as high as 100 or 200 percent. Mr. Gregory was asked if the increase in traffic could be that much, to which he responded: "I just don't know. I would judge, I don't even know. I just don't know." (Transcript at 60). From that sentence, in which Mr. Gregory said that he "didn't know" three times, the Court below concluded that there was evidence in the record that the increase could be as high as 200 percent. The fact of the matter is that Mr. Gregory said he did not know. Thus, on the facts, it would appear that while there is proof that the traffic would increase, there is no proof that it would increase 100 to 200 percent.

Of course, anything is possible, and to that extent, the Chancellor may have felt that a 100 to 200 percent increase was a possibility and somehow significant to the decision in this case. However, such a conclusion is pure speculation, and not an appropriate grounds upon which to base an administrative ruling. It is certainly not reasonably probable that such an increase in traffic would occur. See Lindsey v. Miami Development Corporation, 689 S.W.2d 856, 861-2 (Tenn. 1985); Porter v. Green, 745 S.W.2d 874, 877 (Tenn.App. 1987) (medical proof must be reasonably certain and not a mere possibility).

<sup>4</sup>Notice that while most conditional uses require MPC recommendations, see, e.g., COMZO § 103.311(j), 103.313(1), 103.316(g), the asphalt plant in Eatherly did not. COMZO § 103.71. Thus, most conditional uses require the MPC to review and evaluate the application and presumably that includes consideration of the "Major Street Plan." Where such MPC review is lacking, as in § 103.71, specific reference to Major Street Plan is made.

regulations require that "all access roads shall be all-weather and of sufficient width to allow safe two-way truck traffic." (Transcript at 18). Mr. Gregor "understands, concurs, and fully welcomes" the Department's regulatory supervision. (Transcript at 7) . The access roads are appropriate for "heavy two-way truck travel." (Transcript at 8).

Furthermore, the location of the landfill on a major street directly contributes to highway safety.

Unlike other roads, these [major] streets will accommodate the traffic more safely and will be better able to withstand the wear and tear of the heavy trucks going to and from the plants. Locating the asphalt plants on major streets will also ensure quick access should the need arise.

Eatherly v. Board of Zoning Appeals , 14 T.A.M. 51-14 at 6 (Tenn. App. 1989 ) (emphasis added). The foregoing applies to landfills as well as to asphalt plants.

Finally, as will be further reinforced in the next sub-section of this Brief, neither the MPC nor the Traffic and Parking Commission would have recommended approval if the site plan and connected access streets were not designed and laid out consistent with traffic safety. Thus approvals by these agencies implicitly recognize that the traffic will be safely accommodated along major streets.

Even assuming for the moment that there would be a substantial increase in traffic, there is still no basis for the Board to deny this application. Any development of property increases the traffic in the surrounding vicinity. The construction of a single-family residence on West End Avenue in Nashville would increase the traffic to some extent. The significant question is whether the substantial increase in traffic would cause a safety hazard. This position has been embraced before by this Court. In Merritt v. Wilson County Board of Zoning Appeals , 656 S.W.2d 846, 854 (Tenn.App. 1983), Judge Lewis cited with approval the Pennsylvania Supreme Court in Lower Marion Township v. Enokay, Inc. , 427 Pa. 128, 233 A.2d 883 (1967), where even though the Board of Zoning Appeals concluded

that the road system adjacent to the subject property was critically overcrowded and that the construction of the development would cause a serious additional traffic burden, the Court nonetheless concluded that "an increase in traffic standing alone, does not constitute a significant reason to refuse a property owner the legitimate use of his land." Other Courts have recognized this same proposition:

An increase in traffic . . . even if it did occur, does not necessarily adversely affect the public convenience and welfare. A mere increase in traffic at the site of a proposed use is not a valid zoning criterion when neither a consequent intensification of traffic congestion or hazard at the location accompanies it.

Toohy v. Kilday, 415 A.2d 732, 737 (R.I. 1980). There was no testimony by any competent witness<sup>5</sup> and no finding by the Board of Zoning Appeals that the road system adjacent to the landfill was critically overcrowded or that the intensification of the use would cause a serious additional traffic burden or hazard. In fact, precisely the opposite has been demonstrated in the record. The Metropolitan Traffic and Parking Commission has approved. (Transcript at 20). The Metropolitan Planning Commission recommended approval. (Transcript at 21).

(3) Satisfaction of Traffic Requirements by Recommendation of Other Metropolitan Agencies

The Chancellor's conclusion that the approval of the Metropolitan Traffic and Parking Commission and the Metropolitan Planning Commission does not satisfy this subsection of COMZO is simply incorrect. The Chancellor concluded that there was no proof to show that subsection (b) was satisfied. Yet surely the approval of both the Planning Commission and the Traffic and Parking Commission is ample evidence upon which a reasonable mind could conclude that traffic not only would be accommodated along major streets, but that it would be done "safely." The

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<sup>5</sup>Mr. Jemison did testify in opposition that the "traffic would be too heavy out there on Whites Creek Pike." This lay opinion, whatever it may mean, is not competent. See § VII.B of this Brief.

Court below provided no explanation as to why this proof, the approval of the Metropolitan agencies primarily responsible for traffic conditions in Nashville, was insufficient. Mr. Gregory contends that the approval of those agencies is decidedly sufficient alone, but in conjunction with his testimony concerning the amount of truck traffic (20-30 trucks in four months) and its origins (mostly "uptown"), the vicinity sketch, the site plan, and the submissions to the Health Department, it is overwhelmingly decisive.

[A] Quantum of Proof Required

There is no law in Tennessee on the quantum of proof necessary to successfully establish a prima facie case<sup>6</sup> when applying for a conditional use permit. Counsel for the Appellant has been unable to find law addressing this quantum of proof in any jurisdiction. However, as a general matter, the applicant's proof must logically be sufficient to support a favorable administrative finding. Under the Common Law Writ of Certiorari, there must be evidence that "a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." Pace v. Garbage Disposal District, 390 S.W.2d 461, 463 (Tenn.App. 1965).<sup>7</sup> Under the Common Law Writ, there must be more than a scintilla or glimmer of evidence. It must be of a substantial and material nature, the type that would require submission of a case to a jury. Pace, 390 S.W.2d at 463. Finally, substantial evidence is not limited to direct evidence, but may also

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<sup>6</sup>"Prima facie case" is used here in the sense of producing enough evidence so as to shift the burden of production over to the opponents. See McCormick on Evidence, § 342, note 4 (3rd Ed. 1984).

<sup>7</sup>Several cases have cited Pace as defining the terms "substantial and material" in the context of the Uniform Administrative Procedures Act, T.C.A. § 4-5-101 et seq. See, e.g., Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515, 521 (Tenn.App. 1981). Pace, however, appears to have been decided under the Common Law Writ of Certiorari. First of all, the U.A.P.A. was not enacted until 1974, while Pace was decided in 1965. Secondly, Pace concerns a utility district which is a municipality under Tennessee law (T.C.A. § 7-82-301) and hence not reviewable under the U.A.P.A. See T.C.A. § 4-5-102(2) (agency is defined to include each state board commission, committee, department, officer, or any other unit of state government).

include circumstantial evidence or the inferences reasonably drawn from direct evidence. Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W.2d 274, 280 (Tenn.App. 1988) (this is an appeal under the UAPA). While it is sometimes said that under the Common Law Writ of Certiorari, "any material evidence" is sufficient to sustain the findings of the administrative body, see City of Chattanooga v. Tennessee Alcoholic Beverage Commission, 525 S.W.2d 470, 478 (Tenn. 1975), and City of Elizabethton v. Sluder, 534 S.W.2d 115, 118 (Tenn. 1976), since at least 1947, the Tennessee Supreme Court has maintained that the terms "material evidence" and "substantial evidence" are used interchangeably. Tennessee Cartage Company v. Pharr, 199 S.W.2d 119, 120 (Tenn. 1947).<sup>8</sup> Members of this Court have freely utilized the substantial evidence or substantial and material evidence tests under the Common Law Writ of Certiorari. Anderson v. Carter, 512 S.W.2d 297, 307 (Tenn.App. 1974) (Opinion by Judge Todd); Holt v. Metropolitan Employee Benefit Board, 10 T.A.M. 39-18 (Tenn.App. 1985) (Opinion by Judge Koch, citing Goodwin v. Metropolitan Board of Health, 656 S.W.2d 383, 391 (Tenn.App. 1983)) (copy attached as Exhibit Four). Judge Cantrell, in his well-known law review article concerning the Common Law Writ, embraces the same test.<sup>9</sup>

Certainly a reasonable mind might accept the expert opinions of the Metropolitan Traffic and Parking Commission and the Metropolitan Planning Commission as adequate to support a rational conclusion and to furnish a reasonably sound basis for concluding that the traffic generated by this

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<sup>8</sup>It is somewhat interesting to note that in some ways the law in this state concerning certiorari has come full circle. In the Tennessee Cartage Company case, the Court indicated that the presence of substantial evidence expressed "the fact that there was, or was not, a 'rational basis' for the action taken by an administrative board . . ." 199 S.W.2d at 120. Recently, the Tennessee Supreme Court, speaking through Special Judge Wade, noted the similarity between the Common Law Writ and the rational basis test commonly utilized to test the constitutionality of a municipal legislative enactment. McCallen v. City of Memphis, 786 S.W.2d 633, 640 (Tenn. 1990).

<sup>9</sup>B. Cantrell: Review of Administrative Decisions by Writ of Certiorari in Tennessee, 4 Memphis State University Law Review, 19, 30 (1973).

construction landfill would be safely accommodated along major streets. As pointed out earlier, the Board is not free to deny the permit if proof as to all the requirements is met. In the absence of competent conflicting proof, the Board must issue the permit if the applicant demonstrates compliance with all the requirements. Thus, in this case since no competent evidence was submitted in opposition, if the Traffic and Parking Commission and the Metropolitan Planning Commission actions are legally sufficient, the permit should have been issued by the Board of Zoning Appeals. When those approvals are coupled with the other evidence presented by Mr. Gregory,<sup>10</sup> there can be no doubt of the legal sufficiency of the applicant's case.

In a similar case out of Georgia, Rogers v. Atlanta, 110 Ga.App. 114, 137 S.E.2d 668 (1964), a group of Jehovah's Witnesses applied for a special permit for a church in a residential district. Churches were permitted "where it can be shown that its location or planned traffic pattern does not constitute a traffic hazard or create congestion in the streets." 137 S.E.2d at 671. The church presented proof about their current membership and the number of cars which attended their regular services, much like Mr. Gregory's testimony concerning the number of trucks (20 to 30 in four months, Transcript at 61) which come to his landfill. The Court noted that the application was approved by the Traffic Department of the City of Atlanta and by the City's Planning Department. 137 S.E.2d at 672. The Court concluded that the relatively small number of vehicles which would be generated by the church activity was insufficient to show a traffic hazard. Id. at 672-3.

Similarly, the approvals of the two Metropolitan agencies taken in conjunction with the number of trucks coming to the landfill, even if increased

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<sup>10</sup>This includes his own testimony, the vicinity sketch, the site plan, and the submissions to the Health Department.

by 200 percent, would result in roughly only one truck per day.<sup>11</sup> This information coupled with the approval by the Metropolitan Traffic and Parking Commission and the Metropolitan Planning Commission, clearly demonstrates that the truck traffic can be safely accommodated along Whites Creek Pike.

A review of the function and purpose of the two commissions may also shed light on the respective abilities to give expert opinions concerning the traffic considerations inherent in this application.

[B] Function and Purpose of Traffic and Parking Commission

The Metropolitan Traffic and Parking Commission was created by the Metropolitan Charter, Section 11.901.<sup>12</sup> The Commission is authorized to select a chief traffic engineer who must be a graduate of a school of traffic engineering and must have had at least five years of experience in traffic administration. Metro Charter § 11.903 (copies of Charter provisions attached as Exhibit Five). Furthermore, the Metro Traffic and Parking Commission:

For the purpose of making the roads, streets and other public ways safe for pedestrians, motorists, and others, and for the purpose of facilitating the flow of traffic thereon, . . . is hereby authorized to adopt and publish traffic regulations . . .

To conclude, as the Court did below, that the approval of the Metropolitan Traffic and Parking Commission (either alone or in conjunction with the other proof) did not satisfy subsection (b) is difficult to understand. Approaching the question from the opposite point of view, surely had the Metropolitan Traffic

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<sup>11</sup>Thirty trucks over a four-month time period as testified to by Mr. Gregory (Transcript at 61), works out to about 7-1/2 trucks per month. Calling that eight trucks a month, it would work out to approximately two trucks per week. Even tripling that number (increasing it by 200 percent), works out to six trucks per week or roughly one truck a day.

<sup>12</sup>While in the past, municipal ordinances were not judicially noticeable, the Tennessee Rules of Evidence have changed that holding. See Draper v. Haynes, 567 S.W.2d 462, 464-5 (Tenn. 1978), and Metropolitan Government v. Shacklett, 554 S.W.2d 601, 605 (Tenn. 1977). Rule 202(b) makes it optional as to whether judicial notice can be taken of municipal ordinances. While the Tennessee Rules of Evidence do not address the noticeability of municipal charters, the Tennessee Supreme Court has in the past ruled that such charters may be judicially noticed. State ex rel. Schmittou v. City of Nashville, 345 S.W.2d 874, 878 (Tenn. 1961).

and Parking Commission recommended disapproval to the Metropolitan Board of Zoning Appeals, that would have been sufficient grounds upon which the Board could have denied the application. To say then that the recommendation of approval by the Traffic and Parking Commission is not sufficient to satisfy subsection (b) is inappropriate. Consider also that here one branch of the Metropolitan Government, the Board of Zoning Appeals, is essentially arguing that the recommendation of approval by the Metropolitan Traffic and Parking Commission, an equal and co-ordinate branch of the same government, specializing in traffic problems, is insufficient to satisfy this element of the prima facie case. Surely, under the Pace analysis, a reasonable mind could conclude that a recommendation by Traffic and Parking is sufficient proof. This, of course, does not bind the Metropolitan Board of Zoning Appeals; if there was sufficient proof on the other side of the case to deny the permit, then notwithstanding the recommendation of the Planning Commission or the Traffic and Parking Commission, the Board could still deny the application. However, as will be pointed out in the next major section of this Brief, there was no competent proof to the contrary.

[C] Function and Purpose of Metropolitan Planning Commission

Furthermore, Mr. Gregory not only had the approval of the Traffic and Parking Commission, but also that of the Metropolitan Planning Commission. The Metropolitan Planning Commission was specifically required by COMZO § 103.323(g) to review the proposal "taking into account the above conditions [including subsection (b)] as well as any other pertinent factors related to the use and operation of such facility." Yet the Planning Commission recommended approval. (Transcript at 21). The approval of the Planning Commission is probably even more telling than that of the Traffic and Parking Commission. The powers of the Commission are extremely broad and cover not only land use planning matters but also transportation considerations. The Metropolitan Charter gives the MPC "all of the powers, duties, and responsibilities which are now or may hereafter be granted to municipal planning commissions, regional planning commissions, o r

metropolitan planning commissions by general state law . . ." Metro Charter ,  
Section 11.504.

In the performance of those powers, the MPC has the authority to:

. . .

(d) enter upon any land and make examinations and surveys and place and maintain necessary monuments and markers thereon;

(e) make, amend and add to the master or general plan for the physical development of the entire Metropolitan Government area;

(f) exercise control over platting or subdividing of land within the Metropolitan Government area;

(g) draft for the Council an official map of the area and recommend or disapprove proposed changes in such map;

(h) make and adopt a zoning plan and recommend or disapprove proposed changes in such plan;

. . .

(j) make and adopt plans for the replanning, conservation, improvements, and renewal of neighborhoods, planning units and communities within the Metropolitan Government area.

. . .

(l) promote public interest in and understand the operation of planning and its organization and constituent parts, and the implementation of planning, including zoning, subdivision regulations, urban renewal, the official map, and capital improvements programming.

Metro Charter § 11.504. Furthermore, under the Charter, the Planning Commission has the responsibility of reviewing and recommending the location and construction of all streets, parks, other public ways, grounds, places or spaces, including public buildings, structures, and public utilities. This procedure, known as mandatory referral, requires that if the Planning Commission recommends disapproval, the Metropolitan Council can only override disapproval by a two-thirds vote, similar to the zoning power. Metro Charter § 11.505.

The Metropolitan Planning Commission, under the Tennessee statutes relating to municipal planning, has the function and duty of making and adopting an official general plan for the physical development of the municipality. T.C.A. § 13-4-201. The plan may include the general location, character and extent of streets and other public ways, the general location of public buildings and other public property, the general location and extent of public utilities and terminals, and the land use plan. Id. "The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality which will, in accordance with existing and future needs, best promote public health, safety, morals, order, convenience, prosperity, and the general welfare, as well as efficiency and economy in the process of development." T.C.A. § 13-4-203. Furthermore, the municipal Planning Commission, in this case the Metropolitan Planning Commission, also regulates the subdivision of real estate into smaller parcels of property. However, the Planning Commission can only do that after it has adopted a master plan which includes at least a major street plan and requiring that a copy of the major street plan be filed in the office of the County Register of that county. See T.C.A. § 13-4-302 and Eatherly v. Board of Zoning Appeals, 14 T.A.M. 51-14 (Tenn.App. 1989) (Exhibit Three). Furthermore, the Planning Commission is intimately involved in the process of formulating and adopting the zoning ordinance. No change from the zoning text or the zoning maps can be made unless it is first submitted to the Planning Commission and approved by it. If it is disapproved, under T.C.A. § 13-7-203, a favorable vote of the majority of the entire membership of the chief legislative body must be obtained, but pursuant to the Metropolitan Charter, § 20.02, this requirement has been increased and there must be a two-thirds majority in order to override a disapproval by the Planning Commission. The MPC therefore plays a major role not only in developing the long-term plans for the development of the City but also in promulgating the zoning regulations which give force and effect to the plan.

Pursuant to Metropolitan Charter, § 20.02, in the early 1970's, the Metropolitan Planning Commission drafted what is now known as the Comprehensive Zoning Ordinance of Nashville and Davidson County and referred to in this record as COMZO. As § 20.02 requires, there is a comprehensive plan prepared by the Metropolitan Planning Commission in order to guide its determinations on such matters. Mr. Gregory noted the consistency of the proposal to the Metropolitan General Plan. (Transcript at 51).

The plan always includes an element on transportation. In fact, transportation has a major impact on the use of land, probably far more than any other governmental facility. See 1 Williams: American Land Planning Law, Section 1.27.

Entire chapters in major works on urban planning are devoted to transportation. The most recent edition of the famous "Green Book," the so-called "Bible of urban planners," devotes the entirety of Chapter 6 (out of a total of 16 chapters) to transportation planning. Frank S. So and Judith Getzels: The Practice of Local Government Planning, (2nd Ed. 1988). And the types of questions considered by transportation planners are both large and small:

Transportation planning considers questions that range from the global -- how can transportation systems be used to create desirable urban forms? -- to the particular -- how many parking spaces does a suburban office complex need?

Id. at 139. Another very recent text in this field has said:

Urban mobility planning can be divided into several functional areas, each with a unique set of problems. First and often, most visible is the vehicle movement sector, focused on means to maximize accessibility for private cars, trucks and mass transit vehicles to all parts of the region. The point of departure for such planning is the presence or expectation of congestion: too many vehicles in too small a place over a given period of time. This has been endemic in central business districts for centuries, and many programs, from one-way streets to bypass freeways, have aimed at reducing traffic tie-ups.

William C. Johnson: The Politics of Urban Planning, (1989) at 143. It is clear that the Metropolitan Planning Commission was right at home in reviewing this conditional use permit application. In fact, this review, based solely on objective planning considerations, is probably the least biased and most honest evaluation of any developmental proposal. It is also of course clear that the planning board may exercise an advisory function in relation to the Board of Adjustment. 4 Anderson, Law of Zoning, Section 23.26 (3rd.Ed. 1986). In the case of COMZO, while § 103.323(g) expressly provides for Planning Commission input, § 101.25(e) also provides that "the Metropolitan Planning Commission shall be permitted to submit an advisory opinion on any matter before the Board and such opinion shall be read into the record at such public hearing." Section 101.25(d) allows the Board to "call upon any other agency of the Metropolitan Government for information in the performance of its duties and it shall be the duty of such other agency to render such information to the Board as may be reasonably required." The Planning Commission, the Traffic and Parking Commission, the Department of Public Works, and the Metro Health Department, all of whom either approved or indicated that approval would be forthcoming contingent on zoning approval, certainly had the requisite skill and expertise to review this application.

[D] The Evidentiary Effect of Approval by Other Metro Agencies

While ordinarily administrative agencies are not bound by expert opinions<sup>13</sup> and are free to resolve conflicts arising in such testimony, Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W. 274, 281 (Tenn.App. 1988), whenever "opinion evidence has been submitted by only one side, so that there is no question of conflict, there are three general situations in which an agency will reach a decision contrary to the opinion of an expert." 4 J. Stein, G. Mitchell & B. Mezines, Administrative Law, Section 28.06 (1988). The agency may substitute its own expertise for that of the witness; there may be direct evidence in the record contrary to the expert's opinion; and the agency may deem the expert's testimony as having minimum credibility. Id.

It is absolutely clear in this case that none of these three explanations can justify the refusal of the Metropolitan Board of Zoning Appeals to consider, let alone give conclusive effect to, the recommendations of the Metropolitan Traffic and Parking Commission or the Metropolitan Planning Commission. First, the Board of Zoning Appeals could not have substituted its own expertise for that of the Traffic and Parking or Planning Commissions. The MBZA itself has no transportation expertise. It does not develop the major street plan; the Planning Commission does. It does not regulate traffic in Nashville, the Traffic and Parking Commission does. In fact, one of the major criticisms of zoning boards has been their lack of expertise.

. . . It has been during this [time] that the courts of many states have tended to treat local zoning boards and city councils as if these were the equivalent of highly professionalized federal agencies, with a serious concern for the general welfare and with real

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<sup>13</sup>This rule must be questioned in the context of a conditional use permit. If the applicant presents expert proof, and no other proof is offered on the issue, the Board is legally required to issue the permit. Otherwise, a board could arbitrarily deny the permit and deprive a landowner of a legal use of his land, a use presumptively approved by the local legislative body. Father Ryan v. Oak Hill, 774 S.W.2d 184 (Tenn.App. 1988); NOISE v. Metro Board of Zoning Appeals, see Exhibit Three. This is essentially the situation in this case.

professional expertise (if such there be). To treat such local agencies this way is absurd; their motivation is quite as likely to protect the local tax base, or to provide special favors -- and their level of competence frequently defies any attempt at polite description. Typical in this regard is the repeated insistence by the Courts that such boards should provide findings to support their conclusions; the very existence of the long line of cases repeating this point is eloquent testimony to how little attention the boards pay to the Courts in this regard. A more serious problem is that such local boards simply tend to decide most issues on a "common sense," and to ignore the rules prevailing in Court of Appeals law.

N. Williams: American Land Planning Law, Section 4.04 (emphasis added) .

Professor Williams is not the only writer who has noted these shortcomings.

Expert training for board members is not required under any of the enabling statutes, yet the Board must deal with complex technical matters, particularly in use variance cases. Expertise is especially necessary for determination of such factors as the risk of smoke and noise nuisance, revenue generation, traffic patterns and sewage disposal capacity. The Board, which should consider these matters when determining the effect of a variance on the community, not only lacks expertise itself, but also lacks any institutionalized tie to the city or county planning staff. Local planning experts may present evidence and make recommendations to the Board, but the Board is not required to adopt them.

Note: Variance Administration in Indiana -- Problems and Remedies, 48 Indiana Law Journal, 240, 245 (1972). See also Note: Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances, 20 Connecticut Law Review, 669, 703-4 (1988). To conclude therefore that the Board of Zoning Appeals may substitute its own expertise in the area of transportation planning for that of the Planning Commission or the Metropolitan Traffic and Parking Commission would be ludicrous.

The second general situation in which an administrative agency will reach a decision contrary to the uncontradicted opinion of an expert is where there is direct evidence in the record contrary to the expert's opinion. There is no

contrary evidence in this record at all except that which was offered by lay witnesses who are incompetent to do so. This topic will be addressed more fully in Section VII.B of this Brief.

Third and finally, if the agency deems that the expert's testimony has minimal credibility, then the agency may be free to reject it.

An expert's opinion testimony may be given low credibility, and therefore minimum consideration, when the expert is friendly or sympathetic to the party on whose behalf he is testifying, the evidence offered is fallacious on its face, or the opinion of the expert is intrinsically non-persuasive even though it is uncontradicted.

4 J. Stein, G. Mitchell & B. Mezines, Administrative Law, Section 28.06 (1988).

Surely this third and final category is not applicable in the case at bar. The Metropolitan Planning Commission and the Traffic and Parking Commission surely were not friendly or sympathetic to Mr. Gregory. This is not the case of a privately retained expert who came in and testified about the traffic problems along this highway. Mr. Gregory's proof is much stronger than that. Two independent municipal agencies recommended approval of his application. Certainly the approval of the Planning Commission and Traffic and Parking Commission is not fallacious on its face. Finally, the opinions of the Planning Commission and Traffic and Parking Commission cannot be said to be intrinsically non-persuasive: if the opinions of these agencies on transportation planning problems are not absolutely persuasive, then it is difficult to understand whose opinion would be.

Mr. Gregory strongly contends that the approvals by the Metropolitan Planning Commission and the Metropolitan Traffic and Parking Commission are sufficient to demonstrate compliance with subsection (b) regarding traffic generation. If either of those two Metropolitan agencies had felt that the traffic in this area could not be safely accommodated along major streets, it would not have recommended approval. Certainly had the Planning Commission or the Traffic and Parking Commission recommended disapproval, and had the Board then turned down the application, Metro would not be contending that that was an insufficient basis upon which to base the denial. Metro would then certainly be arguing that the denial should be upheld because those agencies had recommended disapproval.<sup>14</sup>

Finally, one special Tennessee case should be noted here. In Sexton v. Anderson County, 587 S.W. 2d 663 (Tenn.App. 1979), an application for a landfill

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<sup>14</sup>As COMZO was originally written, Metropolitan Planning Commission approval was required. If the MPC did not approve, the applicant was not even permitted to go to the Board. The original version is at COMZO § 103.323, p.344. This arrangement was somewhat akin to the Rutherford County ordinance considered in Stone Man, Exhibit One.

by way of a conditional use permit was made to the Anderson County Board of Zoning Appeals. It was denied. The ordinance required that in order to obtain a conditional use permit (in that case it was referred to as a special exception), the approval of the Anderson County Health Department and the Tennessee Department of Public Health had to be obtained. There were no other requirements; those approvals had been obtained and the Court of Appeals ultimately upheld the Chancellor's decision reversing the Board's decision to deny the permit. Clearly, not only was the approval of the two health agencies sufficient to justify the issuance of the conditional use permit in that case, but the approval was absolutely conclusive. Mr. Gregory does not insist that MPC or Traffic and Parking Commission approval is conclusive. If other expert proof was adduced by the opponents, the Board could pick and choose between conflicting expert opinions and the Board's finding as to which expert was correct would be virtually unchallengeable. Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W.2d 274, 281 (Tenn.App. 1988). But where, as here, and in Sexton, the approvals were uncontradicted by any competent evidence, the Board must grant the permit. This is especially true given the longstanding Tennessee rule that zoning ordinances must be strictly construed in favor of the property owner because they deprive the property owner of a use of land that would otherwise be lawful. State ex rel. SCA Chemical Services v. Sanidas, 681 S.W.2d 557, 562 (Tenn.App. 1984). The ordinance requires the Planning Commission to make a recommendation. A favorable recommendation should be deemed sufficiently probative as to meet the minimum legal requirements.

In essence, the question in this case is whether Mr. Gregory surmounted the burden of producing sufficient evidence to make out a prima facie case, that is, to convince reasonable minds that traffic could be safely accommodated along major streets. Given the recommended approvals of all of the Metropolitan agencies involved, it is extremely difficult to understand how the Metropolitan Board of Zoning Appeals can possibly argue that this facility would create a traffic hazard.

(c) Basic Community Function Under § 103.323(c)

Subsection (c) requires that the facility provide a basic community function or an essential service necessary for a convenient and functional living environment. The record is replete with references to the necessity of this type of facility.

I believe everyone here is aware of the needs for this type of facility. In fact, as of today, there is a most urgent need. I recognize in the audience some owners of roofing companies, paving companies, demolition contractors who I think will be willing or more than willing to speak in regard to that need if they were asked to do so.

Transcript at 52. See also Transcript at 54. Mr. Gregory was asked if there were any other construction landfills and he responded:

To my knowledge, there is not a permitted landfill in Davidson County with the exception of, I think there is an industrial landfill out in the Old Hickory-Madison area. I believe it's classified as an industrial landfill, I'm not sure but I believe that is the case, which is off Canton Pass, Cheyenne Boulevard.

Transcript 61-62. Speaking in support, John Maxwell, President of Maxwell Roofing and Sheet Metal Company, testified that:

As of today, I have nowhere in the county to dispose of my trash. It's piling up in my dump truck and on my lot at my present site. The need for a construction landfill in Davidson County is critical. I'm sure I'm not but just a drop in the bucket when it comes to measuring the amount of construction debris that needs to be disposed of. Our need is critical.

Transcript at 62. Another witness testified that:

There is not a certified landfill in Davidson County except for the one that he was telling you about in Old Hickory. That's in Madison and it's not even in Nashville. There is not one in Nashville. We're having to haul our stuff to Cheatham County because it's closer out there than in Madison. He charges \$30.00 a load. There really is a need for one around the downtown area because we're anticipating

tearing down more buildings there in downtown. There's not any close place for dumping that is feasible for hauling.

Transcript at 63.

(d) Fencing and Screening Under § 103.323(d)

Subsection (d) requires fencing, screening and landscaping as appropriate.

This is the other section which the Chancellor deemed Mr. Gregory not to have met. The Chancellor ruled that:

Plaintiff testified illegal dumping could be a problem, but the Metro Health Department requires a trained attendant be on duty. Furthermore, Plaintiff acknowledged dumping had occurred when no one was present. There is no proof that an attendant would be present 24 hours a day to monitor the dumping. This could have led the Board to conclude that subsection (d) was not satisfied.

Tr. at 22. It is difficult to understand what testimony the Chancellor was referring to when the Court below says that the Plaintiff testified that illegal dumping could be a problem. In fact, Mr. Gregory said:

The Metropolitan Health Department has been out. You have to have a fenced area or a natural barrier. The creek is a natural barrier. I have a fenced-in front or a guard-rail that cannot be entered except through a locked gate. No one can get into the property, in fact, I had to put the fence up because every time I left, someone would come in and dump something that I would have to haul off and carry it to the landfill. So I put a fence up with a lock to keep everyone out. The Health Department requires that anytime you have the gate open that you have an attendant on duty to see that nothing that cannot legally go into the landfill goes in. They require that. That is part of the permitting process.

Transcript at 56. In response to another question, about who was going to stop someone from dumping products not permitted in the landfill, Mr. Gregory said:

I would say, Mr. Grizzard, that would be a problem all right, but the State and the Metropolitan Health Department requires you to have an attendant on duty, a trained attendant to inspect and make sure that only those items that are acceptable can be received. They also check and see that that is complied with.

Transcript at 59. The Chancellor said that there was no proof that an attendant would be present 24 hours a day to monitor the dumping but there is nothing in the text of the zoning ordinance or anywhere else which requires a 24-hour-a-day attendant. Certainly this section, section 103.323(d) does not require it. This part of the zoning ordinance requires fencing, screening and landscaping a s appropriate. The Metropolitan Health Department's regulations provide tha t "selected site shall be fenced or access otherwise controlled to preven t unauthorized entrance to the site." (Transcript at 18). "Gate shall be pr ovided at the entrance to the private landfill and shall be locked when the landfill is unattended." Id. There is no requirement that an attendant be present 24 hours a day to monitor the dumping. The Health Departme nt regulations do require that "a respons ible employee . . . be present at the site at all times durin g operating hours . . ." Id. Mr. Gregory submitted proof, by way of a letter to the Department of Public Health, dated 2 December 1989, which indicates th e manner in which he intends to satisfy these requirements. Specifically wit h regard to site fencing and gates, that letter said:

Site entrance is controlled by cyclone fence, steel guard rails, and natural barrier o f Page's Branch. No vehicle can enter sit e except through front entra nce which is recess- ed from public road and controlled by 14-foot cyclone fence gate. When site is unattended, control gate shall be locked.

Transcript at 7. With regard to operation personnel, Mr. Gregory said in hi s letter:

Applicant agrees to have a responsible em - ployee present at the site at all times during published operating hours. This employee will be trained and instructed so that combustible materials shall be disposed of so as not t o produce a nuisance or fire hazard.

Transcript at 8.

The Chancellor's conclusions regarding this subsection are totall y unsupported by the record. No one would argue but that illegal dumping can be a problem at any landfill. However, as the Chancellor and Mr. Gregory pointed

out, the Metropolitan Health Department requires both fencing and a trained attendant on duty (although not 24 hours a day). Mr. Gregory testified that there is already a fence there and has guaranteed that a trained attendant will be on duty pursuant to the Health Department regulations. Mr. Gregory did say that dumping had occurred when no one was present. (Transcript at 56). But that was before he put up the fence. ". . . in fact, I had to put the fence up because everytime I left, someone would come in and dump something that I would have to haul off and carry it to the landfill. So I put a fence up with a lock to keep everyone out." Id. Thus, to the extent that there was any illegal dumping at this site, Mr. Gregory immediately rectified it by removing the illegal fill and taking it to the Metro landfill, an appropriate public landfill, and further made sure that it would not happen again by the erection of a fence. The agency most intimately familiar with these regulations, the Metropolitan Health Department, has advised Mr. Gregory that they would issue a permit after he obtained the zoning approval from the Codes Administration. (Transcript at 51). This testimony is further reinforced by a letter, from George Hansel, the chief engineer with the Metropolitan Health Department, which says in part that:

The only remaining deterrent to our issuing a permit for this operation appears to be an interpretation by the legal department of the comprehensive zoning ordinance "sanitary landfill" provision. In discussing the situation with Mr. Lon West of the Metropolitan Codes Department, we feel there is some misunderstanding as to whether this operation is a land use or a construction practice. It is suggested that you might contact Mr. West and set up a meeting with the legal department to clarify the situation.

Transcript at 14.

Furthermore, if the MBZA believed that a 24 hour-a-day attendant was really necessary, it clearly had the power to impose reasonable conditions on the issuance of the permit. T.C.A. § 13-7-206; Nance v. City of Memphis, 672 S.W.2d 208 (Tenn.App. 1983). The Board could have reasonably required an attendant be

present 24 hours a day. That was not done because it was not the reason for the denial of the permit.

Finally, the Metropolitan Planning Commission was charged with looking at this specific subsection as well and it recommended approval. (Transcript at 21). It would have been virtually impossible for Mr. Gregory to have prove n compliance with subsection (d) to any greater extent than he did in the record presented by this case.

(e) Off-Street Parking Under § 103.323(e)

Subsection (e) requires that off-street parking be based upon a recommenda - tion from the Metropolitan Traffic Engineer. Howe ver, inasmuch as no parking is required for this landfill use, the recommendation of the traffic engineer was not necessary. To the ex tent it is necessary, the approval by Paul High of the Traffic and Parking Commission is sufficient. (Transcript at 20).

(f) Variances Under § 103.323(f)

Subsection (f) allows for certain variances, none of which were requested or permitted under the circumstances of this case.

(g) Recommendation of Metropolitan Planning Commission Under § 103.323(g)

Subsection (g) requires that the site plan be first approved by th e Metropolitan Planning Commission taking into accou nt all of the above conditions as well as any other pertinent factors related to the use and operation of the facility. The Planning Commission, as has been noted throughout this Brief , recommended approval. (Transcript at 21). More i mportantly, because subsection (g) requires the Planning Commission to review all of the conditions for an y conditional use permit, the Planning Commission must have also examined all of the requirements for this private landfill, including the two which th e Chancellor found to be absent. The Planning Commission must have considere d that the traffic would be safe ly accommodated along major streets and must have also

considered that the fencing and screening provided by Mr. Gregory was appropriate under the circumstances of this case. For the Court below to hold that there was no proof on either of those issues is simply incorrect.

(h) Approval of a Sanitary Landfill by Resolution of the Metropolitan Council Under § 103.323(h)

Subsection (h) of § 103.323 requires that a resolution of the Metropolitan Council approve the location of any garbage dump or sanitary landfill. This, however, of course, is not a sanitary landfill or garbage dump. Only non-putrescible materials may be placed into this landfill. (Transcript at 17 and 19). No resolution of the Metropolitan Council was necessary.

**B. THE BOARD MUST ISSUE A CONDITIONAL USE PERMIT WHERE THE APPLICANT HAS INTRODUCED PROOF SHOWING COMPLIANCE WITH EACH AND EVERY REQUIREMENT AND THERE IS NO COMPETENT EVIDENCE SUBMITTED IN OPPOSITION TO IT.**

The Court below, having concluded that Mr. Gregory did not demonstrate compliance with subsections (b) and (d) of § 103.323 of COMZO, did not consider the proof submitted in opposition to the application. There was another good reason for the lower Court's failure to consider the opposing proof: none of the opposing proof rose to the dignity of being material evidence on any of the issues in the case.

There are at least four reported<sup>15</sup> Tennessee cases dealing with conditional use permits in circumstances very similar to the case presented here, particularly insofar as it concerns opposing proof. All four of the Tennessee cases stand for the general proposition that if the applicant meets all of the requirements of the zoning ordinance, then to deny the conditional use permit is arbitrary and unreasonable. Father Ryan v. City of Oak Hill, 774 S.W.2d 184 (Tenn.App. 1988); Merritt v. Wilson County Board of Zoning Appeals, 656 S.W.2d 846 (Tenn.App. 1983); Sexton v. Anderson County, 587 S.W.2d 663 (Tenn.App. 1979);

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<sup>15</sup>There are a number of other unreported cases, some of which have already been referred to in this Brief. See Stone Man, Exhibit One; Eatherly, Exhibit Two; and NOISE, Exhibit Three.

and Harrell v. Hamblin County Quarterly Court, 526 S.W.2d 505 (Tenn.App. 1975). All four of these cases are reversals of zoning boards by courts where the board was unduly swayed by public sentiment. Sexton is the clearest example, especially inasmuch as it involved a sanitary landfill, a use not totally unrelated to the one presented by this case. In Sexton, a property owner applied for a special exception to allow the operation of a sanitary landfill. The Board voted against the application and following an appeal to the Anderson County Chancery Court, the Board was reversed. The Zoning Board appealed to the Tennessee Court of Appeals.

The argument of the land owner was that he had fulfilled the requirements set out under the ordinance. In Sexton, there were two: First, the Anderson County Health Department had to approve the operation of the landfill; and second, the Tennessee Department of Public Health had to approve the operation of the landfill. The argument of the Zoning Board was that the landfill would be injurious to the public health and safety of the surrounding community. It also argued that the landfill would be detrimental to the character of the neighborhood. The Court of Appeals affirmed the decision of the Chancellor.

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

Sexton, 587 S.W.2d at 666 (emphasis added). As the Court might suspect, a large number of opponents attended the public hearing conducted by the Anderson County Board of Zoning Appeals. Many of those who attended voiced strong and sincere

beliefs that the operation would have an adverse impact on the community . However, the Court noted that none of the suggestions were supported by a f actual basis. None of the witnesses had any knowledge of any odor problems at lan dfills which were operated in a manner similar to this on e. Many people testified that the property values would decrease but none could point to any actual reduction in property values due to the proposed development. Neither could they sho w that a decline in property val ues had taken place in areas adjacent to similar kinds of landfill operations. The Court concluded that "in the absence of materia l evidence on these issues, the expression of fears by members of the communit y alone, however sincere, will not support the determination of the Board of Zoning Appeals." Id.

In the case at bar, the facts are substantially similar. The opponent s here spoke in broad general terms of four separate factors. First, they spoke of traffic problems (Transcript at 64); secondly, the impact on the reputation of the community (Transcript at 68); third, the fa ct that ownership might change (Transcript at 66); and fourth, storm water management problems (Transcript at 68). It shou ld first be pointed out that no experts were retained by th e opposition. None of the departments of the Metropolitan Government which could in a sense provide free expertise for the opponents registered a discordant note. All of the various commissions and departments approved this use at thi s location. Essentially, the unsubstantiated fears of the neighbors were accepted by the Board of Zoning Appeals and formed the basis of its denial of thi s application. Increased t raffic congestion was a concern of the neighborhood in Sexton. But just as in Sexton, no proof was adduced to substantiate those fears. None of the people who spoke in opposition had any background in traffic co ntrol, urban planning, or civil engineering. There was no proof from the opponent s concerning any increase in traffic, and the only type of increase in traffi c which would have been relevant would have been that which was not accommodated along a major street. Th e only testimony in the record concerning this element is from Mr. Gregory who indicated that the traffic would be accommodated along

major streets by virtue of the location of the landfill. (Transcript at 51) .  
Furthermore, the truck traffic was not shown by anyone to be unsafe, and to the  
contrary, was approved by both the Metropolitan Planning Commission and the  
Metropolitan Department of Traffic and Parking. As mentioned earlier, the amount  
of traffic under any circumstances is extremely small. <sup>16</sup>

The second and third possible bases for the denial, the reputation of the  
City and the possible transfer of ownership, are both totally inappropriate .  
Neither the reputation of the City or of the National Baptist Convention are  
relevant to the land use planning considerations present in this case. The  
transfer of ownership should have no bearing on this matter either. Any  
succeeding owner of this property, whether it be sold or passed down by  
inheritance, would be under the same obligations under COMZO as is Mr. Gregory.  
New owners could not come in and willy-nilly violate the zoning ordinance just  
because they are new owners. They would be subject to exactly the same  
requirements of the local land use planning authorities. 6 P. Rohan: Zoning and  
Land Use Controls , § 44.01[4] at 44-18 (1990).

Finally, there is some extended discussion about drainage in this record.  
Yet again, the only proof in the record is from a qualified expert who drew up  
the engineering plans for this site. (Transcript at 53). Mr. Gregory hired a  
civil engineer to study the impact of the drainage from this property. He also  
received the approval of the Metropolitan Department of Public Works. The  
conclusions of the civil engineer, unrebutted except by wild speculation of the  
surrounding property owners, was that it would not increase any flood elevation  
on any adjacent properties.

The Metropolitan Council conclusively determined when it enacted COMZO ,  
specifically § 103.323, that demolition landfills were compatible with  
residential communities if the special conditions were met. The Appellant here  
undeniably met all of the special conditions, notwithstanding the findings of the

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<sup>16</sup>See footnote 11 at page 26.

Chancellor below. Neither the neighbors nor the zoning board may now be heard to second guess the legislative determination of the Council. The Board should have issued the permit; the Court below should have reversed the Board and this Court should reverse the Court below.

**C. THE METROPOLITAN BOARD OF ZONING APPEALS MUST BE REVERSED IF IT HAS ACTED ILLEGALLY, ARBITRARILY, FRAUDULENTLY, OR BEYOND ITS JURISDICTION.**

This case is before this Honorable Court on a Common Law Writ of Certiorari, as per T.C.A. § 27-8-101 et seq. The Court can therefore reverse the Board's decision if it is illegal, arbitrary, fraudulent, or beyond its jurisdiction. Hoover Motor Express Company v. Railroad and Public Utilities Commission, 195 Tenn. 592, 604-5, 261 S.W.2d 233, 238 (1953). Mr. Gregory respectfully submits that the Board's decision to deny this conditional use permit for an intermediate impact community facility activity (demolition landfill) was illegal, arbitrary, or beyond its jurisdiction.

It is, of course, true that under the Common Law Writ of Certiorari, a Court may not substitute its judgment for that of the administrative tribunal. Further, there is no doubt but that the decision of the Zoning Board becomes final on the facts. Reddoch v. Smith, 214 Tenn. 213, 379 S.W.2d 641 (1964). However, there must be competent material evidence presented to the Board upon which it could make its factual findings. The leading case in the country is Topanga Association for a Scenic Community v. County of Los Angeles, 113 Cal.Rptr. 836, 522 P.2d 12 (1974), a variance case. The Court held that the Zoning Board:

Must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to appraise the reviewing court of the basis for the board's action. We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's finding and whether these findings support the agency's decision. In making these determinations, the reviewing

court must resolve reasonable doubts in favor of the administrative findings and decision.

522 P.2d at 16. This Court itself has reached similar conclusions. In Holt v. Metropolitan Employee Benefit Board, 10 T.A.M. 39-18 at 12-13 (Tenn.App. 1985) (Exhibit Four), Judge Koch, writing for the Court, held:

Adequate findings of fact provide the necessary cornerstones for reviewing courts' determination of this issue [whether there is substantial and material evidence in the record]. When we were called upon to review the propriety of a board's decision, we must look to the board's decision itself and the facts upon which it is based, not counsel's post hoc rationalizations for the agency's decision.

Id. Judge Koch also cited several administrative law treatises for the proposition that: "Adequate findings of fact are necessary even in the absence of a statute or rule requiring them." Id. at 12, note 10. In this case, of course, COMZO requires factual findings. COMZO § 101.25(h). Judge Koch cited with approval the Missouri Court of Appeals:

It is too clear to admit of argument that a court cannot be expected to determine whether or not an agency's decision is supported by competent and substantial evidence when the court has only before it the bare ultimate conclusion which the agency reached.

Century State Bank v. State Banking Board of Missouri, 523 S.W.2d 856, 859 (Mo.App. 1975). He also noted that the Tennessee Supreme Court has similarly observed this rule in cases involving the Uniform Administrative Procedures Act. Levy v. State Board of Examiners for Speech Pathology and Audiology, 553 S.W.2d 909, 911-12 (Tenn. 1977).

No facts were found in this case, however. The clear un rebutted proof was that Mr. Gregory met all of the requirements. There was no discretion remaining in the Board to deny the application. Absent some competent proof upon which to base its denial of this permit, the Board was acting beyond its jurisdiction, arbitrarily, or illegally in refusing to grant the conditional use permit. Therefore, even under the limited review posture of the Common Law Writ of

Certiorari, this Court must reverse the decision of the lower Court and of the Board of Zoning Appeals.

**D. THE BOARD ACTS ILLEGALLY, ARBITRARILY, OR BEYOND ITS JURISDICTION WHEN IT SUBMITS A LAND USE APPLICATION TO A REFERENDUM IN PUBLIC HEARING.**

Perhaps the most disturbing aspect of this case is the failure of the Board of Zoning Appeals to discuss the proposal in any manner whatsoever. Mr. Demonbreun, the Secretary of the Board of Zoning Appeals, closed the public hearing after rebuttal. (Transcript at 73). Immediately following the closing of the public hearing, Mr. Hoover, the vice-chairman of the Board, asked:

Do we have a show of hands of those who are in favor of this? Do we have a show of hands of those who are opposed to this? Of those who are opposed, how many of those live in the immediate area, say one mile? All right, thank you. If you are for it, would you stand, if you live within a mile of it? Thank you.

Transcript at 73. Immediately following those comments, the following took place:

Mr. Grizzard: I move that we deny.

Mr. Hoover: I'm sorry, I did not hear what your motion was.

Mr. Grizzard: To deny.

Mr. Hoover: Do I have a second?

Mr. Jones: I second.

Mr. Hoover: I have a motion to deny and a second. All in favor, say aye. Aye.

Ms. Graham: Aye.

Mr. Grizzard: Aye.

Mr. Jones: Aye.

Mr. Karr: Aye.

Mr. Hoover: Opposed? Five to zero.

Mr. Demonbreun: Motion is denied, five to zero.

Transcript at 73-74. There was never any discussion of the application in any meaningful way. The only significant action that took place after the closing of the public hearing was a request by Mr. Hoover, the vice-chairman of the Board

of Zoning Appeals, for a show of hands as to who was in support and who was in opposition. Immediately following that, the Board denied the motion. Id.

It is absolutely clear that such conduct on the part of a Board of Zoning Appeals is totally illegal. In Sexton v. Anderson County, 587 S.W.2d 683 (Tenn.App. 1979), the Tennessee Court of Appeals noted:

While a hearing where all interested parties are given the opportunity to fully express their views is essential, it is not a function of the board to conduct a referendum on public attitudes relative to the petition.

587 S.W.2d at 664, footnote 1. Interestingly, in the Sexton case, there was no actual show of hands of those in support and opposition; the referendum discussed by Judge Franks there was much more subtle. The Court evidently was concerned with the failure of the Board to swear the witnesses, allow cross-examination, and the acceptance of evidence which was totally incompetent. Sexton, 587 S.W.2d at 666. The same Court, in Harrell v. Hamblen County, 528 S.W.2d 505, 508-9 (Tenn.App. 1975), found:

It is obvious that the Planning Commission and the Quarterly Court denied the permit [for a mobile home park] to the Petitioners because of the objection of the adjacent property owners, which they were without authority to do.

Id., and cited with approval by this Court in Merritt v. Wilson County, 656 S.W.2d 846, 855 (Tenn.App. 1983). As in the case at bar, no reasons were given for the denial of the permit. Id. at 507. However, immediately before the vote, one board member commented on the need to consider the people in opposition. Id.

Other Courts have handled this problem in a similar manner. In Robert Lee Realty v. Village of Spring Valley, 61 N.Y.2d 894, 474 N.Y.S.2d 475 (N.Y. 1984), the applicant's supermarket had been destroyed by fire and sought a special permit to replace the supermarket. The Court concluded that, "It appears that petitioner's application was denied not because of any objection peculiar to the proposed development, but because of community pressure." 474 N.Y.S.2d at 476. In Georgia, a group of Jehovah's Witnesses applied for a special permit for a

church. Rogers v. Atlanta, 110 Ga.App. 114, 137 S.E.2d 668 (1964). The primary objection was traffic congestion and the Court quickly disposed of that, not only by reference to the testimony in the record, but by reference to the fact that the permit had been approved by both the Traffic Department of Atlanta and by the City Planning Department. 173 S.E.2d at 672. There was significant opposition and the Court concluded that none of the reasons advanced by the opponents could be grounds for denying the permit. 137 S.E.2d at 674. See also Kent v. Zoning Board, 58 A.2d 623, 624 (R.I. 1948); Homecraft v. MacBeth, 148 N.E.2d 563, 566 (Ind. 1958); Dietrich v. District of Columbia Board of Zoning Appeals, 320 A.2d 282, 285 (D.C.Ct.Apps. 1974).

Finally, this Court in Stone Man v. Rutherford County Regional Planning Commission, 10 T.A.M. 5-7 (Tenn.App. 1985) (Exhibit One) reversed a decision denying Stone Man the right to develop a rock quarry in part because the disapproval was based on "public pressure being brought to bear at its meetings." Exhibit One at 15.

In this case, immediately before the vote, the Board actually conducted a referendum of those in support and opposition, a clearly illegal action, totally beyond its jurisdiction. No other discussion was held. The number of people who supported or opposed the application has absolutely no relevancy to the merits of the application and is totally irrelevant to all land use planning considerations. Conducting a public referendum contaminates the entire procedure and requires a reversal of the Board's decision.

**E. AN AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER THE TENNESSEE EQUAL ACCESS TO JUSTICE ACT.**

Inasmuch as the Court below decided that the applicant had not demonstrated compliance with all of the conditions, it did not reach the issue of attorney's fees under the Tennessee Equal Access to Justice Act, T.C.A. § 29-37-101 et seq. Mr. Gregory believes that he is entitled to his attorney's fees under the

provisions of this Act and on remand, assuming that this Court reverses the Court below, asks that the availability of fees be considered.

#### VIII. CONCLUSION

Mr. Gregory put on decisive proof concerning each and every element for a conditional use permit permitting him to use his property as a demolition landfill. In particular, he clearly demonstrated that traffic would be safely accommodated along major streets and that the property was fenced and screened as appropriate. There was no competent proof submitted in opposition to the application and he is therefore entitled to the conditional use permit under the law of this state. The Board of Zoning Appeals not only made no findings of fact which would assist this Court in determining as to why it denied the permit, but it also conducted a public referendum on the application by asking those present at the public hearing to vote either for or against the proposal. The Board's decision was contaminated by this political vote counting. For all of those reasons, the decision of the Court below and of the Board of Zoning Appeals should be reversed.

Respectfully submitted,

PARKER, LAWRENCE, CANTRELL & DEAN

By: \_\_\_\_\_

George A. Dean  
S.Ct.Reg. 6737  
Fifth Floor  
200 Fourth Avenue North  
Nashville, Tennessee 37219  
Telephone: (615) 255-7500

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was mailed to Mr. Steve Nunn, Attorney for Appellee, Legal Department, Metropolitan Courthouse, Nashville, TN 37201 on this the \_\_\_\_ day of October, 1990.

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George A. Dean