

IN THE SIXTH CIRCUIT COURT FOR DAVIDSON COUNTY,  
TENNESSEE

THE JACKSONIAN FOUNDATION, INC., )  
 ET AL., )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 WALGREEN CO. AND METROPOLITAN )  
 BOARD OF ZONING APPEALS, ET AL., )  
 )  
 Respondents. )  
 )  
 RUSS MORRIS, )  
 )  
 Intervening Respondent. )

No. 98C-1755

**FILED**  
 APR 30 1999  
 RICHARD P. FROOKER, Clerk  
 By \_\_\_\_\_ Deputy

**MEMORANDUM AND ORDER**

This case involves a Petition for Writ of Certiorari seeking review of a decision entered June 5, 1998, by the Metropolitan Board of Zoning Appeals that granted a setback variance. After considering the record from the Board of Zoning Appeals, memoranda submitted by the parties and all applicable case law and statutory provisions, this Court finds that the decision of the Metropolitan Board of Zoning Appeals is supported by material evidence and must be affirmed.

**Issues Presented**

1. Is there material evidence supporting the decision to grant a variance?
2. Did the applicant for the variance have standing to present the application before the Board?

**Standard of Review**

A Trial Court is not permitted to substitute it's judgment for that of an administrative agency, instead, it acts as a reviewing body to determine if material evidence supports the action complained of. See, McCallen vs. City of Memphis 786 S.W.2d 633 (Tenn. 1990). If there is any material evidence in the record that supports the decision of the board, this court must affirm. Id. The board's

decision may only be reversed if it acts arbitrarily, capriciously, illegally, or in excess of its jurisdiction. *Hoover Motor Express v Railroad and Public Utilities Commission*, 261 S.W.2d 233 (1953).

### **Material Evidence**

The Metropolitan Board of Zoning Appeals held that zoning variance was appropriate due to the exceptional narrowness and unique characteristics of this property. This determination is supported by material evidence that was submitted at the hearing before the Board. There was evidence presented before the Board of Zoning Appeals consisting of testimony, diagrams and photographs that support the determination that the lot is entitled to a variance due to the unique characteristics and exceptional narrowness of the property.

### **Standing**

The applicant for the variance had “standing” to request relief from the Board of Zoning Appeals. Petitioners argue that Russell Morris did not have standing to apply for the variance since he was not specified as the owner or the owner’s agent. However, the record is clear that owners of the property were present and allowed the variance to be submitted on their behalf; furthermore, a letter from one of the owners expressly speaks of the “... variance that we request...”. See, Record at 182

The Metropolitan Zoning Ordinances did not specify how an “agent” of an owner was to be identified. The application lists “Walgreen’s lessee” as appellant and “John Cobb” as owner and indicates that both are represented by “Russell Morris III”. Absent some rule or regulation that required the owners to endorse an agent, it appears that Mr. Morris was clearly acting on behalf of both the owner and the lessee. This is not a situation where an individual with no legally cognizable interest in the property has sought to obtain a zoning variance.

Furthermore, any objection to standing was waived if not presented at the hearing below. In reviewing an administrative agency decision this Court is required to consider only the evidence presented before the agency. It would be inherently unfair for someone to allow an applicant to argue a case and then raise standing as a defense when the matter reaches the Trial Courts, thereby prohibiting the applicant from submitted proof substantiating standing.

Finally, it appears that other courts faced with similar situations have determined that representatives of lessees were vested with implicit authority by the owner to seek a variance. See generally, Zoning: Who may apply for variance, special exception or use permit or appeal from denial therefore, 89 ALR.2d 663.

The Court adopts the following Findings of Fact:

1. On March 20, 1998, Russell Morris filed an application for a building permit with the Metropolitan Department of Codes Administration seeking permission to construct a new Walgreen's Store to be located at 3010 West End Avenue in Nashville. At the time, the site was occupied by an apartment building known as the Jacksonian.

2. The application for a building permit was denied and an appeal was taken to the Metropolitan Board of Zoning Appeals.

3. The Board heard the case on May 21, 1998. The specific request was for a setback variance of 17 feet; ordinarily, a front setback of 69 feet would have been required; the owners proposed to provide a setback of only 52 feet.

4. There was sufficient proof before the Board of Zoning Appeals to sustain this application for variance. The applicant clearly documented the unusual shape of this property, its proximity to four public rights of way, the practical difficulties caused to the owner if a variance were not granted, and the other requirements of the variance statute, Tenn. Code Ann. § 13-7-207 (3).

5. The petitioner here contends that there remain other reasonable uses of this property and that the variance was therefore improperly granted. However, the question concerning whether the owner suffers a practical difficulty as a result of the shallowness of the property and its proximity to four public rights of way is a question for the discretion of the zoning board. The real issue is whether this owner experiences difficulties in the utilization of this property as compared with

the uses of other properties in the general vicinity and in this same zone district. It seems very clear that the other properties in the surrounding vicinity and in the same zone district involve intense commercial uses. The zoning board certainly did not act arbitrarily, capriciously, illegally, or beyond its jurisdiction in concluding that the owner did suffer a practical difficulty.

6. There was a sufficient factual basis for the issuance of the variance in this case.

The court having concluded that the Metropolitan Board of Zoning Appeals did not act arbitrarily, capriciously, illegally, or in excess of its jurisdiction by granting the variance applied for in this case and that there was sufficient evidence before it to justify the decision of the board granting this variance;

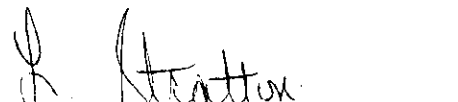
**It is therefore ORDERED**, that the petition in this cause be and hereby is **DISMISSED**. Costs are taxed to the Petitioners for which execution shall issue if

Entered this 30<sup>th</sup> day of April, 1999.

  
Thomas W. Brothers, Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Order has been forwarded by first-class mail postage prepaid to C. Michael Lawson, Esq., 4205 Gallatin Road, Nashville, TN 37207; G. Brian Jackson, Esq., Miller, Martin & Trabue, 2500 Nashville City Center, 511 Union Street, Nashville, TN 37219; Thomas V. White, Esq., First American Center, Suite 2100, 315 Deaderick Street, Nashville, TN 37238; Shayna Abrams, Metro Legal Department, 204 Metro Courthouse, Nashville, TN 37201 & George A. Dean, Esq., 200 Fourth Avenue North, 5<sup>th</sup> Floor, Nashville, TN 37219, on this 36<sup>th</sup> day of April, 1999.

  
Deputy Clerk