

March 8, 1996

Mr. Rick Shepherd, Secretary
Board of Zoning Appeals
Metro Howard Office Building
700 Second Avenue South
Nashville, TN 37210

Re: Case Number: 96-22
555 Church Street
Map: 93-6-1 Parcel: 76
Zoning Classification: CC

Dear Mr. Secretary:

This letter is submitted in support of the application of 555 Cumberland, L.P., for certain variances in the above-captioned case before the Metropolitan Board of Zoning Appeals. We would request that this letter be made a part of the record of that case and have enclosed sufficient copies to be distributed to each member of the Board of Zoning Appeals.

The owner and appellant, 555 Cumberland, L.P., owns a parcel of property located at 555 Church Street in downtown Nashville which is currently being used for surface parking. This proposal is to construct a new 23-floor apartment building with retail sales on the first floor and a 6-story underground parking garage. The activity type is classified as permanent residential (COMZO §17.12.060(B)), and general retail sales (§17.12.080(16)). There are two small variances which are necessary in order to construct this project. The first is a variance in the floor area ratio (COMZO §17.64.020), and the second is in the sky exposure plane (COMZO §17.64.210).

Originally there was an appeal to this Board for a variance in the rear yard provision inasmuch as an elevated walkway is proposed to be constructed from the high-rise residential to an adjacent parking garage. This request is hereby withdrawn inasmuch as COMZO §17.68.100 applies the exceptions contained in §17.64.080 to residential uses in CC zone districts. COMZO §17.64.080(G) does not consider that an elevated walkway is an obstruction when located in a required yard. Thus, the third variance originally applied for is no longer necessary.

555 Cumberland, L.P. has appealed to the Metropolitan Board of Zoning Appeals under §§17.132.010 and 17.132.060 of COMZO. The applicant seeks these variances to permit the construction of this 23-story apartment building for residential purposes.

I. Factual Background

As the Board knows, the central business district in downtown Nashville has, over the past 25 years or so, suffered an erosion of support. Gradually, large department stores have abandoned the downtown area and there has been a search for ways to keep the central business district vibrant, notwithstanding the loss of these facilities. Certainly, the placement of the Wild Horse Saloon, the overall reinvigoration of Second Avenue, the re-opening of the Ryman Auditorium, and the construction of the arena, are all contributing to this revitalization of downtown Nashville. The Church Street corridor, however, has gained very little from these efforts at reinvigoration. This project will address that omission.

The idea is simple enough: to bring a residential life back to downtown Nashville. In years gone by, Church Street was an important area of the city insofar as residential accommodations. In the early part of this century, the commercial influence moved people away from the downtown area and the city lost the effect of having people living in close proximity to the central business district. This project will bring a first-class high-rise apartment complex back to downtown Nashville, at a key location along Church Street, with the hope that it will revitalize this area of our city.

II. Specific Variance Standards

The standards for variances are controlled both by the Tennessee State Zoning Enabling Legislation and the Metropolitan Comprehensive Zoning Ordinance (COMZO). Section 17.132.060 of COMZO provides:

Except for variances specifically authorized by the Metropolitan council to be considered before the board, the board shall not grant a variance unless it makes findings based upon evidence presented to it as follows:

A. The particular physical surroundings, shape, or topographic conditions of the specific property involved that would result in a particular hardship upon the owner as distinguished from a mere inconvenience, if the strict application of this title were carried out;

B. The conditions upon which the petition for a variance is based would not applicable, generally, to other property within the same district;

C. The variance will not authorize activities in a zone district other than those permitted by this title;

D. Financial returns only shall not be considered as a basis for granting a variance;

E. The alleged difficulty or hardship has not been created by any person having an interest in the property after the effective date of the ordinance codified in this section;

F. The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the area in which the property is located;

G. The proposed variance will not impair an adequate supply of light and air to adjacent property, or substantially increase the congestion of the public streets or increase the danger of fire or endanger the public safety, or substantially diminish or impair property values within the area;

H. The Board may require that the plan of development provides for compensating features to offset any potentially adverse conditions that might be brought about by the said variance; and

I. The Board shall obtain an advisory opinion from the Metropolitan Traffic Engineer before reducing the number of parking spaces.

The project proposed here by 555 Cumberland, L.P. clearly meets each of these requirements as follows:

A. Unusual Conditions

There are two unusual physical features of this property which justify granting the variances in this case. First, as is clearly demonstrated by the site plan, this property sits on an unusually narrow lot. The lot itself is less than 100 feet wide. Enabling legislation for the State of Tennessee specifically provides that narrowness of the lot is an appropriate grounds upon which to grant a variance. T.C.A. §13-7-209(3) provides: "Where, by reason of exceptional narrowness . . . the Board may grant a variance . . ." Thus, the extreme narrowness of the lot makes it difficult to comply both with the FAR regulations and the sky exposure plane regulations. A building of any height whatsoever on such a narrow lot almost immediately is beyond the building envelope set by the sky exposure plane regulations. The variance in FAR is only 9% over permitted floor area; the fact that such a small variance in FAR causes a sky exposure plan difficulty illustrates the impact of the narrowness of the lot.

In addition, there is a rather severe topographic slope on this property. Looking at the elevation drawings showing both the north and west elevation, one can see that the property slopes away as you walk down 6th Avenue towards Commerce. Once again, this exceptional topographic condition is clearly recognized both by COMZO and the State Zoning Enabling Legislation as an appropriate grounds upon which a variance might be granted.

B. Conditions Not Applicable to Other Properties Generally

The other properties on either side do not suffer from the same narrowness or unusual slope as does this parcel of property. For example, the sky exposure plane would not have a very great impact on the church lot immediately adjacent to the proposed complex. Because it sits away from 6th Avenue and fronts only on Church, the sky exposure plane for similar types of construction would allow a building height in excess of the building proposed here. On the other side of the 6th, the property is again very wide and neither the floor area ratio nor sky exposure plane problems inherent on this narrow parcel of property would be present.

C. Use Variances

This application is for a sky exposure plane and floor area ratio variance. It will therefore not authorize any activities in this zone district which are not already permitted under the zoning ordinance. Specifically, this property is located in a CC zoning district which allows use of property as permanent residential. COMZO

§17.60.020.¹ In addition, general retail sales and service are also clearly permitted in a CC zone district. Id. There is, therefore, no use variance being applied for on this property.

D. Financial Returns

The basis of this variance is only minimally related with financial returns on the property. This variance is premised on the unusual physical conditions of the property, its narrowness, and steep topographic break. Both of the variances are reasonably small and will not have a significant impact financially on the project.

E. Self-Created Hardship

The unusual conditions of this property have not been created by the property owner, or any predecessor of this property owner in title. The narrowness of the lot in particular is something that the owner has to live with, but certainly did not contribute to in any way, shape or form. The slope on the property is also a matter of topographic condition and not something created artificially by the current owner or any predecessor in title.

F. The Public Welfare

The granting of these variances will not be detrimental to the public welfare or injurious to other property or improvements in the area in which it is located. In fact, the applicant has pushed the bulk of the building towards 6th Avenue in order to minimize, insofar as it is possible, any difficulty for the church which is immediately adjacent to it on Church Street. The floor area ratio variance, which is approximately 9% more than what is permitted, is certainly not going to have a significant impact. As discussed below, the public welfare will be served by permitting this residential project to proceed, as evidenced by the General Plan itself. See Section IIJ below.

¹ This change in the text of COMZO took place relatively recently and if reference is made to a copy of the zoning ordinance even dated as late as July 1994, it does not show that this activity is permitted in a CC zone district. Rest assured, however, that the text has been changed allowing CC to accommodate residential activities.

G. Miscellaneous

These variances will not impair an adequate supply of light and air to the adjacent properties, in particular, the church. Again, the attempt to shift the largest part of the building towards the 6th Avenue side is an attempt to minimize any impact on that property. The building will not substantially increase the congestion of the public streets. The building will sit at the intersection of Church and 6th, and while traffic in downtown Nashville is occasionally heavy, the residential nature of this building will most likely decrease traffic congestion, rather than increase it. One can clearly anticipate that some of the residents of this apartment building would work in the downtown area and might not even need the use of an automobile to reach their place of work. Thus, instead of commuting downtown by automobile, the occupants could, with a reasonable degree of ease, get to their place of employment on foot. The building will not increase the danger of fire or endanger the public safety. The Standard Building Code has been, and will be, complied with in all respects; to the extent that there is any deviation from the Building Code, the appropriate applications will be presented to the Board of Building Code Appeals for their consideration pursuant to the terms of the Standard Building Code.² This building will not substantially diminish or impair property values in downtown Nashville. As mentioned earlier, this project has the possibility of assisting a revitalization of Church Street and may increase the value of properties along that corridor.

H. Compensating Features

While the Board has the right, both at common law and under COMZO, to require compensating features for any variance granted, the applicant here would suggest that this design is already drawn so as to minimize any impact on surrounding properties and, also, to minimize the size of the variance requested. The floor area ratio variance is only 9%; the building has been shifted towards the 6th Avenue side so as to reduce impact on the church; parking is being provided underground; retail sales is being provided on the first floor (approximately 5,000 square feet of retail sales) which was at the request of the staff of the Metropolitan Planning Commission. All of these enhancements to the design should offset any perceived impact of the variances.

² The elevated walkway will probably require action by the Building Code Board.

I. Advisory Opinion from the Traffic Engineer

This subsection applies only when there is a request to reduce the number of required parking spaces. There is no such request here and, as a result, subsection I of the variance standards is inapplicable.

J. Conformity with Zone Plan

Finally, the Tennessee Municipal Zoning Enabling Legislation, T.C.A. § 13-7-207(3) provides that the granting of a variance must be done such that it is "without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." While the Metropolitan Government has, in the past, taken the position that this does not require a finding that the variance complies with the General Plan for Nashville, out of an abundance of precaution, the applicant submits that this project clearly complies with Concept 2010, the General Plan for Nashville and Davidson County adopted in 1992, and with the Subarea 9 Plan adopted in December 1991. The applicant is not submitting copies of these plans but would request that copies of the plan be made part of the record through the Planning Commission. One of the most important concepts identified by the SP-9 is to create self-supporting residential areas downtown. SP-9 at 6 and 58. This project will help accomplish that very important goal. Again, at page 104 of SP-9, the Planning Commission notes that:

Adding to the existing residential population within the subarea is one of the most direct strategies to improve the economic aspects of the other struggling components within downtown such as retail, restaurants, entertainment, and, to some extent, traffic congestion.

SP-9 also makes clear that a wide variety of residential projects addressing different market segments is important in a diverse area such as SP-9. High-rise urban style residential construction is recognized as one of those. The clear mandate of the General Plan is to encourage residential construction downtown. This project will further that goal and that augurs in favor of the variances requested.

III. The Impact of Proposed New Zoning Ordinance for Metropolitan Nashville

Interestingly enough, Metro Nashville has embarked on a course to adopt a new zoning ordinance which would entirely replace the textual provisions of COMZO. It seems reasonably certain, based on the drafts of the proposed new zoning ordinance,

that neither of the variances applied for here would be required under the terms of the new zoning ordinance. In other words, if the new zoning ordinance, as suggested by the Planning Commission staff, were to be adopted today by the Metropolitan Council, these variances would not be necessary. For example, the FAR provisions in a CC zone district remain the same (12.0) but there is a bonus for residential in the CC district which increases the maximum FAR from 12 to 15. This would easily exceed the request which is pending before the Board now. See §3.5(C) of the Zoning Code Draft dated 11/16/95, prepared by the Metropolitan Planning Commission and its staff. In addition, the traditional "wedding cake" set back arrangement, made famous by the 1916 Comprehensive Plan for New York City, appears to be abandoned in the most recent draft of the proposed Metro Zoning Ordinance. Section 3.3 deals with street setbacks and, on page 3-6, the table indicates no street back for a CC zone district. There is a note expressly providing that there is not street set back required in a CC zone district.

To be fair, there is a comment which is reproduced in this draft which suggests that CC should have a street set back. Whether it will be applied to the next draft of the zoning code is unknown.

The real point here is that the City is certainly moving in the direction of not only permitting, but encouraging, residential uses in the downtown area as a means of revitalizing and reinvigorating downtown Nashville. The applicant here earnestly submits that it complies with all of the requirements for a zoning variance and that having demonstrated compliance with what might be termed the threshold requirements, the beneficial aspects of this project should be considered on a favorable basis by this Board and the variances should issue as a result.

IV. Judicial Precedent for Variance

It is perhaps appropriate to compare and contrast two separate zoning variance cases which have been heard by this Board in years gone by but which are somewhat similar to the applications pending before this Board. Both cases are supportive of the position taken by the applicant here.

In the first case, *Belmont Hillsboro Neighbors, Inc. v. Metropolitan Board of Zoning Appeals* (Davidson County No. 81-1540-I), a neighborhood association appealed from a decision of this Board granting several variances to the optionees of a parcel of property located at the corner of Blair Boulevard and Hillsboro Road, otherwise known as Kinnard's Corner. The plan submitted required variances for the rear yard, set back and maximum height of the structure and the floor area ratio, the last two of which are involved in this case. The evidence before the Board of Zoning Appeals at that time demonstrated that the subject property was exceptional both in its shape and

topographic condition. The Court concluded easily that this Board complied both with the Tennessee Zoning Enabling Statutes and COMZO in granting the variances requested. The Court concluded that the Board's decision was supported by substantial material evidence concerning the exceptional shape and topographic condition of the property. No appeal was taken. The applicant here believes that this case is almost precisely on point with the application pending before this Board.

In the second case, *Historic Nashville, Inc. v. Metropolitan Board of Zoning Appeals*, the Board granted an exceptionally large floor area and sky exposure plane variance to the developer of a commercial office building on Second Avenue in downtown Nashville. The difficulty was that there was very little, or possibly even, no evidence submitted to the Board by the applicant that there was any unusual physical condition of the property which justified the relaxation of the zoning regulations. Ultimately, the case was defended by the legal department on the basis that the property occupied the entirety of a perfectly square city block, and that that was somehow an unusual or unique physical feature. The Court of Appeals did not agree and the decision was ultimately reversed.

The applicant submits that the evidence before this Board of exceptional narrowness and topography concerning this parcel of property in downtown Nashville distinguishes it from the *Historic Nashville* case and warrants the issuance of the variances requested here.

In fact, inasmuch as the author of this letter was one of the attorneys in both of the cases mentioned above, it can be stated with a strong degree of certainty that the proof in this case is much more similar to the proof in the *Belmont Hillsboro Neighbors* case, than it is to the *Historic Nashville* case. This judicial precedent should be somewhat reassuring to the members of the Board in considering the application here on its merits.

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V. Conclusion

555 Cumberland, L.P. therefore respectfully requests that the variances applied for in this case be granted. The project meets all the requirements for this board to grant the variances; the project is an attractive one, will bring a residential life style to Church Street in downtown Nashville where little or none exists now, will enhance the downtown area in general, and will overall be beneficial to the future of the City.

Respectfully submitted,

PARKER, LAWRENCE, CANTRELL & DEAN

George A. Dean