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POLICY BRIEF

Streamlining Tennessee Land Use Approvals to Address the Housing Crisis

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In Tennessee, as in many other states, regulations on land use and development have slowed the permitting and construction of new housing, while housing costs keep climbing. In Nashville, the median price for a single-family home in June 2024 was over $530,000, up almost 6 percent year-over-year.[1] Housing prices are quickly rising elsewhere in the state as well, pushing more and more middle-class buyers out of the market. A main contributor to this shortage of affordable housing is the challenge of obtaining subdivision approvals and final permits for both single-family and multifamily housing.

Although Tennessee is not one of the most highly regulated states in the country in terms of local building and zoning regulations,[2] the degree of discretion involved in issuing building and zoning permits in Tennessee can make for a protracted approval process and result in denials for inappropriate reasons. Additionally, when developers challenge the decision of a local planning commission or board of zoning appeals, they must resort to a Tennessee procedure known as the common law writ of certiorari, which is archaic, not well understood, and subject to delays.

This brief identifies several areas where the decision-making process for land use approvals might be streamlined and made more transparent to ensure that any denials are based on a reasonable evidentiary basis instead of political pressure on local boards and commissions. Specifically, the brief discusses and provides recommendations regarding the following:

- Modifying vested rights to increase protections for buyers and applicants
- Minimizing hearings and maximizing objectivity for variances and conditional use permits
- Changing the common law writ of certiorari to clarify legal appeals
- Expanding requirements for continuing land use education

Modify Tennessee's Vested Property Rights Act to Increase Protections for Buyers and Applicants

The question of whether a developer is entitled to rely on the zoning laws that existed at the time of an application—known as the doctrine of vested rights—has plagued Tennessee for decades. From the outset, Tennessee's 1935 zoning enabling statute failed to mention nonconforming uses and vested rights.[3] As a result of this oversight, the courts were called upon to address both doctrines and tended to defer to local governmental officials.

In the 1940 case of *Howe Realty v. City of Nashville*,[4] for example, a builder obtained a permit for a commercial building on a lot zoned for commercial use, but before construction could begin, the city of Nashville rezoned the builder's property to residential and revoked the permit. The Supreme Court of Tennessee determined, consistent with the majority rule in other jurisdictions, that a building permit has none of the elements of a contract and may be changed or entirely revoked unless the permittee has performed some substantial part of the construction. Following this rule, the court held that the rezoning was valid, and that the builder's project was barred. But what amount of construction qualifies as "substantial"? And who makes that determination, other than the local officials?

In Tennessee, it is not uncommon for public backlash or objections from local officials to arise after a building permit is issued. Often, those who object to the project quickly introduce a bill to the city council to change the underlying base zoning in a way that renders the construction noncompliant. Typically, these new zoning regulations are adopted much more quickly than the permittee can finish a substantial part of the construction.

Recognizing this as a problem, the Tennessee General Assembly passed the Vested Property Rights Act of 2014 (the Act).[5] The Act guarantees that municipal or county development regulations in effect at the time of either the issuance of a building permit or the approval of a development plan will continue to apply to the particular project under consideration for a specified number of years.[6] In doing so, the Act reverses *Howe Realty* by preventing municipalities from rescinding permits post-issuance.[7]

Despite this reform, the problem remains that there is often a long gap between when a developer submits an application and when that application is considered by the locality. While the application is pending, opponents have the opportunity to press for changes to the underlying base district zoning that will prevent the application's success. The result is either the demise of a project or significant delays.

The American Planning Association recommends legislation that addresses this difficulty by granting vested rights at the time of the application itself, provided that the application substantially complies with all existing local regulations.[8] Once the application has been filed and the request for

development approval has become public knowledge, it is no longer a race to the council chambers to amend the zoning regulations to defeat the proposal. Failure to comply with local development regulations, including building code and zoning regulations, remains a valid basis for disapproval.

Even the American Planning Association's changes would not necessarily suffice to completely resolve the issue of developers having the rug pulled out from beneath them by city councils. For example, in the case of *Westchester Co., LLC v. Metro. Gov't of Nashville & Davidson Cnty.*,[9] a developer purchased a property zoned for multifamily residential use in contemplation of building apartments. After the purchase deed was executed but before any application was made by the developer, the city council rezoned the property for single-family residential use. The developer filed suit claiming that its right to build the apartments had vested, but the Tennessee Court of Appeals denied the claim, holding that the existence of a contract to convey the property to a third-party was essentially irrelevant and there could be no estoppel against the local government or its representatives.

To address this situation, we recommend adding a provision to the Act establishing that any zoning in effect at the time a property is acquired cannot be amended in a manner that reduces development potential for a fixed period of time after the date of sale. This recommendation reflects certain principles of the Property Ownership Fairness Act,[10] which protects property owners against uncompensated deprivation of valuable rights and provides assurance to buyers not only that the seller's property rights will survive the transfer of the deed, but also that their purchase is not a high-stakes gamble on the vagaries of local politics. By removing an important source of economic uncertainty, the assurance that land use rights are durable will encourage investment in housing and participation in housing development by a wider range of developers, including those who do not have the resources to fight a protracted political or judicial battle.

Policy recommendations

We recommend the following amendments to the Tennessee's Vested Property Rights Act of 2014:

1. Change the date on which vested rights are established under the Act. Instead of having development rights vest on the date that the building permit is issued or the development plan is approved, the rights should vest on the date that the applications or development plans are submitted, provided that the application substantially complies with all the requirements of local development regulations.
2. Provide that any zoning in effect at the time a property is acquired cannot be amended in a manner that reduces development potential, such as by limiting the number of permitted units, decreasing height limits, or increasing parking requirements, for a fixed period of time after the date of sale.

Empower Staff, Minimize Hearings, and Maximize Objectivity for Variances and Conditional Use Permits

Tennessee's current process for considering special permits and variances through local boards of zoning appeals (BZA) is slow, lacks specific criteria for approval, and is subject to political pressure. Streamlining this uncertain and unwieldy process should include allowing ministerial approval of special permits and variances, minimizing the role of public hearings, and requiring clear and objective standards for approvals.

In Tennessee, a BZA typically has three basic powers:

1. To interpret the zoning regulations
2. To grant conditional use permits specifically authorized by the zoning regulations11
3. To grant variances[12]

The latter two powers should instead be vested in administrative officials, allowing them to determine the threshold question of whether there is compliance with the applicable regulations. This change would speed up the application process. Consideration by the BZA is time-intensive because most localities require public hearings with advanced notice to the general public and surrounding property owners.[13] Having a local official make the initial decision—with the potential of an appeal to the zoning board if necessary—would be more efficient.

It is important to note that administrative officials make the initial decision on virtually all other zoning matters, including interpretations of the zoning code itself and whether a land use is legally nonconforming under the provisions of the local zoning ordinance and Tennessee state law.[14] In addition, Tennessee BZAs are often subject to political pressure. Large crowds and local officials at public hearings can influence perception of the merits of the pending application. Having a zoning official make the decision in the absence of a public hearing will not eliminate this problem of public persuasion but can reduce it considerably.

Regardless of whether administrative officials decide on special permits and variances or that power is retained by the BZA, regulations must be specific and clear, allowing decision makers to render well-reasoned determinations. Although one might think that specific guidelines are always included in local zoning regulations, that is often not the case. While clear criteria are common in the larger cities in Tennessee, most zoning regulations retain subjective conditions. For example, it is common for regulations to feature vague criteria that apply to all conditional uses established within a particular zoning ordinance, such as the requirement that a proposed development not adversely affect the health, safety, and general welfare of the community. Ambiguous criteria like these offer little guidance to administrative decision makers. Open-ended requirements that refer to vague terms like "health" or "general welfare" should be specifically excluded by state legislation to promote clarity and uniformity in decision-making.

Ambiguity in zoning extends beyond local regulations to other contexts, such as compliance with a municipality's comprehensive plan.[15] Many municipal planning commissions require that development applications comply with the general plan, provided the municipality has chosen to adopt one, but since general plans outline future goals for the community, it can be difficult to deduce how they apply to present-day projects. Requiring that the general plan include a section of objective provisions to determine subdivision compatibility would eliminate yet another area where ambiguity either slows down or prevents appropriate decision-making.

Policy recommendations

1. Shift responsibility for conditional use approval to administrative officials instead of the BZA.
2. Require that all named conditional uses in the applicable zoning ordinance have specific and objective standards by which administrative decisions can be made, and omit subjective and ambiguous requirements such as health, safety, and general welfare.
3. Require that the general plans applied to subdivision applications include specific and objective requirements that can be used to determine outcomes.

Change the Common Law Writ of Certiorari to Clarify Legal Appeals

Land use decisions in Tennessee are most frequently appealed using an archaic legal device known as the common law writ of certiorari. Although the writ is known by the "common law" name, there exists both specific statutory authority[16] and constitutional authority[17] for the writ. This confusion is compounded by the existence of an entirely separate device, the statutory writ of certiorari, which, despite its name, is fundamentally different from the common law writ. Because the common law writ is infrequently used today, many Tennessee lawyers and judges have limited familiarity with the process.[18]

A better way to proceed would be to adopt an entirely separate system devoted exclusively to the appeal of land use matters. This system would cover the majority of land use controversies, including appeals from zoning boards involving variances, applications for conditional use permits, interpretations of zoning provisions, and questions of nonconforming uses. It would also encompass appeals from planning commissions involving subdivisions and planned developments. To the extent that a local legislative body is involved in the process of ruling on these types of administrative concerns, the appeals could also come from the legislative body, which in these instances would be acting administratively under Tennessee law.[19] Similar systems have been implemented in other states, such as the Housing Appeals Board in New Hampshire.[20]

A new and clearer system would help resolve other problems. First, the writ may appear to be just a garden-variety form of administrative review, where the record from the prior proceeding is presented to the judge, who must uphold the administrative decision unless it is arbitrary and capricious, illegal, or beyond the jurisdiction of the administrative tribunal.[21] The writ contains

many pitfalls for the unwary, however. For example, a petition requesting issuance of the writ must be verified, which means that someone must swear that the allegations of the petition are true.[22] Tennessee's Rules of Civil Procedure no longer require verification of pleadings, so this requirement is easily overlooked. If the writ is not properly verified, however, it is subject to dismissal upon motion or on the court's initiative. Cases have been dismissed based on this single oversight.[23] Given that the parties were already present at the prior proceeding, which was audio or video recorded, the signature of the petitioner's attorney pursuant to the Rules of Civil Procedure should be sufficient without any verification.

Another concern with the current system is that land use lawsuits, like most other lawsuits, generally progress at a snail's pace. Litigation is rarely a swift process, and the ordinary timeframes for judicial resolution, usually measured in months to years, can be fatal to the economics of housing development, resulting in a loss for developers even when they prevail in litigation. Because of these incentives, the developer is typically the party most anxious to have the matter resolved. Local governments, by contrast, can be indifferent to the duration of litigation, while neighbors who are parties to the appeal actually embrace delays, believing that delays are an advantage.

In recognition of this problem, Tennessee does require that lawsuits commenced using the writ of certiorari are prioritized on the trial court's docket. Specifically, state law provides that these cases "shall be heard and determined at the earliest practical date."[24] Land use attorneys in Tennessee know that citing the prioritization provision is not much use in getting an expedited hearing date from a local court. With local governments and neighbors unlikely to facilitate an accelerated case schedule, a mechanism beyond the nonspecific prioritization language is necessary to ensure prompt adjudication and disposition of appeals.

Money talks. A new land use review act should not only require that cases be heard promptly but also subject the local government to a monetary penalty if the case is not docketed for hearing within some reasonable but specified period, such as 180 days.[25] Furthermore, land use applicants could be entitled to attorneys' fees[26] if the case has not been determined within that same time frame. Waiving fees rather than imposing new ones may be another option. For example, in the event that the land use applicant prevails, fees that are due to the local government would be waived, and fast tracking the remaining permit process would be required.

Some elements of the common law writ do not need to be altered, however. These elements include a standard of judicial review, which is favorable to the local government, and a restriction on the introduction of additional evidence before the trial court.

Policy recommendations

Tennessee's archaic common law writ of certiorari should be replaced with a new land use review statute which would:

1. Create a new system devoted exclusively to the appeal of land use matters that avoids the certiorari process
2. Simplify technicalities such as the requirement for a verification of pleadings
3. Strengthen consequences for localities for failing to hear cases in a prompt and timely manner

Expanding Requirements for Continuing Land Use Education

Like many states, Tennessee requires that zoning board members participate in continuing land use education to stay current on zoning and land use laws.[27] While this training is important and necessary, Tennessee's current framework for continuing land use education has four areas for improvement. First, local legislatures may opt out of the education requirements by ordinance. The solution to this is simply to remove the option for members of the local legislative body to opt out of continuing land use education requirements at any time by ordinance.[28] Zoning board members, no matter their jurisdiction, hold similar roles and responsibilities and should be similarly prepared. Current hourly requirements are not onerous but rather reasonable in proportion to the responsibilities of the office.

The second shortcoming is that penalties for board members' noncompliance with education requirements are ineffective. Currently, the only penalty for failing to undergo the required training is the possibility of removal from the board.[29] The authors are unaware of this provision ever having been enforced against a board member. Since the penalty is not a sufficient incentive, an alternative would be to disqualify members from voting or participating at any hearings and meetings until they have completed their training. If a majority of board members have not obtained the appropriate training, applications would be approved by default.

The third issue with the current training system is that it addresses an overly broad range of subjects. The list of permitted topics includes land use planning, zoning, floodplain management, transportation, community facilities, ethics, public utilities, and much more.[30] Training should focus on topics that zoning board and planning commission members most often address in contested administrative hearings and appeals. These topics would include variances, conditional use permits, subdivision applications, and conducting hearings in an effective manner. Such focused training sessions would increase the competence of boards in the ordinary matters that routinely arise.

For example, it is essential that board members understand what an applicant is required to demonstrate to obtain relief from the board. To receive a variance in Tennessee, the applicant must demonstrate, among other things, some extraordinary physical feature of the land that justifies the relaxation of the zoning regulations.[31] Tennessee zoning boards frequently fail to recognize when this requirement has been met. In the case of conditional use permits (special exceptions), zoning boards often rule against applicants who comply with all requirements, believing erroneously that

boards have a reserved power to deny an application if for some reason they do not believe it to be an appropriate use of land. This type of error can lead to costly and time-consuming lawsuits.[32] Trainings can help board members better understand the thorny political issues surrounding conditional use permits. Zoning boards are not the only scofflaws, however. Planning commission members also require training as they sometimes operate under similar incorrect assumptions. Some boards act under the belief that subdivision plans may be rejected even if the requirements of the adopted regulations are met.[33]

Finally, both zoning boards and planning commissions require training for when public hearings become contentious, which they often do. Speakers may run over their allotted time, tempers may flare, and unless boards or commissions have some expertise in how to run these hearings, the situation may devolve into a chaotic or acrimonious affair that must be suspended, resulting in further delays for both the applicant and the public. Boards and commissions should receive training on the proper conduct of public hearings to ensure that proceedings are civil in tone and efficiently run.

Policy recommendations

1. Remove the possibility for local government to opt out of training, and require that local governments keep up with training hours for both staff and board members.
2. Prohibit members of boards or commissions who have not taken required trainings from voting or attending meetings and hearings.
3. Focus the scope of the topics addressed during training sessions on regularly occurring issues.
4. Include trainings on conducting hearings in an effective manner.

Conclusion

The current housing crisis obligates Tennessee's policymakers to examine the means for speeding up housing production. One approach is through targeted reforms that streamline the land use approvals process. The four reforms outlined in this brief—strengthening vested rights, reforming variances and conditional use permits, replacing the writ of certiorari, and boosting board member training requirements—are not exhaustive, but they represent practical, straightforward, and effective measures. These reforms can help create a legal climate that supports, rather than obstructs, housing production in Tennessee.

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Notes

1. "Nashville Housing Market Report," Rocket Homes, last updated September 2024, https://www.rockethomes.com/real-estate-trends/tn/nashville (last updated September 2024).
2. See Patrick McLaughlin and Mark Febrizio, "Mapping Regulatory Restrictions in US States" (Mercatus Data Visualization, Mercatus Center at George Mason University, February 26, 2019). For overall regulatory restrictiveness, Tennessee ranked 12 least regulated out of 27 states studied.
3. Tenn. Code Ann. § 13-7-103 et seq. (2023).
4. 176 Tenn. 405, 141 S.W. 2d 904 (Tenn. 1940).
5. Tenn. Code Ann. §§ 13-4-310(b)–(k) (municipal) and 13-3-413 (b)–(k) (county).
6. For example, in the case of a preliminary development plan, the applicant has three years after preliminary approval to (1) obtain final approval, (2) get a building permit, and (3) begin site prep. An additional two years are added when construction begins, with a 10-year total for the rights so vested. Tenn. Code Ann. § 13-4-310(d).
7. Tenn. Code Ann. § 13-4-310(c).
8. Stuart Meck, ed., *Growing Smart Legislative Guidebook* (American Planning Association, 2002), section 8-501.
9. Westchester Co., LLC v. Metro. Gov't of Nashville & Davidson Cnty., No. M2004-02391-COA-R3CV, 2005 WL 3487804 (Tenn. Ct. App. Dec. 20, 2005).
10. See Christina Sandefur and Timothy Sandefur, "Protecting Private Property Rights: The Property Ownership Fairness Act" (Goldwater Institute Policy Paper, 2016).
11. The Tennessee Code uses the term "special exceptions." Tenn. Code Ann. § 13-7-109 (2). Conditional uses, special uses, and special exceptions, whatever the nomenclature, all usually indicate that the use applied for is likely to have a somewhat greater impact on surrounding land uses and thus requires special attention.
12. Tenn. Code Ann. §§ 13-7-109 (counties) and 13-7-107 (municipalities).

13. Tennessee's zoning enabling act does not actually require a public hearing at all.

14. The Tennessee Non-Conforming Property Act (Tenn. Code Ann. § 13-7-208) is possibly one of the broadest provisions relating to preexisting land uses in the country.

15. Tennessee requires that counties promulgate comprehensive growth plans. Tenn. Code Ann. § 6-58-101 et seq. For municipalities, however, only the preparation of a "major street plan" is required, but many do prepare a "general plan" for development. Tenn. Code Ann. §§ 13-4-101 et seq. & 13-4-201 et seq.

16. Tenn. Code Ann. §§ 27-8-101 et seq. & 27-9-101 et seq.

17. Tenn. Const. art. VI, § 10.

18. There are some attorneys who frequently work with the writ, including local government lawyers, members of the staff of the attorney general, as well as lawyers who customarily work on land use planning issues, but they are not numerous.

19. Zoning changes adopted by local legislative bodies would continue to be heard customarily as declaratory judgments since, under Tennessee law, even the smallest zoning change is considered to be legislative in nature.

20. See N.H. Rev. Stat. Ann. § 679.

21. Ben H. Cantrell, "Review of Administrative Decisions by Writ of Certiorari in Tennessee," *Memphis State University Law Review* 4 (1973–74): 19–32..

22. Tenn. Code Ann. § 27-8-106.

23. *See, e.g.*, Hirt v. Metro. Bd. of Zoning Appeals, 542 S.W. 3d 524 (Tenn. App. 2016).

24. Tenn. Code Ann. § 27-9-111.

25. This assumes, of course, that the land use applicant has not been the cause of the delay.

26. The Tennessee Equal Access to Justice Act (Tenn. Code Ann. § 29-37-101 et seq.) allows modest attorneys' fees to a successful petitioner. Note that the fees may be awarded at each step of judicial review including the administrative hearing, trial court review, Court of Appeals, and Supreme Court. *See* State v. Thompson, 197 S.W.3d 685 (Tenn. 2006).

27. In Tennessee, board members are required to attend four hours of training covering a broad swath of possible land use subjects. Administrative officials, such as zoning administrators, building code officials, and professional planners who give advice to zoning boards, are required to attend eight hours of similar training each year. *See* Tenn. Code Ann. §§ 13-3-101(j)(1) (regional planning); 13-4-101(c)(1) (municipal planning); 13-7-106(c)(1) (county zoning); 13-7-205 (c)(1) (municipal zoning). *See also id*. at §§ 13-3-101(j)(2) (regional planning); 13-4-101(c)(2) (municipal planning); 13-7-106(c)(2) (county zoning); 13-7-205 (c)(2) (municipal zoning).

28. *Id*. at §§ 13-3-101(j)(9) (regional planning); 13-4-101(c)(9) (municipal planning); 13-7-106(c)(9) (county zoning); 13-7-205(c)(9) (municipal zoning).

29. *Id*. at §§ 13-3-101(j)(8) (regional planning); 13-4-101(c)(8) (municipal planning); 13-7-106(c)(8) (county zoning); 13-7-205(c)(8) (municipal zoning).

30. *Id*. at §§ 13-3-101(j)(5) (regional planning); 13-4-101(c)(5) (municipal planning); 13-7-106(c)(5) (county zoning); 13-7-205(c)(5) (municipal).

31. *Id*. at §§ 13-7-109(3) (county), 13-7-207(3) (municipal); McClurkan v. Metro Board of Zoning Appeals, 565 S.W.2d 495 (Tenn. App. 1977). The legislation was proposed by Alfred Bettman in 1934 and is one of the forms he suggested as a matter of course during his long career. See Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States* (Harvard University Press, 1935), 102–3.

32. *See*, *e.g.*, Demonbreun v. Metro. Bd. of Zoning Appeals, 2011 WL 2416722, at *17 (Tenn. Ct. App. June 10, 2011).

33. Difficulty understanding the state of the law on issues of dedications and exactions also arises among elected and appointed officials, as well as professional staff.