

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

ANTHONY J. WHEELER, GARY D.
SMITH, and LINDA T. COLLINS,

Petitioners,

vs.

Docket No. 19C1445

THE TOWN OF WALDEN, TENNESSEE
and LOP, LLC,

Respondents.

**ORDER REGARDING PETITION FOR WRIT OF CERTIORARI AND/OR FOR
DECLARATORY RELIEF, AND MOTION FOR SUMMARY JUDGMENT**

This matter is before the court based upon the Petition for Writ of Certiorari and/or for Declaratory Relief filed by the Petitioners Anthony J. Wheeler, Gary D. Smith and Linda T. Collins (hereinafter referred to collectively as the petitioners) seeking a writ of certiorari or, alternatively, a declaratory judgment pursuant to T.C.A. §29-14-101.

The respondents, the Town of Walden, Tennessee, and LOP, LLC, responded by filing an answer, and also their motion for summary judgment as to the plaintiffs' petition. LOP asserts that there are no genuine issues of material fact with respect to the claim for declaratory judgment, and that LOP is entitled to judgment as a matter of law. LOP essentially formulates the issue as whether or not the petitioners have a valid claim that ordinance 2019-331, as passed by the Town of Walden, was arbitrary, capricious, or illegal? LOP argues that ordinance 331 was properly filed and approved by the Town on October 29, 2019. Based upon these arguments, the defendant LOP, LLC requests the court enter an order granting it's motion for summary judgment as to the plaintiffs' writ of certiorari and

declaratory relief.

The court finds, and there is no dispute, that each of the petitioners are residents of the Town of Walden, who own properties either within the town or adjacent land in Hamilton County, Tennessee. The court finds that the respondents are also owners of real property located within the Town of Walden.

The court finds that the Town of Walden enacted a zoning ordinance in 2002 that was last amended in July of 2017. Section 1.01 of the zoning ordinance provides as follows:

11. Section 1.01 of the Zoning Ordinance provides further that:

Therefore, in order to provide for continued prosperity, health, and identity of the community in the future, the Town of Walden sets forth the following purposes for the ordinance:

- *To maintain rural character and small scale of development;*
- *To encourage harmonious and integrated development patterns that are economically feasible and are in harmony with the community with the following development priorities:*
 - Outdoor gathering places;*
 - Pedestrian facilities;*
 - Mixed uses;*
 - Landscaping;*
- *To discourage commercial strip development; . . .*

The court finds that the defendant LOP submitted their application for the rezoning of 15.77 acres located at 1823 and 1833 Taft Hwy, as well as an unaddressed property in the 1800 block of Taft Hwy, 857 Timesville Road, and an unaddressed property in 800 block of Timesville Road from Agricultural (A-1), Residential (R1) and Commercial (C-1) to Village Center Zone (VC-1), to allow for the construction of a 45,000 square foot grocery store with

fuel center and office/retail building with adjacent public parking. The Village Center Zone in Section 4.05(e) of the zoning ordinance prescribes specific regulations for a "Village Center".

15. The Village Center Zone (VC-1) in Section 4.05(e) of the Zoning Ordinance, prescribes specific regulations for a "Village Center":

*(e) **Development Regulations.** Certain requirements set forth in this section may be waived by the Board of Mayor and Alderman, so long as the plan approved conforms with the guidelines and intent of this section.*

*(1) **Development Size.** This new zone will apply only to future development taking place after the passage of this ordinance and will be limited to projects of no less than fifteen (15) acres.*

*(2) **Development Layout.** Small, four (4) sided blocks, rectangular, or irregular shaped with no side exceeding 400 feet in length. Each side of the block will face a street. Project plans are required and shall be reviewed by the Regional Planning Agency and Board of Mayor and Alderman.*

*(3) **Off-Street Parking.** The parking area will be in the center of the block with access limited to three (3) of the four (4) sides. No garage or parking area shall be entered from the front.*

*(4) **Streets.** Streets must be designed for on street parking and must be limited to two (2) twelve (12) foot lanes. On street parking may have a limited parking time and may be controlled by parking meters.*

*(5) **Residential Area.** No block may have more than twenty (20) percent residential lot area at street level.*

*(6) **Sidewalks.** Each block must have eight (8) foot sidewalks on all four sides.*

It is undisputed that the professional staff of the planning commission issued a report at the April 12, 2019 meeting concerning the proposed rezoning. The staff recommended that the development be approved, but only if 7 conditions were imposed, namely:

(1) Amount of building area available for retail use shall not exceed eighty percent (80%);

- (2) No more than one curb permitted onto Taft Highway;*
- (3) Minimum building frontage on any public right-of-way or designated internal private street shall be sixty percent (60%);*
- (4) Maximum square footage of any one building shall not exceed twenty-thousand (20,000) square feet;*
- (5) Publically (sic) accessible, centrally located open space shall be provided within the VC-1 zoned areas;*
- (6) Internal street network with an average block length not to exceed two-hundred (200) feet connecting the mix of uses, areas of parking, and civic spaces.*

The streets can be private. All designated streets should have curb and gutter, sidewalks and street trees. No parking other than on-street parking permitted between the designated streets and proposed buildings;

(7) A site plan shall be provided to and approved by the Regional Planning Agency before building permits are approved by Hamilton County, per Article 4, Section E-2, indicating compliance with the conditions noted above.

In addition to the 7 conditions, the planning staff also set out the following statement, citing the land use plan for the Town of Walden:

“ . . . staff's overriding main concern is the large-scale building and associated parking, and the lack of an internal street network with defined streets conflicts with the plan recommendations for “small to moderate scale buildings, landscaping, architectural detailing, preservation of tree cover and rule vistas, and compact site design with less emphasis on parking.”

The planning commission recommended rezoning of the nine (9) acres, and the approval of the development with conditions, and waiving all six (6) of the development regulations for the VC zoning. In lieu of the waived ordinance standards, the planning commission adopted some of the conditions that had been recommended by the professional staff, but not all. At

the request of LOP, LLC, the planning commission overrode the professional staff recommendations, removing conditions (4) and (6) which related to the maximum square footage of any one building and the need for an internal street network. On August 17, 2019, the Town published the required notice of public hearing for the rezoning, and on September 10, 2019 at their regular meeting, the Board of Mayor and Aldermen conducted the public hearing on the recommended rezoning as required by T.C.A. §13-7-105. At the public hearing, residents and property owners were given the opportunity to speak in favor of or in opposition to the rezoning. Several residents took advantage of the opportunity. On October 8, 2019, at the regularly called meeting, the Board of Mayor and Aldermen considered Ordinance 2019-331 on first reading, and the Mayor read the entire ordinance into the record. However, unlike the planning commission resolution, the ordinance contained 17 conditions on the development plan, as opposed to the 5 approved by the planning commission. Prior to the vote, the ordinance was revised to change these conditions as well as to add an additional condition, number 18. These conditions were not part of the discussion at the public hearing. The board passed the ordinance by a 2 to 1 vote. In addition to adding the 13 new conditions, the Board's October 8, 2019 decision on the ordinance, departed from the recommendations of the planning commission. Some of those new conditions are as follows:

a. modifying Item 3 of the Planning Commission's recommendations specifying that minimum building frontage on any public right-of-way or designated internal private street shall be 60% to "minimum building frontage on Taft Highway right of way shall be 80%".

b. modifying Item 4 of the Planning Commission's recommendations requiring a "publicly (sic) accessible, centrally located open space . . . within the VC-1 Village Center Zone Area" to simply requiring an "open space protection plan". See Condition 5 of the Ordinance.

The petitioners also argue that there is no dispute that the development as proposed does not constitute a Village Center. Specifically, petitioners argue that the size of the development (9 acres) is not large enough to meet the requirements of a Village Center, there is no residential space nor any requirement that the development have any residential component, and the overall plan does not conform with the guidelines, the zoning ordinance section 4.05e or section 4.05a. Ultimately, the petitioners argue that neither the ordinance nor the development conform with the plain terms, guidelines or intent of the Village Center Zone.

On October 29, 2019 at a specially called meeting, the Board passed the ordinance on second and final reading. At the second and final reading, the Board again made other amendments to the ordinance. At the October 29th meeting, the Board added 5 new conditions to the ordinance and development plan. The court finds that these new conditions were not part of any discussions at any public hearings. After the October 29, 2019 meeting, the ordinance was referred back to the planning commission for review. The petitioners argue that this referral back to the planning commission was pursuant to zoning ordinance sections 10.02 and 10.04. Those sections provide as follows:

10.02 Initiation of Amendments. *The Board of Mayor and Alderman may from time to time, after report thereon by the Planning Commission and after public hearings as required by law, amend, supplement, or change the number, shape or boundaries of Zones, or any regulations or provisions of this Ordinance. Any amendment, supplement, or change may be initiated by the Board of Mayor and Alderman or recommended by the Planning Commission.*

10.3 Public Hearing on Amendments. *Upon receipt of a petition or proposal for a change, the Planning Commission shall prepare a report on the proposed change, approving or disapproving the proposal or petition, or may specify conditions of approval or a recommendation of the proposed change, with reason therefore, and submit it to the Board of Mayor and Alderman. The Planning Agency, at the authorization of the petitioner, shall thereupon give notice of a public hearing to be held by the Board of Mayor and*

Alderman, at a regular session of the Board . . . to be held not less than fifteen (15) days from the publication of the notice or such longer period of time, if any, as prescribed by the Tennessee Code Annotated. . .

10.04 Action of the Board of Mayor and Alderman. *After the official hearing by the Board of Mayor and Alderman as described above, the Board of Mayor shall, by majority vote approve or disapprove the amendment with modification, but if a modification is made or additional requirements are added to the proposed rezoning by the Board of Mayor and Alderman, the modified amendment shall be referred to the Regional Planning Commission for review, as prescribed above. (Emphasis added).*

The court finds that on December 9, 2019, the planning commission met, but took no further action on the ordinance. The planning commission made no formal recommendation of approval or disapproval concerning the ordinance as modified by the Town board. At the December 10, 2019 meeting at the regular meeting of the Board of Mayor and Aldermen, no further action was taken on the ordinance and the ordinance was published on December 15, 2019, and pursuant to town charter Section 6- 2–101 became effective.

The petitioners now argue that the actions taken by the Board in passing the ordinance and approving the development were in direct conflict with the land use plan and the zoning ordinance, both as to their general standards and purposes, and the specific requirements of the Village Center Zone. Furthermore, the petitioners argued that the board's actions violate the letter and intent of the zoning ordinance and land use plan for various reasons. The petitioners aver that they will be damaged by the Town's decision, and ultimately, that the board's decision to pass the ordinances approving the development were illegal, arbitrary and capricious, and should therefore be overturned. The petitioners argue that Ordinance 331 is an invalid exercise of the zoning power without rational basis and inconsistent with the stated purposes of the zoning ordinance and land use plan of the Town of Walden. Furthermore, the petitioners argue that the publication and adoption of the

Ordinance on December 15, 2019 without additional, meaningful review and formal approval, disapproval, or suggestions by the planning commission, after the extensive substantive changes made in the ordinance following the planning commission's first reviewed in August of 2019, was in violation of T.C.A. §13-7-105(a), (sections 10.02-04 of the zoning code), and a violation of due process of law, rendering the ordinance void ab initio. The petitioners also argue that the Town's failure to conduct additional public hearings on the Ordinance after the September 10, 2019 public hearing after the ordinance had undergone extensive substantive changes, was in violation of T.C.A. §13-7-105(b) (sections 10.02-04 of the zoning code), and a violation of due process of law, again, rendering the ordinance void ab initio. Ultimately, the petitioners' request the court to set aside the action of the Board of Mayor and Aldermen of the Town of Walden, and further request the court to declare Ordinance 2019-331 to be invalid, as without a rational basis and inconsistent with the zoning ordinance in violation of the procedural protections contained in the State zoning enabling legislation and the zoning ordinance.

CONCLUSIONS OF LAW

The court finds that the development regulations provided in sections 4.05 of the Town of Walden's zoning ordinance have not been met. The court finds that the ordinance as enacted does not conform to the plain terms, guidelines, or the intent of the Village Center Zone applicable to the Town of Walden. The court finds that the ordinance, as approved, does not require the mix of uses as required by the Town's zoning requirements, nor does the ordinance require an internal street network, nor does it contain a blend of commercial and residential areas. Whether or not the additional conditions bring the ordinance in conformity with the Village Center is an item that should have been debated by public discourse and was not properly done. Whether or not the additional conditions meet the

elements required of a Village Center as envisioned by the zoning ordinance and land use plan, were not properly noticed, debated and/or discussed in the required public forum after the extensive changes and/or conditions were placed. The court is moved by the fact that Alderwoman McKinsey expressly stated that the multiple conditions added to the ordinance were meant to “replace the requirements of the Village Center Zone. Alderwoman McKinsey went on to state that she firmly believed that the zoning and land-use plan should be updated and just because an existing zoning ordinance exists does not mean it is good for all time”. Notwithstanding Alderwoman McKinsey’s statements, the court finds that there is a prescribed legal process to change the Town’s zoning ordinance that was not properly followed in this case. The court finds that the Town’s actions effectively substantially changing the requirements without further public meeting or hearing, were an illegal and arbitrary action that the law prohibits.

The court finds that the board was required to resubmit the modified ordinance to the planning commission for review, and to hold another public hearing after the first reading. This is based upon this court’s finding that the board substantially modified what was originally approved at the first reading on October 8, 2019. The court finds that the law is clear. In Edwards v. Allen, 216 S.W.3d 270 (Tenn. 2007), the Tennessee Supreme Court held that the board’s failure to provide notice of and to hold a new public hearing after it expanded the reclassification from 10 acres to 90 acres and its failure to resubmit the entire area for the planning commission’s consideration were fatal to the board’s jurisdiction. (*Id* at 288). The court reiterated the rule that “where a legislative body substantially alters a proposed zoning ordinance, it must be resubmitted to the planning commission and another public hearing had when the planning commission’s recommendation would likely have been altered by the revision or those opposed to the change are detrimentally impacted.”

This court finds, in this case, that the addition of the multiple new conditions substantially altered the proposed ordinance that was noticed for the initial public hearing. The court finds that the addition of the multiple substantive new conditions triggered a requirement that the proposed ordinance be resubmitted to the planning commission, and the need for another public hearing. This did not happen. The court finds that the imposition of 18 new conditions, the modification of 2 of the planning commission's proposed conditions, and the addition of an entirely new section (section 5) are substantive alterations and/or revisions having an impact or potential impact on the citizens/landowners of the Town of Walden. The court finds that the board's changes here were both substantial and extensive. Therefore, the court finds that re-submission to the planning commission and to the public for public hearing, are required as a matter of law, and this requirement was not met. The court finds that the Town's failure to resubmit the modified ordinance to the planning commission and hold another public hearing are required. The board's failure to do so was an arbitrary exercise of power.

In addition to the above, the court finds that the planning commission's decision on December 9, 2019 to take no action does not meet the applicable requirements of meaningful review by the planning commission. Furthermore, the court finds, regardless of the planning commission's action or inaction, this does not obviate the need for further public hearing before the board for the reasons set out above. The court finds that the Town's zoning ordinance, as well as Tennessee law, require approval or disapproval by the planning commission. Additionally, the court finds that under the plain language of the Town of Walden's zoning ordinance where the board modifies a proposed ordinance, as was done here, it "shall be referred to the regional planning commission for review as prescribed

above". (ZO section 10.04). The court finds that the "as prescribed above" language refers to section 10.03, which sets out as follows:

Upon receipt of a petition or proposal for change, the planning commission shall prepare a report on the proposed change, approving or disapproving the proposal or petition, or may specify conditions of approval or recommended modification of the proposed change, with the reason therefore, and submit it to the board. The planning agency, at the authorization of the petitioner, shall thereupon give notice of a public hearing to be held by the board...

This court has already found that the board substantially modified the proposed ordinance with its substantial additional conditions, therefore requiring the need for reference back to the planning commission, who the court finds should have prepared a report as required by section 10.03 and then resubmitted the same to the Board. This was not done. Finally, the zoning ordinance then requires further notice of another public hearing to be held by the board. This was not done. The court finds that whether or not the planning commission's inaction was a report or not, which the court does not find that it was, the court still finds that no notice nor any further public hearing was ever held. The court finds that the failure to hold another public hearing was required by section 10.03, and that requirement was not met.

In addition to the findings set out above, the court finds that the actions of the board failed to properly apply the explicit requirements of the Town's Village Center-1 zone in the Town's zoning ordinance. The court finds that the Town failed to comply with the procedural requirements in the zoning ordinance, state law, and as required by due process of law. Additionally, the court has a great concern that one of the requirements of the zoning ordinance is that the center should contain a mix of uses. The court's review of the facts related to this development do not seem to meet the requirement of a mix of uses. Additionally, the VC-1 zoning requirements require an internal street network. The court finds that the plan that was approved by the board does not meet the internal street network

requirement of the Town's zoning ordinance. This is in spite of the fact that the planning commission staff noted "that in order to comply with the plan recommendations of emphasizing pedestrians and interconnected street pattern, staff is recommending a condition [of an internal street network] to provide internal connectivity through the site connecting the mix of uses, areas of parking, and civic spaces". The court finds that if the internal-street-network condition was not approved by the town, then the planning commission staff recommended denying waiving the requirement". The court finds that ordinance 331 as approved by the board does not contain an internal street network condition.

For the reasons sets out above, the court finds that the board's approval of ordinance 2019-331 was illegal, arbitrary and capricious. While the court's ruling, set out herein, obviates the need to rule on LOP, LLC's motion for summary judgment, for appellate purposes the court will rule on the motion. Based upon the findings set out herein, the court finds that the ordinance shall be invalidated. Because the court has found several material facts to exist in this matter, the court finds that summary judgment in favor of LOP, LLC would be inappropriate. Based upon this finding, the court finds that the respondent's motion for summary judgment is respectfully denied. The petitioners argue in their response to LOP, LLC's motion for summary judgment that in the event the court determines that ordinance 331 was enacted illegally, arbitrarily, or capriciously, then this court may grant summary judgment in favor of the petitioners. The petitioner's cite to the case of Harris v. Stover, WL 1472642, at *3-4 (Tenn. Ct. App. May 30, 2006). In that case, the Court of Appeals held that because the trial court had found that the movant's claim for summary judgment was barred as a matter of law, then the court can grant summary judgment in favor of the petitioners. The court agrees.

Based upon all of the facts set out herein, the court finds that summary judgment in favor of the petitioners is warranted. The same is granted.

IT IS SO ORDERED.

THIS 2nd day of July, 2021.


J. MICHAEL SHARP, JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served upon the following by delivering the same via U. S. Mail and/or via facsimile to the parties listed below:

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This ___ day of July, 2021.

CLERK