

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT**

**STEVEN SNYDER, H. ANDREW DECKER,
and R. GREGORY BREETZ,**

Petitioners,

vs.

**THE METROPOLITAN NASHVILLE
PLANNING COMMISSION, and SECOND
AVENUE NASHVILLE PROPERTY, LLC,**

Respondents.

F.O-6
Docket No. 21-1077-II
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**STEVEN SNYDER, H. ANDREW DECKER,
and R. GREGORY BREETZ,**

Petitioners,

vs.

**THE METROPOLITAN NASHVILLE
PLANNING COMMISSION, CENTRUM
REALTY AND DEVELOPMENT, and
CRD 2ND AVENUE OWNER, LLC,**

Respondents.

Docket No. 22-0017-II

MEMORANDUM AND ORDER

These two matters, consolidated for all purposes, were heard on March 24, 2022, on writs of certiorari filed by Petitioners Steven Snyder, H. Andrew Decker and R. Gregory Breetz (the "Petitioners") seeking review and repeal of two decisions by the Respondent The Metropolitan Nashville Planning Commission (generally "Metro", and specifically the "Planning Commission") approving two concept plans for developments. The first was for a three-building project to be located at 2nd Avenue and Peabody Street, approved at the Planning Commission's September 9, 2021 meeting, to be developed by Respondent Second Avenue Nashville Property, LLC (the "2nd

and Peabody Property” and the “2nd and Peabody Project” and the “2nd and Peabody Developer”). The second was also for a three-building project, this one located at 506 2nd Avenue South in the Rutledge Hill neighborhood, approved at the Planning Commission’s December 9, 2021 meeting, to be developed by Respondents Centrum Realty and Development and CRD Second Avenue Owner, LLC (the “Rutledge Hill Property” and “Rutledge Hill Project” and the “Rutledge Hill Developers”). Both decisions involved exceptions to the applicable height restrictions for the subject neighborhoods, as set out in the Downtown Code, created in 2010 and modified six times since then, including a modification prior to the Rutledge Hill Project, to establish standards for fifteen (15) downtown subdistricts.

Upon consideration of the pleadings, the arguments of counsel at the hearing of this matter, and the entire record, this Court is prepared to rule.

FINDINGS OF FACT

The Parties

Petitioners are owners and residents of units at the City Lights Condominiums at 20 Rutledge Street in Nashville (“City Lights”). City Lights is one block away from the 2nd and Peabody Property and directly across Rutledge Street from the Rutledge Hill Property. They have an interest in these projects as neighbors who would be directly affected by the proposed construction.

The 2nd and Peabody Project is proposed for a set of adjacent lots known as 507, 509, 511, 519 and 521 2nd Avenue North, and 203 Peabody Street. The Rutledge Hill Project is proposed for a lot known as 506 2nd Avenue South, next door to the 2nd and Peabody Property. The illustration below shows the 2nd and Peabody Project outlined in blue and the Rutledge Hill Project outlined in red.



The Downtown Code

The Downtown Code (“DTC”) was adopted February 2, 2010, as Chapter 17.37 of the Metropolitan Nashville and Davidson County Zoning Code and an attachment to Ordinance No. BL2009-586. It “implements the community vision” through a “community planning process” in which “stakeholders reached a common vision for the future of Downtown.” (DTC, §I).

The Plan envisions multiple distinct neighborhoods within Downtown, each with its own character and scale, which contribute to the vitality of Downtown as the center of the city and the region.

The DTC regulates the physical form of buildings to ensure each makes a positive contribution to a complete urban environment. By ensuring a specific and predictable urban form, the DTC ensures that all new construction makes a positive contribution to the public realm – streets and open space – and that all investments are held to the same standard.

(*Id.*).

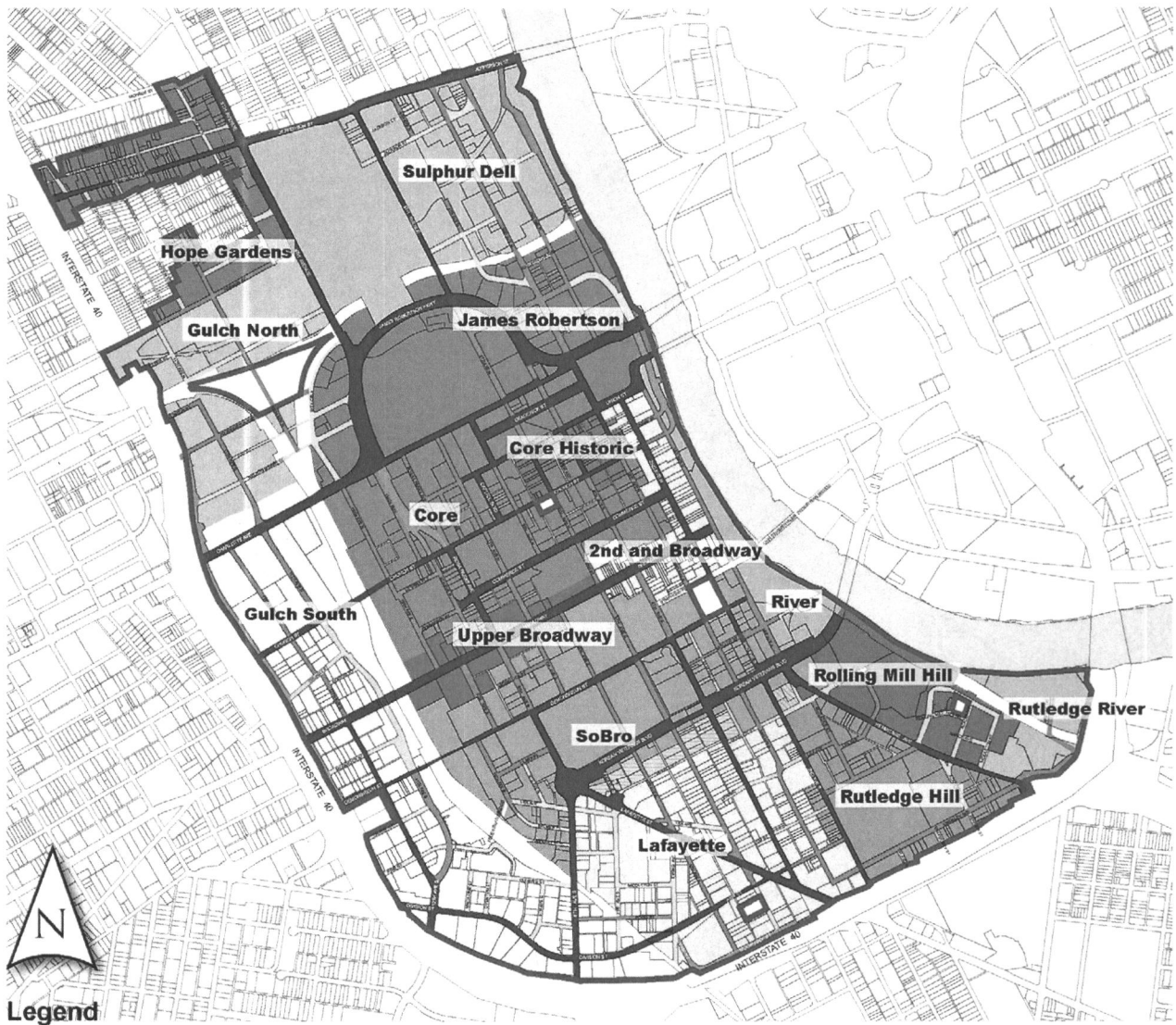
The Guiding Principles of the DTC are identified as follows:

- Ensure that Downtown remains the civic, commercial and entertainment center for Nashville, Middle Tennessee and the Southeast.
- Provide opportunities for continued growth while preserving and enhancing the character that inspires residents and businesses to move to Downtown.
- Create strategic mixed use to facilitate Downtown's transformation into a 24/7 community.
- Create and nurture urban neighborhoods.
- Create active, attractive streets and streetscapes.
- Protect and reuse historic structures and districts.
- Create environmentally sustainable and energy efficient development.
- Create "great spaces" throughout Downtown for the enjoyment of citizens and visitors.
- Provide for improved mobility in and through Downtown to support other principles for healthy growth in Downtown.

(*Id.*). The "Subdistricts" included in the DTC, divided by defined neighborhoods, each with a separate set of standards, are:

- James Robertson
- Core
- Core Historic
- 2nd and Broadway
- Upper Broadway
- SoBro
- River
- Rolling Mill Hill
- Lafayette
- Rutledge Hill
- Rutledge River
- Gulch South
- Gulch North
- Hope Gardens
- Sulpher Dell

The map included in the DTC showing the boundaries of the Subdistricts is set out below:



The 2nd and Peabody Project is in the Lafayette Subdistrict. The Rutledge Hill Project is in the Rutledge Hill Subdistrict.

Although there are many specifics that apply to each of the Subdistricts, the DTC codifies height standards for each Subdistrict, but does allow for bonus height as well as additional modifications to overall height.

Bonus Height Program

The Bonus Height Program (“BHP”) is set out in Section IV: General Standards of the DTC. It allows for additional building height, not otherwise provided for in the Subdistrict standards, “in exchange for contribution to specified programs that provide benefits to the public” including Leadership in Energy and Environmental Design (“LEED”) certification for individual buildings and neighborhood development, pervious surface, historic building preservation, publicly-accessible open space, inclusionary housing, civil support space, upper level garage liners, and underground parking. (DTC, §IV: General Standards). Each Subdistrict has a BHP maximum.

The Lafayette Subdistrict, where the 2nd and Peabody Project is proposed, is described as:

. . . currently a primarily industrial and business services environment with strong transportation connections to the Gulch, SoBro, Midtown, and South Nashville neighborhoods. This neighborhood will likely retain many of the industrial and business service uses while accommodating a greater variety of uses. The neighborhood is primarily low-rise and should act as a transition from the height of the Core and SoBro to the single-family neighborhoods to the South.

(DTC, §II, Subdistrict Standards, Lafayette Subdistrict: Regulating Plan). The building restrictions include 15 stories for transitional properties, 12 stories on Lafayette Street, and 8 stories in the Subdistrict generally. Under the BHP, those heights could be increased to 18, 15 and 11 stories respectively. (DTC, §IV: General Standards, BHP).

The Rutledge Hill Subdistrict, where the Rutledge Hill Project is proposed, is described as “includ[ing] a variety residential and civic historic buildings” and “is largely intact and new buildings of complimentary height, scale and massing” some of which “are governed by a National Register District that regulates development, restoration and demolition.” (DTC, §II, Subdistrict Standards, Rutledge Hill Subdistrict: Regulating Plan). The building restrictions include 6 stories

for primary and secondary streets, and 4 stories for tertiary streets.¹ Under the BHP, the primary and secondary street heights can be increased to 7 stories, but the tertiary street height cannot be increased.

Overall Height Modifications

The DTC also allows for modifications from the standards, and, specifically at issue here, an overall height modification process in addition to the BHP:

Modifications to the Standards

Based on site-specific issues, an applicant may seek modifications to the standards in this document.

Any standard within the DTC may be modified, insofar as the intent of the standard is being met, the modification results in better urban design for the neighborhood as a whole, and the modification does not impede or burden existing or future development of adjacent properties.

The DTC, the Downtown Plan² and any other policies and regulations from governing agencies shall be consulted when considering modifications. Any standards that shall not be modified are explicitly noted in this document.

Modifications may be approved by Planning staff, the Downtown Code Design Review Committee (DTC DRC) or the Planning Commission.

(DTC §I, Application of the DTC: Modifications).

The DTC was amended in 2011, 2012, 2013, 2015, 2016 and 2021. The most recent amendment was dated November 16, 2021, after the approval of the 2nd and Peabody Project, but before approval of the Rutledge Hill Project. One of the changes involved the section setting out

¹ There appears to be an inconsistency in the DTC from the Subdistrict Regulating Plan, which shows 4 stories as the limit for tertiary streets, and the BHP Chart, showing 3 stories as the pre-BHP limit.

² This is a reference to the Nashville Next plan, which incorporates the Community Plan, including the Downtown Plan, adopted by the Metropolitan City Council pursuant to Resolution Number RS2015-256 on August 24, 2017. It was submitted as an Appendix to Petitioners' Brief. In the Downtown Plan, Downtown is divided into four zones: T6-DN (Downtown Neighborhood), T6-CP (Downtown Capitol), T6-DC (Downtown Core) and T6-SB (Downtown 2nd and Broadway).

the considerations for Overall Height Modifications, directly at issue in this case. That provision is currently as follows, with those changes highlighted in bold:

For modifications to overall height, the Executive Director of the Planning Department shall determine whether the development has made reasonable efforts to use all appropriate bonuses available in the Bonus Height Program. The Executive Director's decision may be appealed to the DTC DRC/MDHA DRC. If it has been determined that all reasonable efforts have been made to use the Bonus Height Program, the applicant shall hold a community meeting providing notices to property owners within 300 feet, and the Planning Commission shall review the modification request and may grant, at its discretion, additional height for exceptional design, including but not limited to unique architecture, exceptionally strong streetscape, **contribution to the skyline**, improvement of the project's relationship to surrounding properties, **improvement to the character of the neighborhood**. **In some instances, consideration may be given where a project results in implementation of significant community improvements (e.g. quality open space, upgrading public infrastructure, or others determined by the policies of Metro departments) and/or contributes to the implementation of community improvements determined by the policies of Metro departments.**

(*Id.*). The DTC allows for additional height beyond the BHP if the afore-mentioned criteria are met. Interestingly, while there is a cap under the BHP, the DTC does not specifically provide for a cap on the number of floors that may be approved with the overall height modification criteria.

The 2nd and Peabody Project Application and Approval Process

The 2nd and Peabody Project was initially proposed on January 27, 2021 and sought approval of a two-office tower project of 38 and 34 stories each. The proposal was to change the Nashville Plan designation of the 2nd and Peabody Property from T6-DN to T6-DC.³ The Nashville Plan provides for T6-DN that “[t]he appropriate form and design are critical to ensure that dense and intense development does not overwhelm the streetscape, damaging the liveliness and attractiveness of Downtown.” Regarding building height, the Nashville Plan provides:

In all cases, the T6 Downtown Transect area character and urban condition dictate that one-story buildings are inappropriate and all buildings are a minimum of three stories. The height is based on the location within the T6-DN area, architectural

³ See *supra* n.2.

elements, and the surrounding context. Consideration of appropriate heights is based on the following factors:

- Proximity to other policy areas and the role of the building in transitioning between policies;
- Planned height of surrounding buildings and the impact on adjacent historic structures;
- Contribution that the building makes to the overall fabric of the neighborhood in terms of creating pedestrian-friendly streetscapes, plazas and open space, public art, innovative stormwater management techniques, etc.;
- Relationship of the height of the building to the width of the street and sidewalks, with wider streets and sidewalks generally corresponding to taller building heights;
- Prominence of the street and its role in the T6-DN street hierarchy;
- Prominence of the street or intersection on which the building is located, with locations at or within a few hundred feet of the highest-order intersection in the center being favored for taller buildings;
- Proximity to existing or planned transit;
- Capacity of the block structure and rights-of-way to accommodate development intensity;
- Use of increased building setbacks and/or building stepbacks to mitigate increased building heights;
- Topography;
- Ability to provide light and air between buildings and in the public realm of streets, sidewalks, internal walkways, multi-use paths, and open spaces; and,
- Extent to which affordable or workforce housing as defined in the Glossary of this document is provided by the development.

The Nashville Plan includes a very different vision for the T6-DC area in terms of building height, with “the most dense and intense development” in Davidson County. Building height is addressed as follows:

Location within the T6 Downtown Transect Category, which is envisioned to be the most intense in the County, dictates that one-story buildings are inappropriate. All buildings are a minimum of three stories in height. It is recommended that height bonuses be achieved through the provision of affordable or workforce housing as per the Downtown Code. Further refinement of appropriate form may be established through the Community Planning process to be in keeping with the goals and objectives of the Community Plan.

The height is based on the location within the T6-DC area, architectural elements, and the surrounding context. Consideration of appropriate heights is based on the following factors:

- Proximity to other policy areas and the role of the building in transitioning between policies;
- Planned height of surrounding buildings and the impact on adjacent historic structures;
- Contribution that the building makes to the overall fabric of the T6-DC area in terms of creating pedestrian-friendly streetscapes, plazas and open space, public art, innovative stormwater management techniques, etc.;
- Relationship of the height of the building to the width of the street and sidewalks, with wider streets and sidewalks generally corresponding to taller building heights;
- Prominence of the streets and its role in the T6-DC policy's street hierarchy;
- Prominence of the street or intersection on which the building is located, with locations at or within a few hundred feet of the highest-order intersection in the center being favored for taller buildings;
- Proximity to existing or planned transit;
- Capacity of the block structure and rights-of-way to accommodate development intensity;
- Use of increased building setbacks and/or building stepbacks to mitigate increased building heights;
- Topography;
- Ability to provide light and air between buildings and in the public realm of streets, sidewalks, internal walkways, multi-use paths, and open spaces; and,
- Extent to which affordable or workforce housing as defined in the Glossary of this document is provided by the development.

The original 2nd and Peabody Project proposal was set for hearing by the Planning Commission on March 25, 2021, at which it voted to defer the item.

On July 19, 2021, a new application was submitted for the 2nd and Peabody Project that included three buildings which were 32, 36 and 18 stories in height. It was originally set on the August 26, 2021 Planning Commission agenda but reset for September 9, 2021. Prior to that meeting the project was approved by the DRC.

The Planning Commission staff recommended approval of the project with conditions. The project details were described as follows:

The project is located on the full block encompassed by 2nd Avenue South, Peabody Street, 3rd Avenue South, and Lea Avenue. The primary drop-off area and lobby access is located along 3rd Avenue South, with entry to the below-grade parking garage located at that drop-off, and an additional garage entry/exit point on Peabody Street. All loading and service operations will be located in the below-grade parking garage.

This project includes:

- 1.37 acres of publicly accessible open space.
The publicly accessible open space borders the full edge of 2nd Avenue South, with additional open space and pathways located between the buildings, as well as along the proposed realignment of Lea Avenue.
- Activated ground floors. The ground levels of each building will be activated through retail and restaurant use and will be open to the public.
- Below grade parking and loading.

In recommending the 2nd and Peabody Project, the Planning Commission staff, through Executive Director Lucy Kempf, determined that the developer “made reasonable efforts to use all appropriate bonuses available in the Bonus Height Program. Efforts include fulfilling requirements of the Open Space, Pervious Surfaces, Public Parking, and Underground Parking bonuses, as well as committing to earn LEED Silver-level (or higher) certification.” In the height modification analysis, the Planning Commission staff relied upon the fact that community meetings were held at which those in favor and opposed were heard, the project involved unique architecture, enhanced streetscape and open park space, it improved the relationship to surrounding properties with a realignment of Lea Avenue, and “additional considerations.” The recommendation was in favor of the project, noting:

The project offers unique design characteristics and expression in its site and open space design, as well as through the building massing and façade articulation. The project’s emphasis on residential use lays the groundwork for a vibrant urban neighborhood in this part of downtown. The project’s significant amount of open park space will be an important neighborhood amenity in this area of the Lafayette Subdistrict.

(ARI-000422)⁴. The conditions recommended by the Planning Commission staff were:

1. The project shall obtain a minimum of LEED Silver certification, or equivalent, as described within the LEED section of the DTC.
2. All bonus height actions identified in this application, including any that require a deed or restrictive covenant, must be approved prior to building permit approval.
3. The developer shall propose an agreement for reasonable public access (e.g. hours of operation and other operational expectations) to the privately-owned, publicly accessible open space. This shall be reviewed by Metro Planning and Metro Legal and recorded prior to the issuance of building permits.
4. The applicant shall coordinate with NDOT and WeGo Transit on future mobility needs on 2nd Avenue South and 3rd Avenue South.
5. The applicant shall coordinate with NDOT and Metro departments on their proposed realignment and construction of Lea Avenue, and related ROW dedications.
6. Existing overhead lines along all frontages shall be buried.
7. The proposed residential use shall not be converted to short-term rental use, memorialized by a deed restriction or covenant, as reviewed by Metro Legal prior to issuance of a Use and Occupancy Letter.

(ARI-000441).

In its presentation to the Planning Commission, the 2nd and Peabody Developer noted the changes in that proposal from the one previously submitted, with special attention to policy goals of more meaningful publicly accessible open space, a shift to more predominantly residential land use with active ground floor uses, and lowering the height proposal. (ARI-000448). It also asserted an approach more consistent with the T6-DN concepts in the Nashville Plan, although adjacent to the T6-DC area and recognition of those different, more dense and intense development characteristics. (ARI-000449). The developer emphasized the unique architecture, exceptionally strong streetscape and improvement of the property's relationship to surrounding properties. (ARI-000455).

⁴ Because this is a consolidation of two administrative appeals, there are two records. References to the record associated with 21-1077-II shall be "ARI" and the one associated with 22-0017-II shall be "ARII".

The Planning Commission met, with eight (8) Commissioners present.⁵ Presenters included the 2nd and Peabody Developer, a representative of the Planning Commission staff, and members of the public both for and against. It was noted that two community meetings had been held, one with the prior project plan and one with the new plan. Further, that the DRC had approved the project. The Planning Commission had a fulsome discussion of the project and voted 6-2 to approve it with conditions.

The Rutledge Hill Project Application and Approval Process

The Rutledge Hill Project was submitted on August 4, 2021 for one 45-story and one 16-story residential building, and a 23-story hotel. (ARII-0170-0171). It was resubmitted with modifications on October 6, 2021 and included one 32-story and one 39-story residential building, and a 19-story hotel. (ARII-0512). The Rutledge Hill Developer relied, in part, on the adjacency of the then-approved 2nd and Peabody Project to emphasize the appropriateness of the proposed height in relation to nearby properties. (ARII-0373).

The Planning Commission staff recommended approval of the project with conditions. The project details were described as follows:

The project is located at 0 and 500 2nd Avenue South, on the block encompassed by 2nd Avenue South, Peabody Street, Rutledge Street, and Lea Avenue. The project has frontages on all four streets. Entries to the below-grade parking garage entry are located on Rutledge Street, Peabody Street, and 2nd Avenue, and the loading area is located in the garage. There is a porte-cochere for the hotel located off of Peabody Street, and a drop off area located off of 2nd Avenue. The proposed public park will have three primary entry points, at the corner of Rutledge Street and Lea Avenue, on 2nd Avenue, and on Peabody Street. The project is proposing activating key locations adjacent to the park with retail and restaurant use that will be open to the public.

In recommending the Rutledge Hill Project, the Planning Commission staff, through Executive Director Lucy Kempf, determined that the developer “made reasonable efforts to use all

⁵ Commissioners Jim Lawson and Lilian Blackshear were absent.

appropriate bonuses available in the Bonus Height Program. Efforts include fulfilling requirements of the Open Space, Pervious Surfaces, Public Parking, and Underground Parking bonuses, as well as committing to earn LEED BD+C gold certification and LEED-ND silver certification, or equivalent.” In the height modification analysis, the Planning Commission staff relied upon the fact that community meetings were held at which those in favor and opposed were heard, the project involved project design elements such as publicly accessible open space, an emphasis on non-short term rental residential use, substantial park space, proportional adjustments of height among the buildings, minimized building footprints and others. The recommendation was in favor of the project, noting:

The project provides a new 1.36 acre park within the Rutledge Hill neighborhood. The project’s emphasis on residential use supports the goal of [sic] a creating a vibrant, dense urban neighborhood in this part of downtown.

(ARII-0519-0522). The conditions recommended by the Planning Commission staff were:

1. The project shall obtain a LEED BD+C gold certification and LEED ND silver certification, or equivalent, as described within the LEED section of the DTC.
2. All bonus height actions identified in this application, including any that require a deed or restrictive covenant, must be approved prior to building permit approval.
3. The developer shall propose an agreement for reasonable public access (e.g. hours of operation and other operational expectations) to the privately-owned, publicly accessible open space. This shall be reviewed by Metro Planning and Metro Legal and recorded prior to the issuance of building permits.
4. The applicant shall coordinate and comply with guidance from NDOT on any TIS and other related mobility and infrastructural recommendations as noted in the Nashville DOT section above.
5. All overhead lines along all frontages shall be buried.
6. The proposed residential use shall not be converted to short-term rental use, memorialized by a deed restriction or covenant, as reviewed by Metro Legal prior to issuance of a Use and Occupancy Letter.
7. Prior to the issuance of a Final Site Plan, the applicant shall meet with Metro officials to discuss the possibility of using District Energy Service.

(ARII-0523).

In its presentation to the Planning Commission, the Rutledge Hill Developer emphasized the “spectacular public park space” that is an “oasis” and “unique and inclusive.” (ARII-0573-0574). He emphasized the proximity to the 2nd and Peabody Project and that this development would be “complementary to the overall neighborhood, inclusive of the 2nd and Peabody developments.” (ARII-0575). He noted the park was “a key driver for the development.” (ARII-0577).

The Planning Commission met, with eight (8) Commissioners present.⁶ Presenters included the Rutledge Hill Developer, a representative of the Commission staff, and members of the public both for and against. It was noted three community meetings had been held, and that the DRC had approved the project. The Planning Commission had a fulsome discussion of the project and voted 5-3 to approve it with conditions.

STANDARD OF REVIEW

Judicial review of a local administrative body’s decision is obtained by filing a petition for a common law writ of certiorari. Tenn. Code Ann. § 27-8-101; *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990). This writ provides a narrow scope of review by a trial court. *Willis v. Tenn. Dep’t of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003). Trial courts have been instructed, when reviewing local zoning and planning decisions pursuant to a writ of certiorari, that review is limited to whether or not the body “exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision.” *Harding Academy v. Metro Gov. of Nashville*, 222 S.W.3d 359, 363 (Tenn. 2007)

⁶ The Court notes there had been a change in the Planning Commission membership since the approval of the 2nd and Peabody Project. Councilmember Kathleen Murphy was replaced with Councilmember Brett Withers. Also at this meeting, Commissioners Lawson and Blackshear were present, but Chair Greg Adkins, who attended the prior meeting, was absent.

(quoting *Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000)). Generally, in such appeals, actions that are considered illegal, arbitrary or fraudulent include:

(1) the failure to follow the minimum standards of due process, (2) the misrepresentation or misapplication of legal standards, (3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards.

Id. (citing *Hoover v. Metropolitan Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn. Ct. App. 1996)). Review is generally limited to the record produced by the local administrative board, unless the reviewing court permits the introduction of additional evidence on the issue of whether the board exceeded its jurisdiction or acted illegally, capriciously, or arbitrarily. *Moore v. Metropolitan Bd. of Zoning Appeals*, 205 S.W.3d 429, 435 (Tenn. Ct. App. 2006). If a board issues a decision lacking evidentiary support, or if a board denies a request that meets all applicable requirements with no basis for the denial, then the decision is arbitrary and unreasonable. *Harding Academy*, 222 S.W.3d at 363.

The scope of review regarding matters of law requires application of a *de novo* standard with no presumption of correctness. *Id.* (citing *Lafferty*, 46 S.W.3d at 759). The Court may reject an administrative agency's factual findings only if a reasonable person would *necessarily* draw a different conclusion from the record. *Miller v. Tennessee Bd. of Nursing*, 256 S.W.3d 225, 229 (Tenn. Ct. App. 2007) (citing *Jones v. Greene*, 946 S.W.2d 817, 828 (Tenn. Ct. App. 1996) (emphasis added)).

When the factual support for an administrative decision is challenged, determining whether substantial and material evidence supports the decision requires a reviewing court to conduct a searching and careful inquiry into the entire record. *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995); *Willamette Indus., Inc. v. Tennessee Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999). The Court,

however, may not reweigh the evidence or substitute its judgment for that of the administrative agency. *Martin v. Sizemore*, 78 S.W.3d 249, 276 (Tenn. Ct. App. 2001); *see also McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 693 (Tenn. 1996); *Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn. 1977). Instead, the Court must review the record for such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration. *Clay County Manor, Inc. v. State*, 849 S.W.2d 755, 759 (Tenn. 1993); *Southern Ry. Co. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984); *Miller*, 256 S.W.3d at 229).

CONCLUSIONS OF LAW

As set out in *Hudson v. Metropolitan Gov't of Nashville and Davidson County*, M2009-01081-COA-R3-CV, 2020 WL 7255807 (Tenn. Ct. App. Dec. 8, 2020), the Court of Appeals provided:

Planning commissions are entrusted with the authority to set local planning priorities. *See Metro. Gov't of Nashville & Davidson Cty. v. Barry Constr. Co.*, 240 S.W.3d 840, 852 (Tenn. Ct. App. 2007). And they enjoy 'a considerable amount of discretion' when exercising their authority. *State ex rel. Byram v. City of Brentwood*, 833 S.W.2d 500, 505 (Tenn. Ct. App. 1991).

Hudson, 2020 WL 7255807, at *3. Consideration of applications pursuant to the local planning laws is an administrative or "quasi-judicial function." *Id.* (citing *B & B Enters. of Wilson Co., LLC v. City of Lebanon*, No. M2003-00267-COA-R3-CV, 2004 WL 2916141, at *3 (Tenn. Ct. App. Dec. 16, 2004); *McCallen*, 786 S.W.2d at 638). Their "power or jurisdiction is limited in scope to that expressly conferred by statute" and cannot be exercised in a legislative fashion. *Father Ryan High School, Inc. v. City of Oak Hill*, 774 S.W.2d 184, 190 (Tenn. Ct. App. 1988). Petitioners assert that the Planning Commission staff, in making recommendations to the Planning

Commission, is legislating by making lot by lot decisions about modifications of the DTC height standards in approving building projects that significantly exceed those standards.

The DTC does not have height restrictions, but rather height standards with a provision to modify them in certain circumstances. Just as at the state level the General Assembly grants administrative agencies the power to issue rules and regulations that are limited to implementation of the legislature's will or policy, *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997), the Planning Commission's authority is similarly limited and shaped by the ordinances enacted by the Metro Council. See *Father Ryan High School, Inc.*, 774 S.W.2d at 190. "[T]he test for determining whether a statute is an unlawful delegation is whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent." *Bean*, 953 S.W.2d at 199.

The Planning Commission is established in the Metro Charter at 11.504 as follows:

The metropolitan planning commission shall have all of the powers, duties and responsibilities which are now or may be hereafter granted to municipal planning commissions, regional planning commissions or metropolitan planning commissions by general state law, including specifically but not limited to such powers, duties and responsibilities with respect to general planning, zoning and subdivision regulations as are granted by the following chapters of title 13 (Public Planning and Housing) of the Tennessee Code Annotated: chapter 3, part 1 (Regional Planning Commissions); chapter 3, part 4 (Regional Planning Regulations); chapter 7, part 1 (County Zoning Regulations); chapter 4, part 1 (Municipal Planning Commissions); chapter 4, part 3 (Municipal Planning Regulations); and chapter 7, part 2 (Municipal Zoning Regulations); provided such powers, duties and responsibilities are not in conflict with the provisions of this article. To the extent that there is any conflict between the powers given a metropolitan planning commission and the powers given a municipal planning commission or a regional planning commission, the commission hereby created shall be deemed a metropolitan planning commission; and to the extent that there is any conflict between the powers given a municipal planning commission and the powers given a regional planning commission, the commission hereby created shall be deemed a municipal planning commission. In addition thereto, the commission shall have such powers, duties and responsibilities as are provided by ordinance.

In the performance of these powers, duties and responsibilities, the metropolitan planning commission shall have the authority, and where appropriate to the context shall be required, to:

- (a) Within its budget appropriation and other funds at its disposal employ personnel and enter into contracts for such services as it may require.
- (b) Enter into agreements and receive such grants and/or assistance as may be available from the federal or state governments for planning purposes; receive gifts for planning purposes.
- (c) Require information which shall be furnished within a reasonable time from the other departments and agencies of the metropolitan government.
- (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.
- (i) Make, in cooperation with the metropolitan government housing authority, and adopt plans for the clearance and rebuilding of slum areas and for the improvement of blighted areas within the metropolitan government area.
- (j) Make and adopt plans for the replanning, conservation, improvements and renewal of neighborhoods, planning units and communities within the metropolitan government area.
- (k) Submit annually to the mayor, not less than sixty (60) days prior to the beginning of the budget year, a list of recommended capital improvements which in the opinion of the commission are necessary or desirable to be constructed or otherwise provided during the forthcoming six-year period. Such lists shall be arranged in order of preference with recommendations as to which projects shall be constructed in which years.
- (l) Promote public interest in and understanding of planning and its organization and operation, the master or general plan and its constituent parts, and the

implementation of planning, including zoning, subdivision regulation, urban renewal, the official map and capital improvements programming.

(Metro Charter, §11-504).

The Planning Commission Rules and Procedures, adopted May 12, 2005 and revised July 13, 2017 (“Rules & Procedures”), establish the process for “the orderly disposition of the business” of the Commission. They specifically address the roles of the Commission and the Metro staff employed to support that body. Section V addresses the role of the Commission staff, stating that the Executive Director is the “technical advisor and secretary to the [Planning] Commission.” The Rules & Procedures further provide that “The Planning Commission will generally make its recommendation in conformance with the General Plan.” (Rules & Procedures §VI(H)). The Planning Commission staff is available to the Commissioners to “clarify[] the content of the proposal.” (Rules & Procedures §VII(B)(2)). As discussed above, the DTC was adopted as Chapter 17.37 of the Metro Code to “implement[] the community vision” through a “community planning process” in which “stakeholders reached a common vision for the future of Downtown.” (DTC, §I).

Petitioners assert that the Planning Commission, initially through its staff and then through the Commission itself, exceeded its authority by approving the plans that include heights well outside of the DTC standard and the BHP additions. They argue that the modification standards should be void for vagueness as they involve completely subjective judgments about design, unique architecture, streetscapes, contribution to the skyline and the like. Further, that even though the authors of the DTC included those modification standards, or they were added by the Metro Council over time through amendments, the Planning Commission cannot possibly be implementing legislative standards because the standards do not provide sufficient guidance to do so. Additionally, Petitioners state that the provided guidance, through the height standards and

BHPs, has been ignored, all of which results in a Planning Commission decision that is not sustainable.

The Court is not unsympathetic to Petitioners' concerns. Indeed, as citizens of Nashville, we are all interested in appropriate, well-considered growth and residing in a city that is not for sale to developers. It is difficult to understand what standards the Planning Commission and its staff are applying in approving these projects given how out of skew they are with the existing neighborhoods and the standards set out in the DTC. It is not, however, for the Court to substitute its judgment for that of the Planning Commission, but rather to evaluate the process to determine if it acted in a manner exceeding its authority, was arbitrary and capricious, or made a decision not supported by the substantial evidence in the record. In this case the Court cannot make such a finding.

The Planning Commission staff followed the DTC modification requirements, including obtaining approval required from the DRC. The DTC does allow for modifications outside of the BHP and sets out a mechanism for doing so, including the factors required for consideration. The DTC specifically provides that "the Planning Commission shall review the modification request and may grant, at its discretion, additional height for exceptional design." (DTC §I). Whether or not Petitioners or the Court think the proposed projects have exceptional design, unique architecture or exceptional streetscapes is not the standard. That authority is expressly conferred upon the Planning Commission, as advised by its staff and with required approval by the DRC. These factors are admittedly subjective, and compared to an application of objective factors, can be dissatisfying to dissenting opinions. However, they are standards that the Metro Council has approved as applicable to this process, and the Court cannot substitute its judgment for that of the Planning Commission which voted to approve. Although there were dissenting opinions among

the Planning Commission members, both projects were the subject of fulsome debate, with interested parties having the opportunity to weigh in and address their pros and cons. Ultimately the Planning Commission, applying the DTC modification standards, voted to approve the projects. They applied the applicable standards through a legally complying process and determined that the projects should be approved despite the heights of the included buildings.

The Court issues this decision with some hesitation and shares the view of Commissioner Jeff Haynes, who commented at the 2nd and Peabody Project hearing as follows:

I think unless we pause on our bonus sites, our infrastructure as a city is not going to keep up in the core of our downtown. And if we do this project and then we continue down the Lafayette district, we're going to create an infrastructure problem. And I think as a city, especially in the core of our downtown, we've got to pause on triple the density of the bonus heights.

(ARI-553). Commissioner Haynes double-downed on his concerns at the subsequent meeting to discuss the Rutledge Hill Project:

So, I happen to disagree with my fellow commissioners. Very rarely do I disagree with the planning staff. And I think this is a critical time in our city. We need to pause our height bonus process. This is a great, beautiful project. It's in the wrong location.

. . . The risk we take if we approve this kind of density, it's going to permeate through Rutledge Hill on a case-by-case basis and we're going to lose the views that they talk about protecting at Fort Negley.

. . . And quite honestly, you can design beautiful projects with greenways, parks, wide streets with lower density. You don't have to have this verticality here.

So, I think this board needs to think seriously about the height density process, and we need to pause.

(ARII-620-621). Commissioner Pearl Sims followed these last comments with additional reflections about the exceptions overcoming the rule:

I think if we don't stop and do exactly what Commissioner Haynes just said, we're setting ourselves up where the exceptions which can create growth and create activity are going to give way to jeopardizing our values in this city.

(ARII-622-623).

The Court does not believe Petitioners have met their burden of proving that the Planning Commission's actions and processes constituted an excess of its authority, were arbitrary and capricious or without substantial evidence, or constituted illegal procedure. If the leadership of Nashville is going to continue to create flexible standards to modify well-thought-out and drafted zoning ordinances, then courts are limited in the effectiveness of their review authority. The modifications are not supposed to be the rule, and the DTC does not make them such, but the modification policy provides for significant discretion by the Planning Commission, which discretion has been thoughtfully applied in these cases pursuant to the Court's narrow review. *See Harding Academy*, 222 S.W.3d 359 at 363.

CONCLUSION

As the record contains substantial and material evidence to support the Planning Commission's decisions, the Planning Commission's approval of the 2nd and Peabody and Rutledge Hill Projects are affirmed. Costs are taxed to Petitioners.

It is so ORDERED.

s/Anne C. Martin

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RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

5-2-22
Date