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ARTHUR G. SEYMOUR, JR.
(1945 - 2019)

August 7, 2023

Knoxville Knox County Planning
400 Main Street
Suite 403
Knoxville, TN 37902

Re: Agenda Item No. 6
File No. 8-A-23-HPA
0 Central Ave. Pike

Dear Planning Commission:

I represent the applicant, Beaver Creek Development, LLC. At your upcoming Planning Commission meeting you will be considering the applicant's request for a Level II Certificate of Appropriateness for a ~31.32-acre parcel of property located at 0 Central Ave. Pike (PID No. 068 075) (the "Property"). Staff's recommendation is to approve a Level II COA for new disturbance of 5.23 acres, but this recommendation for approval is only for a portion of the property, excluding ~14.8 acres from their slope analysis. For the reasons stated herein, the applicant asserts that a Level II COA is not necessary because of the exemptions in Section 8.9.B.4 of the Zoning Ordinance. In the alternative, the applicant requests a Level II COA in the amount of 11 acres[1] of disturbance because all of the allowable slope disturbance of the Property, 14.14 acres, was previously disturbed by the TVA for its utility lines on the eastern portion of the Property.

The Proposed Disturbance is Exempt from the COA requirements under Section 8.9.B.4 of the City of Knoxville's Zoning Ordinance.

Pursuant to Section 8.9.B of the City's Zoning Ordinance,

[1] Applicant has a pending Concept Plan (7-B-23-C) and Special Use application (8-A-23-SU) which are being postponed until the issue of allowable disturbance has settled. If the requested disturbance of ~11 acres is not approved, then these applications would need to be withdrawn and the applicant would need to decide if developing the property with 5.23 acres of disturbance is viable.

The HP Overlay regulations apply to all development on lots in all districts withing the HP Overlay district with the following exceptions:

1. Legally existing structures existing as of the effective date of this Code.
2. Lots of record for single-family dwellings existing as of the effective date of this Code. This exception applies only where the lot of record is one acre or less.
3. Lots that have been issued a grading permit prior to the effective date of this Code.
4. Lots that have been previously legally disturbed or developed would also be excepted provided that **any new/additional disturbance does not exceed the previously-disturbed area or the maximum land disturbance permitted by Table 8.6 below[2], whichever is greater.** For the purposes of this section, disturbance shall mean any activity that changes the physical conditions of land form, vegetation and hydrology, creates bare soil, or otherwise may cause erosion or sedimentation.

(**Emphasis** added).

Section 8.9.B.4 is the operative exemption at issue in this application. Based upon the plain language of this provision of the ordinance, and giving each word its plain and ordinary meaning, the "new/additional disturbance" on the Property is exempt from the HP Overlay regulations to the extent of the "previously-disturbed area or the maximum land disturbance permitted by Table 8.6 below, whichever is greater." In other words, the applicant is entitled to "new/additional disturbance" in the amount of 14 acres (the amount of the "previously-disturbed area" in the TVA easement) or 14.17 acres (the amount of the disturbance allowance calculated for the entire 31.32 acres of the Property per Table 8.6) "whichever is greater."

Tennessee case law provides that zoning ordinances are to be construed using the same principles used to construe statutes. *See Lions Head Homeowners' Ass'n v. Metro Bd. of Zoning Appeals*, 968 S.W.2d. 296, 301 (Tenn. Ct. App. 1997). When a statute or ordinance is clear and unambiguous, it should be interpreted according to its plain meaning "without a forced interpretation that would limit or expand the [ordinance's] application." *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). When a statute is clear, "we apply the plain meaning without complicating the task. . . . Our obligation is simply to enforce the written language." *Lind v. Beaman Dodge*, 356 S.W.3d 889, 895 (Tenn. 2011). It is the cardinal rule of statutory interpretation not to overlook or ignore any of the statute or ordinance. *See Richards v. Vanderbilt Univ. Med. Ctr.*, 2023 Tenn. App. LEXIS 273 at *17 (Tenn. Ct. App. July 11, 2023)(citing Coleman v. State, 341 S.W.3d 714, 722 (Tenn. 2005)).

Exemption 4 in Section 8.9.B. is clear and unambiguous. The requested 11 acres of "new/additional" disturbance is less than either the "previously disturbed area" or "the maximum land disturbance permitted by Table 8.6." To read it otherwise would be to force a strained interpretation on the plain language of the ordinance which would arbitrarily limit its application.

Staff's position is that the previously legally disturbed area within an HP Overlay "is part of the maximum land disturbance budget, not separate from it." That interpretation effectively nullifies the exemption of Section 8.9.B.4. To follow that interpretation, 8.9.B.4 would have no purpose and would be effectively eliminated from the Zoning Ordinance by interpretation. In essence, this interpretation modifies the exemption in 8.9.B.4 by changing the words

[2] Table 8.6 is the land disturbance calculation tables which form the basis for staff's slope disturbance allowance in any lot within the HP Overlay in the City of Knoxville.

"new/additional disturbance" to mean instead "overall disturbance." That may be the preferred interpretation of the HP Guidelines from the staff or Plans, Review & Inspections, but that is contrary to the plain language and is, in essence, amending the zoning ordinance administratively, via interpretation, instead amending the ordinance through the proper legislative channels. As the Tennessee Courts have held multiple times, municipalities, like the City of Knoxville, lack the inherent power to regulate or control the use of private property within their boundaries. Their power is derived solely from the state though specific delegations of the General Assembly. *421 Corp. v. Metropolitan Government of Nashville and Davidson County*, 36 S.W. 3d 469, 475 (Tenn. Ct. App. 2000); *Cherokee County Club, Inc. v. City of Knoxville*, 152 S.W.3d 466 (Tenn. 2004). As these laws and regulations are in derogation of common law and operate to deprive property owners of a use of their property which would otherwise be lawful, they are to be strictly construed by the courts in favor of the property owners' right to the free use of their property. *Anderson County v. Remote Landfill Services*, 833 S.W.2d 903 (Tenn. Ct. App 1991).

As such, the applicant should be allowed to develop its property, within its proposed 11 acres of disturbance, based on a clear and unambiguous application of Section 8.9.B.4 of the Zoning Ordinance.

Alternatively, a Level II COA for 11 acres of disturbance should be granted by the Planning Commission.

The applicant applied for a Level II COA with the express condition that it was not waiving its arguments that the exemptions cited above apply to the Property. Assuming for the sake of argument that the exemptions do not apply, or that staff's interpretation is correct, then the applicant should still be granted a Level II COA for its requested 11 acres of disturbance. The requested disturbance is 3 acres less than would be allowed under a slope analysis for all 31.32 acres of the Property. Because of the TVA disturbing 14 acres, which are now rendered unbuildable[3] due to the easement, the entire property essentially unbuildable without the recognition of an exemption, or a Level II COA, because of the previously disturbed areas for the easement in conjunction with the HP overlay.

Staff's recommendation is creative; however, it essentially subdivides the Property by carving off 14.8 acres from their slope analysis and recalculating the slope analysis only to the remaining 16 acres. But the Property is not separate parcels, and is being sold and developed as a single, unified parcel. The acquisition and carrying costs for the Property, and therefore the margins of the development consider all 31.32 acres, not just the 14.8 acres that were previously disturbed by the TVA. Moreover, nothing in the zoning ordinance authorizes staff to arbitrarily consider one portion of the Property for a slope-analysis while excluding another. Although local governments and administrative agencies have broad discretion when it comes to decisions involving local land-use matters, that discretionary authority must be exercised within existing standards and guidelines. *McCallen v. City of Memphis*, 786 S.E. 2d 633, 639 (Tenn. 1990).

A more equitable resolution, that would allow this property to be developed for much-needed residential units within a city amid a population boom and an affordability crisis, would be to not penalize this applicant because of the TVA's pre-HP overlay disturbance, but to allow new/additional disturbance in an amount that is both less than the slope-analysis for the entire

[3] Even though buildings cannot be built in the easement, other infrastructure such as parking areas, streets, driveways, and stormwater drainage facilities could be located within the easement area.

parcel, but would accommodate a concept plan that would allow for approximately 103 housing units.

Staff asserts that "approving a COA based on a disturbance limit of 5.23 acres rather than 11 acres requested balances the integrity of the HP Overlay District with practical development considerations"; however, the practical development considerations may prevent meaningful development on the property either by this developer or by future developers. Amid the current affordability crisis in the City, more flexibility is needed to encourage responsible development, and neither Planning Staff or Plans, Review & Inspections have identified any concern that the additionally requested disturbance would be unsafe or cause harm to the surrounding properties. To the contrary, allowing the 11 acres of new/additional disturbance not only serves the plain language of the HP exemptions, but also serves the statutorily mandated purpose of the zoning regulations to promote the health, safety, morals, convenience, order, prosperity and welfare of *present and future inhabitants* of the state and the City of Knoxville. See Tenn. Code Ann. Section 13-7-203.

Conclusion:

Either by determining that the plain language of Section 8.9.B.4 of the zoning ordinance allows the requested disturbance, or by exercising your discretion in granting a Level II COA for 11 acres of new/additional disturbance, the applicant respectfully requests their application be granted in a manner that will allow them to move forward with their previously filed Concept Plan and Special Use application.

Please contact me if you have any questions.

Sincerely,

Benjamin C. Mullins
FRANTZ, McCONNELL & SEYMOUR, LLP

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