March 26, 2003

Re: Subdivision issues

Dear Madam,

This letter is in response to your correspondence of March13, in which you provide background information concerning issues which have arisen with the Subdivision, and ask specific questions. I will recap some of that information so this opinion letter is as thorough as possible.

It is my understanding that the development of the subdivision began in June of 1996, on land located outside the municipal boundaries of your Town. The Planning Commission granted approval and accepted a letter of credit for the bond. The bond expired approximately one (1) year later. In January of 1998, approval was granted for the second phase of the project, and another bond was set and posted in the amount of $31,500.00. This second bond for phase two of the project expired the next year, and the developer submitted a personal check as bond in the amount of $35,000.00. Although the check states that it is "held until the Planning meeting at 2/9/99," the meeting was held and no further bond has ever been posted by the developer.

In 2000 the urban growth boundary was established for the Town, in compliance with the requirements of Public Chapter 1101. The urban growth boundary (hereafter UGB) excludes the area in which the subject subdivision is located, so the project was effectively removed from the Planning Commission's jurisdiction. However, the State Planning office determined that, since the developer posted a bond with the Planning Commission, the Planning Commission would retain jurisdiction until the bond was released. Various drainage problems have arisen as a result of the developer's activities on the site.

Before addressing your specific questions I want to address the grounds upon which the Planning Commission has continued to exercise jurisdiction over this development. Although I originally thought that the commission, as a regional commission, could have jurisdiction over a subdivision located outside the UGB, I have determined that is not the case. The state planning office frequently names municipal planning commissions as "regional" planning commissions, but the designation has no impact on the jurisdiction of the body. You have further informed me that the commission does not have any members who are officials from the County, which leads me to conclude that it is not a true regional planning commission.

Tennessee Code Annotated ' 13-3-102 contains information concerning the designation of a municipal planning commission as a regional commission, and states that the region to be included consists of a single municipality, together with territory adjoining but outside of such municipality, *no part of which is outside the municipality's urban growth boundary*, or, if no such boundary exists, more than five (5) miles beyond the limits of the municipality. (emphasis added)

Therefore, the area located outside the Town's UGB cannot be subject to the jurisdiction of the Planning Commission, whether it has been designated a municipal or regional body.

This lack of jurisdiction outside the UGB is made clear in Public Chapter 1101 as codified in Tennessee Code Annotated ' 6-58-101, et seq. In section 6-58-106(d) of the law, it states "*nothing in this chapter shall be construed to authorize municipal planning commission jurisdiction beyond an urban growth boundary."* (Emphasis added).

In my opinion, despite the direction of the state planning office, the Municipal/Regional Planning Commission has no jurisdiction over this subdivision. Assuming that the developer may be entitled to some type of "grandfather" rights to continue to act under the jurisdiction of the Commission, which is not based on any portion of the law, those rights would only be as good as the bond. Since the developer wrote on his check that it was only to be held until a meeting in February of 1999, and since most checks are only valid for six (6) months, the bond has effectively expired and the developer may no longer rely on the bond as a basis for claiming that the Planning Commission has authority over the project. The Planning Commission should immediately divest itself of any dealings with this development, send back the check, and notify the county.

Following are the answers to your questions:

1. Is the Town liable for the drainage problems?

No, because the Town has done nothing itself to interfere with the natural flow of water. In Miller v. City of Brentwood, 548 S.W.2d 878 (Tenn. App. 1977), property owners sued the city for granting building permits for construction on land located above their subdivision, claiming the construction increased water runoff. The Court of Appeals rejected their claim against the city on four grounds:

> 1. No court has been so bold as to hold a local government liable for failure to assure that a building project would not injure its neighbors before issuing a permit for construction. To initiate such a rule would make it necessary for every municipality to require indemnity bonds from builders in fantastic amounts before issuing permits for construction, in which case the cities would be the liability insurers upon each building constructed with the city's permission.
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> 2. The watershed that drained into the drainage ditch that flooded the subdivision property was not entirely within the city limits, and construction outside the city contributed to the flooding.
> 3. The natural flow rule prevails in Tennessee. Under that rule, the lower landowner is the subservient estate and the upper landowner is the dominant estate, so that the lower landowner must accept water that naturally flows from the upper land to the lower land. It would be inappropriate for a city to impair the usefulness of vacant land (located between the development and the subdivision in the Miller case) to protect the lower lying property. To do so would have the effect of transferring the subservient status of the lower land to that of the upper land; that is, to reverse the natural flow rule recognized in Tennessee.
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> 4. There was no authority at that time to compel a city to construct an artificial drainage

sewer.

The Miller Court did not rule that the flooded landowners had no recourse, only that their complaint should be brought against the developer and upper landowners.

A city may only be held liable for taking some action, such as a public works project, which interferes with the natural flow of water. This is clearly not the situation for the Town.

2. Can the Town force the developer to have an engineer review the problem and to follow all engineering recommendations?

No. As discussed above, the Planning Commission has no jurisdiction over the project, as it is located outside the Town's UGB. The Commission should revoke approval of the project and the Town should revoke any permits issued and direct the developer to the appropriate county office.

3. What can the commission do in an instance where the bond has expired?

Your subdivision regulations should contain rules applicable to bonds. Normally, the developer would be given notice of the expiration and an amount of time to post another bond, or to extend the current bond. If after a reasonable period of time, the developer takes no action then the Commission should revoke approval and direct the Town to revoke any building permits issued.

If the subdivision regulations contain no provisions on bonds, the Commission should adopt a set of rules for subdivision bonds, and enforce those rules uniformly. T.C.A. ' 13-4-303(b) grants planning commissions authority to accept a bond, pending final approval of the subdivision plat, in an amount and with the surety and conditions satisfactory to it,...within a period specified by the commission and expressed in the bonds, and the municipality is hereby granted the power to enforce such bonds by all appropriate legal and equitable remedies.

I recommend that the Commission adopt rules concerning bonds, and include in those rules a manner for dealing with expired bonds, such as setting a 30 or 60 day limit for the developer to renew the bond or face revocation of approval and permits. The Commission should provide notice to developers who have posted bonds of the meeting at which the rules will be discussed, and the rules should be made available to the developers after adoption. If this process is followed, in my opinion, those rules may be applied retroactively to any bonds which have already expired.

4. Can the County Building Commissioner refuse to issue building permits, based on the rationale that the developer has not met the Planning Commission requirements, and the road is not public?

Yes, but he should do so based on authority from the county, rather than the Planning Commission.

I hope this information is helpful. Thank you for consulting with MTAS.

Sincerely,

Melissa A. Ashburn
Legal Consultant