IN THE COURT OF APPEALS OF TENNESSEE

CONCERNED NEIGHBORS OF NASHVILLE

Petitioners/Appellants

vs. **No. M2009-01417-COA-R3-CV**

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, METROPOLITAN PLANNING COMMISSION and NASHVILLE AREA HABITAT FOR HUMANITY, INC.

Respondents/Appellees

BRIEF ON BEHALF OF PETITIONERS/APPELLANTS

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IN THE COURT OF APPEALS OF TENNESSEE

ANDREW BERNARD SHUTE, JR. and CONCERNED NEIGHBORS OF NASHVILLE

Petitioners/Appellants

vs. **No. M2009-01417-COA-R3-CV**

METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE, METROPOLITAN PLANNING COMMISSION and NASHVILLE AREA HABITAT FOR HUMANITY, INC.

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STATEMENT OF THE ISSUES

I. **THE METROPOLITAN NASHVILLE PLANNING COMMISSION VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN IT DID NOT REQUIRE ANY SWORN EVIDENCE WHATSOEVER FOR ITS DECISIONS**

II. **THE METROPOLITAN NASHVILLE PLANNING COMMISSION VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN THAT ADMINISTRATIVE AGENCY FAILED TO STATE SPECIFIC REASONS FOR ITS DECISIONS**

STATEMENT OF THE CASE

Petitioners Andrew Shute Jr. and Concerned Neighbors of Nashville filed two Writs of Certiorari[1] in Chancery Court entitled Shute et al. vs. Metropolitan Government et al., Chancery Court # 09-222 and #08-2761 (5th Circuit Court by Interchange). Petitioners then filed amendments[2] to their writs, while Respondents filed motions to dismiss[3], answers[4], and the administrative records of each hearing before the Metropolitan Nashville Planning Commission. While two different administrative hearings of the Metropolitan Nashville Planning Commission are involved in these two writs, the same legal issues are raised and the same or immediately adjacent land is the subject. Petitioners Shute et al. made the same legal arguments in each of these two cases, as did the Respondents and the court below consolidated these two cases in

[1] R.222 Vol.1 p.1 and R.2761 Vol.1 p.1. References to the two trial court records in this brief are abbreviated "R.222" for the record in case #09-222-I and are abbreviated "R.2761" for the record in case #08-2761-II, followed by the volume(Vol.) and page (p.) number.
[2] R.222 Vol.1p.12 and R.2761 Vol.IIp.152.
[3] R.2761 Vol.I p.30,p. 57
[4] R.2761 Vol.I p.142 and p. 155, R. 222 Vol.I, p.21 and p. 39.

issuing its decision denying the writs of certiorari[5]. These two appeals were then consolidated in the Court of Appeals of Tennessee as case # M2009-01417-COA-R3-CV.

STATEMENT OF THE FACTS

Both these cases result from and arise out of Metropolitan Government of Nashville Planning Commission hearings that impact the same area of undeveloped land known as the Park Preserve land in Nashville. In the first administrative proceeding, the Planning Commission approved a Concept Plan, subject to certain conditions, for Phase I of the Park Preserve subdivision land plat application by the respondent Habitat for Humanity. The petitioners Shute and the neighborhood organization, CNON, opposed the application and filed a writ of certiorari to reverse that decision.

In the second application regarding Phase II of the Park Preserve land, the Planning Commission made a decision that the Planned Unit Development or PUD for that Park Preserve land was "active", meaning that respondent Habitat for Humanity could go forward with its development plan to build the world's largest Habitat housing development on the Park Preserve land in Nashville. The petitioners Shute and the neighborhood organization, CNON, opposed the decision and filed a writ of certiorari to reverse that ruling.

Petitioners are adjacent landowners to that 10.31 acre plot of land in their residential neighborhood in Davidson County, Tennessee, such land being identified on Map 060-00,

[5] R. 2761 Vol.II p. 223 and R. 222 Vol.II p. 147.

Parcels 005, 006, and 060 and known as Phase 1 of the Park Preserve.[6] Petitioner Concerned Neighbors of Nashville ("CNON") is a not for profit community organization composed of residential homeowners and occupants in the neighborhood adversely impacted by the proposed development of the Park Preserve. CNON was formed for the express purpose of influencing the development of the Park Preserve in a manner that is consistent with the existing growth of the residential neighborhoods in its community. Its members own real property bordering on or near the Park Preserve, pay Davidson County property taxes, and pay local sales taxes. The members of CNON are concerned about the development of the Park Preserve and its impact on their neighborhood and property values.[7]

In the administrative hearings below, the respondents made its land use decision about the Park Preserve land with no sworn evidence and no sworn testimony presented by anyone whatsoever.[8] There were no sworn documents and no affidavits presented at the Planning Commission hearing to support the official ruling or decision of this administrative agency.[9]

Further, in the administrative proceedings below, there was never any vote by the Planning Commission as to specific reasons for the decision of the Planning Commission. Instead the Planning Commission just adopted a motion to approve the application [10]in one hearing and a

[6] R. 2761 Vol.I p.2 and R. 222 Vol. I p.2.
[7] Id.
[8] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 121-218 (Transcript of statements, comments and hearing); Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 154-292(Transcript of statements, comments and hearing).
[9] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 2-119; Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 3-153.
[10] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 216-17.

motion to declare the Planned Unit Development or PUD "active"[11] (contrary to the recommendation of its own staff[12]) in the other hearing with no statement of reasons.

The order of the Court below accurately summarizes the procedure and process before the Metropolitan Nashville Planning Commission[13] that is the subject of both issues raised on appeal except for the statements at page 148 and page 152 of Volume II of the Record in 09-222 that the decision of the Planning Commission included "specific and unique aggregate of actions taken by (respondent Habitat for Humanity)". At page 291 of the Administrative Record of the 09-222 case the transcript states no reasons in the motion to declare the PUD active: "I'll make the motion to declare the PUD active… all in favor…The PUD is declared as active."

SUMMARY OF THE ARGUMENT

The action of the Planning Commission was illegal in violation of due process of law under the federal constitution and in violation of the law of the land guarantee in our state constitution. The Planning Commission made a decision adverse to the Petitioners without providing the process mandated by the United States and Tennessee Constitutions.

The Planning Commission violated due process by making its decision with no sworn evidence presented by anyone whatsoever. There were no sworn documents and no affidavits presented at the Planning Commission hearing to support the Respondent's official ruling or decision.

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[11] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 291.
[12] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 34.
[13] R. 2761 Vol. II pp. 223-225 and R. 222 Vol.II p. 147-149.

Further, in the administrative proceedings below, there was never any vote by the Planning Commission as to specific reasons for the decision of the Planning Commission. Instead the Planning Commission made the same kind of general and conclusory 'Final Decision' as was criticized and rejected by the Tennessee Supreme Court in Levy v. State Board of Examiners, 553 S.W.2d 909; 1977 Tenn. LEXIS 594. A fundamentally fair hearing includes the due process right to have the government state the official reasons for its decision. A fundamentally fair hearing includes the due process right for aggrieved parties and for the reviewing court to know the basis for the "decision" of the Planning Commission.

ARGUMENT:

I. THE PLANNING COMMISSION ACTIONS VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN IT DID NOT REQUIRE ANY SWORN EVIDENCE WHATSOEVER FOR ITS DECISION

No sworn evidence was presented by anyone to the Planning Commission in these cases. No verified information was required or presented. No sworn documents and no affidavits were presented or used by the administrative agency below in making its rulings. No one who spoke or wrote to the Planning Commission in these proceedings was sworn to tell the truth- not the staff, not the petitioners, not the respondents, not the representatives of the developer Habitat for Humanity, no one at all..

The absence and lack of any sworn evidence whatsoever in an administrative agency proceeding is a case of first impression in the Tennessee appellate courts. Due process already requires both civil courts and criminal courts to rely upon and cite evidence

for their rulings. Administrative decisions should require no less as a matter of fundamental fairness.

Grandstaff v. Hawks, 36 S.W.3d 482; 2000 Tenn. App. LEXIS 355 (2000) states the core value of American law that courts do not make decisions unless there is evidence: "The trial court directed a verdict for the passenger on the grounds that there was **no evidence** that his negligence caused the driver to strike the bicyclist or that the driver's negligence should be imputed to the passenger. The Tennessee Supreme Court affirmed the directed verdict because there was **no evidence…."(**emphasis added**).**

The Supreme Court has frequently observed that the requirement that there must be sworn evidence is a fundamental part of the due process guarantee. As the Supreme Court stated in Garner v. Louisiana, 368 U.S. 157(1961):

"In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented, and in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners acts caused a disturbance of the peace." (footnotes omitted). As the Court summarized its opinion, "having shown that these records contain no evidence to support a finding…"(emphasis added), the ruling below is reversed.

In a similar case, Thomson v. Louisville, 362 U.S. 199 (1960), the Court made the same ruling that due process requires evidence: "Thus we find no evidence whatever

in the record to support these convictions. Just as ‘Conviction upon a charge not made would be sheer denial of due process,’so is it a violation of due process to convict and punish a man without evidence of his guilt.”(footnotes omitted).

The Court later summarized its Thomson decision in Shuttlesworth v. Birmingham, 382 U.S. 87(1965):

> The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U.S., at 199. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S., at 206.

This reasoning should apply with even greater force to administrative agency decisions, especially considering the breadth and scope of administrative power in daily lives and in government with many commentators referring to such agencies as a fourth branch of government. See e.g., Richard H. Pildes, Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2245, 2279-80 (2001).

Other jurisdictions have reached the same conclusion using a due process analysis that administrative decisions must be based on sworn evidence. In Capello v. City of Mayfield Heights, 271 N.E.2d 831(Ohio 1971), the case involved a hearing before the board of zoning appeals for Cuyahoga County during which the board took unsworn

testimony. The Common Pleas Court and the Court of Appeals upheld the board's decision, but the Supreme Court remanded it because in the absence of sworn evidence before the board, there was no evidence to support its decision. See also, Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127(1957), Leppo v. City of Petaluma, 20 Cal. App. 3d 711, 717 97 Cal. Rptr. 840 (1971), Heard v. Foxshire Associates, LLC, 145 Md.App. 695, 706-708, 806 A.2d 348 (2002).

"Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. Southern R. Co. v. Virginia, 290 U.S. 190", Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123; 71 S. Ct. 624; 95 L. Ed. 817; 1951 U.S. LEXIS 2349 (1951) (Justice Frankfurter concurring).

There is a distinct and hallowed tradition in our common law and legal precepts that sworn evidence is a traditional and essential requirement of a fair hearing. In ancient Greece, one of the cradles of our democratic institutions, this concept was a fundamental part of justice: "The ancient concept of justice represented by the Erinyes is private vengeance: when calamity strikes, we cry: "O Justice!" It is precisely this Spirits of Vengeance. It is precisely this conception of justice that Athena replaces by "witnesses, . . . proofs, [and] sworn evidence." To rebut the Erinyes, she counsels against anarchy and despotism, for if it avoids these Athens will "possess a bulwark to safeguard your country and your government." (emphasis added). David Luban,"SOME GREEK TRIALS: ORDER AND JUSTICE IN

HOMER, HESIOD, AESCHYLUS AND PLATO", 54 Tenn. L. Rev. 279, 297-98(1986).

Our English common law heritage valued and required sworn testimony. King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779) (no testimony whatever can be legally received except upon oath). Our legal system has long honored and upheld objections to general warrants based on the common law of England where that doctrine was firmly established. General warrants were "not based on sworn evidence:"Even if somebody had been named in the warrant, must there not be an Information upon oath, of his being Author, Printer or Publisher?". Eric Schnapper, "UNREASONABLE SEARCHES AND SEIZURES OF PAPERS", 71 Va. L. Rev. 869, n.164 (September, 1985); see e.g. Nadine Farid, " Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise", 40 New Eng. L. Rev. 555 (2006); 6 John Henry Wigmore, Evidence in Trials at Common Law para. 1816 (rev. 1976).

As the Supreme Court stated in Meyer v. State of Nebraska, 262 U.S. 390 (1923):

'No state ... shall deprive any person of life, liberty or property without due process of law.' While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.(emphasis added).

We generally require sworn evidence in every area of the law at present, except for some administrative hearings. Self-proving affidavits for example are used in almost every state to facilitate probate by creating sworn evidence of due execution. Bruce Mann, "FORMALITIES AND FORMALISM IN THE UNIFORM PROBATE CODE", 142 U. Pa. L. Rev. 1033 (1994).

Most government applications require applicants to provide the agencies with information concerning their operations, and to sign the statements under oath. Shannon L. Chaffin, "LOSS OF INTEGRITY MAY MEAN LOSS OF THE FARM: FALSE STATEMENTS MADE IN FEDERAL WATER SUBSIDY APPLICATIONS AND THE DOCTRINE OF JUDICIAL ESTOPPEL,", 15 S.J. A. L. Rev. 1 (2005/06).

The test for due process application is Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18. The Mathews test examines three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (424 U.S. at p. 335 [47 L. Ed. 2d at p. 33]).

Applying the balancing test in Mathews, the petitioners have an important interest in the use and enjoyment of their community and the impact that that land use regulations will have on it. It would be a small burden to require oaths to be administered at the beginning of an agency hearing as is routinely done in most hearings. The other factor to be analyzed under Mathews is the effectiveness of the added procedure in limiting the harm of a wrongful deprivation of a protected liberty or property interest[14]. An oath is very

[14] The order of the Court below recites at R.222,Vol.II p.151 that petitioners "do not have a property right at stake…". Yet, petitioners alleged under oath in paragraph 2 of their verified petitions that they are "adjacent landowners" to the 260.43 acres of the Park Preserve that are "directly and adversely" affected by the Planning Commission rulings and that the development of the Park Preserve land, as authorized by the Planning

useful in ascertaining the truth in an agency hearing where issues are contested especially where other procedural protections are lacking (most administrative proceedings do not follow strict rules of evidence for example).

We rely on the oath as a guarantor of legitimacy. Requiring sworn testimony is no hindrance to any proceeding, while the advantage and justice of requiring sworn testimony is obvious. We all recognize at a very early age the power and meaning of a sworn oath as opposed to just a personal statement. As children, we swore to our testimony: crossing our hearts and hoping to die; swearing on our mothers' lives. Or even more powerfully we swore with a swearing to God or a swearing on the Bible. Our word alone was understood to be insufficient; we knew as much, and accepted it. "An oath brings weight to a witness's testimony. It is to serve for the witness as a reminder of both the gravity of the undertaking and the penalty associated with dishonesty during the course of that undertaking." California v. Green, 399 U.S. 149, 158 (1970) (reviewing the purpose of the oath taken by a witness). There is importance to an oath, a gravitas and a message inherent therein that mandates a sense of trust. "That this trust exists, that the oath is of consequence, is demonstrated by the prevalence of the oath …"Nadine Farid, " Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise", 40 New Eng. L. Rev. 555 (2006).

Commission rulings, will negatively impact their property values as adjacent landowners and affect their property values. (R.222 Vol.I,p.2 and R.2761 Vol.I,p.2).

II. THE PLANNING COMMISSION DECISIONS VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN THE AGENCY FAILED TO STATE SPECIFIC REASONS FOR ITS DECISIONS

The action of the Planning Commission in considering and voting on the respondent's proposed Concept Plan and PUD was quasi-judicial and administrative in nature. *See Lafferty v. City of Winchester*, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000).

When acting as a quasi-judicial administrative body, the Planning Commission (not the individual Commissioners as argued by Metro and Habitat) must provide reasons for their official decision as required in *Levy vs. State Board of Examiners for Speech Pathology*, 553 S.W.2d 909 (Tenn. 1977).

The approved minutes of the Planning Commission are the only record this Court should review when determining whether the Planning Commission stated adequate and proper reasons when it voted to approve the applicant's concept plan. *Carter County Bd. Of Educ. Comm'rs v. American Fed'n of Teachers*, 609 S.W.2d 512, 517 (Tenn. Ct. App. 1980). Only the decision in the approved minutes states the official decision of the Planning Commission, not individual opinions/statements by individual commissioners.

The approved minutes of the October 23, 2008 Planning Commission meeting do not state any specific reasons with regard to the applicant's proposed concept plan or the vote to approve such plan. The Commission simply passed a motion to approve the concept plan without any recitation in the decision of the reasons for doing so.

The Planning Commission's failure to provide adequate and proper reasons with regard to its ruling violates due process of law under the federal constitution and violates the law of the land guarantee in our state constitution. The Planning Commission made a decision adverse to the Petitioners without providing the process mandated by the United States and Tennessee Constitutions.

Thus the final order of the Planning Commission in this case was illegal by its failure to provide specific reasons for its decision just as our Supreme Court ruled in *Levy vs. State Board of Examiners for Speech Pathology*, 553 S.W.2d 909 (Tenn. 1977). The argument below that Levy is a statutory decision, not a due process decision, is incorrect. The Court of Appeals in Qualls v. Camp, 2007 Tenn. App. LEXIS 465,Tenn. Ct. App. 2007 decided that issue when they upheld the award of attorney fees to counsel who argued that an administrative agency decision made without specific reasons, under Levy v. State Board of Examiners, violated due process.

The Planning Commission here failed to adopt such specific and definite reasons as to enable a court on review to determine the questions involved and whether the decision should stand. Thus, specific reasons for the agency decision are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without reasons, a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support (material evidence) in the evidence. Baltimore & O.R. Co. v. Aberdeen & R.R. Co., 393 U.S. 87 (1968); USV Pharmaceutical Corp. v. Secretary of Health, E. & W., 466

F.2d 455 (1972); State Board of Medical Examiners v. Gandy, 149 S.E.2d 644, 646 (1966); Allied Investment Co. v. Oklahoma Securities Com'n, 451 P.2d 952 (Okl.1969).

Our state Constitution guarantees law of the land and guarantees that the courts of Tennessee will be open and available to all. Administrative agency decisions given with no specific reasons effectively denies those state constitutional guarantees, since the parties and the reviewing Court cannot validly weigh and analyze the validity of the decision when no reasons are stated by the agency. There was never any agreement among the members of the Metro Government Planning Commission as to the basis of evidence in the record, if any, and there was never any vote by the Planning Commission as to particular reasons or Findings of Fact and Conclusions of Law for the alleged decision of the Planning Commission.

Based upon the above, Respondent's actions violate the due process and law of the land rights of Petitioners because it denied Petitioners a full and fair review and appeal in that Respondents failed to state reasons for its decisions. Accordingly, Respondents' actions are an exercise of judicial functions that exceed its jurisdiction and Respondents acted illegally in violation of due process and law of the land.

Finally, the Courts cannot properly decide whether the decisions of the Planning Commission below is supported by substantial and material evidence in the record because the Planning Commission did not state reasons in its decision by which to judge or evaluate the materiality of the "evidence". A fair hearing that is not arbitrary

and capricious includes the due process right to have the reviewing court know the evidentiary basis for the 'decision' of the Planning Commission."

CONCLUSION

Both because the administrative agency failed to require sworn evidence and because in its ruling it failed to state specific reasons for its decision, the ruling of the Court below should be reversed and this proceeding should be remanded to the lower Court for issuance of a writ of certiorari and the award of costs and reasonable attorney fees pursuant to 42 USC sec.1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Larry Woods

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STATEMENT OF THE ISSUES

III. THE METROPOLITAN NASHVILLE PLANNING COMMISSION VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN IT DID NOT REQUIRE ANY SWORN EVIDENCE WHATSOEVER FOR ITS DECISIONS

IV. THE METROPOLITAN NASHVILLE PLANNING COMMISSION VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN THAT ADMINISTRATIVE AGENCY FAILED TO STATE SPECIFIC REASONS FOR ITS DECISIONS

STATEMENT OF THE CASE

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[15] R.222 Vol.1 p.1 and R.2761 Vol.1 p.1. References to the two trial court records in this brief are abbreviated "R.222" for the record in case #09-222-I and are abbreviated "R.2761" for the record in case #08-2761-II, followed by the volume(Vol.) and page (p.) number.
[16] R.222 Vol.1p.12 and R.2761 Vol.IIp.152.
[17] R.2761 Vol.I p.30,p. 57
[18] R.2761 Vol.I p.142 and p. 155, R. 222 Vol.I, p.21 and p. 39.

adjacent land is the subject. Petitioners Shute et al. made the same legal arguments in each of these two cases, as did the Respondents and the court below consolidated these two cases in issuing its decision denying the writs of certiorari[19]. These two appeals were then consolidated in the Court of Appeals of Tennessee as case # M2009-01417-COA-R3-CV.

STATEMENT OF THE FACTS

Both these cases result from and arise out of Metropolitan Government of Nashville Planning Commission hearings that impact the same area of undeveloped land known as the Park Preserve land in Nashville. In the first administrative proceeding, the Planning Commission approved a Concept Plan, subject to certain conditions, for Phase I of the Park Preserve subdivision land plat application by the respondent Habitat for Humanity. The petitioners Shute and the neighborhood organization, CNON, opposed the application and filed a writ of certiorari to reverse that decision.

In the second application regarding Phase II of the Park Preserve land, the Planning Commission made a decision that the Planned Unit Development or PUD for that Park Preserve land was "active", meaning that respondent Habitat for Humanity could go forward with its development plan to build the world's largest Habitat housing development on the Park Preserve land in Nashville. The petitioners Shute and the neighborhood organization, CNON, opposed the decision and filed a writ of certiorari to reverse that ruling.

[19] R. 2761 Vol.II p. 223 and R. 222 Vol.II p. 147.

Petitioners are adjacent landowners to that 10.31 acre plot of land in their residential neighborhood in Davidson County, Tennessee, such land being identified on Map 060-00, Parcels 005, 006, and 060 and known as Phase 1 of the Park Preserve.[20] Petitioner Concerned Neighbors of Nashville ("CNON") is a not for profit community organization composed of residential homeowners and occupants in the neighborhood adversely impacted by the proposed development of the Park Preserve. CNON was formed for the express purpose of influencing the development of the Park Preserve in a manner that is consistent with the existing growth of the residential neighborhoods in its community. Its members own real property bordering on or near the Park Preserve, pay Davidson County property taxes, and pay local sales taxes. The members of CNON are concerned about the development of the Park Preserve and its impact on their neighborhood and property values.[21]

In the administrative hearings below, the respondents made its land use decision about the Park Preserve land with no sworn evidence and no sworn testimony presented by anyone whatsoever.[22] There were no sworn documents and no affidavits presented at the Planning Commission hearing to support the official ruling or decision of this administrative agency.[23]

Further, in the administrative proceedings below, there was never any vote by the Planning Commission as to specific reasons for the decision of the Planning Commission. Instead the

[20] R. 2761 Vol.I p.2 and R. 222 Vol. I p.2.
[21] Id.
[22] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 121-218 (Transcript of statements, comments and hearing); Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 154-292(Transcript of statements, comments and hearing).
[23] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 2-119; Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 3-153.

Planning Commission just adopted a motion to approve the application [24]in one hearing and a motion to declare the Planned Unit Development or PUD "active"[25] (contrary to the recommendation of its own staff[26]) in the other hearing with no statement of reasons.

The order of the Court below accurately summarizes the procedure and process before the Metropolitan Nashville Planning Commission[27] that is the subject of both issues raised on appeal except for the statements at page 148 and page 152 of Volume II of the Record in 09-222 that the decision of the Planning Commission included "specific and unique aggregate of actions taken by (respondent Habitat for Humanity)". At page 291 of the Administrative Record of the 09-222 case the transcript states no reasons in the motion to declare the PUD active: "I'll make the motion to declare the PUD active… all in favor…The PUD is declared as active."

SUMMARY OF THE ARGUMENT

The action of the Planning Commission was illegal in violation of due process of law under the federal constitution and in violation of the law of the land guarantee in our state constitution. The Planning Commission made a decision adverse to the Petitioners without providing the process mandated by the United States and Tennessee Constitutions.

[24] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 08- 2761, pages 216-17.
[25] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 291.
[26] Administrative Record of the Metropolitan Planning Commission in Chancery Docket No. 09- 222, pages 34.
[27] R. 2761 Vol. II pp. 223-225 and R. 222 Vol.II p. 147-149.

The Planning Commission violated due process by making its decision with no sworn evidence presented by anyone whatsoever. There were no sworn documents and no affidavits presented at the Planning Commission hearing to support the Respondent's official ruling or decision.

Further, in the administrative proceedings below, there was never any vote by the Planning Commission as to specific reasons for the decision of the Planning Commission. Instead the Planning Commission made the same kind of general and conclusory 'Final Decision' as was criticized and rejected by the Tennessee Supreme Court in Levy v. State Board of Examiners, 553 S.W.2d 909; 1977 Tenn. LEXIS 594. A fundamentally fair hearing includes the due process right to have the government state the official reasons for its decision. A fundamentally fair hearing includes the due process right for aggrieved parties and for the reviewing court to know the basis for the "decision" of the Planning Commission.

ARGUMENT:

III. THE PLANNING COMMISSION ACTIONS VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN IT DID NOT REQUIRE ANY SWORN EVIDENCE WHATSOEVER FOR ITS DECISION

No sworn evidence was presented by anyone to the Planning Commission in these cases. No verified information was required or presented. No sworn documents and no affidavits were presented or used by the administrative agency below in making its rulings. No one who spoke or wrote to the Planning Commission in these proceedings was sworn to tell the truth- not the staff, not the petitioners, not the respondents, not the representatives of the developer Habitat for Humanity, no one at all..

The absence and lack of any sworn evidence whatsoever in an administrative agency proceeding is a case of first impression in the Tennessee appellate courts. Due process already requires both civil courts and criminal courts to rely upon and cite evidence for their rulings. Administrative decisions should require no less as a matter of fundamental fairness.

Grandstaff v. Hawks, 36 S.W.3d 482; 2000 Tenn. App. LEXIS 355 (2000) states the core value of American law that courts do not make decisions unless there is evidence: "The trial court directed a verdict for the passenger on the grounds that there was **no evidence** that his negligence caused the driver to strike the bicyclist or that the driver's negligence should be imputed to the passenger. The Tennessee Supreme Court affirmed the directed verdict because there was **no evidence…."(**emphasis added**).**

The Supreme Court has frequently observed that the requirement that there must be sworn evidence is a fundamental part of the due process guarantee. As the Supreme Court stated in Garner v. Louisiana, 368 U.S. 157(1961):

"In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented, and in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in Thompson v. City of Louisville, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners acts caused a disturbance of the peace." (footnotes omitted). As the Court summarized its opinion, "having shown that these records contain <u>no evidence</u> to support a finding…"(emphasis added), the ruling below is reversed.

In a similar case, Thomson v. Louisville, 362 U.S. 199 (1960), the Court made the same ruling that due process requires evidence: “Thus we find no evidence whatever in the record to support these convictions. Just as ‘Conviction upon a charge not made would be sheer denial of due process,’so is it a violation of due process to convict and punish a man without evidence of his guilt.”(footnotes omitted).

The Court later summarized its Thomson decision in Shuttlesworth v. Birmingham, 382 U.S. 87(1965):

> The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as Mr. Justice Black pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U.S., at 199. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt." 362 U.S., at 206.

This reasoning should apply with even greater force to administrative agency decisions, especially considering the breadth and scope of administrative power in daily lives and in government with many commentators referring to such agencies as a fourth branch of government. See e.g., Richard H. Pildes, Cass R. Sunstein, "Reinventing the Regulatory State," 62 U. Chi. L. Rev. 1, 4-6 (1995); Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2245, 2279-80 (2001).

Other jurisdictions have reached the same conclusion using a due process analysis that administrative decisions must be based on sworn evidence. In Capello v. City of Mayfield Heights, 271 N.E.2d 831(Ohio 1971), the case involved a hearing before the board of zoning appeals for Cuyahoga County during which the board took unsworn testimony. The Common Pleas Court and the Court of Appeals upheld the board's decision, but the Supreme Court remanded it because in the absence of sworn evidence before the board, there was no evidence to support its decision. See also, Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127(1957), Leppo v. City of Petaluma, 20 Cal. App. 3d 711, 717 97 Cal. Rptr. 840 (1971), Heard v. Foxshire Associates, LLC, 145 Md.App. 695, 706-708, 806 A.2d 348 (2002).

“Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. Southern R. Co. v. Virginia, 290 U.S. 190”, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123; 71 S. Ct. 624; 95 L. Ed. 817; 1951 U.S. LEXIS 2349 (1951) (Justice Frankfurter concurring).

There is a distinct and hallowed tradition in our common law and legal precepts that sworn evidence is a traditional and essential requirement of a fair hearing. In ancient Greece, one of the cradles of our democratic institutions, this concept was a fundamental part of justice: “The ancient concept of justice represented by the Erinyes is private vengeance: when calamity strikes, we cry: "O Justice!" It is precisely this Spirits of Vengeance. It is precisely this conception of justice that Athena replaces by "witnesses, . . . proofs, [and] sworn evidence." To rebut the

Erinyes, she counsels against anarchy and despotism, for if it avoids these Athens will "possess a bulwark to safeguard your country and your government." (emphasis added). David Luban,"SOME GREEK TRIALS: ORDER AND JUSTICE IN HOMER, HESIOD, AESCHYLUS AND PLATO", 54 Tenn. L. Rev. 279, 297-98(1986).

Our English common law heritage valued and required sworn testimony. King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779) (no testimony whatever can be legally received except upon oath). Our legal system has long honored and upheld objections to general warrants based on the common law of England where that doctrine was firmly established. General warrants were "not based on sworn evidence:"Even if somebody had been named in the warrant, must there not be an Information upon oath, of his being Author, Printer or Publisher?". Eric Schnapper, "UNREASONABLE SEARCHES AND SEIZURES OF PAPERS", 71 Va. L. Rev. 869, n.164 (September, 1985); see e.g. Nadine Farid, " Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise", 40 New Eng. L. Rev. 555 (2006); 6 John Henry Wigmore, Evidence in Trials at Common Law para. 1816 (rev. 1976).

As the Supreme Court stated in Meyer v. State of Nebraska, 262 U.S. 390 (1923):

'No state ... shall deprive any person of life, liberty or property without due process of law.' While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.(emphasis added).

We generally require sworn evidence in every area of the law at present, except for some administrative hearings. Self-proving affidavits for example are used in almost every state to facilitate probate by creating sworn evidence of due execution. Bruce Mann,

“FORMALITIES AND FORMALISM IN THE UNIFORM PROBATE CODE”, 142 U. Pa. L. Rev. 1033 (1994).

Most government applications require applicants to provide the agencies with information concerning their operations, and to sign the statements under oath. Shannon L. Chaffin, “LOSS OF INTEGRITY MAY MEAN LOSS OF THE FARM: FALSE STATEMENTS MADE IN FEDERAL WATER SUBSIDY APPLICATIONS AND THE DOCTRINE OF JUDICIAL ESTOPPEL,”, 15 S.J. A. L. Rev. 1 (2005/06).

The test for due process application is Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18. The Mathews test examines three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (424 U.S. at p. 335 [47 L. Ed. 2d at p. 33]).

Applying the balancing test in Mathews, the petitioners have an important interest in the use and enjoyment of their community and the impact that that land use regulations will have on it. It would be a small burden to require oaths to be administered at the beginning of an agency hearing as is routinely done in most hearings. The other factor to be analyzed under Mathews is the effectiveness of the added procedure in limiting the harm

of a wrongful deprivation of a protected liberty or property interest[28]. An oath is very useful in ascertaining the truth in an agency hearing where issues are contested especially where other procedural protections are lacking (most administrative proceedings do not follow strict rules of evidence for example).

We rely on the oath as a guarantor of legitimacy. Requiring sworn testimony is no hindrance to any proceeding, while the advantage and justice of requiring sworn testimony is obvious. We all recognize at a very early age the power and meaning of a sworn oath as opposed to just a personal statement. As children, we swore to our testimony: crossing our hearts and hoping to die; swearing on our mothers' lives. Or even more powerfully we swore with a swearing to God or a swearing on the Bible. Our word alone was understood to be insufficient; we knew as much, and accepted it. "An oath brings weight to a witness's testimony. It is to serve for the witness as a reminder of both the gravity of the undertaking and the penalty associated with dishonesty during the course of that undertaking." California v. Green, 399 U.S. 149, 158 (1970) (reviewing the purpose of the oath taken by a witness). There is importance to an oath, a gravitas and a message inherent therein that mandates a sense of trust. "That this trust exists, that the oath is of consequence, is demonstrated by the prevalence of the oath …"Nadine Farid, " Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise", 40 New Eng. L. Rev. 555 (2006).

[28] The order of the Court below recites at R.222,Vol.II p.151 that petitioners "do not have a property right at stake…". Yet, petitioners alleged under oath in paragraph 2 of their verified petitions that they are "adjacent landowners" to the 260.43 acres of the Park Preserve that are "directly and adversely" affected by the Planning Commission rulings and that the development of the Park Preserve land, as authorized by the Planning Commission rulings, will negatively impact their property values as adjacent landowners and affect their property values. (R.222 Vol.I,p.2 and R.2761 Vol.I,p.2).

IV. THE PLANNING COMMISSION DECISIONS VIOLATED DUE PROCESS AND LAW OF THE LAND GUARANTEES WHEN THE AGENCY FAILED TO STATE SPECIFIC REASONS FOR ITS DECISIONS

The action of the Planning Commission in considering and voting on the respondent's proposed Concept Plan and PUD was quasi-judicial and administrative in nature. *See Lafferty v. City of Winchester*, 46 S.W.3d 752, 758 (Tenn. Ct. App. 2000).

When acting as a quasi-judicial administrative body, the Planning Commission (not the individual Commissioners as argued by Metro and Habitat) must provide reasons for their official decision as required in *Levy vs. State Board of Examiners for Speech Pathology*, 553 S.W.2d 909 (Tenn. 1977).

The approved minutes of the Planning Commission are the only record this Court should review when determining whether the Planning Commission stated adequate and proper reasons when it voted to approve the applicant's concept plan. *Carter County Bd. Of Educ. Comm'rs v. American Fed'n of Teachers*, 609 S.W.2d 512, 517 (Tenn. Ct. App. 1980). Only the decision in the approved minutes states the official decision of the Planning Commission, not individual opinions/statements by individual commissioners.

The approved minutes of the October 23, 2008 Planning Commission meeting do not state any specific reasons with regard to the applicant's proposed concept plan or the

vote to approve such plan. The Commission simply passed a motion to approve the concept plan without any recitation in the decision of the reasons for doing so.

The Planning Commission's failure to provide adequate and proper reasons with regard to its ruling violates due process of law under the federal constitution and violates the law of the land guarantee in our state constitution. The Planning Commission made a decision adverse to the Petitioners without providing the process mandated by the United States and Tennessee Constitutions.

Thus the final order of the Planning Commission in this case was illegal by its failure to provide specific reasons for its decision just as our Supreme Court ruled in *Levy vs. State Board of Examiners for Speech Pathology*, 553 S.W.2d 909 (Tenn. 1977). The argument below that Levy is a statutory decision, not a due process decision, is incorrect. The Court of Appeals in Qualls v. Camp, 2007 Tenn. App. LEXIS 465,Tenn. Ct. App. 2007 decided that issue when they upheld the award of attorney fees to counsel who argued that an administrative agency decision made without specific reasons, under Levy v. State Board of Examiners, violated due process.

The Planning Commission here failed to adopt such specific and definite reasons as to enable a court on review to determine the questions involved and whether the decision should stand. Thus, specific reasons for the agency decision are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without reasons, a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support

(material evidence) in the evidence. Baltimore & O.R. Co. v. Aberdeen & R.R. Co., 393 U.S. 87 (1968); USV Pharmaceutical Corp. v. Secretary of Health, E. & W., 466 F.2d 455 (1972); State Board of Medical Examiners v. Gandy, 149 S.E.2d 644, 646 (1966); Allied Investment Co. v. Oklahoma Securities Com'n, 451 P.2d 952 (Okl.1969).

Our state Constitution guarantees law of the land and guarantees that the courts of Tennessee will be open and available to all. Administrative agency decisions given with no specific reasons effectively denies those state constitutional guarantees, since the parties and the reviewing Court cannot validly weigh and analyze the validity of the decision when no reasons are stated by the agency. There was never any agreement among the members of the Metro Government Planning Commission as to the basis of evidence in the record, if any, and there was never any vote by the Planning Commission as to particular reasons or Findings of Fact and Conclusions of Law for the alleged decision of the Planning Commission.

Based upon the above, Respondent's actions violate the due process and law of the land rights of Petitioners because it denied Petitioners a full and fair review and appeal in that Respondents failed to state reasons for its decisions. Accordingly, Respondents' actions are an exercise of judicial functions that exceed its jurisdiction and Respondents acted illegally in violation of due process and law of the land.

Finally, the Courts cannot properly decide whether the decisions of the Planning Commission below is supported by substantial and material evidence in the record because the Planning Commission did not state reasons in its decision by which to

judge or evaluate the materiality of the "evidence". A fair hearing that is not arbitrary and capricious includes the due process right to have the reviewing court know the evidentiary basis for the 'decision' of the Planning Commission."

CONCLUSION

Both because the administrative agency failed to require sworn evidence and because in its ruling it failed to state specific reasons for its decision, the ruling of the Court below should be reversed and this proceeding should be remanded to the lower Court for issuance of a writ of certiorari and the award of costs and reasonable attorney fees pursuant to 42 USC sec.1988.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered by U.S. Mail, first class postage prepaid, to the following attorneys for respondents:

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on or before the 12th day of October, 2009.

_____
Larry Woods