

First Reading: 8/20/13
Second Reading: _____

2011-115
Bassam Issa of ANT Group, LLC
District No. 4
Staff Version

ORDINANCE NO. _____

AN ORDINANCE TO AMEND CHATTANOOGA CITY CODE, PART II, CHAPTER 38, ZONING ORDINANCE, SO AS TO REZONE PROPERTY LOCATED AT 1825 GUNBARREL ROAD, MORE PARTICULARLY DESCRIBED HEREIN, FROM R-4 SPECIAL ZONE TO C-2 CONVENIENCE COMMERCIAL ZONE, SUBJECT TO CERTAIN CONDITIONS.

SECTION 1. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That Chattanooga City Code, Part II, Chapter 38, Zoning Ordinance, be and the same hereby is amended so as to rezone:

Tract of land at 1825 Gunbarrel Road being Lot 2, Revised Plat of Lots 1 and 2, Amy's Addition to Pine Terrace Subdivision, Plat Book 86, Page 130, and described in Deed Book 7859, Page 0266, ROHC. Tax Map No. 158D-F-012.

and as shown on the map attached hereto and made a part hereof by reference, from R-4 Special Zone to C-2 Convenience Commercial Zone.

1. The use of the property will be limited to a sit down restaurant only;
2. The building architectural design will be similar to the IHOP constructed on Brainerd Road;
3. The building square footage will be limited to a maximum of 4,200 square feet of gross leasable floor area;
4. Ingress or egress from existing curb cuts only;

5. Install landscaped buffer along the rear property line. Buffer to be a 20 ft. Type "B" Landscaping Buffer – Masonry wall – 6 ft. high – gate to access landscaping;
6. Existing dumpster to be enclosed in masonry walls to coordinate with the building design – 6 ft.;
7. Lighting to be directed away from all adjacent residential areas with poles being a maximum of 35 ft. height which is existing on this site. All lighting on this property shall be no more than .5 maximum foot candles along the shared western property line;
8. Drive thru service will be prohibited;
9. The sale of beer and alcohol will be prohibited and there will be no allowed late night events facility operations on this site;
10. Signage – limited to monuments with maximum surface area of 48 sq. ft. and a maximum of 6 ft. in height. No pedestal signage permitted;
11. No outdoor food service or outdoor music; and
12. Deliveries and dumpster service limited to the hours of 7:00 a.m. to 7:00 p.m.

SECTION 2. BE IT FURTHER ORDAINED, That this Ordinance shall take effect two (2) weeks from and after its passage.

Passed on second and final reading: _____

CHAIRPERSON

APPROVED: _____ DISAPPROVED: _____

MAYOR

/mms

First Reading: _____
Second Reading: _____

2011-115
Bassam Issa of ANT Group, LLC
District No. 4
Applicant Version

ORDINANCE NO. _____

AN ORDINANCE TO AMEND CHATTANOOGA CITY CODE, PART II, CHAPTER 38, ZONING ORDINANCE, SO AS TO REZONE PROPERTY LOCATED AT 1825 GUNBARREL ROAD, MORE PARTICULARLY DESCRIBED HEREIN, FROM R-4 SPECIAL ZONE TO C-2 CONVENIENCE COMMERCIAL ZONE.

SECTION 1. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That Chattanooga City Code, Part II, Chapter 38, Zoning Ordinance, be and the same hereby is amended so as to rezone:

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and as shown on the maps and drawings attached hereto and made a part hereof by reference, from R-4 Special Zone to C-2 Convenience Commercial Zone.

SECTION 2. BE IT FURTHER ORDAINED, That this Ordinance shall take effect two (2) weeks from and after its passage.

Passed on second and final reading:_____

CHAIRPERSON

APPROVED:____ DISAPPROVED:____

MAYOR

/mms

2011-115 City of Chattanooga
November 14, 2011

RESOLUTION

WHEREAS, Bassam Issa of ANT Group, LLC petitioned the Chattanooga-Hamilton County Regional Planning Commission to recommend to the Members of the City Council of the City of Chattanooga the rezoning from R-4 Special Zone to C-2 Convenience Commercial Zone property located at 1825 Gunbarrel Road.

Lot 2, Revised Plat of Lots 1 and 2, Amy's Addition to Pine Terrace Subdivision, Plat Book 86, Page 130, ROHC. Tax Map 158D-F-012 as shown on the attached map.

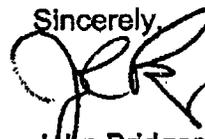
AND WHEREAS, the Planning Commission held a public hearing on this petition on November 14, 2011,

AND WHEREAS, the Planning Commission heard and considered all statements favoring or opposing the petition,

AND WHEREAS, the Planning Commission has studied the petition in relation to existing zoning and land use and potential patterns of development.

NOW THEREFORE, BE IT RESOLVED that the Planning Commission, on November 14, 2011, recommended to the Members of the City Council of the City of Chattanooga that this petition be denied.

Sincerely,



John Bridger
Secretary

Case Number:	2011-115	
Applicant Request:	Rezoning to C-2 Convenience Commercial	
STAFF RECOMMENDATION:	DENY	
Applicant:	ANT Group, LLC	
Property Address:	1825 Gunbarrel Road	
Jurisdiction:	City Council District 4 / Hamilton County District 8	
Neighborhood:	East Brainerd	
Development Sector:	Outer Suburban Growth	
Proposed Development	PLANNING COMMISSION ACTION:	
Site Plan Submitted:	Yes	Deny
Proposed Use:	Commercial development	
Purpose:	IHOP Restaurant	
Site Characteristics		
Current Zoning:	R-4 Special Use Zone	
Current Use:	Vacant (site prepared with parking and dumpster area)	
Adjacent Uses:	Office, Bank, Commercial development across street	
Size of Tract:	0.86 acres	
Access:	Good, direct access onto Gunbarrel Road	
Analysis		
Extension of Existing Zoning?	No	
Community Land Use Plan:	Hamilton Place Community Plan (2001)	
Proposed Use Supported by Community Land Use Plan?	No	
Proposed Use Supported by Comprehensive Plan?	No	
Comments		
Planning Staff:	The applicant has proposed rezoning a 0.9 acre tract from R-4 Special Zone to C-2 Convenience Commercial Zone for a 24-hour a day, sit-down restaurant called IHOP.	
	In order to provide a thorough and thoughtful review of this case, staff reviewed the proposal itself, adopted plans and policies for the area, the planning and zoning history of the site and surrounding community, the traffic study, and other applicable land use factors.	
	<u>Rezoning Proposal</u>	
	<u>Site Context</u>	
	The property is between a one-story, multi-tenant medical office building and a one-story bank branch with drive-thru service (<i>see maps at end of text</i>).	
	<u>Site Plan</u>	
	The applicant attended a City of Chattanooga Presubmittal Meeting on 09/15/11 to review the site plan with City staff. At that meeting no major issues were identified with the site plan. It does meet the minimum requirement regarding landscape buffers and provides an appropriate amount of parking on-site. The applicant is proposing to	

use the existing curb-cut on Gunbarrel Road. (see maps at end of text)

Community Input

The applicant and associates attended a meeting of the Friends of East Brainerd on 8/18/11. At that meeting, they provided information regarding the rezoning proposal and the use of the site for an IHOP restaurant. They answered community members' questions during the meeting and made themselves available afterwards to address any additional issues. Additionally, the applicant hosted a public meeting at the community YMCA to provide additional information and respond to questions. Staff understands that the applicant, the property owner, and other representatives have spoken with other East Brainerd and nearby residents.

Area History of Plans and Policies

The following is a synopsis of zoning policies and plan recommendations for the portion of the Hamilton Place community in which the proposed rezoning is located:

1986 Shallowford Rd/Gunbarrel Road zoning policy

"The surrounding residential neighborhood will remain viable or such as long as the commercial zoning are confined to the areas indicated in this policy study."

Preliminary Zoning Policy Recommendations: Gunbarrel Road from Igou Gap to East Brainerd Road:

"This section of Gunbarrel is predominately residential. There is still some new subdivision development occurring in this area. Given the land use character of this section and the lack of significant road improvements, the recommendation for this portion of Gunbarrel Road is moderate-density residential at 7.5 units per acre with owner-occupied townhouses or condo's being the preferred use. Property at the intersection of Gunbarrel Road and East Brainerd Road is developed commercially."

Note: A Preliminary Zoning Policy Study for Internal Properties Located Between I-75, Gunbarrel Road, Igou Gap Road and Hamilton Place Mall was conducted four months after the opening of Hamilton Place Mall but seems to focus on property between I-75 and Gunbarrel Road north of Igou Gap Road.

Note: A 1988 Zoning Administrative Policy for Growth Corridor Overlay Zone Design Standards (1988 Growth Corridor Policy for Gunbarrel Road) was created to develop minimum design criteria which promote and encourage timely, efficient and high quality development of land within certain urban corridors.

2000 Jarnigan Road/Igou Gap Road/ West of Gunbarrel Road Zoning Policy Study

- Request by City Council
- Adopted by City Council, Resolution No. 22584, July 2000

According to the study, because of the increase in zoning applications for the area south of the mall and west of Gunbarrel Road, the City Council asked RPA to review and make recommendations to revise the existing policy. The following are the Policy Goals from the study:

- Allow Some New Commercial Development
- Protect Existing Residential Neighborhood
- Provide Diversity in Housing
- Provide Transition between Uses

Area V of that study focused on this section of Gunbarrel Road. The policy recommendation for that area was Institutional/Office- "The East Brainerd Road Area Study adopted in 1990 called for institutional uses along Gunbarrel Road. Up to this point in time the recommendations of that plan have been followed. It is recommended that this area continue to be developed as institutional and office." That study recommended that a "larger study of the mall area is needed".

2000 Zoning Study

City Council requested (Resolution No. 22611) a Zoning Study for an area bounded on the west by Gunbarrel Road, on the north by Standifer Gap Road, on the east by Jenkins Road, and on the south by East Brainerd Road, but excluding properties that were currently covered by an adopted zoning policy.

2001 Adopted Plan: Hamilton Place Community Plan

"The purpose of the Hamilton Place Community Plan is to address both the livability needs of surrounding neighborhoods and the long-term economic vitality of the Hamilton Place retail district. Throughout the plan, strategies and policies are presented to promote a positive and mutually supportive relationship between the retail district and established neighborhoods. Most importantly, this plan strives to build "community centered" vision by informing how the retail district and neighborhoods are pieces of a larger community context that also includes streets, parks, public facilities and the natural environment." With this "community" focus in mind, the following goals, developed through this planning process, structure the Hamilton Place Community Plan:

- Protect and enhance existing neighborhoods
- Strengthen existing commercial areas
- Improve the transportation system
- Protect the environment

- Identify opportunities for community facilities and parks

Planning Principles:

Planning principles were developed through the planning process to support the goals identified above and to provide guidance for future land use. The principles identified for Land Use are as follows:

- Commercial and neighborhood boundaries should be maintained as defined by the land use plan
- Configure new development so that it is compatible with existing adjoining uses.
- Examples include placing smaller scale, less intense buildings next to existing neighborhoods.
- Placement of large-scale buildings next to neighborhoods should be avoided.

Planning Challenges:

The plan states that two critical challenges emerged to guide the development of the Hamilton Place Community Plan: defend the neighborhoods and strengthen the commercial core:

Defend the Neighborhoods

"There is an overwhelming concern from area residents to protect their neighborhoods and clearly define where growth should occur. In the public phone survey 89% stated that the City should clearly define where future growth will occur, and 79% valued the protection of existing neighborhoods. The "pressured sites" are where this issue is most obvious and where solutions will occur first. The solution involves clearly defining an appropriate land use mix that can bridge the gap between the intensity of commercial uses and the surrounding single-family residential neighborhoods. These areas include among others the "triangle" site north of Shallowford Road, the area south of Shallowford Road just east of the YMCA, the Igou Gap/Gunbarrel area, and the Igou Gap/Clearview Drive area. In order to support and connect to existing neighborhoods, new development should also include parks and open spaces that are inter-connected by pedestrian-friendly sidewalks and greenways."

Strengthen the Commercial Core

"As identified in the public phone survey, 76% of respondents believe that the prosperity of the commercial area is important to the larger community. A key challenge of this plan will be to find ways to support the future success of the commercial areas while minimizing their impact on the neighborhoods. The ability to accommodate infill development and a broader

mixture of uses including retail, residential, and office will allow the commercial core to grow and adapt over time. One of the biggest challenges to this future commercial development is transportation access, which will eventually impact the quality of the area's shopping experience."

Plan Recommendation: Gunbarrel Road between Igou Gap Road and East Brainerd Road

The land use strategy supports the current policy of office and institutional uses along this portion of Gunbarrel Road with the exception of the Applegate subdivision.

Comprehensive Plan 2030

This portion of East Brainerd is identified in the City and County adopted Comprehensive Plan 2030 as contained in the Outer Suburban Growth Development Sector. The Plan identifies Outer Suburban Growth areas as providing both infill and outward growth opportunities for conventional low-density development. These areas are appropriate for the separation of residential and non-residential uses. Regarding business uses, the plan states that a mix of retail and office uses is encouraged.

Zoning History

In 2000, a zoning request for R-1 Residential to C-2 Convenience Commercial was processed for 1821 and 1825 Gunbarrel Road. The proposed use at that time was "retail (restaurants)". The site plan showed two 7,000 square foot restaurants. At that time, staff recommended a denial of the C-2 and approval of the R-4 Special Zone. The reason for the recommendation was that "The policy for this area recommends office/institutional uses. The request for commercial does not meet the existing policy. The site is located between two existing office developments (O-1 zone)." The Chattanooga-Hamilton County Regional Planning Commission recommended that the petition for C-2 be approved subject to restaurant use only, excluding fast food restaurants or any restaurant that has a drive-thru or curb service; and no lighting to be directed off-site. In April 2001, City Council reviewed the case and deferred action on the request (then identified as Brick Oven Pizza). It was announced at the next hearing that the case had been requested for withdrawal (10/2001).

The Hamilton Place Community Plan was adopted in October 2001. This property and the abutting property were rezoned from R-1 Residential to R-4 Special Zone in 2003. The purpose stated at that time was a "medical office building" with the site plan showing a 10,000 square foot building with 153 parking spots. Staff supported the rezoning to R-4 Special Zone as there was already development of that type in the area, it was a reasonable extension of current zoning,

and it was in conformance with the plan for the area. The Chattanooga-Hamilton County Regional Planning Commission also recommended approval of the 2003 request.

In June 2006, Bassam Issa received a variance from the Board of Zoning Appeals for 1825 Gunbarrel Road to 1) reduce the number of parking spaces from 414 to 364 and 2) a Special Permit for off-street parking on an R-1 lot adjacent to R-4 property.

Staff Recommendation

The applicant and his team have done a very thorough job in preparing for this rezoning request. They provided a detailed site plan and proposed site specific conditions, attended a community meeting and hosted another to present the request, and provided a traffic study as part of the proposal. However, staff is recommending denial of the C-2 Convenience Commercial zoning request and affirms the existing policy of office and Institutional uses to the west of Gunbarrel Road. This recommendation supports the policies in place since 2000 (and earlier) and the adopted plan (2001) that support maintaining a commercial edge and supporting existing neighborhoods.

Site zoning

At the time of rezoning from R-1 Residential to R-4 Special Zone in 2003 (Ord. No. 11500), the purpose was identified as a "medical office building" with the site plan showing a 10,000 square foot building with 153 parking spots. However, no conditions were placed on the R-4 zoning at that time. Staff understands that the applicant can choose to develop the site with any of the R-4 Special Zone permitted uses listed below along with the additional 14 Special Permit uses:

R-4 SPECIAL ZONE

Permitted uses.

- (1) Single-family, two-family, and multiple-family dwellings, excluding factory manufactured homes constructed as a single self-contained unit and mounted on a single chassis.
- (2) Lodging Houses, Boarding Houses and Bed and Breakfast.
- (3) Colleges, schools and libraries.
- (4) Churches and including a columbarium and/or mausoleum as an accessory use.
- (5) Dormitories.
- (6) Professional, medical or dental offices and clinics.
- (7) Laboratories and research centers not objectionable because of odor, dust, noise, or vibration.
- (8) Offices.
- (9) Studios.
- (10) Parks and Playgrounds.
- (11) Home occupations.
- (12) Banks and bank branches.
- (13) Accessory uses and buildings.
- (14) Day care homes.
- (15) Kindergartens operated by governmental units or by religious organizations.
- (16) Drug stores or restaurants in office buildings of four (4) or more stories.
- (17) Museums and art galleries with retail sales as an accessory on-site use, except that such accessory use shall require a Special Permit under the terms of Article VIII.
- (18) Identification signs for commercial uses, subject to the same regulations which govern size, appearance, location, etc., for signs identifying on premise office uses.
- (19) Radio, television and motion picture production studios, excluding transmission towers.
- (20) Parking lots and garages as an accessory to a permitted use when located on the same lot or an adjacent lot.

(21) Short-Term Vacation Rental.

Uses permitted as special exceptions by the board of appeals.

- (1) Fraternal, professional or hobby clubs.
 - (2) Hospitals and nursing homes.
 - (3) Funeral homes, mortuaries, and undertaking establishments (and including cremation/crematory, when used in conjunction with such establishments).
 - (4) Day care centers.
 - (5) Kindergartens not operated by governmental units or by religious organizations
 - (6) Small animal hospitals.
 - (7) Radio, television and motion picture studios transmission towers shall require a Special Permit under the terms of Article VIII.
 - (8) Drug and alcohol, penal or correctional halfway houses or rehabilitation centers and uses similar in character.
 - (9) Gift shops.
 - (10) Beauty shops, barber shops, and hair salons.
 - (11) Assisted Living Facilities.
 - (12) Medically Assisted Living Facilities.
 - (13) Communication Towers.
 - (14) Social Service Agency.
-

In 2006, the applicant also obtained a Special Permit for off-street parking on an R-1 lot adjacent to R-4 property. With the Special Permit, the property could be developed with even greater intensity as much of the required parking could be accommodated off-site. The R-4 Special Zone allows "Drug stores or restaurants in office buildings of four (4) or more stories". It is staff's understanding, in consultation with the City Zoning Official, that this restaurant could be something like an IHOP as long as it was contained in a four-story office building. Final determination as related to use of the zone and use specific to this site is made by the City Zoning Official.

This proposed IHOP site does not adjoin commercially zoned property on the west side of Gunbarrel Road. The site has both an R-4 Special Zone to the north and south of it. There is a C-2 Convenience Commercial Zone to the north of this site at the southwest corner of Gunbarrel Road and Igou Gap Road. One property was rezoned to C-2 prior to the adoption of the Hamilton Place Community Plan and one immediately at the intersection was rezoned by Bassam Issa- ANT Group LLC in 2006. Staff, Planning Commission and City Council supported the request, with staff's reason for recommendation being in part that "The request for commercial zoning is in keeping with the recommendation of the 2001 Hamilton Place Community Plan. Commercial development is recommended for this corner of Gunbarrel Road and Igou Gap Road."

There is no precedent by City Council for a change in the existing policy of office and institutional uses. There was a 2005 request for property (1511 Gunbarrel Road) south of the rezoning request site for R-4 Special Zone and C-5 Neighborhood Commercial for 200' parallel to the road. Both Staff and Planning Commission recommended denial of that C-5 request while recommending approval of the R-4. The staff recommendation gave a reason as "Approve R-4 for the requested use of offices for the entire site. This is in keeping with the recommendations of the Hamilton Place Plan that supports office

development west of Gunbarrel Road. Opening up this corridor to commercial rezoning not only goes against the Hamilton Place Plan, but also opens up the rest of the corridor for commercial consideration". City Council approved an R-4 Special Zone for the entirety of the site. Currently at 1511 Gunbarrel Road, approximately 200' of the property parallel to the road is undeveloped with the rear of the parcel containing two buildings.

Traffic Study

City Traffic Engineer's comments: "I have reviewed the traffic impact study that Volkert prepared for this zoning request and concur with its conclusion that the traffic generated would be comparable to what an office development would generate. I do, however, have concerns with the precedent that this case would cause for this section of Gunbarrel Road south of Igou Gap Road. If other property owners in this area were encouraged to request and be granted rezoning of their office zone to commercial, there is the potential that higher amounts of traffic could be generated than what currently exists, particularly during the peak hours.

Because Gunbarrel at East Brainerd Road is at capacity, any additional traffic at this intersection would create even more congestion during peak hours. Based on these observations, I recommend that this case be denied."

Precedent

The challenge of this zoning case remains the complexity of the existence of a regional mall with expected large and smaller-scale satellite commercial development, an existing road system, and maintaining the viability of neighborhoods as stated in the adopted Hamilton Place Community Plan. The heart of each of the studies since 1986 has been to determine an answer to the appropriate arrangement of these pieces.

Staff's approach was to look at this proposal at two levels. The first was to examine the site in respect to the proposed use and conditions, site plan, and the immediately surrounding development. If you stand at the site during the day and look around, it may seem that a restaurant could be an appropriate fit. There are existing restaurants across the street, a carwash two lots down, a bank on one side and an office on the other.

The differences are easier to see in the evening, night and on the weekends. Offices and office buildings for the most part maintain hours of operation from Monday-Friday within the range of 7:00 a.m.-5:00 p.m. While some institutional uses such as the hospital are open 24 hours a day, the offices within the hospital are primarily open during regular office hours.

The R-4 Special Zone allows "banks and bank branches". The property immediately abutting the rezoning request site is developed with a bank branch. It does have a drive-through which is open until 4:00 p.m. Monday-Thursday, 6:00 p.m. on Friday and from 8:00 a.m.-noon on Saturday. Staff discussed the possible appropriateness of the proposed IHOP while considering a range of conditions. The applicant has proposed nine conditions to be placed on the C-2 Convenience Commercial Zone:

Applicant proposed zoning conditions for the C-2 Convenience Commercial Zone:

- The use of the property will be limited to a family style sit down restaurant only.
 - The building square footage will be limited to a maximum of 4,000 square feet.
 - Ingress or egress from existing curb cuts only.
 - Install landscaped buffer along the rear property line. Buffer to be a 20' Type "B" Landscaping Buffer.
 - Dumpster to be enclosed in masonry walls to coordinate with the building design.
 - Lighting to be directed away from all adjacent residential areas with poles being a maximum of 35' height.
 - Drive thru service will be prohibited.
 - The sale of alcohol will be prohibited.
 - The building architectural design will be similar to the new IHOP constructed on Brainerd Road.
-

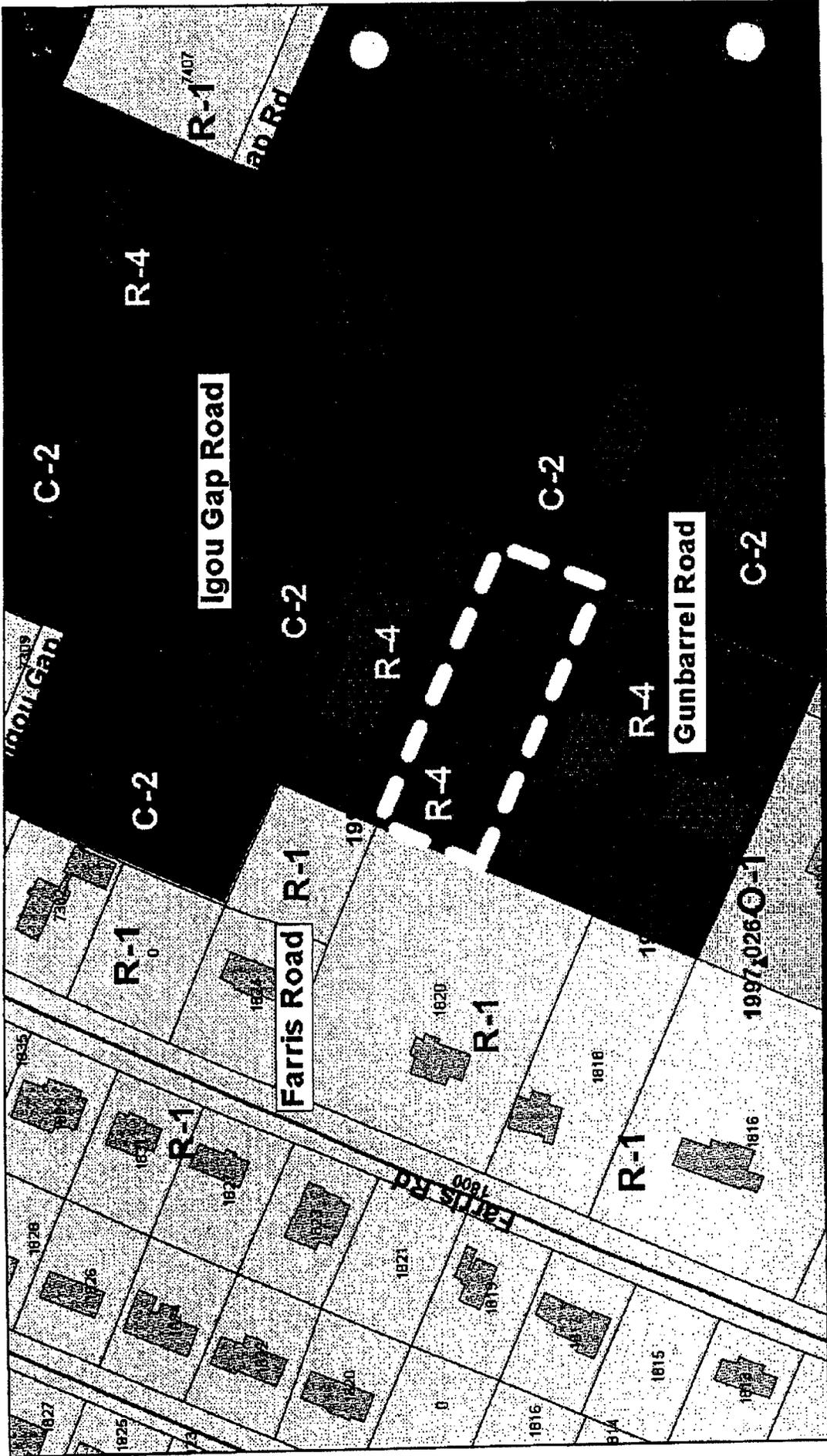
For the most part, the proposed conditions and the site plan seem adequate for many site-specific issues although placement of the dumpster in close proximity to the R-1 Residential Zone should be reconsidered. However, once commercial development is permitted within this institutional/office policy area, greater noise and activity will be introduced during evening and weekend hours. The IHOP model as a 24-hour sit-down restaurant particularly reflects some of the differences between a traditional office model and a commercial development.

Staff also looked at this rezoning through a broader lens of the overall community. The plan recommendation for most of the western edge of Gunbarrel Road between Igou Gap Road and East Brainerd Road is for an Office/Institutional Use as those properties for the most part abut single-family residences. The recommended land use intensity is not higher as there is no ability to buffer the impact of higher-intensity uses with a less-intense use (i.e. introducing a transitional use to step down the activity/impact of a higher-intensity use). The exception is the section for this rezoning case where the properties to the east side of Farris Road have a plan recommendation of medium-intensity residential.

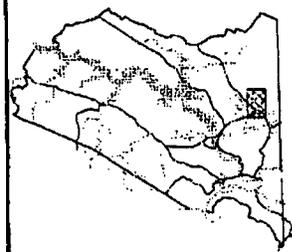
November, 2011

In reviewing the land use, current zoning, and past and existing plans/policies, staff is affirming the existing plan recommendation for office/institutional uses along the western side of Gunbarrel Road. Economic development and job growth are important aspects of community planning. There are still sites for development in the Hamilton Place Mall area particularly to the north of Shallowford Road and possible sites for redevelopment among the vacant commercial properties in the area. Staff supports the planning history for the area that strives to maintain the balance of commercial growth and the redevelopment of a community while maintaining the integrity of neighborhoods. It is a goal of almost every planning process to support reinvestment in the existing residential properties, an investment that can come with continued high quality of life and an understanding of the proposed development form in the area.

In summary, staff is recommending denial of the commercial rezoning request because it is not supported by the City Traffic Engineer and clearly conflicts with the established zoning policy for office-institutional development along this corridor, which was intended to protect the bordering neighborhood.



PLANNING COMMISSION RECOMMENDATION FOR CASE NO. 2011-115: Deny



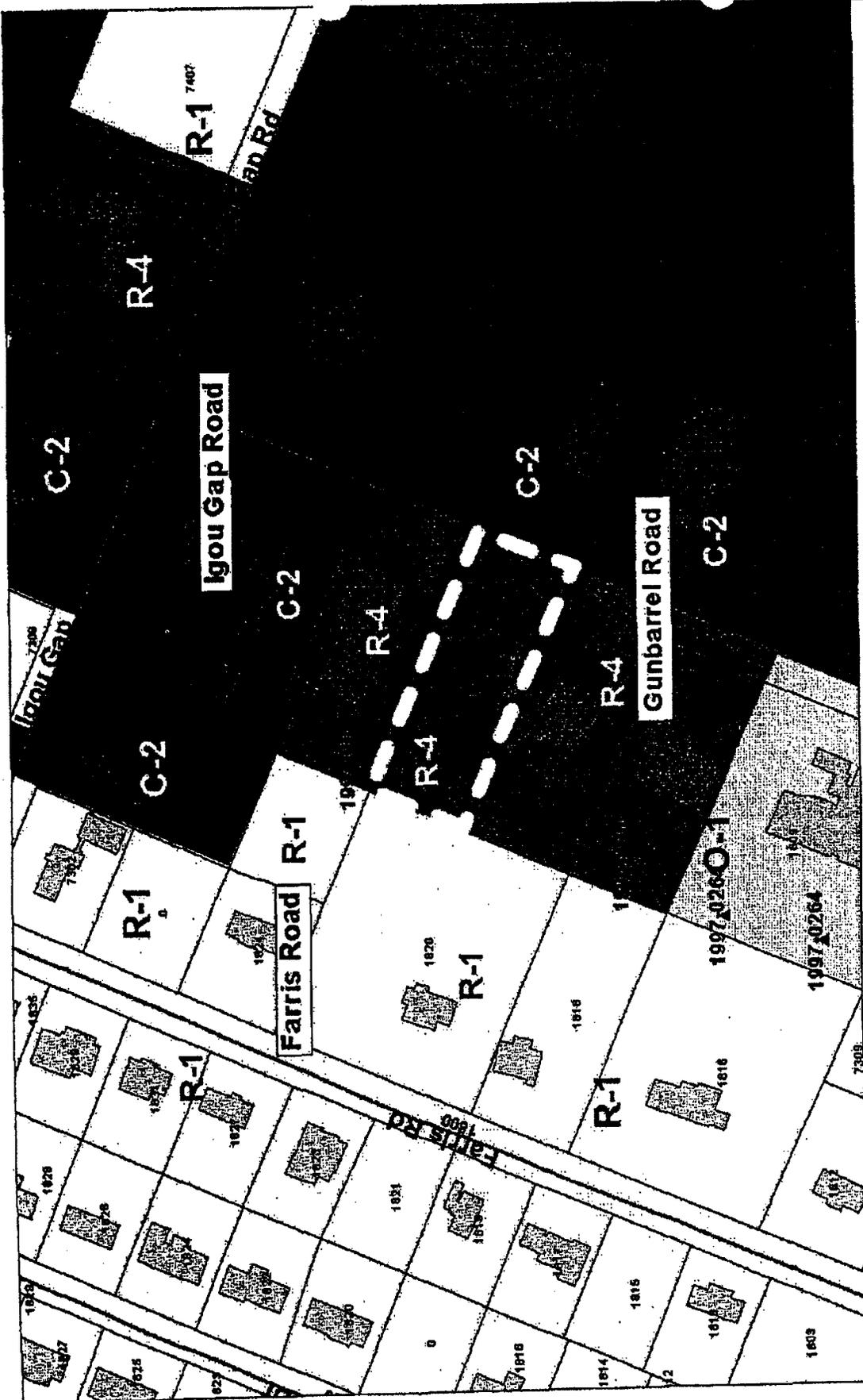
2011-0115 R-4 to C-2



1 in. = 150.0 feet



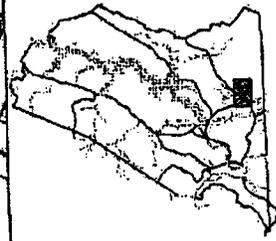
Chattanooga - Hamilton County Regional Planning Agency



1 in. = 150.0 feet



2011-0115 R-4 to C-2



Chattanooga - Hamilton County Regional
Planning Agency

Revised Plan 2011-115

SITE INFORMATION

OWNER INFORMATION
 MR. DAUGART EISA
 APT GROUP, LLC
 915 FIRST OBER DRIVE
 COLTSVILLE, TN 37046

PROJECT CONTACT INFORMATION
 MR. DAVID SHANNAN
 THE TRULOCK GROUP, LLC
 640 TOWNES FERRIS ROAD
 SUITE 100
 ATLANTA, GA 30324
 770-961-4000
 dshannan@trulock.com

ZONING
 EXISTING: R-4 (SPECIAL ZONE)
 PROPOSED: C-2 (CONFORMANCE COTERMINAL ZONE)
 REQUESTED AREA OF REZONING: 0.840 ACRES (21,441 SF)

PARKING
 REQUIRED: 56 (1 SPACE PER 25 SF OF FLOOR AREA)
 PROVIDED: 54

DRIVE AISLE: 24'

REQUIRED BUILDING SETBACKS

FRONT: 25'
SIDE: 10' (MIN. ADJACENT TO RESIDENTIAL ZONING)
REAR: 25' (MIN. ADJACENT TO RESIDENTIAL ZONING)

LANDSCAPE BUFFERS:
 A 24' TYPE 'B' LANDSCAPE BUFFER IS REQUIRED ALONG ALL PROPERTY LINES THAT ADJ. RESIDENTIAL ZONING.

SITE LOCATION MAP

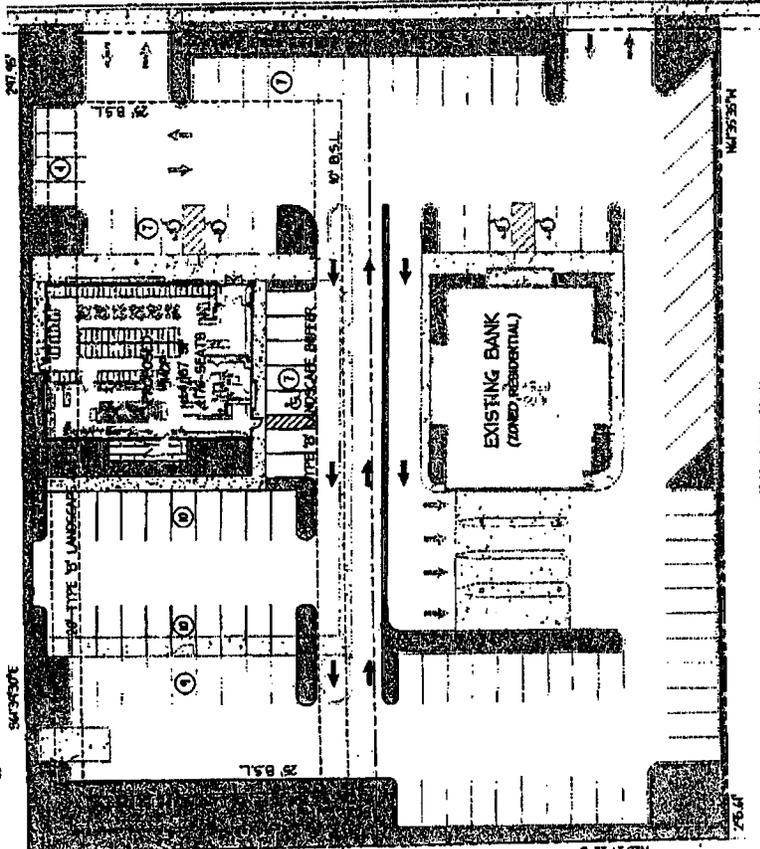


LEGEND

PROPOSED ASPHALT AREAS

PROPOSED LANDSCAPED AREAS

HAMILTON EAST PROFESSIONAL PROFESSIONAL COURTS, LLC, A TENNESSEE LIMITED LIABILITY COMPANY
 DEED BOOK 1724, PAGE 634 LOT 6 PINE TERRACE SUBDIVISION (P.S. 74, P.S. 14)
 ZONED R-4



GAVIN V. BRYANT AND SARAH S. BRYANT, TRUSTEES
 DEED BOOK 4577, PAGE 527
 ZONED R-1

DEBORAH DISTEFANO
 DEED BOOK 4263, PAGE 452
 ZONED R-4

AND H. SCOTT AND ZELLA SCOTT
 DEED BOOK 1776, PAGE 681
 ZONED R-1

INGENIUM DESIGN GROUP, INC.
 CIVIL ENGINEERING AND PLANNING
 CHENOWETH OFFICE PARK
 400 DORRAN LANE
 REVELL, GA 30160
 770.872.9550 661.443.3023 FAX
 www.ingeniumdesign.com



DATE	SCALE	OWNER
	1"=40'	
PROJECT NO.	FILE NAME	PROJECT NUMBER

NO.	REVISIONS	BY	DATE
1	REVISE SHARED DRIVE AISLE	JTP	07/16/11

NO.	REVISIONS	BY	DATE

DATE	SCALE	OWNER
	1"=40'	
PROJECT NO.	FILE NAME	PROJECT NUMBER

IHP - GUN BARREL ROAD
 RE-ZONING SITE PLAN
 CHATTANOOGA, TENNESSEE

SITE INFORMATION

OWNER INFORMATION:
 GIN BARREL LLC
 405 GREAT CREEK DRIVE
 COLTSVILLE, TN 38504

PROJECT CONTACT INFORMATION:
 MR. DAVID SHANNON
 THE TIMONEY GROUP, LLC
 640 TONGUES TERRY ROAD
 SUITE 100
 ATLANTA, GA 30348
 770-465-0004
 dshannon@timoneygroup.com

ZONING: R-1 (SPECIAL ZONE)
 PROPOSED C-2 (COMMERCIAL OFFICE ZONE)
 REQUESTED AREA OF REZONING: 0.40 ACRES (27,46 SQ FT)

PARKING:
 REQUIRED BY (1) SPACE PER 75 SQ FT FLOOR AREA
 PROVIDED: 54

DRIVE AREAS: 24'
 REQUIRED BEHIND: 20'
 FRONT: 20'
 SIDE: 10' (MIN. ADJACENT TO RESIDENTIAL ZONING)
 REAR: 25' (MIN. ADJACENT TO RESIDENTIAL ZONING)

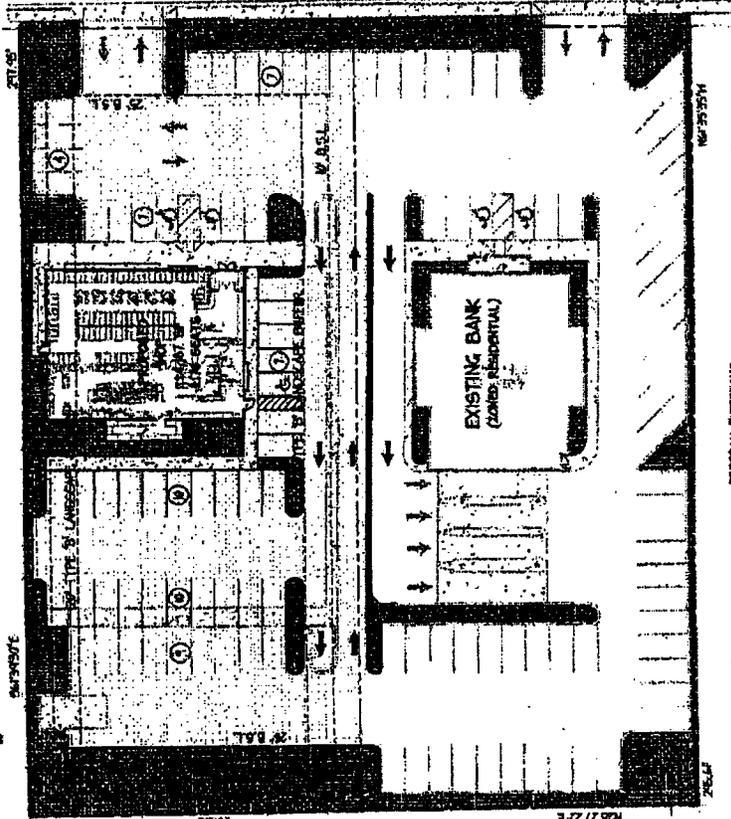
SITE LOCATION MAP



1100P - GIN BARREL ROAD
 RE-ZONING SITE PLAN
 CHATTANOOGA, TENNESSEE

LEGEND

- PROPOSED ASPHALT AREAS
- PROPOSED LANDSCAPED AREAS



HAMILTON EAST PROFESSIONAL COURTESY,
 LLC, A TENNESSEE LIMITED LIABILITY COMPANY
 DEED BOOK 7274, PAGE 634 LOT 6 PINE TERRACE
 SUBDIVISION (PG 73, PG 14)
 ZONED R-1

DEBORAH DETERANO
 DEED BOOK 683, PAGE 42
 ZONED R-1

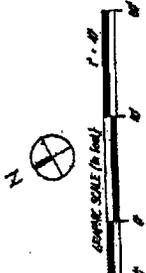
CAYN V. BRAYNT AND SARAH S. BRAYNT, TRUSTEES
 DEED BOOK 4871, PAGE 527
 ZONED R-1

VID N. SCOTT AND JELLA SCOTT
 DEED BOOK 715, PAGE 451
 ZONED R-1

DATE:	01/08/2014
SCALE:	1" = 40'
BY PROJECT:	JFP
FILE NAME:	01P-SITE PLAN
PROJECT NUMBER:	JFP

NO.	REVISION	BY	DATE
1	REVISE SHARED DRIVE AISLE	JFP	01/08/14

NO.	REVISION	BY	DATE





RETAIL

CAR WASH

OFFICE

BANK

OFFICE

OFFICE

OFFICE

BANK

RESTAURANT

RESTAURANT

RESTAURANT

RESTAURANT

2011-115 R4 to C2

Printed Sep 14, 2011

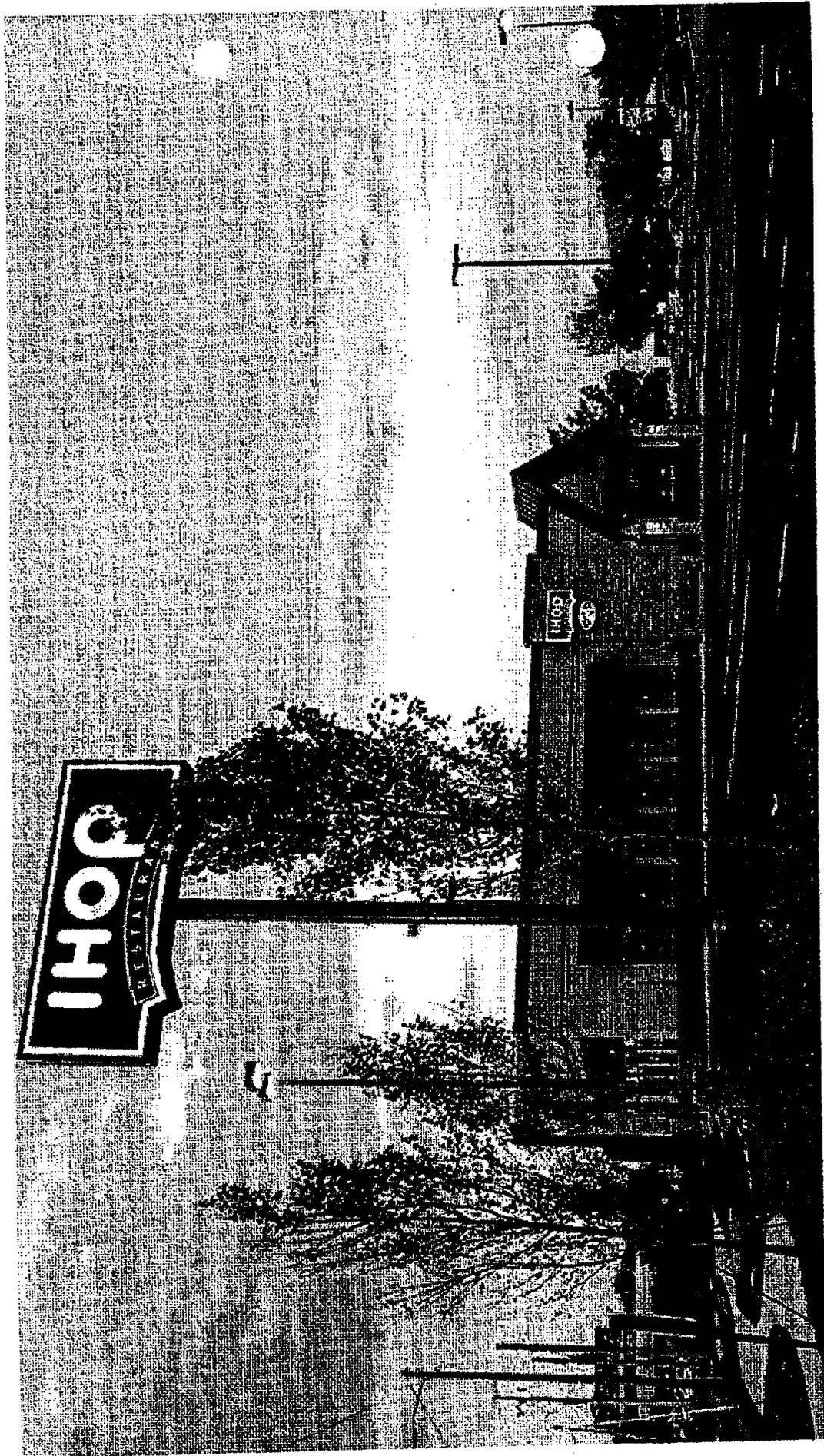
Scale 1:4500

NEUHOFF TAYLOR ARCHITECTS

PROFESSIONAL CORPORATION

IHOP Zoning Proffers

- The use of the property will be limited to a family style sit down restaurant only.
- The building square footage will be limited to a maximum of 4,000 square feet.
- Ingress or egress from existing curb cuts only.
- Install landscaped buffer along the rear property line. Buffer to be a 20' Type "B" Landscaping Buffer.
- Dumpster to be enclosed in masonry walls to coordinate with the building design.
- Lighting to be directed away from all adjacent residential areas with poles being a maximum of 35' height.
- Drive thru service will be prohibited.
- The sale of alcohol will be prohibited.
- The building architectural design will be similar to the new IHOP constructed on Brainerd Road.



AERIAL PHOTO WITH SITE PLAN





- Commercial
- Office
- Institutional/Civic
- High-density residential

Hamilton Place Community Plan, 2001
 Gunbarrel Road- Igo Gap to East Brainerd

NOTICE

WHEREAS, petition to amend Ordinance No. 6958, known as the Zoning Ordinance, have been proposed to the City Council of the City of Chattanooga:

1. The Chattanooga-Hamilton County Regional Planning Commission has recommended that the following petition to rezone be denied:

2011-115 Bassam Issa of ANT Group, LLC. 1825 Gunbarrel Road, from R-4 Special Zone to C-2 Convenience Commercial Zone.

The City Council of the City of Chattanooga, Tennessee will hold a public hearing in the Council Assembly Room, City Council Building, 1000 Lindsay Street, Room 101, Tuesday,

May 14, 2013

at 6:00 p.m. for the purpose of hearing any person whose property may be affected by, or who may otherwise be interested in, said amendments.

This the ____ day of _____, 2013.

Sandra Freeman
Interim Clerk to the City Council

IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

ANT GROUP LLC,)	NO. 12-0107
)	
Plaintiff,)	PART 2
)	
vs.)	
)	
THE CITY OF CHATTANOOGA,)	
THE CHATTANOOGA CITY)	
COUNCIL,)	
)	
Defendants.)	
)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Partial Motion for Summary Judgment of the Plaintiff, ANT Group, LLC (“ANT” or “Plaintiff”) against Defendants, the City of Chattanooga and the Chattanooga City Council (collectively, “the City”), and the Motion for Summary Judgment of the City against ANT.

I. BACKGROUND

This dispute arises from events occurring during the application and deliberation process of the City Council for the rezoning request of ANT relative to its property located at 1825 Gunbarrel Road (the “Property”). At the time ANT purchased the Property, it was zoned “R-4” under the City’s 2001 Hamilton Place Land Use Plan (“2001 Land Use Plan”), which permitted “drug stores or restaurants in office buildings of four or more stories.” *See* City Ord. §§38-121 to 124. ANT planned to construct a free-standing IHOP restaurant on the Property, for which it needed a zoning designation of “C-2,” which has no restrictions. *See* City Ord. §§38-181 to 189.

2013 JUL -4 PM 3: 55

FILED
S. LEE AKERS, C&M

At the December 20, 2011 public hearing of the City Council on ANT's rezoning request, the City voted to deny ANT's rezoning application. Compl., ¶25. The City denied the rezoning request purportedly on grounds that the property fell within the provisions of the 2001 Land Use Plan and to rezone the property as ANT requested would conflict with the Plan. Compl., ¶25.

ANT filed its Verified Complaint for declaratory judgment and for an order reversing the rezoning denial against Defendants on February 15, 2012. Its request for declaratory judgment is based primarily on the claim that the City had no valid basis to deny its rezoning application. Specifically, it cited instances where the City Council violated the 2001 Land Use Plan previously by rezoning other properties, the bias and improper lobbying of Councilman Jack Benson against ANT's rezoning request, misinformation presented to the Council regarding the rezoning request, and the fact that the proposed C-2 construction would impose no greater burden on traffic in the area than the R-4 zoning designation. Defendants filed their Answer on March 19, 2012 denying Plaintiff is entitled to declaratory judgment on the ground that avoiding conflict between the requested rezoning and the 2001 Land Use Plan was a legitimate basis for the denial.

Plaintiff later filed its First Amended Complaint on February 11, 2013 adding several new claims against Defendants. The first claim asserts Defendants violated the Tennessee Open Meetings Act pursuant to T.C.A. § 8-44-101 *et seq.* by conducting electronic transmissions and informal assemblages, which were used to deliberate the rezoning application. First Amend. Compl., ¶51. The other claim alleges Defendants violated the rules for conducting public hearings by failing to provide Plaintiff the

opportunity for rebuttal, thus entitling Plaintiff to a rehearing on the rezoning application. First Amend. Compl., ¶37. Defendants filed their Answer to the First Amended Complaint on March 11, 2013 denying the occurrence of any outside deliberations violating the Tennessee Open Meetings Act and explaining that the City offered Plaintiff rebuttal at a later date, which the Plaintiff refused. Defendants contend in their Answer that a “reconsideration” of Plaintiff’s rezoning application took place at the public hearing on the matter, thus curing any possible violation of the Tennessee Open Meetings Act.

Plaintiff filed its Motion for Partial Summary Judgment on March 18, 2013, along with a Memorandum of Law and a Statement of Undisputed Material Facts, asserting, based on case law from Ohio’s Court of Appeals, the “fairly debatable” standard is akin to the “material evidence” standard. Under the “material evidence” standard, Plaintiff asserts the Court should grant summary judgment in its favor on the basis that the undisputed evidence establishes that the denial by the Council was based on improper reasons driven primarily by racial discrimination and bias on the part of Councilman Jack Benson. ANT also asserts the undisputed evidence shows that the City Council failed to provide Plaintiff due process at the City Council hearing on December 20, 2011, and that in itself provides a basis on which the Court should remand the matter. ANT does not seek summary judgment as to its Open Meetings Act claim.

Defendants filed their Motion for Summary Judgment on March 18, 2013, along with a Memorandum of Law and Statement of Undisputed Material Facts, asserting that under the “fairly debatable” standard, the City had valid grounds to deny Plaintiff’s rezoning application and that even if violations of the Tennessee Open Meetings Act

transpired, such violations were cured by public “reconsideration” of the issue. Defendants also contend that Plaintiff waived his right to assert any procedural defect claims because he was given opportunity for rebuttal at a later time, but refused to exercise it.

ANT filed its Response to Defendants’ Motion on April 17, 2013. It argues the undisputed facts show Council members relied on illegitimate facts and reasons for denial of Plaintiff’s rezoning application. It further contends Defendant is not entitled to summary judgment on the Open Meetings Act violation because there are disputed facts as to whether the Council engaged in “new and substantial reconsideration.”

Defendants filed their Response to Plaintiff’s Motion on April 17, 2013. Defendants argue the City Council provided adequate reason in their denial of Plaintiff’s rezoning request and no impermissible prejudice tainted the Council’s decision. Defendants additionally argued that Plaintiff waived its claim regarding any procedural defects in the hearing on December 20, 2011 because Plaintiff declined the offer to present rebuttal at a later date.

The Court heard arguments on the Motions on July 2, 2013 and took the matters under advisement. After considering the filings and arguments of the parties, the Court now issues the following Memorandum Opinion and Order.

II. ISSUES PRESENTED

- 1) Is either party entitled to summary judgment on ANT’s claim that the City wrongfully denied its rezoning request?
- 2) Is the City entitled to summary judgment on ANT’s claim that it violated the Tennessee Open Meetings Act?

- 3) Is either party entitled to summary judgment on ANT's claim that the City did not provide procedural due process to ANT when it failed to provide equal time for debate to ANT at the December 20, 2011 City Council meeting?

III. LEGAL STANDARD

As the Complaint in this matter was filed after July 1, 2011, the standard provided by T.C.A. § 20-16-101 applies as to the Defendants' Motion for Summary Judgment because they do not bear the burden of proof at trial¹. Certainly, as indicated in the preamble to Public Chapter 498, the apparent intent of the legislation was to bring Tennessee into conformity with the Tennessee federal courts when considering a motion for summary judgment.² For the federal courts, in reviewing a Motion for Summary Judgment under F.R.C.P. 56, the court views the evidence in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When the Motion is supported by documentary proof, such as depositions and

¹ The full text of T.C.A. §20-16-101 is as follows:

In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

- (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
- (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

² The Preamble to Public Chapter 498 is as follows:

WHEREAS, the Tennessee Supreme Court announced a summary judgment standard in *Hannan v. Alltel Publishing Co.*, 270 S.W. 3d 1 (Tenn. 2008) for a party who does not bear the burden of proof at trial to obtain summary judgment; and

WHEREAS, this standard differs from the standard applied by Tennessee federal courts in cases in which the federal summary judgment standard applies; and

WHEREAS, this higher *Hannan* standard results in fewer cases being resolved by summary judgment in state court, increasing the litigation costs of litigants in Tennessee state courts and encouraging forum shopping; and

WHEREAS, the purpose of this legislation is to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in *Hannan*;

affidavits, the non-moving party may not rest on the pleadings but, rather, must present some “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). It is insufficient for the non-moving party to “simply to show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the non-moving party is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Summary Judgment must be entered “against a party who fails to make a showing sufficient to establish an existence of an essential element to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. With regard to the Sixth Circuit “this requires the non-moving party to ‘put up or shut up’ for the critical issues of its asserted causes of action.” *Lord v. Saratoga Capital, Inc.*, 920 F. Supp. 840, 847 (W.D. Tenn. 1995).

Against this backdrop, however, as noted in Section 2 of Public Chapter 498, “Except as set forth herein, Rule 56 of the Tennessee Rules of Civil Procedure remains unchanged.” As of the date of this Memorandum Opinion and Order, there is little, if any, Tennessee appellate guidance for trial courts. This Court will assume that, as noted above with regard to federal court review, the evidence is to be viewed in a light most favorable to the non-moving party. In addition, this Court will assume that the prohibition against “weighing evidence” continues. A trial court must refrain from weighing the evidence at the summary judgment stage; any conflict at all in the evidence must be resolved against

the moving party. *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 84, 87 (Tenn. 2008). This Court must further assume that T.R.C.P. 56.04 continues to exist and, therefore, "... the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As to ANT's Partial Motion for Summary Judgment, the summary judgment standard articulated by the Tennessee Supreme Court in *Hannan v. Alltel Publishing Company* controls: "[I]n Tennessee, a moving party who seeks [through summary judgment] to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." 270 S.W.3d 1, 8-9 (Tenn. 2008). Additionally, the movant can shift the burden by conclusively establishing an affirmative defense. *Blair v. West Town Mall*, 130 S.W.3d 761, 767 (Tenn. 2004). Under either method, the moving party must assert "something more than . . . that the nonmoving party has no evidence." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83-84 (Tenn. 2008). When the movant is the party who bears the burden of production at trial, on the other hand, the movant must allege "undisputed facts that show the existence of [its claim or affirmative defense.]" *Hannan*, 270 S.W.3d at 9 n.6. If the movant does not properly support its motion, the non-moving party's burden is not triggered and summary judgment will not be appropriate. *Blair*, 130 S.W.3d at 767.

When the movant “makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.” *Id.* “The non-moving party may not simply rest upon the pleadings, but must offer to establish the existence of elements of the claim.” *Id.* For example, the non-moving party may convince the trial court that there are sufficient factual disputes to warrant a trial by:

(1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley v. West Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 n. 6 (Tenn. 1993)).

IV. THE DISCUSSION

A. Denial of Rezoning Request

Both ANT and the City seek summary judgment as to ANT’s claim that the City Council wrongfully denied ANT’s request to change the zoning of ANT’s property at 1825 Gunbarrel Road from R-4 to C-2. Both parties agree there is a deferential standard regarding court review of zoning decisions by the City Council:

In enacting or amending zoning legislation, the local authorities are vested with broad discretion and, *in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority.* If there is *a rational or justifiable basis* for the enactment and it does not violate any state statute or positive constitutional guaranty, *the court should not interfere* with the exercise of the zoning power ..., unless the enactment ... is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relationship to the public health, safety, or welfare, or plainly contrary to the zoning laws.

McCallen v. City of Memphis, 786 S.W.2d 633, 640 (Tenn. 1990) (quoting *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983)).

Despite this deferential standard, ANT contends the City Council's basis for denying its zoning request was arbitrary and capricious primarily because the Council's vote was tainted by inappropriate lobbying against the request on the part of former City Councilman Jack Benson. Among other things, ANT also points to misinformation presented by Councilman Benson in the Council meeting at which the vote took place on December 20, 2011 and inaccuracies in the information presented by the Regional Planning Agency ("RPA") in its presentation at the meeting as other improper bases for the Council's denial of the rezoning request.

Citing an Ohio Court of Appeals decision, *Central Motors Corporation v. City of Pepper Pike*, 409 N.E.2d 258, 272 (Ohio Ct. App. 1979), ANT contends the "fairly debatable" standard implies that the "justifiable basis" on which the Council denied the vote must also be a *reasonable* basis. ANT argues the 2001 Land Use Plan, which the City purports to be the justifiable basis for the denial, also did not provide the City Council with a reasonable basis on which to deny the re-zoning request because the Council had previously approved the rezoning of other properties violating the 2001 Land Use Plan. It therefore contends the denial was arbitrary and capricious despite purportedly being based on the 2001 Land Use Plan.

Conversely, the City contends the conflict with the 2001 Land Use Plan was a valid basis on which the Council denied the rezoning request. Specifically, according to the City Council minutes, Greg Haynes with the RPA recommended denial of the request on the

basis that the rezoning of this property would set a precedent on the west side of Gunbarrel Road going against the strictures of the 2001 Land Use plan, which was put in place in an effort to promote strong commercial growth and protect the surrounding residential neighborhood. *See* Def. SUMF, Ex. C (Dec. 20. 2011 Meeting Minutes). Thus, the City argues that even in the face of all ANT's asserted inaccuracies, inappropriate behavior on the part of Councilman Benson, and other alleged unjustifiable bases for denial, the Court has no discretion to overturn the Council's decision in the face of this rational and justifiable basis. The City relies heavily on a factually similar case, *MC Properties, Inc. v. City of Chattanooga*, 994 S.W.2d 134 (Tenn. Ct. App. 1999), in support of this argument.

In *MC Properties*, the Court of Appeals upheld the trial court's affirmation of the City Council's denial of a request for rezoning. The plaintiff in that case made similar arguments as here, such as the council's previous allowance of rezoning of similarly situated properties and the fact that the rezoning would not increase the burden on traffic, as the RPA had claimed it would. *Id.* at 135. However, the court, noting that "the Council has the power to zone property in its discretion, so long as it is rationally related to the welfare of the people," upheld the denial because the council had based its decision on the "justifiable basis" that the road system could not handle the additional traffic at the time. *Id.*

ANT attempts to distinguish *MC Properties* by arguing that case did not involve a "bad actor," such as Councilman Benson, improperly lobbying against the rezoning request. However, the Court is not persuaded that the addition of this factor, or any other improper bases for denial, affect the analysis as long as the Council had at least one

justifiable basis on which to deny the request. Contrary to ANT's assertion that the "justifiable basis" must also be "reasonable," the court's analysis in *MC Properties* stressed that the reasons advanced by the City for denial "*may not be good reasons, but this is not for the Court to determine* so long as the issue is fairly debatable. . . we may not substitute our judgment for the City Council." *Id.* at 135-36 (emphasis added). Thus, the standard requires not a justifiable basis that is *reasonable*, it simply requires a justifiable basis "rationally related to the welfare of the people." *Id.*

ANT also cites a 2009 Court of Appeals decision, *Demonbreun v. Metro Board of Zoning Appeals*, in support of its argument that Mr. Benson's improper role in the decision-making process is grounds for this court to overturn the Council's denial of its request. The Court of Appeals granted relief to the plaintiff in *Demonbreun* because, unlike the City Council in deciding whether to grant the rezoning request, the Board of Zoning Appeals ("BZA") had *no discretion* to deny the request for a special exception upon proof of compliance with the standards for such. 2011 WL 2416722, at *9-13 ("Because of the nature of a special exception, *i.e.*, it is a use specifically permitted where the legislatively prescribed conditions exist, a special exception permit must be granted where the application meets those conditions."). Accordingly, upon a showing by the plaintiff that the BZA's denial resulted from the dislike of the board members and other improper reasons, despite his compliance with the necessary standards, the court of appeals affirmed the trial court's reversal of the BZA denial. *Id.* at *16-17. However, *Demonbreun* is not controlling as to an appeal of a rezoning request denial by the City Council because the Council is not constrained to grant a rezoning request upon the showing of certain conditions being met.

Instead, a city council may grant or deny such a rezoning request on any “justifiable basis.” See 3 Rathkopf, *The Law of Zoning and Planning*, § 40:1 *et seq.* (4th ed.) (noting the “broad discretionary latitude” afforded legislators in zoning decisions).

Indeed, another Court of Appeals case, *Blankenship v. Gibson County*, in which the appellate court upheld the granting of Gibson County’s Motion for Summary Judgment by the trial court, echoes the holding of *MC Properties* rather than *Demonbreun*. No. W2003-00735-COA-R3-CV, 2004 WL 1293273 (Tenn. Ct. App. June 10, 2004). In *Gibson*, the court found that the County’s asserted basis for denial of the rezoning request and its failure to comport with the County’s land use plan was a sufficient basis for denial despite the assertions of the plaintiff. *Id.* In upholding the summary judgment, the court stated:

Assuming *arguendo* the truth of Blankenship's assertions, it is undisputed that the area in which his property is located has not been designated for future commercial use under the Gibson County Land Use Plan and that the road on which the public entrance of the music park is located has not been designated a major thoroughfare. In view of Blankenship's prior indication of interest in opening a restaurant or club on his property, either concerned citizens or the County Commission had a basis for believing that approving the zoning change would expand the commercial use and the use of alcohol on the property beyond the current use. Thus, regardless of any exceptions the County Commission may have made in the past, the County Commission clearly had a rational and justifiable basis for denying Blankenship's re-zoning request. Under the applicable standard, we cannot conclude that the County Commission's decision to maintain the property's zoning designation as A-1 (Agriculture/Forestry) was arbitrary, capricious, unreasonable, or contrary to zoning laws. Thus, we affirm the trial court's grant of summary judgment in favor of the defendants.

Id. at *3.

Similarly, here, assuming for the purposes of summary judgment that all assertions by ANT regarding Mr. Benson's actions, misinformation, previous approval of zoning deviations from the 2001 Land Use Plan on different properties, and other improper bases for the Council's decision are true, the video of the December 20, 2011 Council Meeting and the Meeting Minutes for the same, reflect that the Council also considered the recommendation by the RPA for denial of the request on the basis that it went against the 2001 Land Use Plan:

Mr. Haynes stated that in 2001 a Land Use Plan was put into place that recommended offices and institutional uses on this side in order to protect and enhance the existing neighborhood; that RPA had supported this Policy since 1986. He stated that many seem to think that restaurants are an appropriate fit; however rezoning this property would set a precedent on the west side; that in an effort to promote strong commercial growth and protect the residential neighborhood, they were recommending denial.

Def. SUMF, Ex. C, p. 2 (Dec. 20. 2011 Meeting Minutes); *see also* DVD: City Council Meeting Dec. 20, 2011.³ Accordingly, under *Blankenship* and *MC Properties*, because there was at least one justifiable basis on which to deny the rezoning request before the Council, the Court is constrained by the deferential standard of review of zoning decisions to affirm the denial by the City Council, despite any other unjustifiable reasons that may have affected the Council's decision. Therefore, the City's Motion for Summary Judgment as to the propriety of the bases for denial of the rezoning request is granted.

³ The Court would note it has reviewed the video of the meeting in its entirety, and affirms that the Meeting Minutes reflect accurately the representations made in the Meeting. Citation to a time stamp of when these statements were made by Mr. Haynes was not possible because the type of media player used by the Court to view the video did not provide such.

B. Procedural Issues

Despite this Court's granting of the City's Motion for Summary Judgment as to the denial of the rezoning request above, the procedural defects within the Council's December 20, 2011 hearing provide an alternative basis on which ANT may be entitled to relief. ANT's Motion for Partial Summary Judgment asserts numerous instances of misconduct or deviation by the City Council from procedural rules during the rezoning hearing on December 20, 2011. ANT claims such misconduct and failure to comply with procedural requirements violated its right to due process in the hearing, entitling ANT to a new hearing on the rezoning application.

The underlying basis for ANT's procedural claim is a resolution adopted by the City on July 1, 2004 setting forth the procedural rules for City Council meetings. Resolution No. 24117. Subsections D and (F) of the Resolution state as follows:

(D) Proceedings in Council Meetings:

(10.) In the case of public hearings which debate the passage of an ordinance, the Chairperson may set time limitations in advance of the hearings; provided, however, that *equal time be afforded to those who support such proposals and those who are in opposition*. In the case of group opposition or group support, the Chairperson may limit the number of spokespersons.

(11.) In the case of initial readings on Zoning Ordinances, the following procedures shall be followed:

- a) The case shall be presented by a member of the staff of the Office of Planning and Development.
- b) The applicant shall be granted *a maximum of nine (9) minutes for oral presentation plus two (2) minutes for rebuttal*.
- c) *Spokespersons for the opposition shall be granted equal time.*
- d) Discussion between Council Members shall not be interrupted by either the applicants or the opponents, nor by any

other members of the public present in the Council Chambers. *The Chair shall strictly enforce these rules.*

(F) Code of Ethics

(1.) Members of the Council are expected to be prompt in their attendance of official meetings, including those held in joint session with the Hamilton County Commission. Such meetings *shall be conducted in an orderly manner and according to the Rules of Procedure as adopted by this Council.*

(2.) Conduct of individual Members during meetings of the Council is expected to reflect a total sense of respect for the office held by those assembled to conduct business. *Members shall be courteous to one another, to any member of the administrative staff, as well as persons who may address the Council. A Member may not speak until recognized by the Chair and shall not be recognized the second time on the same subject until all Members who wish to speak have had an opportunity to do so.* Any disorderly conduct shall be noted by the Chair, and the offending Member shall forfeit the privilege of the floor for the remainder of the meeting, except for the purpose of casting his vote.

Id. (emphasis added). Thus, of primary importance is that there is “a maximum of nine (9) minutes for oral presentation plus two (2) minutes for rebuttal,” and that “Spokespersons for the opposition shall be granted equal time.”

The Court may decide the issue of procedural compliance with the Resolution set forth above as a matter of law, as neither party disputes what took place in the public hearing on December 20, 2011. The Council meeting minutes from December 20, 2011 and the video itself show that Greg Haynes presented the RPA’s position on the rezoning request, and afterwards ANT had 9 minutes to present. After ANT’s presentation, the three witnesses in opposition had 3 minutes each. After the opposition witnesses had used all of its allotted time, Councilman Benson requested the Council hear one additional opposition

witness (Mike Baker), which was granted by a majority of the Council. At the conclusion of Mr. Baker's presentation ANT was not given rebuttal time, rather the Council went ahead and voted. The minutes from the December 23, 2011 Council meeting reflect that ANT complained after the vote to Ms. Ladd regarding the lack of rebuttal time, and she therefore offered to allow him time for rebuttal at the December 23, 2011 Council meeting, but he declined because the Council had already voted to deny the rezoning request. Thus, it is apparent that the City Council violated Resolution No. 24117 as a matter of law primarily by failing to provide rebuttal time, but also by allowing an additional witness for the opposition.

Rather than dispute the procedural defects themselves, the City asserts that the offer for additional rebuttal time by Councilwoman Ladd cured any defect in the procedure. The City further contends that ANT waived its right to assert any procedural defect claims now, as it declined the offer for a later rebuttal. However, because the offer by Councilwoman Ladd was made *after* the Council had already voted to deny the rezoning thus rendering any rebuttal futile, the Court disagrees that the offer for additional rebuttal was sufficient to cure the Council's obvious noncompliance with Resolution No. 24117(D). Moreover, the allowance of an extra witness in opposition to the rezoning request only further infringed upon ANT's procedural rights as accorded by the Resolution.

Accordingly, ANT's Motion for Summary Judgment as to its procedural defects claim is granted. As to the remedy for these procedural defects, the Court finds that, although the City Council's ultimate denial of the rezoning request was within its legislative discretion under the arbitrary and capricious standard enunciated in *McCallen v.*

City of Memphis, 786 S.W.2d 633, 640 (Tenn. 1990), its failure to follow its own procedural rules with regards to the request was arbitrary and capricious as it was “plainly contrary” to the procedures governing consideration of rezoning requests under the same standard announced in *McCallen*. Clearly, compliance with its own public hearing procedures for considering a zoning request is implied within the zoning laws themselves, as they mandate that any amendments or proposed changes to the existing zoning laws must be heard by public hearing in front of the City Council. *See* City Ord. §38-672(1).

Further, although there is a dearth of case law specifically addressing the appropriate remedy for a municipal legislative body’s non-compliance with such internal procedural rules, the Court finds that the *McCallen* and its progeny, as well as equitable considerations, require the Court to remand the rezoning request for a new hearing. *See* Gibson’s Suits in Chancery, §2.25 (8th Ed.) (“Equity enforces what good reason and good conscience require.”). The City Council is directed to re-hear ANT’s rezoning request within sixty (60) days of the entry of this Order and provide proper notice of the re-hearing to the public. The Court anticipates full compliance with the applicable procedures upon the re-scheduling and re-hearing of the matter.

C. Tennessee Open Meetings Act

The City asserts it is entitled to summary judgment on ANT’s Open Meetings Act claim due to the “reconsideration” of the issue at the public hearing. In support of this proposition, the City cites *Johnston v. Metro. Government of Nashville & Davidson County*, 320 S.W.3d 299, 312-13 (Tenn. Ct. App. 2009), which held: “[E]ven if members of a public body engage in conduct that violates the Open Meetings Act, the action of the

public body will not be deemed void if, in the interim, there was a 'new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue.'" (quoting *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436-37 (Tenn. Ct. App. 1990)). In *Johnston*, the court upheld the trial court's finding that even if certain email exchanges were considered to be deliberations in violation of the Act, "the ultimate decision was made in accordance with the ... Act in that substantial and substantive deliberations were held and the vote on the bill [was] conducted at the public meeting of the council." The court observed that no decision was made prior to the Council's public vote, and "prior to the vote, extensive discussion was had on the floor of the council." *Id.*

Similarly, here, ANT contends that email exchanges and private meetings between the Council members, at the behest of Councilman Benson, violated the Open Meetings Act. However, the City contends the public hearing on December 20, 2011 in which the Council debated the issue constituted "substantial and substantive" public deliberation sufficient for the Court to cure any violations of the Act under *Johnston*. However, due to the procedural issues cited in the previous section, and the fact-intensive inquiry required to determine whether the discussion of the rezoning request was sufficiently "substantial," the Court cannot decide this matter at the summary judgment stage.

However, the Court's reluctance to grant the City's Motion for Summary Judgment as to the Open Meetings Act claim is irrelevant, because T.C.A. § 8-44-105 provides only for rehearing if there is violation of such. Thus, ANT's claim as to the Open Meetings Act

is rendered moot because the Court has already remanded the rezoning request for rehearing based on the procedural deficiencies discussed previously.

V. CONCLUSION

The Court's findings of fact and conclusions of law are set forth above. Based upon such, it is hereby **ORDERED, ADJUDGED and DECREED** that:

1. Defendants' Motion for Summary Judgment as to the City Council's denial of the rezoning request is **GRANTED**— ANT's claim as to this issue is dismissed with prejudice;

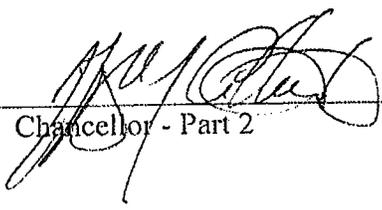
2. Plaintiff's Partial Motion for Summary Judgment as to the City Council's denial of the rezoning request is rendered moot by the dismissal of this claim;

3. Plaintiff's Partial Motion for Summary Judgment is **GRANTED** as to the procedural defects of the City Council Meeting— ANT's rezoning request shall be remanded for a rehearing by the City Council within sixty (60) days of the entry of this Order;

4. Defendants' Motion for Summary Judgment as to the Tennessee Open Meetings Act claim is rendered moot by the remand of the rezoning request;

5. The Clerk's costs are adjudged 50 percent against Plaintiff and 50 percent against Defendants, for which execution may issue.

ENTER:


Chancellor - Part 2

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this Memorandum

Opinion and Order has been placed in the United States Mail addressed to:

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Chattanooga, TN 37450

Phillip Noblett
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City Attorney's Office
100 E. 11th Street, Suite 200
Chattanooga, TN 37402

This the 5 day of July, 2013.

S. Lee Akers, Clerk and Master

By: *Virginia D Moore*
Deputy Clerk and Master