



CITY APPOINTEES
TIMOTHY RAINEY, ESQ., CHAIR
MARY BAKER
JOY DOSS
JOHN JACKSON III

BOARD OF ADJUSTMENT

CITY BOARD EST. 1925 – COUNTY BOARD EST. 1931 – MERGED, 1970

JOSH WHITEHEAD, AICP, SECRETARY

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COUNTY APPOINTEES
MADELEINE SAVAGE-TOWNES, ESQ., VICE CHAIR
CARSON CLAYBROOK
J.T. MALASRI
PORTIA SCURLOCK

Date: January 27, 2021

To: Timothy Rainey, Chairman
Madeleine Savage-Townes, Vice Chair
Mary Baker, Member
Carson Claybrook, Member
Joy Doss, Member
John Jackson, III, Member
J.T. Malasri, Member
Portia Scurlock, Member

From: Josh Whitehead, Secretary

RE: 2020 Annual Report

Mr. Chairman and Members of the Board:

It has been a pleasure to serve as your Secretary this past year. This Annual Report summarizes the attendance and case load of the Board during 2020.

1. Attendance

Tim Rainey served as Chairman during 2020 and Madeleine Savage-Townes served as Vice Chair. Below is the attendance of Board members during the year:

Regular Members

Chairman Rainey attended 11 of 11 meetings.

Vice Chair Savage-Townes attended 8 of 11 meetings.

Ms. Baker attended 11 of 11 meetings

Mr. Claybrook attended 11 of 11 meetings

Ms. Doss attended 9 of 11 meetings.

Mr. Jackson attended 8 of 11 meetings

Mr. Malasri attended 11 of 11 meetings

Ms. Scurlock attended 10 of 11 meetings.

The meetings from April through the end of the year were held telephonically due to the COVID-19 pandemic and the fact that the Board's regular meeting location, the Memphis City Council Chamber, has been closed for renovations. In addition, the meeting in

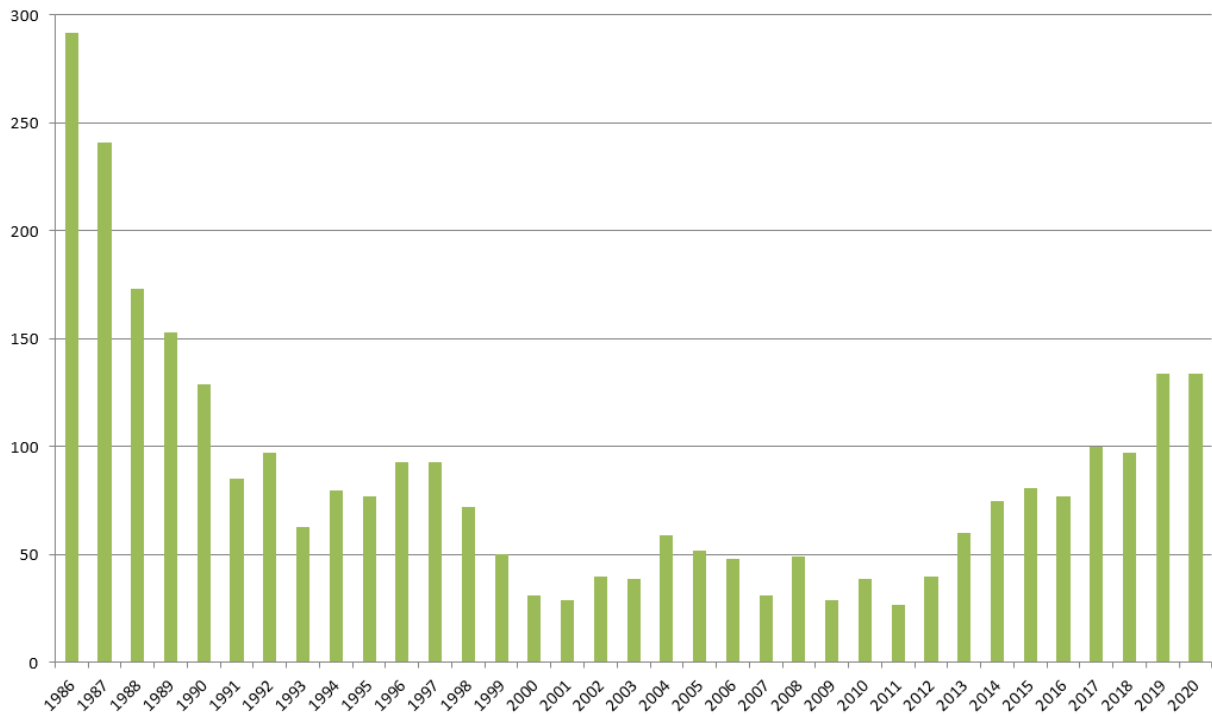
March was cancelled due to the then-recent onset of the pandemic at the time notices needed to be mailed in advance of the meeting.

2. Caseload

134 cases were filed with the Board in 2020. This includes cases filed in late December that were docketed for the January 2021 meeting. Of the cases *acted* upon in 2020:

- **23** involved use variances;
- **12** were correspondence cases, or major modifications to requests already approved by the Board;
- **4** were Conditional Use Permits for uses that specifically require such a review under the Unified Development Code;
- **2** were appeals of administrative citations or interpretations of the Code and
- **12** involved sites located in unincorporated Shelby County, with the balance involving sites located in the City of Memphis.

The table below indicates annual caseload from 1986 to 2020, according to case prefix year. The last case filed in 2020, Docket BOA 20-134, represents the 13,974th request submitted to the Board since its inception in 1925.



3. Significant Cases, 2020

BOA 20-2: Valvoline Oil Change on the south side of Union between Avalon and Rozelle (see photograph below)



BOA 20-3: apartment and office complex on Front Street that will include the redevelopment of the old Conwood manufacturing complex (see rendering below)



BOA 20-24: erection of airplane in front of East High School (see rendering below)



BOA 20-43: gas station at southeast corner of Broad and Hollywood (see rendering below); *note: the case was rejected by the board*



BOA 20-47: rehabilitation of an industrial building on Yale to establish a Binghampton branch of the Ave Maria nursing home

BOA 20-51: renovation of the old Luciann Theater on Summer for commercial uses (see historic photograph below)



BOA 20-58: warehouse on east side of Swinea between Winchester and Shelby Dr.

BOA 20-66/102: apartments at Vance and Wagner at the site of the Nylon Net Bldg.

BOA 20-71: apartments at Vance and Front (see rendering below)



BOA 20-89: homeless shelter at site of old auto inspection station on Washington

BOA 20-90: renovation of office building on Union Ext. at Poplar into apartments

BOA 20-94: permit the Prairie Farms (formerly Forest Hill) dairy on Madison to use warehouse and parking at the rear of its site; *note: the case was rejected by the board*

BOA 20-116: use variance to allow the renovation of the old Collins Chapel Hospital on North Ayers (see photo from 1971 below, courtesy of the *Commercial Appeal*)



4. Staff, 2020

As has been the case since 2001, the Board of Adjustment has been staffed by the land use section Memphis and Shelby County Division of Planning and Development (“DPD”). In 2020, this section was formally changed from the “Office of Planning and Development” to “Land Use and Development Services.” Clarke Shupe-Diggs was hired to cover the vacancy of Somer Smith during the calendar year. Ms. Shupe-Diggs served as at the department’s intern in 2019-2020. The University of Memphis intern for this year is Bradley Thomas. In early 2020, Brian Bacchus and Jeffrey Penzes were elevated to the position of Principal Planner. Unchanged from the year before are the following individuals and position: Chip Saliba and Brett Ragsdale, Deputy Administrators; Burk Renner, Manager and Brett Davis, Lucas Skinner, Teresa Shelton, Ayse Tezel and Seth Thomas, Municipal Planners.

5. Use Variances and Sunsets

During the past year, the board has discussed its role in reviewing use variances, which are those variances related to the use of land rather than, say, the bulk of the building on the land. Most other zoning boards in Tennessee operate under the Tennessee Code Annotated (TCA 13-7-207(3)), which is silent on the matter of use variances. Memphis and Shelby County’s zoning board, on the other hand, operates under a series of private acts passed by the Tennessee General Assembly. These acts specifically allow the board to “vary or modify the application of any of the regulations or provisions of such ordinance related to the use, construction or alteration of buildings or structures of the use of land” (Private Acts of 1925, Chap. 428, emphasis added).

The enabling legislation guiding the board’s consideration of use variances has been reviewed by the Tennessee courts numerous times, the most cited case is *Reddoch v Smith*, 18 McCanless 213 (1964). This case, which was docketed as BOA 62-35 (County), involved a proposed Texaco station at the corner of Poplar and June in what was then unincorporated Shelby Co. In *Reddoch*, the Tennessee Supreme Court ruled that the board had been given “wide [and] liberal discretion” by the General Assembly and could “rezone” properties so long as there is evidence of “practical difficulties” or “unnecessary hardships” (*Reddoch*, pp. 215, 222 and 223). The *Reddoch* court found that the applicant had indeed presented valid practical difficulties or unnecessary hardships to justify a use variance, including the following: 1) the owner had marketed the site for eight years for a single-family residence (for which it was zoned) without selling it, 2) Poplar Ave. had a high volume of traffic and 3) the property was in close proximity to a new interstate highway ramp.

Just a few years later, the Tennessee Court of Appeals overturned the board’s approval of a use variance for another gas station, this one at the northeast corner of Summer and Graham in a multi-family zoning district (Docket BOA 70-36 (City)). The Court found that no evidence of a practical difficulty or unnecessary hardship was presented; in fact, the record reflected that the apartment building that stood, and still stands, on the site

enjoyed a high occupancy rate at the time, showing the property *could* be used as zoned (*Houston v Board of Adjustment*, 488 S.W.2d 387 (1972)).

I have recently written an article for the American Planning Association's (APA) *Zoning Practice* on the status of use variances around the country. Some states allow them, but require a finding of hardship, with bulk variances requiring a presumably lesser showing of practical difficulty. Other states specifically prohibit them. Still others, like Tennessee, are silent on the issue. And some jurisdictions like Memphis and Shelby County have their own enabling legislation; for instance, use variances are allowed in Missouri but not in its largest city, Kansas City. Download the APA article [here](#) (the editors, unprompted by me, even included a photograph of the Luciann Theater for the front cover of the article, a probable nod to one of this year's use variances).

The most cited variance case under the general acts codified in the Tennessee Code Annotated provides direction to the board on one important, yet entirely different, matter: tying a variance to a particular owner. In *McClurkan v Metro*, 565 S.W.2d 495), the Tennessee Court of Appeals found that Nashville's Board of Zoning Appeals erred in approving a variance for a four-plex in a single-family zoning district because it was conditioned upon a particular person's ownership of the property. Since variances are meant to be based on some peculiar quality of the land itself, they run with the land and cannot be limited to any specific owner. As we have discussed several times during the past year, one possible way to approve a variance provisionally that passes muster under *McClurkan* is to provide a sunset period to ensure its conditions of approval are met. In addition, the board amended its Rules several years ago to allow it to conduct a Show Cause Hearing to revoke a variance if evidence is presented that certain conditions of approval are not being satisfied.