

MEGAN BARRY  
MAYOR



**METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY**

Metropolitan Historic Zoning Commission  
Sunnyside in Sevier Park  
3000 Granny White Pike  
Nashville, Tennessee 37204  
Telephone: (615) 862-7970  
Fax: (615) 862-7974

**STAFF RECOMMENDATION**  
**201 Broadway**  
**October 19, 2016**

**Application:** New construction  
**District:** Broadway Historic Preservation Zoning Overlay  
**Council District:** 19  
**Map and Parcel Number:** 09306209900  
**Applicant:** Old Town Trolley Tours of Washington, Inc.  
**Project Lead:** Robin Zeigler, robin.zeigler@nashville.gov

<p><b>Description of Project:</b> The applicant is seeking approval of flag poles, an improvement that has taken place without a Preservation Permit.</p> <p><b>Recommendation Summary:</b> Staff recommends disapproval of the flag poles finding that the improvement does not meet Section III of the design guidelines for new construction.</p>	<p><b>Attachments</b> <b>A:</b> Photographs <b>B:</b> Site Plan <b>E.</b> Letter from Shawn Henry</p>
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**Vicinity Map:**



**Aerial Map:**



## Applicable Design Guidelines & Ordinances:

### DESIGN GUIDELINES

#### III. New Construction

**General Principles:** New construction should be consistent with existing buildings along a street in terms of height, scale, setback, and rhythm; relationship of materials, texture, details, and color; roof shape; orientation; and proportion and rhythm of openings.

#### I. Parking/Parking Structures, Plaza, Arcades, Landscape and Open Space

1. Parking, parking structures, plazas, arcades, landscape and open space may be appropriate components of new construction when the design of such development contributes to the overall character of the district and the streetscape, and the new construction is consistent with the design guidelines for new construction.
2. New parking should remain subordinate to the street scene and should be wrapped with a pedestrian friendly buffer or façade.
3. Parking structures should be wrapped with retail space or other active use along the street edge.
4. Curb cuts are not permitted on Broadway, and vehicular access should occur at the alley on properties that abut alleys.
5. All applicable guidelines for new construction shall be followed for parking structures.
6. Removal or demolition of existing historic buildings or portions of buildings to create a plaza, arcade, or open space are not appropriate.

#### ORDINANCE 17.32.040

The following on-premises signs are exempt from the operation of these sign regulations provided they are not placed or constructed to be in violation of 17.20.180, visibility, or so as to create a hazard of any kind through the obstruction of vision by motorists and pedestrians.

- I. In commercial and industrial districts flags of eight square feet or less in size that are mounted on individual poles. The poles shall be separated by a minimum distance of twenty-five feet, except that four poles may be clustered at one location per street frontage. If the option to cluster is exercised no other poles shall be erected along that street frontage. The flags may contain a logo and shall be subject to the height and front setback requirements for the respective district.

**Background:** 201 Broadway is a parking lot at the corner of Broadway and Second Avenue that was added to the Broadway Historic Preservation Zoning Overlay in 2014.

The parking pay machine and curb cut on Broadway were constructed prior to the lot being added to the overlay.

In May 2016, staff noted that the following improvements had been made without a permit: addition of a free-standing ATM, flag poles, food trucks, food and ticket sales trailers, and resurfacing of the lot. Recently a food truck was removed; however, two food trailers and a ticket trailer remain. At the September MHZC meeting, the ATM was disapproved and legal counsel for the property owner provided a letter stating that the trailers will become motorized vehicles that will not be in place more than 90 days at a time and therefore do not require MHZC review. This leaves just one violation, the flag poles, which the applicant requests to keep. (See attached letter from Shawn Henry.)

## Analysis and Findings:

### Summary

The five flag poles are thirty-five foot (35') tall steel poles. The diameter was requested but not provided. The square footage of the flags themselves was not provided. The poles on Broadway are twenty feet and four inches (20' 4") apart. The ones on Second Avenue are between twenty feet, four inches and twenty four feet (20' 4"-24') apart.



Figure 1: The 5 flag poles. (Photo taken on May 24, 2016)



Figure 2: Two of the flagpoles. (Photos taken on September 11, 2016.)

## Analysis

General Principles, Section III states that “new construction should be consistent with existing buildings along a street in terms of height, scale, setback, and rhythm; relationship of materials, texture, details, and color; roof shape; orientation; and proportion and rhythm of openings.” The historic streetscape includes a minimum of two-story buildings with walls that extend the full width of the lot, store-front windows and upper-level punched-openings. Flag poles do not create the solid rhythm established by the historic buildings. In addition, historically flag poles were generally associated with civic buildings or with public spaces such as parks and plazas. In this case, the flag poles are not associated with a building or public space.

Since the project does not include a building, it was more specifically reviewed under design guideline III.I for “parking/parking structures, plaza, arcades, landscape and open spaces.” Parking/parking structures, plaza, arcades, landscape and open spaces are only appropriate when the “design of such development contributes to the overall character of the district and streetscape and the new construction is consistent with the design guidelines for new construction.” As reviewed above, the proposal does not contribute to the overall character of the district and the streetscape, nor is it “consistent with the design guidelines” for new construction as it does not meet “General Principles” of section III for new construction.

In addition, the flag poles do not meet section 17.32.040 of the base ordinance for flag poles. Section 17.32.040 requires that flag poles be at least twenty-five feet (25’) apart. The distance between them varies but they are all closer together than twenty-five feet (25’). The ordinance requires that the flag itself not exceed 8 square feet. The size of the flags was not provided and, due to the height of the poles, staff was unable to measure them. The ordinance also requires that the poles meet the height requirements for the district. The design guidelines require that the height of a new building be compatible to adjacent buildings (“New construction-general principles”). In this case, the request is not a building but a pole, so staff compared the height to other poles in the district. There are no flag poles located on Broadway within the district’s boundaries; however light and signal poles are between fifteen and twenty feet (15’-20’) tall. Staff contends that a 35’ tall pole is too tall to meet the historic context.



Figure 3: This image shows that the flag poles are significantly taller than other poles in the district.

### Recommendation

Staff recommends disapproval of the flag poles finding that the improvement does not meet Section III of the design guidelines for new construction.

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THOMAS V. WHITE  
JOHN W. NELLEY, JR.  
THOMAS C. SCOTT  
PETER J. STRIANSE  
HUGH W. ENTREKIN  
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GEORGE A. DEAN  
LESA HARTLEY SKONEY  
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TODD E. PANTHER \*  
DAVID B. GRAY  
SHAWN R. HENRY  
T. CHAD WHITE  
BRANDT M. MCMILLAN \*  
CHRISTOPHER B. FOWLER

ATTORNEYS AT LAW

SUITE 1700  
315 DEADERICK STREET  
NASHVILLE, TENNESSEE 37238  
TEL (615) 244-2770 FAX (615) 244-2778

JOHN C. TUNE  
1931-1983

ERVIN M. ENTREKIN  
1927-1990

\*Rule 31 listed General Civil Mediator

September 13, 2016

**Via Email: [susan.jones@nashville.gov](mailto:susan.jones@nashville.gov)**

Ms. Susan T. Jones, Esq.  
Department of Law  
Metro Courthouse, Suite 108  
P.O. Box 196300  
Nashville, TN 37219-6300

**RE: 201 Broadway**

Dear Ms. Jones:

Our law firm represents *Old Town Trolley Tours*, owner of 201 Broadway. On May 26, 2016, Metro Historic Zoning Commission (“MHZC”) staff issued a *Notice of Abatement for 201 Broadway* for the installation without prior approval of an ATM<sup>1</sup>, flagpoles, concession trailers, and ticket booth. As instructed, my client’s consultant filed a “Preservation Permit Application.” MHZC staff have determined that these site features should be forcibly removed from the site. According to the Downtown Zoning Code, ATMs, retail, and parking lots are land uses permitted by-right on Broadway. Nonetheless, **my client is agreeable to replacing the ticket booth kiosk and concession trailers with operable automobiles (per the zoning code definition of “automobile parking” lot). The commercial vehicles will not be in place more than 90 days at a time** (per MHZC staff recommendation dated August 17, 2016). See sample photo of “ticket booth truck” attached hereto.

**FLAGPOLES**

The MHZC staff is taking the position that all flagpoles are barred from the Broadway Historic Preservation Zoning Overlay (“Broadway Zoning Overlay”). This determination raises serious concerns at its intersection with constitutionally established free speech doctrine which protects the right of private land owners to fly the American flag, or really the flag of any political entity, on their property as political speech. *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601, 607 (4th Cir. 2001).<sup>2</sup>

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<sup>1</sup> The ATM is the property of *First Farmers Bank* who is being represented by another law firm.

<sup>2</sup> “Flags, especially flags of a political sort, enjoy an honored position in the First Amendment hierarchy. One may engage in protected speech by burning a flag, *see Texas v. Johnson*, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 109 S. Ct.

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The MHZC has authority to establish and enforce guidelines relating to the appearance of new buildings, appurtenances, signage, and the demolition of existing structures within the Broadway Zoning Overlay. *See* Metro Code of Ordinances §§ 17.36.100 & 17.40.410 (limiting the review power of the MHZC to, as pertinent, “The appropriateness of the exterior architectural design and features of, and appurtenances related to, any new structure or improvement.”). However, in attempting to use their authority to completely ban all flagpoles, regardless of appearance or construction material used, the MHZC staff has overreached their authority and established a restriction on the free speech rights of property owners in general, and our client in particular. *See City of Ladue v. Gilleo*, 512 U.S. 43, 45, (1994).<sup>3</sup>

Banning all flagpoles in the Broadway Zoning Overlay is a de facto ban on flags. A categorical ban on all flagpoles poses multiple problems. First, by virtue of being a complete bar of all flagpoles the regulation is effectively a limitation of political free speech which is jealously protected under the law. *Freeman v. Burson*, 802 S.W.2d 210, 211-12 (Tenn. 1990) (“The above statute regulates political speech, which is the most highly protected form of speech.”)<sup>4</sup> Secondly, the failure by the MHZC to reference any specific flaws in the appearance of the subject flagpoles relating to size, placement, material, or design is not consistent with the ambit of their authority and a failure to leave open sufficient alternative means for the communication.

Any parsing of the distinction between limitations on flagpoles rather than flags is a distinction without a difference. It will not limit or lessen the crushing burden that this determination places on political speech in violation of well-established state and federal constitutional principles. Limitations on speech which restrict political speech face exacting scrutiny, even if content neutral, which requires that the government show that the restriction is necessary to further an important government interest and that the restriction is narrowly tailored to achieve this goal while leaving open ample alternative channels of communication. *Freeman*, 802 S.W.2d at 212.

At its core the MHZC staff has determined that the five flagpoles supporting five “official governmental flags” are inappropriate within the Broadway Zoning Overlay because they “do not create the solid rhythm established by the historic buildings.” (Aug. 17, 2016, p. 7) This

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2533 (1989), or by affixing a peace symbol to a flag and flying it upside down, *see Spence v. Washington*, 418 U.S. 405, 409-10, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1970).” Surely mutilation of the flag is no more sacred or protected under Tennessee and U.S. law than the respectful and patriotic display of the flag.

<sup>3</sup> City’s ordinance banning display of all signs on private property was constitutionally invalid. *Stromberg v. California*, 283 U.S. 359, 368-70, (1930) (Constitutionally protecting the flying of a red flag.) (*Guilford Planning & Zoning Comm’n v. Guilford Zoning Bd. of Appeals*, No. CV030473311S, 2004 Conn. Super. LEXIS 1049, at \*28 (Super. Ct. Apr. 21, 2004) (Invalidating a zoning determination forcing a landowner to remove an Irish flag and flagpole from his property.).

<sup>4</sup> Referencing *EU v. San Francisco City Democratic Central Committee*, 489 U.S. 214, (1989) noting that the First Amendment “has its fullest and most urgent application” to political speech.

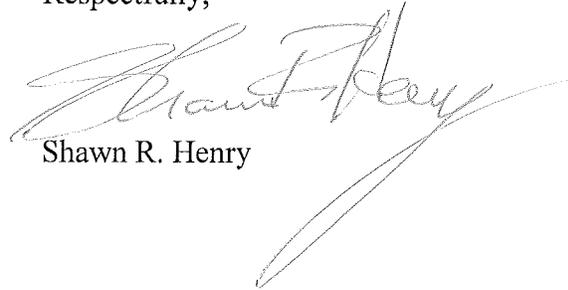
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determination is not only nonsensical but ignores the basic principles of free speech as protected in the Tennessee and United States constitutions. For these reasons, the Metropolitan Government expressly limited its zoning power so as not to infringe upon the right of property owners to fly “official governmental flags” from their supporting structures by exempting them from zoning regulation. Metro Code of Ordinances § 17.32.040(I).<sup>5</sup> Since they are exempt from zoning regulation, they are exempt from historic zoning regulation.

As requested by the MHZC staff, this letter should suffice as my client’s commitment that “the retail trucks will not be in place more than 90 days at a time” and, consequently, the MHZC will not review the same. Additionally, please confirm that the flagpoles will not be reviewed by the MHZC for preservation permit purposes.

Respectfully,



Shawn R. Henry

SRH/acr

Enclosure

cc: Macy Forrest Amos, Metro Legal Department (via email)  
Robin Ziegler, Historic Zoning Administrator (via email)  
Bill Herbert, Zoning Administrator (via email)

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<sup>5</sup> There are numerous other exemptions from zoning regulation, including “inflatable moving advertising figures made to resemble the human form used to draw attention to an event or business” provided the inflatable figures are *attached to a fixed base* and do not exceed twenty feet in height. § 17.32.040(BB).



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