**No. M2018-00834-COA-R3-CV**

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**IN THE COURT OF APPEALS OF TENNESSEE**
**AT NASHVILLE**

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**HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE,**

**Appellant/Plaintiff**

**v.**

**METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,**

**Appellee/Defendant**

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**On Appeal from the Chancery Court of Davidson County, Tennessee Twentieth Judicial District at Nashville**
**WILLIAM E. YOUNG, Case No. 17-386-II**

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# BRIEF OF THE APPELLANT/PLAINTIFF

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**ORAL ARGUMENT REQUESTED**

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## EXPLANATION OF THE TERMS

In this brief, the following intelligible abbreviations will be used to refer to the record. *See* Tenn. R. App. P. 27(g) (2018). References to the technical record will be by (TR.) followed by the appropriate volume and page number as marked by the court clerk. References to the transcript will be by (TT.) followed by the appropriate volume and page number as marked by the court clerk.

## STATEMENT OF THE ISSUES

1. Whether a facial taking claim based on the unconstitutional conditions doctrine is ripe for judicial review immediately upon enactment of the challenged law or must a plaintiff first seek compensation through inverse condemnation.

2. Whether HBAMT has organizational standing to raise a facial challenge to an effective law certain to affect the property rights of HBAMT's members and inflicting immediate compliance costs before the law has been applied to any of HBAMT's members.

## STATEMENT OF THE CASE

On April 24, 2017, Home Builders Association of Middle Tennessee (HBAMT) filed the instant complaint for declaratory and injunctive relief. (TR.I at 1.) In its Complaint, HBAMT challenged the Metropolitan Government of Nashville and Davidson County's (Metro) newly enacted "inclusionary zoning" ordinance. (*Id*.)

HBAMT asserted three claims. First, HBAMT brought a facial taking claim based on the unconstitutional conditions doctrine and argued that the Ordinance violated the Fifth Amendment because it conditions the issuance of development entitlements (e.g., building permits, changes in zoning) upon either the dedication of property to be sold or rented at below-cost, below-market prices or payment of an affordable housing fee in-lieu of the dedication. (*Id*. at 10-11.) HBAMT alleged that Metro's decision to exact units for rent or sale for affordable housing or, alternatively, to exact an affordable housing fee as mandatory conditions on development subjected the challenged ordinance to heightened scrutiny under the constitutional "essential nexus" and "rough proportionality" standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (TR.I at 10:44-10:46.) Together, the nexus and rough proportionality tests hold that the government cannot condition approval of land-use permits (e.g., "development entitlements") on a requirement that private property owners dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the land use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95 (2013).

In its two other claims, HBAMT challenged the Ordinance as a valid exercise of local law. HBAMT argued that the State of Tennessee preempted Metro's ability to require inclusionary zoning for rental units when it enacted Tenn. Code Ann. § 66-35-102(b). (TR.I at 12.) HBAMT also contended that the Ordinance was *ultra vires* because the State of Tennessee never delegated to Metro the power to address housing prices through mandatory inclusionary zoning for rental or any other type of housing. (*Id.* at 14.)

Metro moved to dismiss on June 6, 2017. (*Id.* at 74.) Metro argued that HBAMT's taking claim was not ripe because HBAMT had not sought compensation through state procedures like inverse condemnation. (*Id.*) Further, Metro contended that HBAMT lacked standing because no member had yet been harmed by the law. (*Id.*) Last, Metro argued that no statutory cause of action provided for HBAMT to assert that Metro violated state law. (*Id.*)

On August 16, 2017, the Chancery Court of Davidson County, the Honorable William E. Young, Chancellor, presiding (the trial court) heard the motion to dismiss. (TT.I at 320.) After hearing argument, the trial court issued an order granting Metro's motion to dismiss on October 31, 2017. (TR.II at 174.)

HBAMT moved to alter or amend on November 29, 2017. (*Id.* at 190.) The trial court denied that motion on April 6, 2018. (*Id.* at 266.)

HBAMT filed a timely notice of appeal on May 7, 2018. (*Id.* at 272.)

## STATEMENT OF THE FACTS

This case is about Metro's so-called mandatory "inclusionary zoning" ordinance, and whether the trial court was correct to rule that even a facial challenge to it could not be sustained until and unless the plaintiff was denied just compensation through an inverse condemnation proceeding, thus suffering actual economic loss. Inclusionary zoning laws generally require private property owners to sell or rent houses or rental units at below-market, below-cost prices as a condition to obtaining "development entitlements," such as a building permit or an amendment to the zoning map.

Metro's inclusionary zoning law was enacted with Metro BL2016-133. (TR.I at 44-50.) As described in the Complaint, the Ordinance authorizes Metro to require private property owners seeking development entitlements related to projects of five or more units to sell or rent a pre-determined number of units at a pre-determined below-market rate. (*Id*. at 1-3, 46.) Both the number of units and prices are set forth in tables within Section 17.40.790 of the bill, under the heading: "Requirements for Inclusionary Housing." (*Id.* at 46-47.) Instead of selling the pre-determined number of units at below-market prices, the Ordinance allows a homebuilder to pay Metro a fee in-lieu, referred to by Metro as an in-lieu "contribution." (*Id*. at 47-48.) The Ordinance also permits the private property owner to construct and sell the pre-determined number of units at a different, specified location. (*Id*. at 47.)

The Ordinance simultaneously eliminated some existing development entitlements, thus requiring private property owners now to seek development entitlements for them. (*Id*. at 49.) ("That Section

17.36.090 (Development bonuses.) of the Metropolitan Code is hereby amended by deleting the subsection B.").

Metro also passed a separate bill (BL2016-342) providing for incentive grants for the building of affordable and workforce housing. (TR.I at 57.) The bill does not make these grants mandatory. (*Id.*) (Metro "*may* make incentive grants . . . .") (emphasis added). The grant amount differed for rental and owner-occupied dwellings. (*Id.*) However, no one developer could receive grant amounts greater than 50% of the difference between the annual post-development and pre-development real property ad valorem tax assessment in any given year. (*Id.*)

## SUMMARY OF THE ARGUMENT

This case raises important questions of constitutional law under the United States Supreme Court's unconstitutional conditions doctrine as it applies to taking claims and when such claims are justiciable in Tennessee state courts.

In granting Metro's motion to dismiss, the trial court erred both by treating HBAMT's facial taking claim based on the unconstitutional conditions doctrine as an as-applied challenge *and* a regulatory taking. In the takings context, ripeness is not "one size fits all." Instead, different ripeness standards apply to different types of taking claims: physical takings, regulatory takings, and takings based on the unconstitutional conditions doctrine. Thus, it is imperative that the reviewing court properly characterize a property owner's taking claim before addressing ripeness. In mischaracterizing HBAMT's claim, the trial court incorrectly applied the *Williamson County* ripeness doctrine, which precludes litigants from bringing their claims in federal court before obtaining a final state court ruling. [1] *See generally Williamson Cty. Reg'l Planning Comm'n. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *see also San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 346-49 (2005). The *Williamson County* doctrine – a prudential doctrine in any event – is a special exception to ordinary ripeness rules and applies only to as-applied regulatory taking claims. It was error to deviate from

[1] HBAMT also argues that the *Williamson County* ruling should be overruled and not incorporated as a matter of Tennessee Constitutional law.

ordinary ripeness doctrine and apply *Williamson County* to HBAMT's facial challenge based on the unconstitutional conditions doctrine for three reasons.

**First**, the Supreme Court has ruled that facial taking claims are ripe immediately upon enactment of the offending law. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-38 (1997) (reviewing cases); *San Remo Hotel,* 545 U.S. 323, 340 n.23 (2005); *see also Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, 2005 Tenn. App. LEXIS 382, *92-102 (Tenn. Ct. App. June 30, 2005). When the law is unconstitutional in all its applications, then the courts are fully able to make a ruling based on the face of the law whether the imposed conditions sufficiently relate to a public problem caused by the proposed use (e.g., development), judicial review is proper and necessary.

**Second**, property owners asserting taking claims based on the unconstitutional conditions doctrine can seek only equitable relief in the form of invalidating the condition. *See Koontz*, 133 S. Ct. at 2597 (finding property owner asserting taking claim based on unconstitutional conditions doctrine is equitable relief, not monetary damages); *accord id.* at 2603 (Kagan, J., dissenting) (agreeing with majority that property "owner is entitled to have the improper condition removed . . . but he cannot be entitled to constitutional compensation for a taking of property"). While monetary damages is an appropriate remedy for a regulatory takings claim, compensation would *never* be a proper remedy in an unconstitutional conditions claim. **Third**, even if the *Williamson County* ripeness doctrine could be applied to any kind of facial,

unconstitutional conditions doctrine claim, it would make no sense in the context of monetary exactions like the in-lieu fee. Seeking just compensation for money that a homebuilder just paid Metro would be pointless. Moreover, requiring the homebuilders to first obtain a final administrative decision and then bring an inverse condemnation claim for damages completely bars private property owners from asserting an entire type of taking claim and from seeking invalidation of an arguably unconstitutional law.

Because facial challenges ripen upon enactment, HBAMT's claim was ripe. HBAMT need not pursue a futile inverse condemnation suit that would do nothing to assist judicial resolution or provide HBAMT relief. It is perfectly evident from the text of the Ordinance that the exactions, the mandated set-aside and in-lieu fee, are not limited to mitigating a problem caused by the proposed uses or roughly proportional to the "problem" that HBAMT would exacerbate. The trial court correspondingly erred when it found HBAMT did not have organizational standing until the Ordinance was actually applied to one of HBAMT's members. The Tennessee Declaratory Judgment Act was devised to allow for constitutional suits before an actual injury. Delaying review of the important constitutional questions will result in hardship from compliance, with no offsetting benefit of sharpening this entirely legal question.

## ARGUMENT

### I. Standard of review.

Tennessee Rule of Civil Procedure 12.02(1) is a device for disposing of a complaint for lack of jurisdiction for subject matter. Metro's

arguments, raising injury, ripeness, and exhaustion, all pertain to subject matter jurisdiction, or standing. *See Bernard v. Metro. Gov't of Nashville & Davidson Cty.*, 237 S.W.3d 658, 661 (Tenn. Ct. App. 2007). The concept of subject matter jurisdiction involves a court's lawful authority to adjudicate a controversy brought before it. *See Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996). This Court reviews a trial court's decision on subject matter jurisdiction *de novo*, without a presumption of correctness. *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App. 2006). *De novo* review means that this court reviews the case from the same position as the district court. *See Krick v. City of Lawrenceburg,* 945 S.W.2d 709, 712 (Tenn. 1997) (explaining that when reviewing a trial court's decision, the appellate court approaches the analysis in the case the same way as a trial court).

A motion to dismiss does not test "the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citing cases). And Tennessee has rejected the more restrictive "plausibility" standard required in federal pleadings and does not require a plaintiff to demonstrate any likelihood of prevailing. *Id.* at 430. Furthermore, dismissal of a declaratory action is "rarely appropriate." *Cannon Cty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). Finally, a plaintiff is to enjoy the benefit of all reasonable inferences. *Id.* Thus, for purposes of this appeal, the truth of "all relevant and material averments in the complaint" is taken as admitted. *Id.* at 727 (citations omitted).

## II. HBAMT's facial taking claim based on the unconstitutional conditions doctrine was ripe immediately upon enactment.

Under the traditional and correct ripeness standard, HBAMT's taking claim was ripe for two reasons. First, HBAMT challenged the Ordinance on its face and both the United States Supreme Court and this Court have held that facial taking challenges are ripe immediately upon enactment of the offending law. *Suitum*, 520 U.S. at 736 n.10*; Consol. Waste*, 2005 Tenn. LEXIS at *89; *see also San Remo Hotel*, 545 U.S. at 340 n.23. Second, a reviewing court can look to the Ordinance's text and determine whether the Ordinance violates the nexus and rough proportionality tests because the Ordinance itself sufficiently sets forth the purpose and parameters of its so-called affordable housing dedication and in-lieu fee to determine whether the exactions are limited to mitigating a problem caused by new development generally. Thus, the trial court erred when it failed to apply these traditional ripeness principles and instead mischaracterized HBAMT's claim as a regulatory takings claim before dismissing it as unripe for failure to satisfy the conditions set forth in the *Williamson County* ripeness doctrine – a doctrine that applies only to as-applied regulatory takings claims seeking just compensation.

### A. HBAMT asserts a facial taking claim based on the unconstitutional conditions doctrine, not a regulatory taking.

Here, the trial court erred when it characterized HBAMT's facial claim based on the unconstitutional conditions doctrine as a regulatory taking. Because different ripeness standards apply to different taking

doctrines, identification of the *type* of claim is an essential first step of review. The trial court erred by viewing the Complaint as a routine regulatory taking. As a result of the trial court's mischaracterization, it subjected HBAMT's constitutional challenge to *Williamson County*'s ripeness conditions, a doctrine that is inapplicable in its own right, and should not be a part of Tennessee law, and overruled outright.

### 1. A taking claim predicated on the unconstitutional conditions doctrine is fundamentally different than a regulatory taking.

The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. Const. amend. V. There are three primary taking doctrines: physical takings, regulatory takings, and takings predicated on the unconstitutional conditions doctrine. Thus, a taking occurs when the government (1) directly appropriates or physically invades private property (a physical taking), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982); (2) enacts or applies a regulation that is "so onerous that its effect is tantamount to a direct appropriation or ouster" (a regulatory taking), *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005); or (3) places conditions on a property owner's right to use or build on her property that lack any reasonable relationship to the development (an unconstitutional condition, or an exaction), *Koontz*, 133 S. Ct. at 2591; *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825. An unconstitutional condition is fundamentally different from both a physical taking and its regulatory taking tests. It is the type of taking at issue here.

In its most basic formulation, the unconstitutional conditions doctrine provides that a government may not require a person to give up a constitutional right in exchange for a discretionary government benefit. In the seminal unconstitutional conditions case, the United States Supreme Court held that a government may not do indirectly that which it could not accomplish directly:

> [T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

*Frost & Frost Trucking Co. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926) (striking down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways). The "doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights." Richard A. Epstein, Bargaining with the State 5 (1993). And courts have invoked the unconstitutional conditions doctrine in a wide range of cases where the government sought to trade a discretionary benefit for a person's right to free speech, right to freedom of religion, right to equal protection, and right to due process of law. *Id.* at 9-10 (citing cases).

Through the *Nollan*, *Dolan*, and *Koontz* cases, the United States Supreme Court made clear the unconstitutional conditions doctrine also

applies to property rights. *Lingle*, 544 U.S. at 547 (explaining, in a unanimous opinion, that the tests set forth in *Nollan* and *Dolan* constitute a "special application" of the unconstitutional conditions doctrine). Under the *Nollan* and *Dolan* tests, a government cannot condition the grant or denial of a land-use permit, or in this case a "development entitlement," on the relinquishment of another right unless it can show that there is a "nexus" and "rough proportionality" between its demand and the effects of the proposed land use. *Koontz*, 133 S. Ct. at 2591. As the Court explained, the unconstitutional conditions doctrine recognizes a constitutional injury where a government forces a property owner to choose "between (a) foregoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development." Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management, 27 Geo. Int'l Envtl. L. Rev. 539, 569 (2015). A finding that such a condition is unconstitutional is the equivalent of finding that such a demand "amount[s] to a *per se* taking[.]" *Koontz*, 133 S. Ct. at 2600 (citing *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831).

Taking claims based on the unconstitutional conditions doctrine are distinct from regulatory taking claims. *Id.* at 2604-05 (explaining that *Nollan* and *Dolan* differ from regulatory taking claims). In *Lingle*, the United States Supreme Court distinguished between taking claims seeking just compensation for imposed regulatory restrictions and exactions challenging the validity of an imposed land-use condition. 544

U.S. at 547. In a regulatory taking claim, property owners advance claims seeking just compensation for imposed regulatory restrictions under *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), or *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978), acknowledging the government's authority to impose the regulation in question while seeking compensation because the imposed restriction has proven too burdensome. *Lingle*, 544 U.S. at 539. By contrast, property owners advance claims seeking to stop the government from imposing extortionate, and therefore unconstitutional, conditions on land use under a distinct line of cases, *Nollan*, *Dolan*, and *Koontz*. *Id*. at 545-48. In such cases, the property owner does not challenge a consummated taking, but is trying to stop a threatened, uncompensated taking that burdens her right to use her property.

In addition to being based on distinct legal theories, just compensation plays an entirely different role in an unconstitutional conditions case than in a regulatory taking. In a regulatory taking, the property owner is seeking money damages and thus, compensation provides the remedy. By contrast, in a taking claim based on the unconstitutional conditions doctrine, the property owner seeks invalidation of the unconstitutional condition. Just compensation is, in other words, a condition that has not been met, and thus the demand must be enjoined. This makes sense because an exaction lacking nexus and rough proportionality is flatly unconstitutional, regardless of compensation. The resulting constitutional injury continues absent an order from the court invalidating the imposed condition. No amount of compensation can remedy the constitutional violation because so long as

the unconstitutional condition remains in place, the property owner faces an unconscionable dilemma: either surrender protected rights in order to accept the benefits of a needed permit or remain in limbo indefinitely. *Koontz*, 133 S. Ct. at 2596. And that dilemma is unconstitutional, compensated or not, unless a nexus and rough proportionality exists. The distinction between compensation as a *remedy* versus a *condition* directly led to the trial court's error.

### 2. HBAMT presented an unconstitutional condition challenge, not a regulatory taking.

As previously discussed, the trial court misunderstood the nature of HBAMT's challenge and mischaracterized HBAMT's taking claim as a regulatory taking rather than as a taking predicated on the unconstitutional conditions, which led it to apply an incorrect ripeness standard. (TR.II at 176-80.) In its Complaint, HBAMT advanced its claim challenging the constitutionality of the Ordinance under the unconstitutional conditions doctrine. (TR.I at 2:5, 10:40-50.) HBAMT not only plainly stated this and cited to the applicable cases - *Nollan*, *Dolan*, and *Koontz* - but it also specifically alleged that Metro conditions its approval of development entitlements on the relinquishment of either: 1) property in the proposed development; 2) property in a different development; or 3) actual money in the form of an in-lieu fee. (*Id.* at 10:44-46, 10:49.) Further, HBAMT contended that such conditions do not satisfy the Supreme Court's "nexus" and "rough proportionality" tests. (*Id.*) In other words, HBAMT asserted that its members must either forego development opportunities or comply with Metro's extortionate

demand. (TR.II at 147.) This is the very definition of an unconstitutional condition. *Koontz*, 133 S. Ct. at 2604-05; *Lingle*, 544 U.S. at 547.

As such, HBAMT's claim simply cannot be characterized as a regulatory taking. HBAMT never alleged that the Ordinance unduly restricts the use of private property or asked the court to examine the Ordinance's "character" and "economic impact" – allegations associated with a regulatory taking.[2] *See Koontz*, 133 S. Ct. at 2604 (discussing differences between regulatory takings and unconstitutional conditions doctrine claims). And finally, consistent with the appropriate remedy for an unconstitutional conditions claim, HBAMT sought only invalidation of the unconstitutional condition. (TR.II at 146-47) It never asked for money damages or just compensation.

**3. HBAMT's taking claim is a facial challenge.**

Also, HBAMT raised its constitutional challenge as a "facial" challenge and sought a judicial ruling that the Ordinance is unconstitutional. A plaintiff claiming that a law is facially invalid asserts that the law is not, and can never be, applied in a constitutional way. *See Salerno*, 481 U.S. at 745. Such a claim does not depend on the particular nature of the claimant's property or other fact-specific circumstances: the focus is on the text of the law. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981); *see also Consol. Waste*, 2005 LEXIS

[2] Notably, HBAMT pointed out on several occasions that Metro mischaracterized HBAMT's claim as a regulatory taking, fundamentally misunderstanding *Nollan*, *Dolan*, and *Koontz* claims. (TR.II at 146-47, 149; TT.I at 17:1-8, 19:1-9.) *See* Tenn. R. Ct. App. 6(a)(2) (2017).

382, at *99 (quoting *Fallin v. Knox Cty. Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983)). Conversely, in an as-applied challenge, the property owner asserts that while some circumstances may exist in which the challenged law is within constitutional boundaries, something special about the particular case has caused it to exceed those bounds. *Salerno*, 481 U.S. at 748. Thus, in a facial unconstitutional conditions claim, a property owner alleges that the legislatively-imposed condition is unconstitutional and seeks invalidation of the law. *See*, *e.g.*, *Levin v. City & Cty. of San Francisco*, 71 F. Supp.3d 1072 (N.D. Cal. 2014). Whereas in an as-applied claim, a property owner alleges that the government imposed an unconstitutional condition on its particular piece of property and seeks invalidation of the permit denial or conditional grant. *Koontz*, 133 S. Ct. at 2597. Regardless of whether an unconstitutional conditions claim is brought as a facial or as-applied challenge, the proper remedy is always invalidation of the unconstitutional condition.

Thus, despite the trial court's incorrect assertion that only "public use" taking claims may be asserted as facial claims, (TR.II at 180), courts frequently recognize facial *Nollan*, *Dolan*, and *Koontz* claims. *See*, *e.g.*, *Levin*, 71 F. Supp. 3d at 1084 (invalidating tenant relocation fee ordinance under *Nollan* and *Dolan*); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tenn. 2004) (*Dolan* applied to impact fee ordinance imposing road improvement requirements as a condition to obtain a development permit); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000) (*Dolan* applied to impact fee ordinance conditioning permit

approval on payment of fees); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (same); *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to ordinance imposing easement for fire prevention purposes as a condition for subdivision permit approval); *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995) (*Dolan* applied to state statutes and local ordinances imposing transportation impact fees on new developments); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483, *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance).

In its Complaint, HBAMT asserted a facial challenge arguing that the Ordinance can never be applied in a constitutional way. (TR. I at 10:43-11:45.) As HBAMT explained, the exactions imposed in the Ordinance seek to solve a public problem – a pre-existing lack of affordable housing – that is not caused by new development. (*Id*. at 11:49) Further, because the exactions seek to address a pre-existing public problem, Metro cannot show that the exactions are proportional to the impact any new development may have on a lack of affordable housing options. (*Id*.) HBAMT alleged that, regardless of the development, the Ordinance fails the nexus and proportionality tests set forth in *Nollan* and *Dolan*. (*Id*.) Further, HBAMT sought only equitable relief – a declaration that the Ordinance is unconstitutional and an order invalidating the Ordinance. (*Id*. at 15:76.) Because HBAMT sought only invalidation of the law and because it is undisputed that when HBAMT initiated this suit Metro had not applied the Ordinance, HBAMT can only

be attacking the constitutional validity of the Ordinance, and thus, asserts a cognizable facial challenge.

### B. HBAMT's claim is ripe.

Applying the traditional and correct ripeness standard, HBAMT's claim is ripe because HBAMT challenged the Ordinance on its face and because a court can determine whether the Ordinance satisfies the *Nollan* and *Dolan* tests by reviewing only the face of the Ordinance. The trial court erred when it subjected HBAMT's claim to the *Williamson County* ripeness conditions and dismissed it for being unripe.

#### 1. HBAMT's taking claim is not subject to the *Williamson County* ripeness conditions.

In *Williamson County*, the United States Supreme Court considered an as-applied regulatory taking claim that sought monetary damages. More specifically, the property owner alleged that the land use regulations resulted in a denial of valuable economic use, as applied to the property at issue. *Williamson County*, 473 U.S. at 186-90 (explaining claim brought under *Penn Central*). The Supreme Court held the claim was unripe because the local government had not reached a "final decision" on application of the subject regulations to the plaintiff's property.[3] *Id.* at 192-94. It then went on, in dicta, to articulate and explain that additionally the regulatory taking claim was unripe because

[3] *Williamson County* did not create the "finality" requirement for regulatory takings claims. It existed prior to the decision. *San Remo Hotel*, 545 U.S. at 346-47.

the plaintiff "did not seek compensation through the procedures the State has provided for doing so." *Id*. at 194. Thus, under *Williamson County*, a litigant cannot assert an as-applied regulatory taking claim in federal court without 1) obtaining a final decision by the local regulatory entity and 2) filing a state court action seeking compensation under the state's inverse condemnation statute. *San Remo Hotel*, 545 U.S. at 346-349. Since *Williamson County*, the Supreme Court has clarified that these ripeness requirements are prudential and not jurisdictional.[4] *Suitum*, 520 U.S. at 733-34.

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[4] Recently, Justices Thomas and Kennedy dissented from a denial of certiorari, arguing that the Supreme Court should outright overrule *Williamson County*. *See Arrigoni Enters., L.L.C. v. Town of Durham*, 136 S. Ct. 1409, 1412 (2016) (Thomas, J., dissenting) ("In the 30 years since the Court decided *Williamson County*, individual Justices have expressed grave doubts about the validity of that decision and have called for reconsideration. This case presents the opportunity to consider whether there are any justifications for the ahistorical, atextual, and anomalous state-litigation rule, and if not, to overrule *Williamson County*.") And, this upcoming term, the U.S. Supreme Court will finally have the opportunity to reconsider the state-litigation requirement of *Williamson County*. *See Knick v. Twp. of Scott*, 862 F.3d 310 (3d Cir. 2017), *cert granted*, 2018 U.S. LEXIS 1541 (Mar. 5, 2018) (No. 17-647). For this reason, HBAMT wishes to preserve its argument that *Williamson County*

HBAMT did not, as the trial court erroneously concluded, (TR.II at 176), assert a regulatory taking. Nor did HBAMT seek compensation or review of the Ordinance's economic impact. (TR.I at 14:76) As established above, HBAMT asserted a facial taking claim based on the unconstitutional conditions doctrine seeking a ruling that the Ordinance is unconstitutional and thus, invalid. Thus, the trial court erred when it applied *Williamson County* to preclude review.

1. It is settled law that neither of *Williamson County*'s ripeness conditions apply to facial claims that seek to invalidate a law rather than seek just compensation.[5] In *Yee v. City of Escondido*, 503 U.S. 519, 533-

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should be overruled, or at least, not made part of Tennessee Constitutional law.

[5] *See also Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014) (acknowledging that *Williamson County*'s finality requirement does not apply to facial challenges and that the state litigation requirement applies only when the claimant seeks damages); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) ("*Williamson County*'s finality principles do not apply to facial claims that a given regulation is constitutionally infirm."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 287 (5th Cir. 2012) ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges."); *Knick*, 862 F.3d at 323 (explaining that "[t]here is no question that the first prong of *Williamson County*, the finality rule, does not apply to 'a claim that the mere enactment of a regulation . . .

34 (1992), the U.S. Supreme Court held that *Williamson County* does not apply to facial takings. ("While . . . a claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe for [failure to satisfy *Williamson County*] petitioners mount a *facial* challenge to the ordinance."); *see also San Remo Hotel*, 545 U.S. at 340 n.23 (finding that petitioners' facial claims alleging a regulatory taking "were ripe, of course, under *Yee v. Escondido*"). This is because, unlike as-applied challenges that seek just compensation, a facial challenge does not "depend on the extent to which [plaintiff]s are deprived of the economic use of their particular pieces of property or the extent to which these particular [plaintiffs] are compensated." *Id*. at 534. Rather, a facial challenge depends on whether the "'mere enactment' of a piece of legislation" effects a *per se* taking of property under the Fifth Amendment. *See Suitum*, 520 U.S. at 736 n.10.

This Court addressed the issue as to the facial taking claim asserted in *Consolidated Waste* and held that a property owner challenging the constitutionality of an ordinance on its face need not exhaust

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constitutes a taking without just compensation.'"); *Cty. Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159 (3d Cir. 2006) (holding that plaintiff's facial taking claim did not need to comply with the *Williamson County* finality rule).

administrative remedies.[6] 2005 Tenn. App. LEXIS 382, at *89 ("declin[ing] to apply the *Williamson* County requirement of a final administrative decision on the degree of development allowed or the application of the ordinances"). More specifically, this Court held that *Williamson County*'s "requirement that a landowner seek a final decision by the zoning entity, often called the 'final decision' or 'final answer' requirement, as to the application of a regulation to the landowner's property does not apply to a facial challenge to a zoning ordinance, even when it is brought as a takings claim." *Id.* at *89-90 (relying on *Suitum*, *Yee*, and *San Remo Hotel*). This makes sense because facial challenges like HBAMT's seek a ruling that the law at issue is unconstitutional, no matter how applied, and seek invalidation of the law. Administrative officials and bodies simply cannot provide such relief because they "do not have the authority to declare a statute or ordinance unconstitutional." *Id.* at *101 (citing *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 452 (Tenn. 1995)). So, there is no way to obtain an administrative determination as to the legal issue raised in a direct challenge to the facial validity of the Ordinance.

2. Further, *Williamson County*'s state litigation condition is not applicable to taking claims predicated on the unconstitutional conditions doctrine because such claims seek equitable relief, not monetary damages. As this court has previously acknowledged, *Williamson*

[6] Exhaustion of remedies is generally understood as referring to "administrative and judicial procedures[.]" *Williamson County*, 473 U.S. at 192-93.

*County*'s ripeness conditions only apply to regulatory takings claims. *Consol. Waste*, at *47, *89 (explaining that *Williamson County* set forth "procedural requirements that restrict federal court review of regulatory takings claims against local governments"). And, as the United States Supreme Court has held, *Williamson County* does not apply to taking claims that do not seek monetary compensation. *See San Remo Hotel*, 545 U.S. at 345 (facial taking claims were instantly ripe "by their nature" because they "requested relief distinct from the provision of 'just compensation.'"). In *Williamson County* itself, the Supreme Court made clear that property owners who properly seek to invalidate a regulation, rather than after-the-fact damages under the Just Compensation Clause, are not subject to the state litigation condition. *Williamson County*, 473 U.S. at 197 (reviewing a substantive due process claim that sought "invalidation of the regulation" without applying the state litigation requirement).

As previously explained, in its unconstitutional conditions claim, HBAMT alleged that its members suffer a violation of their constitutional rights the moment that Metro passed the Ordinance. The constitutional injury to HBAMT's members will continue until a court invalidates the imposed conditions. As long as the unconstitutional conditions remain in place, HBAMT's members face an unconscionable dilemma: either surrender protected rights in order to accept the benefits of a needed permit or remain in limbo indefinitely. *Koontz*, 133 S. Ct. at 2596. Accordingly, injunctive relief provides the only adequate constitutional remedy for HBAMT's claim predicated on the unconstitutional conditions

doctrine.[7] *See Nollan*, 483 U.S. at 828-29 (observing that the superior court struck down the contested condition); *id.* at 837-42 (holding that the contested condition was "not a valid regulation"); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir. 2001); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 278-80 (5th Cir. 2012); Scott Woodward, *The Remedy for a "Nollan/Dolan Unconstitutional Conditions Violation*", 38 Vt. L. Rev. 701, 714-15 (2014) ("In general, the remedy for an unconstitutional conditions violation is invalidation of the condition" rather than compensation) (collecting cases from federal and state courts applying *Nollan*, *Dolan*, *Koontz*).

The remedy in an inverse condemnation claim is damages, not invalidation of the law. Thus, the trial court's requirement that HBAMT first seek damages in an inverse condemnation proceeding before it can seek invalidation of the Ordinance reflected its misunderstanding about the nature of an unconstitutional condition versus a regulatory taking. That is, the trial court viewed compensation as a remedy when in fact it is a condition precedent for the law to be valid. While compensation would remedy a regulatory taking, it cannot remedy an unconstitutional condition because the unconstitutional law lacked a valid basis in the first place. As numerous courts have found, in such an instance, the remedy is not compensation but an injunction prohibiting enforcement of

[7] *See also Frost & Frost Trucking Co.*, 271 U.S. at 592-94 (invalidating regulation requiring waiver of rights); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a law conditioning the right to do business on waiver of constitutional rights).

the unconstitutional condition. Thus, by perceiving this as a regulatory taking, the trial court erroneously required HBAMT to pursue a course that would not address the unconstitutional law in any case.

And where the property owner seeks invalidation of a law, requiring him to first seek just compensation makes no sense. *Wilkins*, 744 F.3d at 418 n.6 (explaining that requiring a plaintiff that asserts a public-use challenge and seeks equitable relief to bring an inverse condemnation claim "makes little sense" because compensation is irrelevant). Here, the Ordinance is either constitutional or unconstitutional – valid or invalid. That is all HBAMT asked the trial court to decide. It did not ask for damages because no amount of compensation could render the Ordinance constitutional or repair it because constitutional injury is irreparable. *See, e.g.*, *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("If it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated"). By applying *Williamson County* and requiring HBAMT to file a state inverse condemnation proceeding and seek monetary damages, the trial court refused to acknowledge the alleged injury and barred HBAMT from seeking the only relief appropriate for its claim – equitable relief.

3. Even if the *Williamson County* ripeness conditions applied to facial challenges or to unconstitutional conditions doctrine claims, it most certainly does not apply to challenges of monetary exactions like the in-lieu fee here. Rather than build homes or apartments and sell them at below-cost rates, the Ordinance allows homebuilders to pay an extortionate fee and buy their way out of submission. (TR.I at 20.) Much

as a challenge to a governmental demand for "a direct transfer of funds," does not require a suit for damages, *E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998), seeking just compensation from Metro for money that the homebuilder just paid Metro is nonsensical. It "would entail an utterly pointless set of activities" to require a plaintiff to submit to an unconstitutional demand for money and then go seek one-for-one dollar reimbursement in just compensation for the taking. *Id*. Nothing like this appears anywhere in the law. Indeed, when the government declares it will take a discrete amount of money, but the transfer of money has not yet occurred, a suit for compensation is not available. *Id*. at 520; *Student Loan Marketing Ass'n. v. Riley*, 104 F.3d 397 (D.C. Cir. 1997) (same).

A further problem with requiring a plaintiff to seek just compensation in this context involves what to do with the homebuilder who refuses to agree to the exaction. This is why the Supreme Court and other federal courts have refused to apply *Williamson County*'s state litigation condition where a property owner challenges a demand that he pay a discrete fund of money to the government. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 228-29 (2003) (case ripe without prior damages suit); *Wash. Legal Found.*, 271 F.3d at 850 (same); *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 453-54 (1st Cir. 2009) (challenge to a direct appropriation of funds not subject to *Williamson County* state litigation condition); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995) (same); *Transohio Sav. Bank v. Dir. Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992) (same).

### 2. HBAMT's claim is ripe under the traditional and correct ripeness framework.

Under the proper ripeness standard for a facial taking claim based on the unconstitutional conditions doctrine, HBAMT's claim is ripe for two reasons. First, HBAMT challenged the Ordinance on its face and both the United States Supreme Court and this Court have held that facial taking challenges are ripe immediately upon enactment of the offending law. *Suitum*, 520 U.S. at 736 n.10; *Consol. Waste*, 2005 Tenn. LEXIS 382, at *91. Second, because the Ordinance itself sufficiently sets forth the purpose and parameters of its so-called affordable housing dedication and in-lieu fee to determine whether the exactions are limited to mitigating a problem caused by new development, a reviewing court can look to the Ordinance's text and determine whether the Ordinance violates the nexus and rough proportionality tests.

Both this Court and the United States Supreme Court have held that facial challenges, even when brought as a taking claim, ripen at the time of enactment. *Suitum*, 520 U.S. at 736 n.10 ("such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed"); *Lucas*, 505 U.S. at 1013 n.4; *Consol. Waste*, 2005 Tenn. App. LEXIS 382, at *89 (citing *Suitum*). This makes sense because when the government enacts a law that requires an unconstitutional surrender of a right, it will be apparent on the face of the law and is illegal *per se*. *See Suitum*, 520 U.S. at 736 n.10. Without more, a court can determine if that impact rises to the level of a taking requiring compensation. This is because a government's obligation to compensate a property owner is foreseeable when it passes the unconstitutional law,

and the condition to compensate must be met then.[8] In a facial challenge, there is nothing uncertain about the impact of such a law. The arguments do not change based on the particular facts. *See Yee*, 503 U.S. at 534 (holding facial taking claim ripe upon enactment of the challenged ordinance because, unlike as-applied challenges that seek just compensation, the facial challenge "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated"); *see also San Remo Hotel,* 545 U.S. at 340 n.23 (finding that petitioners' facial taking claims "were ripe, of course[.]").

There is no dispute that Metro formally enacted the Ordinance on September 16, 2016, and it remains on the books today. (TR.I at 24.) The Ordinance requires, as a condition to receiving a development entitlement, either 1) to set aside property in the proposed development; 2) to set aside property in a different development; or 3) to pay Metro an in-lieu fee. (*Id*. at 19-20.) There is nothing speculative about these provisions. HBAMT members' future developments are subject to these conditions, and thus, there is a clear injury to their property warranting

[8] In contrast, in an as-applied challenge, a taking of property only becomes foreseeable if and when the otherwise constitutional law is applied to certain particular situations, which often cannot be foreseen beforehand. *See As-Applied Challenge*, Black's Law Dictionary (10th ed. 2014).

legal action. *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

Yet, according to the trial court, HBAMT's claim will only be ripe after its members (and all property owners seeking to develop) first apply for development entitlements which Metro will either deny or grant conditionally, then file for a variance, *and then* file an "inverse condemnation" action seeking monetary damages even though they would not remedy the harm that the conditions impose. In the meantime, HBAMT's members must halt all development of projects with five (5) or more units or risk spending large sums of money on planning development projects, which the law makes clear Metro will never approve.

Ripeness doctrine does not demand engaging in futile actions, especially for claims like HBAMT's. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 776 n.11 (1988) ("Facial attacks, by their nature, are not depended on the facts surrounding any particular permit denial."); *Hamilton v. Pallozzi*, 848 F.3d 614, 621 (4th Cir. 2017) ("plaintiffs are not required to undertake futile exercises in order to establish ripeness, and may demonstrate futility by a substantial showing"); *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1201-02 (2d Cir. 1977) (plaintiff need not present and be denied a bid when "it would have been futile to do so since it is obvious that they could not have been awarded a contract"). As discussed above, courts frequently recognize and adjudicate facial taking claims based on the unconstitutional conditions doctrine when the

ultimate merits – whether the law violates the nexus and proportionality tests – can be determined by the face of the law.

*Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, provides an excellent recent example of circumstances that warrant facial review and invalidation of an ordinance under *Nollan* and *Dolan* scrutiny. In that case, the City of San Francisco enacted an ordinance that required landlords to pay a "tenant relocation" fee to displaced tenants as a mandatory condition for a permit to remove rent-controlled property from the rental market. *Id.* at 1078, 1083. The mandated fee would be determined by a schedule developed by the Controller's Office, and could be as high as hundreds of thousands of dollars per tenant. *Id.* at 1077-78. Several owners of rent-controlled units brought a facial takings challenge based on the unconstitutional conditions doctrine seeking a declaration that the relocation fee could not survive *Nollan* and *Dolan* scrutiny and asked the court to enjoin the city and county from exacting the payment. *Id.*

The trial court concluded that the landlords' facial taking claim based on the unconstitutional conditions doctrine was ripe for several reasons: the landlords sought injunctive and declaratory relief, they challenged a legislative demand for money, and requiring them to submit to the exaction before challenging would be pointless. *Id.* at 1079. The court explained that it made no sense to require the landlords to go through the expense of obtaining a permit conditioned on the payment of the relocation fee because the language of the ordinance was sufficient to

determine whether the exaction would violate the nexus and proportionality tests. *Id.*

Finding the claim ripe, the trial court moved to the merits, looking only at the face of the ordinance to make its findings. It first addressed the nexus requirement, noting that the public problem the exaction sought to alleviate – the lack of affordable rental housing – was not attributable to any individual landlord. Rather, the limited supply of affordable units was a pre-existing public problem, attributable to entrenched market forces and structural decisions made by the government's own land management plans. *Id.* The court explained that, while the fee may alleviate some of the difficulties associated with the loss of an affordable rental unit, *Nollan* requires a direct cause and effect link between an owner's use of property and the need for the exaction. *Id.* Thus, as the U.S. Supreme Court has held, if a property use does not cause the need for the exaction (in the case of *Levin* – insufficient low-income housing), the government cannot impose it. *See Dolan*, 512 U.S. at 390-91; *Nollan*, 483 U.S. at 838. Additionally, *Nollan* requires that the exaction actually solve the social problem. *Id.* at 1082; *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 395 (finding a government's belief that an exaction "could" remedy a problem is insufficient to satisfy its constitutional burden). Because the ordinance required landlords to pay significant fees to cure a public problem that was not caused by their proposed change in land use, the ordinance violated the nexus requirement. *Levin*, 71 F. Supp. 3d at 1086.

The court then moved onto the proportionality analysis, looking, again only to the face of the ordinance. It found that because the enormous impact fee was intended to address a pre-existing public problem, the government could not show that the fee was proportional to the impact that withdrawing a rental unit would have on the city's rental market. *Id*. at 1085. The court explained that, had the city enacted a tenant relocation fee designed to offset the public costs associated with evicting a tenant such as the costs associated with moving and securing a new rental unit, that fee *may* have passed muster under the proportionality test. *Id*. But, the ordinance as written sought to "force the property owner to pay for a broad public problem not of the owner's making" and no monetary exaction, no matter how small or large, could satisfy the *Dolan* proportionality test in that circumstance. *Id*. at 1086. The court noted, that the ordinance's constitutional infirmities were so apparent that its analysis "does not depend on the dollar amount due in any individual case." *Id*. at 1087.

As *Levin* demonstrates, there is nothing in the nexus and proportionality tests that requires that an exaction be imposed in every instance before a court can determine whether the condition is sufficiently related to a public problem caused by the development. Instead, the question whether a condition is subject to a facial challenge depends on the extent to which the exaction is defined by the ordinance.

In the context of HBAMT's claim, the trial court erred in refusing to recognize HBAMT's facial taking claim based on the unconstitutional conditions doctrine as ripe because the Ordinance sufficiently sets forth the purpose and parameters of its affordable housing mandate to

determine whether the mandated set-aside and fee is limited to mitigating a problem caused by the proposed use. Just like the court found in *Levin*, 71 F. Supp. 3d at 1088-89, the Ordinance fails the nexus test. The lack of affordable housing in Nashville and Davidson County is not attributable to any individual homebuilder. Rather, the limited supply of "affordable" rental units and for-sale units is a pre-existing public problem. While the in-lieu fee and the mandated dedication of a pre-determined number of units per development may alleviate some of the difficulties associated with a need for below-market, below-cost housing, there is still no direct cause and effect link between a homebuilder's use of property and the need for the exaction. In other words, because building new homes or apartments does not cause the need for the exaction – a lack of affordable housing – it cannot be imposed. *See Dolan*, 512 U.S. at 390-91; *Nollan*, 483 U.S. at 838. HBAMT's members cannot be held responsible for solving social problems, unless they trace *directly* to decisions on where, how, and when to use his property (assuming the solution is proportionate). *See William J. (Jack) Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (finding the city failed to satisfy the *Nollan* nexus requirement because it did not show a proposed store was more responsible for congestion than the pre-existing commercial environment in which the store was built). Metro cannot charge HBAMT's members with fixing social problems predominantly caused by forces outside their control. *See Levin*, 71 F. Supp.3d at 1086 (citing *Koontz*, 133 S. Ct. at 2600).

The Ordinance also fails the *Dolan* rough proportionality test which requires the government to show that the development condition is roughly proportional to that portion of the public problem that is created or exacerbated by a landowner's proposed use. *Dolan*, 512 U.S. at 389. Here there are three conditions at issue: selling units on-site at below-market, below-cost rates; selling units off-site at below-market, below-cost rates; and an in-lieu lump sum cash payment. It is true that requiring builders to sell units at below-market, below-cost (or "affordable") rates *may* increase the number of affordable or workforce housing units, but that is not the question in the *Dolan* test. New developments are not the cause of a pre-existing public problem of a lack of affordable housing. New developments in no way reduce the number of affordable housing options available to Metro's residents. Rather, through the Ordinance, Metro seeks to force private property owners to pay (either by taking a loss on a sale or making a steep cash payment) for a broad public problem that they did not cause. Just like the court found in *Levin*, the constitutional infirmity here is so apparent that a court does not need to analyze case-specific facts such as the number of units required to be set-aside or the dollar amount of an in-lieu fee to find that the exactions lack proportionality.

In the context of this case and HBAMT's facial taking claim based on the unconstitutional conditions doctrine, the ultimate question before the court is whether the Ordinance sufficiently sets forth the purpose and parameters of its affordable housing mandate to determine if the conditions (set-asides and in-lieu fee) are limited to mitigating a problem caused by the proposed use (development entitlements). Because that

information can be determined on the face of the Ordinance, there was no reason for the trial court to conclude that HBAMT's facial challenge was unripe.

Had the trial court not erred in applying the *Williamson County* regulatory takings ripeness doctrine, it would have found HBAMT's claim ripe.

## III. HBAMT has standing to bring a pre-enforcement facial challenge on behalf of its members.

HBAMT filed its suit on behalf of its members. To establish organizational standing, HBAMT needed to show: 1) its members would otherwise have standing in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and, 3) neither the claim asserted, nor relief requested, requires the participation of individual members in the lawsuit. *ACLU v. Darnell*, 195 S.W.3d 612, 626 (Tenn. 2006); *Citizens for Collierville v. Town of Collierville*, 977 S.W.2d 321, 323 (Tenn. Ct. App. 1998). The trial court dismissed HBAMT's claims finding that HBAMT cannot establish that its members could sue in their own right until it can "allege any actual injury." (TR.II at 181.) The other factors are not at issue. HBAMT demonstrated – and the trial court did not dispute – that the property rights of its members are germane to its purposes. According to the Complaint, HBAMT is a trade group dedicated to the promotion of protecting the home building industry, which includes businesses that will trigger the inclusionary zoning mandates. (TR.I at 4, 8-9.) Further showing the direct interest of HBAMT, Metro invited HBAMT's Executive Vice President to be a member of its inclusionary zoning stakeholders group. (*Id.* at 6, 9.)

During those meetings, he disapproved of the law. (*Id.*) There is no reason why the claims or relief would require individual members to participate. Again, the trial court, echoing its former concern, concluded that because no member had yet suffered a distinct injury, HBAMT lacked standing. (TR.II at 181.) Its reasoning here mirrored its reasoning on ripeness, that is, the trial court concluded that until one of HBAMT's members suffered actual injury, HBAMT lacked standing. (*Id.*)

The trial court erred in dismissing HBAMT's claim for lack of standing for two reasons. First, HBAMT brought its claim as a pre-enforcement facial challenge seeking equitable relief pursuant to the Tennessee Declaratory Judgment Act, which allows parties to challenge the constitutionality of a law before it is enforced when the issues are appropriate for judicial resolution and when a court's refusal to act will cause hardship to the parties. *West v. Schofield*, 468 S.W.3d 482, 480 (Tenn. 2015). Second, in the Complaint, HBAMT alleged that its members suffered a distinct injury, (TR.1 at 7:26, 9:38-9.), because as previously established, private property owners suffer an immediate constitutional harm the moment a government enacts an unlawful exaction. *See Suitum*, 520 U.S. at 736 n.10.

Claims like HBAMT's pre-enforcement facial challenge seeking equitable relief are expressly permitted under the Tennessee Declaratory Judgment Act (DJA), Tenn. Code Ann. § 29-14-104, a vehicle designed precisely so citizens should not have to run afoul of a law before they may challenge it and have their rights and status adjudicated. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008) ("[Declaratory judgments'] purpose is to settle important questions of law before the

controversy has reached a more critical stage.") The moment Metro enacted the Ordinance, HBAMT's members faced an unconscionable dilemma: either surrender protected rights in order to accept the benefits of a needed permit or remain in limbo indefinitely. *Koontz*, 133 S. Ct. at 2596. The trial court dismissed the claim solely because HBAMT did not identify a member who had sought development entitlements which Metro either denied or conditionally granted. (TR.II at 181). In doing so, the trial court overlooked both the pre-enforcement nature of HBAMT's claim and the facts presented by HBAMT in its Complaint that establish that its members suffered a constitutional harm the moment Metro passed the Ordinance. (TR.I at 7:26, 9:38-9.)

It is not necessary to suffer an actual injury to bring a claim under the DJA. The whole point is to prevent the injury from ever occurring. Under the DJA, "[i]t is not necessary that any breach should be first committed, any right invaded, or wrong done." *City of White House v. Whitley*, 979 S.W.2d 262, 265 (Tenn. 1998) (quotation omitted); *see also Peoples Rights Org. Inc. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) ("[I]t is clear that an individual does not have to await the consummation of threatened injury to obtain preventative relief."). The trial court therefore erred by dismissing the claims as unfit until HBAMT can "allege any distinct injury." (TR.II at 181.) "Declaratory judgments are typically sought before a completed 'injury-in-fact' has occurred." *NRA of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (citation omitted). HBAMT was not looking for "a ticket to bypass standing." (TR.II at 180) (quoting *Massengale v. City of E. Ridge*, 399 S.W.3d 118,

127 (Tenn. Ct. App. 2012)). Standing exists to bring a pre-enforcement challenge testing the constitutionality of a law through the DJA rather than face the uncertainty and harm that would follow from either complying or disobeying it. *See Magaw*, 132 F.3d at 287 ("[A] citizen should be allowed to prefer official adjudication to public disobedience.") (citation and quotation omitted). Hence, "a plaintiff in a declaratory judgment action *need not* show a present injury," contrary to the order's reasoning (TR.II at 181.), just an actual case and controversy. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008) (emphasis added). There is no question that HBAMT, on behalf of its members, face a case and controversy over injuries that are quite distinct and certain.

HBAMT's members face injuries that are certainly impending and have actually occurred. The moment Metro enacted the Ordinance, HBAMT's members were faced with the dilemma of abandoning future developments or complying with the unconstitutional condition. This dilemma is a harm sufficient to establish standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (plaintiff satisfies the injury requirement by alleging, "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute.") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). As explained above, facial challenges are "generally ripe the moment the challenged regulation or ordinance is passed." *Consol. Waste*, 2005 Tenn. App. LEXIS 382, at *91 (quoting *Suitum*, 520 U.S. at 736 n.10); *accord. San Remo Hotel*, 545 U.S. at 340 n.23. The Ordinance became effective on September 1, 2016. (TR.I at 24.) A challenge to it,

therefore, was ripe by the time the trial court dismissed the case. The existence of a law that is the subject of a facial challenge is the necessary showing of injury for an organization like HBAMT, which is certain to be affected by the challenged law. *See B&B Enters. of Wilson Cty. v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010) (the "central concern" of ripeness is whether the case involves uncertain events "that may or may not occur").

The impending injury of certain enforcement is an equal, independent basis to show standing. Courts generally resolve pre-enforcement challenges with two questions: 1) are the issues in the case fit for judicial resolution and 2) will this Court's refusal to act cause hardship to the parties? *West*, 468 S.W.3d at 490. HBAMT's challenge easily passed this threshold. Consideration of the legal issues was fit even before the law was applied. The issues in this case were entirely legal. The text of the law determines the outcome. The arguments will not change based on how the law is applied in particular cases. Thus, waiting for actual harm will not actually sharpen legal review. *See Magaw*, 132 F.3d at 291 ("Enforcement of the Act . . . would not serve to further sharpen or focus" the legal challenges). It would just delay things. Delay, while awaiting the Ordinance to actually be implemented, would serve no purpose because it is not in dispute that Metro would apply the Ordinance. *See id.* at 284 (must examine likelihood harm will come to pass). In its Complaint, HBAMT alleged that its members are the ones who will trigger the Ordinance. (TR.I at 8-9.) They have asked for

development entitlement upgrades in the past, and are sure to again.[9] (*Id.*) There is no doubt that the law would be effective, and homebuilders would be expected to comply. *See Magaw*, 132 F.3d at 289. The "central concern of the ripeness doctrine," *B&B Enters.*, 318 S.W.3d at 847, – whether the harm may not occur – was explicitly discounted by Metro. Even at the hearing on its motion to dismiss, Metro promised it was beginning its enforcement, conceding "it's coming into – going to start coming into play," and that the Planning Department was in the process of applying it to specific projects. (TT.I at 3:21.) The certain enforcement of this law makes this case anything but too unrealized for judicial consideration. *See Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Supreme Court*, 769 F.3d 447, 451 (6th Cir. 2014) ("A plaintiff meets the injury-in-fact requirement–and the case is ripe–when the threat of enforcement of that law is sufficiently imminent.") (citation omitted); *see also Cummings v. Beeler*, 223 S.W.2d 913, 915-16 (Tenn. 1949) (challenged statute had not yet been enforced but would be). Review is appropriate "when enforcement of a statute or ordinance against a particular plaintiff is inevitable." *Magaw*, 132 F.3d at 289 (citing cases). Answering the important constitutional question *before*

[9] Moreover, by taking away existing development entitlements the Ordinance itself made it more necessary that homebuilders would have to ask for zoning upgrades. (TR. I at 49.) ("That Section 17.36.090 (Development bonuses.) of the Metro Code are hereby amended by deleting the subsection B.").

incurring the cost and uncertainty of running afoul of the Ordinance is precisely why the DJA exists.

This delay would inflict hardship, satisfying the second factor. "Where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Suitum*, 520 U.S. at 744. Conversely, when an organization shows that its business members would face economic harm by bringing themselves into compliance, it constitutes hardship. *See Magaw*, 132 F.3d at 286. Compliance with the Ordinance would be a costly affair for obvious reasons. The Ordinance radically alters the economics of building as homebuilders struggle to adjust their margins to account for the mandated pricing of some of their homes at below-market prices. The moment the Ordinance passed it "interfered with [] reasonable investment-backed expected use," "started to in[flict] economic damages," and made the matter ripe. *B&B Enters.*, 318 S.W.3d at 849. Non-compliance would be equally costly because homebuilders will almost always ask Metro for upgrades from existing zoning. According to the Complaint, given the existing zoning map, a homebuilder "must seek additional development entitlements in virtually every instance." (TR.I at 7.) Non-compliance, then, would put a homebuilder out of business. Given the severe economic harms that stem from either compliance or non-compliance, HBAMT's members are placed "in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Magaw*, 132 F.3d at 286 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). Given the economic reality, the case is ripe for judicial review under the DJA.

The Tennessee Supreme Court has authorized pre-enforcement challenges under similar circumstances. In *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927), the owners of a billiard hall challenged a law that made it unlawful to operate pool and billiard rooms for profit in certain situations. Plaintiffs challenged the law's constitutionality and sought injunctive and declaratory relief pursuant to the DJA. *Id.* Notably, the ordinance had not yet been applied to them; plaintiffs only alleged that the county sheriff threatened to "procure warrants against them and close their places of business[.]" *Id.* The Court held the plaintiffs could bring the challenge because they "have a special interest in the question of the constitutionality of the penal statute described in the bill, distinct from the interest of the public generally, in that their investment and property rights will be directly affected and injured by its enforcement" and that "the sheriff had given notice of his intention to proceed against [them]." *Id.* Likewise, HBAMT's members have a special interest in how the Ordinance will affect their investment and property rights.

The trial court erred by requiring actual injury because the DJA offers a means to bring a pre-enforcement facial challenge seeking equitable relief even before an actual injury. HBAMT alleged that its members suffer both certain and impending constitutional harms and thus, should have been allowed to proceed.

## CONCLUSION

This Court should reverse the ruling of the trial court.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Braden H. Boucek, hereby certify that the foregoing brief complies with Tenn. R. S. Ct. 46-3.02 that pertains to the e-filing of briefs. This principal brief contains 11,749 words, with 1.5 line spacing, justified alignment, 1 inch margins, and size 14 Century Schoolbook font for the main text and the footnotes.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2018, by filing the foregoing with the Court's electronic filing system, I caused to be served on the following counsel a true and correct copy of the foregoing BRIEF FOR HBAMT AS APPELLANT:

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