IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, Appellant,	)	
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY,	)	No. M2018-00834-COA-R3-CV Chancery No. 17-386-II
Appellee.	)	

THE METROPOLITAN GOVERNMENT'S BRIEF

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
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ARGUMENT REQUESTED

Document received by the TN Court of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

FACTS 1

ARGUMENT 3

I. STANDARD OF REVIEW 3

II. THIS CASE IS MOOT, NOW THAT THE STATE LEGISLATURE HAS PREEMPTED THE ORDINANCES BEING CHALLENGED 3

III. THE TRIAL COURT CORRECTLY RULED THAT THE CASE WAS NOT RIPE, SINCE HBAMT NEVER APPLIED FOR INCENTIVES OR COMPENSATION 3

A. REGULATORY TAKING REQUIREMENTS UNDER THE FEDERAL CONSTITUTION 5

B. REGULATORY TAKING REQUIREMENTS UNDER THE TENNESSEE CONSTITUTION 6

C. FACIAL CHALLENGES ARE NOT ALLOWED UNLESS THEY CHALLENGE THE PUBLIC PURPOSE 8

D. RIPENESS APPLIES TO EXACTION TAKING CLAIMS 12

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF DID NOT HAVE STANDING TO CHALLENGE BL 2016-133 AND THERE WAS NO PRIVATE RIGHT OF ACTION ALLOWING IT TO ENFORCE STATE LAW 12

A. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE METRO'S ORDINANCE 12

Document received by the TN Court of Appeals.

B. THERE IS NO PRIVATE RIGHT OF ACTION TO ENFORCE THIS STATE LAW 15

CONCLUSION 17

CERTIFICATE OF SERVICE 17

Document received by the TN Court of Appeals.

TABLE OF AUTHORITIES

<u>CASES</u>

Alto Eldorado Partnership v. County of Santa Fe, 634 F.3d 1170 (10th Cir. 2011) 10

Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 466 (Tenn. 2004*)* 1

City of Chattanooga v. Davis, 54 S.W.3d 248 (Tenn. 2001) 13

Coleman v. Henry, 201 S.W.2d 686 (Tenn. 1947) 14

Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008) 13

Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty., 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) 11

Gabhart v. City of Newport, 208 F.3d 213, 2000 WL 282874 (6th Cir. 2000) 6

Goryoka v. Quicken Loan, Inc., 519 Fed.Appx. 926 (6th Cir. Mar. 18, 2013) 16

Hardy v. Tournament Players Club at Southwind, Inc., 513 S.W.3d 427 (Tenn. 2017) 16

Hill v. Beeler, 286 S.W.2d 868 (Tenn. 1956) 16

Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 8

Howe v. Haslam, No. M2013-01790-COA-R3CV, 2014 WL 5698877 (Tenn. Ct. App. Nov. 4, 2014) 13-14

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 9

Massengale v. City of East Ridge, 399 S.W.3d 118 (Tenn. Ct. App. 2012) 12

Document received by the TN Court of Appeals.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992) 13

Moyers v. Sherrod, 525 S.W.2d 126 (Tenn. 1975) 13

Phillips v. Montgomery Cty., 442 S.W.3d 233 (Tenn. 2014) .... 7 -8

Premium Finance Corp. of America v. Crump Ins. Services of Memphis, Inc., 978 S.W.2d 91 (Tenn. 1998) 15

San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323 (2005) 9

State ex rel. Agee v. Chapman, 922 S.W.2d 516 (Tenn. Ct. App. 1995) 9

State, ex rel. Deselm v. Tennessee Peace Officers Standards Comm'n, No. M200701855COAR3CV, 2008 WL 4614523 (Tenn. Ct. App. Oct. 16, 2008) 13

STS/BAC Joint Venture v. City of Mt. Juliet, 2004 WL 2752809 (Tenn. Ct. App. Dec. 1, 2004) 7

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 8

Tennessee Secondary Sch. Athletic Ass'n v. Cox, 221 Tenn. 164 S.W.2d 597 (1968) 9

Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004) 8

West v. Schofield, 468 S.W.3d 482 (Tenn. 2015) 3

Wilkins v. Daniels, 744 F.3d 409 (6th Cir. 2014) 8,11

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 5-7

Yee v. City of Escondido, 503 U.S. 519 (1992) 9

Document received by the TN Court of Appeals.

STATUTES

TENN. CODE ANN. § 1-3-119....................16

TENN. CODE ANN. § 27-8-101....................8

TENN. CODE ANN. § 66-35-102.................... 15-16

TENN. CONST. ART. I, § 21 6

OTHER

Metropolitan Ordinance No. BL 2016-342.................... 1-2

Metropolitan Substitute Ordinance No. BL 2016-133 1-2

Document received by the TN Court of Appeals.

STATEMENT OF THE ISSUES

The Metropolitan Government's affordable housing ordinances provided incentives for building affordable housing and grants that subsidized, dollar for dollar, the amount lost in reduced rent. Is this case moot, now that the state legislature has preempted the ordinances being challenged?

If not, did the Trial Court err in ruling that the case was not ripe and that the Home Builders Association did not have standing, since it never applied for a re-zoning, incentives or compensation for any property, and there is no private right of action for Plaintiff to enforce state law.

STATEMENT OF THE CASE

Plaintiff filed this lawsuit on April 24, 2017. (T.R. 1). The Metropolitan Government filed a motion to dismiss on June 6, 2017. (T.R. 74). The Court granted the motion to dismiss on October 31, 2017. (T.R. 174). Plaintiff filed a motion to alter or amend, which was denied in an order filed April 6, 2018. (T.R. 266). Plaintiff appealed on May 7, 2018. (T.R. 272).

FACTS

In 2016, the Metropolitan Government decided that affordable housing was such an important need in the community that it would subsidize affordable rental units, dollar for dollar. It did this through Substitute Ordinance BL 2016-133 (which provides incentives for building affordable housing) and Ordinance BL 2016-342 (which provides grants that will subsidize, dollar for dollar, the amount lost in reduced rent).[1]

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[1] Certified copies of these ordinances can be found at T.R.42. Although Rule 12 motions are generally decided on the pleadings, courts may consider documents referred to in the Complaint if the documents are central to the plaintiff's claim. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (copies of the ordinance challenged in the lawsuit and the related city charter and code provisions did not raise matters of law or fact that were outside the pleadings).

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Substitute Ordinance BL 2016-133, "the incentive ordinance," was very limited in scope. First, applied only to rental units. (T.R. 46). It did not apply to housing being sold, unless a builder selling housing asked to participate. (*Id.*).

Second, it did not apply to a project built under its current zoning. It applied only if a developer sought to rezone a site so that additional rental units could be built, or when public resources or property was provided for development. (*Id.*). It did not apply to a project building four or fewer rental units – it applied only if a developer planned to build five or more rental units on a site. (*Id.*).

Third, it would not apply unless Metro had adequate funding for grants that offset the amount lost in reduced rent. (*Id.*). If the funding ended, the obligation to rent at a lower rate ended. Fourth, the incentive ordinance sunset on December 31, 2019. (T.R. 44).

Fifth, if the incentive ordinance applies to a site, it requires a certain number of the units that are built be rented at a lower than market rate - and Ordinance BL 2016-342, "the grant ordinance," provides grants that pay the difference between the rent for a market unit and the rent for an affordable housing unit. (T.R. 62).

The Home Builders Association of Middle Tennessee "is a non-profit trade group dedicated to the promotion and protection of the home building industry in the Middle Tennessee area, including Metro Nashville." (T.R. 1, ¶ 12.) HBMAT states that its members build rentals and for sale units in Nashville and projects of five or more units. (*Id.*, ¶¶ 33-34). HBMAT states that its members "will request additional development entitlements from Metro through amendments to the zoning map for most, if not all, of their projects of five (5) or more units going forward." (*Id.*, ¶ 38.)

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ARGUMENT

I. STANDARD OF REVIEW.

A motion to dismiss is reviewed de novo. *West v. Schofield*, 468 S.W.3d 482, 489 (Tenn. 2015)

II. THIS CASE IS MOOT, NOW THAT THE STATE LEGISLATURE HAS PREEMPTED THE ORDINANCES BEING CHALLENGED.

For this section, the Metropolitan Government adopts and incorporates its Motion to Consider Post-Judgment Facts and Dismiss this Case as Moot, filed with this Court on October 4, 2018.

III. THE TRIAL COURT CORRECTLY RULED THAT THE CASE WAS NOT RIPE, SINCE HBAMT NEVER APPLIED FOR INCENTIVES OR COMPENSATION.

Here is a chart showing the different types of takings doctrines:

Type of taking alleged	*Compensation*	*Leading cases*
Government directly takes property.	Just compensation required	*Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S. Ct. 581, 41 L.Ed. 979 (1897) (takings clause is made applicable to the States through the Fourteenth Amendment).
Government allows a permanent physical invasion of property.	Just compensation required	*Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable in apartments effected a taking).
Regulations completely deprive an owner of all economically beneficial use of the property.	Just compensation required	*Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1020 (1992) (Lucas's two beachfront lots rendered valueless by coastal-zone construction ban).
Regulation impedes the use of property without depriving the owner of all economically beneficial use.	Just compensation required	Analysis is governed by factors such as the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with investment-backed expectations. *Penn Central Transp. Co. v. NYC*, 438 U.S. 104 (1978); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

Document received by the TN Court of Appeals.

Exactions – government may not require a person to give up a constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property.	Just compensation required	*Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994).
Public-use challenges - assert that the government taking is for a private purpose, rather than a public use.	If the taking is not made for a public use, it is invalid regardless of whether compensation is provided.	*Kelo v. City of New London, Conn.*, 545 U.S. 469, 490 (2005) (City's condemnations to redevelop downtown and riverfront area are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution); *Montgomery v. Carter Cty., Tenn.,* 226 F.3d 758, 767–68 (6th Cir. 2000) ("We conclude that to the extent that Mary Nave's estate claims that its property was taken for a private use, the claim is ripe and the estate may sue immediately without resorting to state remedies; but that to the extent that the estate claims that the taking was a taking for a public use without just compensation, the claim is not ripe until the requirements of *Williamson County* are met."); *also see Beech v. City of Franklin, Tennessee*, No. 16-6326, 2017 WL 1403201, at *3 (6th Cir. Apr. 19, 2017) ("the Beeches have not alleged a taking for private use. Instead, they alleged a regulatory taking by the City of Franklin, and federal regulatory-takings claims are not ripe unless the property owner first utilizes the adequate procedures available in state court.").
Ordinance does not "substantially advance" legitimate state interests.	Not a valid takings test – obsolete.	*Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 540 & 548 (2005). ("We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan.*").

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A. Regulatory Taking Requirements under the Federal Constitution.

A regulatory takings claim is not ripe *until the regulation has been applied* to the property at issue:

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue…
>
> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City,* 438 U.S., at 123, 98 S.Ct., at 2659, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.,* at 124, 98 S.Ct., at 2659. See also *Ruckelshaus v. Monsanto Co.,* 467 U.S., at 1005, 104 S.Ct., at 2874; *PruneYard Shopping Center v. Robins,* 447 U.S., at 83, 100 S.Ct., at 2041; *Kaiser Aetna v. United States,* 444 U.S., at 175, 100 S.Ct., at 390. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-2 (1985) (emphasis added). The Supreme Court determined that following administrative procedures and using Tennessee's inverse condemnation statute are mandatory prerequisites to bringing a takings claim under the 5th Amendment:

> The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance,…The [Planning] Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements… there is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning ordinance… [R]esort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all

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reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so…if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.
>
> Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn.Code Ann. § 29–16–123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§ 29–16–101 to 29–16–121. The State is prohibited from "enter[ing] upon [condemned] land" until these procedures have been utilized and compensation has been paid the owner, § 29–16–122, but if a government entity does take possession of the land without following the required procedures, "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way...." § 29–16–123.
>
> The Tennessee state courts have interpreted § 29–16–123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations. See *Davis v. Metropolitan Govt. of Nashville,* 620 S.W.2d 532, 533–534 (Tenn.App.1981); *Speight v. Lockhart,* 524 S.W.2d 249 (Tenn.App.1975). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

Williamson Cty., supra at 172, 193–97; also *Gabhart v. City of Newport*, 208 F.3d 213, 2000 WL 282874, at *3 (6th Cir. 2000) ("*Williamson County* clearly compels the conclusion that Gabhart's Fifth Amendment takings claim is not ripe. First, the City's decision is not final because Gabhart has failed both to submit his plat to the Newport Regional Planning Commission and to seek a variance from the regulations. Moreover, Gabhart's claim is not ripe because he has not sought compensation through the State of Tennessee's inverse condemnation procedures. ").

B. Regulatory Taking Requirements under the Tennessee Constitution.

Since the Supreme Court decided *Williamson County*, the Tennessee Supreme Court has determined that the Tennessee Constitution's section governing takings of property (Const. Art. 1, §

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21) encompasses regulatory takings to the same extent as the Takings Clause of the Fifth Amendment to the United States Constitution. *Phillips v. Montgomery Cty.*, 442 S.W.3d 233 (Tenn. 2014). The Court also held that a regulatory takings claim is not ripe until a Commission makes a "final decision" regarding a property:

> The County has not disputed the ripeness of the Property Owners' claim. We recently held in *B & B Enterprises of Wilson County, L.L.C. v. City of Lebanon,* 318 S.W.3d 839, 846–49 (Tenn.2010), that a regulatory takings claim ripens when a Planning Commission makes a "final decision" regarding a property, rather than at the conclusion of judicial review of the administrative decision; thus, we held that the statute of limitations on an inverse condemnation claim begins to run at the moment the Planning Commission's final decision was issued.

Id. at 238 (emphasis added); a*lso see STS/BAC Joint Venture v. City of Mt. Juliet,* 2004 WL 2752809 (Tenn. Ct. App. Dec. 1, 2004) (developer sought damages for a temporary taking, and the Court held that a state inverse condemnation proceeding should have been brought.).

The Court also stated that it would be preferable to hold an inverse condemnation in abeyance until a writ of certiorari process had been exhausted:

> Nothing prevents the parties in an inverse condemnation action from requesting, or the trial court from granting, a stay of that action until judicial review of the administrative decision is concluded. Indeed, such a course is preferable. Once judicial review of the administrative decision is final, the trial court in the inverse condemnation action will be better able to determine both the existence and scope of the alleged regulatory taking.

Id., nt 7 (emphasis added).

In this case, HBMAT did not apply for a rezoning to build a rental property of 5 or more units. HBMAT did not apply for a grant that will reimburse any lost rental revenue for an affordable unit. If HBMAT had gone through a rezoning, and the conditions that would require subsidized units be included were met, it would then apply for a grant that provides reimbursement for lost rental income. At that point, there will be a decision about how the regulations will be applied to the land at issue. If HBMAT disagreed with the amount of the grant, or was refused a grant, *Williamson County* and

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Phillips v. Montgomery require that it pursue state remedies through an inverse condemnation lawsuit. It could also appeal that grant decision through a writ of certiorari. T.C.A. § 27-8-101.

C. Facial Challenges Are Not Allowed Unless They Challenge the Public Purpose.

HBMAT argues that it was making a facial constitutional challenge, instead of an as applied challenge, and that this can be done without specifics. In making this argument HBMAT relies on *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), a pre-*Williamson County* case, and *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), a case where the landowner went through the administrative process. HBMAT also relies on a numerous cases outside the 6th Circuit, including *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004), a Texas case that HBMAT incorrectly cites as being a Tennessee case.

Meanwhile, HBMAT minimizes and ignores the fact that its very argument, that facial challenges are not subject to Williamson County, has been expressly rejected by the Sixth Circuit:

> Appellants contend that *Williamson County* is inapplicable to facial challenges. Their argument oversimplifies Takings Clause jurisprudence. With respect to just-compensation challenges, while *Williamson County* 's first requirement may not apply to facial challenges, its second requirement—that plaintiffs must seek just compensation through state procedures—does. *See Alto Eldorado P'ship v. Cnty. of Santa Fe,* 634 F.3d 1170, 1177 (10th Cir.2011) ("Courts considering claims alleging a ... taking without just compensation, even when characterized as facial claims, have applied the second*Williamson County* requirement...." (citing *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo,* 548 F.3d 1184, 1190 n. 13 (9th Cir.2008); *Cnty. Concrete Corp. v. Twp. of Roxbury,*442 F.3d 159, 168 (3d Cir.2006); *Holliday Amusement Co. of Charleston, *418 Inc. v. South Carolina,* 493 F.3d 404, 407 (4th Cir.2007))).

Wilkins v. Daniels, 744 F.3d 409, 417–18 (6th Cir. 2014) (emphasis added). Instead of recognizing this binding authority, HBMAT cites to its one sentence in a footnote that says the *Williamson County* requirements make little sense – but this footnote is referring to an entirely different type of case – a case where it is alleged that there is no public purpose in the taking. HBMAT never made this allegation in its Complaint.

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The type of takings claim that the Plaintiff is attempting to bring (a facial challenge seeking equitable relief), no longer exists[2]. The types of challenges that are available cannot be brought without complying with *Williamson County*'s ripeness doctrine.

In arguing that its facial challenge was ripe the moment the ordinance at issue was passed, HBMAT also cites to *Yee v. City of Escondido*, 503 U.S. 519 (1992) and *San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323 (2005), and their "substantially advances" doctrine (Brief, p. 39). But this line of case law is obsolete:

> Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins,* this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence…
>
> Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.
>
> …it would require courts to scrutinize the efficacy of a vast array of state and federal regulations-a task for which courts are not well suited…
>
> For the foregoing reasons, we conclude that the "substantially advances" formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005) (emphasis added) (*Murr*, *supra* at 1947 :"the test articulated in *Agins* – that regulation effects a taking if it "does not substantially advance legitimate

[2] There is also not basis in equity to adjudicate this lawsuit when the Plaintiff is basically seeking to create a hypothetical question that does not affect it. Equity does not reach hypothetical questions. *Tennessee Secondary Sch. Athletic Ass'n v. Cox*, 221 Tenn. 164, 176, 425 S.W.2d 597, 602 (1968)("Equity may not be invoked to supply a remedy until a right, legal or equitable, exists."); *State ex rel. Agee v. Chapman*, 922 S.W.2d 516, 519 (Tenn. Ct. App. 1995) ("To justify equitable relief on the ground that irreparable injury will result unless relief is granted, the irreparable injury must be real and practically unavoidable and certain.").

Document received by the TN Court of Appeals.

state interests" was improper because it invited courts to engage in heightened review of the effectiveness of government regulation.").

In *Alto Eldorado Partnership v. County of Santa Fe,* 634 F.3d 1170 (10th Cir. 2011), the Court applied *Lingle* to show that *Yee* and *San Remo* were not good law and to show that facial challenges could not be brought as takings claims:

> *Yee v. City of Escondido,* cited by the developers, is a case in which the property owners used the "substantially advances" theory to allege a regulatory taking. Although the Court declined to address the merits of the claim because it was not encompassed within the question presented on certiorari, the Court noted the challenge was not subject to the *Williamson County* requirements. It reasoned that the "substantially advances" claim, a means of challenging the authority of the government to regulate in a certain manner in the first place, did not depend on how the regulation applied to any particular piece of property or whether compensation was available. Likewise, in *San Remo Hotel, L.P. v. City & County of San Francisco,* the Supreme Court stated the plaintiffs would not have had to ripen their facial challenges to a regulation based on the "substantially advances" theory to bring the action in federal court, with the immediate caveat that the theory had been rejected as a takings claim by *Lingle.* Although these cases suggest facial challenges are not subject to the same ripeness requirements, those facial challenges are no longer available under the Takings Clause.
>
> The "substantially advances" takings theory, now obsolete, differs dramatically from a Takings Clause claim alleging that a legislative or regulatory action, while advancing an authorized purpose, effectuates a taking of property without just compensation. The former, a claim that governmental interference with property rights exceeds its permissible scope of authority, does not depend on whether the landowner subject to the regulation has been compensated; the regulatory action is invalid whether compensation is provided or not. Because no amount of compensation would alter the outcome of such a claim, a waiver of the *Williamson County* requirement that the plaintiff first seek compensation before mounting a no-longer-available "substantially advances" Takings Clause challenge is appropriate.
>
> In contrast, an otherwise proper interference with property rights amounting to a regulatory taking, whether under *Lucas, Loretto,* or *Penn Central,* is constitutional so long as compensation is provided. Compensation negates the constitutional Takings Clause claim altogether. A plaintiff might argue the *Williamson County* requirement is met if a regulation on its face makes compensation unavailable or if compensation can be presumed unavailable by the nature of the regulation. In other cases, plaintiffs may be able to demonstrate that the state has provided no procedure for seeking compensation. Unless a method for seeking compensation is unavailable or compensation is otherwise foreclosed, however, property owners will only be able to show compensation has been denied after first seeking compensation through an available procedure.

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Id. at 1175-1176 (internal citations omitted) (emphasis added). The Sixth Circuit relied on the reasoning of *Alto Eldorado* in finding that the second *Williamson County* requirement applies to facial challenges unless they challenge the public purpose of the alleged taking. *Wilkins v. Daniels*, 744 F.3d 409, 417 nt. 6 (6th Cir. 2014).

HBMAT also contends that *Consolidated Waste* permits a facial challenge in state court without meeting the second *Williamson County* requirement (Brief, p. 32). *Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty.,* 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005). But *Consolidated Waste* does not hold that the *Williamson County* requirements are not applicable in Tennessee takings cases.

The Court's analysis in *Consolidated Waste* noted that the *Williamson County* ripeness requirements are applicable to takings claims:

> [A] court cannot determine that a regulation or regulatory action "goes too far" unless it knows exactly how far the regulation reaches. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S.Ct. 2561, 2566 (1986). Because of the factors to be considered under Penn Central in a regulatory takings analysis, where that analysis is the appropriate one to apply, the court needs to know the type, intensity, or level of development allowed on the property….
>
> The ripeness requirements made applicable to takings claims in *Williamson County* relate in part to the special nature of a takings claim. The requirement that the landowner first seek compensation though available state procedures, for example, is based on the interpretation of the Takings Clause as not limiting local governmental action but as requiring that the local government pay just compensation. Thus, no injury cognizable under the Takings Clause exists until just compensation has been denied, making a claim not ripe for review until that requirement is met.

Id. at 15, 26 (emphasis added). But the *Consolidated Waste* holding actually decided whether "the final decision ripeness requirement of *Williamson County* [also] applies to due process and equal protection claims made in the context of land use issues." *Id.* at 11, 28 (emphasis added). The Court

Document received by the TN Court of Appeals.

declined to extend these requirements to the plaintiff's substantive due process and equal protection challenges. *Id.* at 30.

D. Ripeness Applies to Exaction Takings Claims.

HBMAT also insisted that it was not subject to the *Williamson County* ripeness requirement because it was bringing an exaction-type of takings case. But the Trial Court found no authority for this position:

[8] HBA insists that it may bring a facial challenge alleging an unconstitutional exaction, pursuant to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). HBA contends these cases stand for the proposition that the constitutional violation occurs the moment that an illegal exaction is adopted by the government, arguing that the *Williamson County* requirement that there must be a final agency decision regarding the application of the regulations to the property at issue does not apply to this type of facial challenge. However, this Court finds no authority excluding exaction cases from the *Williamson County* and *Phillips* requirements. The *Nollan*, *Dolan*, and *Koontz* cases all involved situations where an individual owner challenged the application of an allegedly unconstitutional exaction to his or her parcel. None involved a theoretical or facial challenge to an exaction where no parcel was at issue. Without a particular parcel being at issue, the government has no opportunity to show that the allegedly unconstitutional exaction has a relationship to the property.

(T.R. 179). The law that HBMAT insists upon is simply not there.

IV. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF DID NOT HAVE STANDING TO CHALLENGE BL 2016-133 AND THERE WAS NO PRIVATE RIGHT OF ACTION ALLOWING IT TO ENFORCE STATE LAW.

In addition to the takings claim, HBMAT alleged that Metro does not have the authority to pass an inclusionary zoning ordinance, and that the ordinance was pre-empted by state law. However, the Trial Court correctly found that Plaintiff did not have standing to bring these claims, and there is no private right of action allowing it to enforce state law.

A. Plaintiff does not have standing to challenge Metro's ordinance.

"A declaratory judgment is not a ticket to bypass standing." *Massengale v. City of East Ridge,* 399 S.W.3d 118, 127 (Tenn. Ct. App. 2012). "Although a plaintiff in a declaratory judgment action need not show a present injury, an actual 'case' or 'controversy' is still required. A bona fide

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disagreement must exist; that is, some real interest must be in dispute. Courts still may not render advisory opinions based on hypothetical facts." *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d 827, 837–38 (Tenn. 2008) (internal citations omitted).

To demonstrate standing, the organizational plaintiff must establish that:

(1) its members would otherwise have standing to sue 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 the relief requested, requires the participation of individual members in the lawsuit.

Howe v. Haslam, No. M2013-01790-COA-R3CV, 2014 WL 5698877, at *6 (Tenn. Ct. App. Nov. 4, 2014)

Standing for individual members requires that they show the three *Lujan* factors:

> To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992) (citations omitted).

Tennessee has not adopted a "public rights" exception to the requirement of standing. *Howe v. Haslam*, *supra* at *7, *citing City of Chattanooga v. Davis,* 54 S.W.3d 248, 280–81 (Tenn.2001). Being very interested in a matter is not sufficient. *State, ex rel. Deselm v. Tennessee Peace Officers Standards Comm'n*, No. M200701855COAR3CV, 2008 WL 4614523, at *3 (Tenn. Ct. App. Oct. 16, 2008)(affirming dismissal for lack of standing where Plaintiffs claimed that their special interest or injury was being "public spirited citizens" trying to protect local taxpayers.); *Moyers v. Sherrod* 525 S.W.2d 126, 128 (Tenn. 1975) ("Private citizens, as such, cannot maintain an action complaining of the wrongful act of public officials unless such private citizens aver special interest or a special injury

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not common to the public generally."). The Complaint must present the harm being suffered. *Howe v. Haslam*, *supra* at *16 ("In the case now before us, however, neither the TEP nor the TTPC has identified any member who was in fact adversely impacted by the repeal of the 2011 amendment to the Metro Code.").

For example, in *Coleman v. Henry* a "citizen, taxpayer and qualified voter" sought a declaratory judgment to determine the duty of a Senator's campaign manager to file a financial statement of campaign expenditures. 201 S.W.2d 686, 687 (Tenn. 1947). The Tennessee Supreme Court determined that the plaintiff did not have standing to bring the suit:

> The complainant as a 'citizen, taxpayer and qualified voter' has no such special interest in the matters upon which a declaration is sought as entitled him to a declaration. The general rule is that a party having only such interest as the public generally has, can not maintain an action for a Declaratory Judgment... Future and contingent rights, and remote possibilities, are not properly the subject of a declaration.

Id. at 687 (emphasis added, citations omitted).

Here, HBMAT did not present a distinct injury. It presented the conclusory claim that its members "will request additional development entitlements from Metro through amendments to the zoning map for most, if not all, of their projects of five (5) or more units going forward." (T.R. 1, ¶ 38.) But this generalized statement did not address whether the specific contingencies of the ordinance will be met. Is there really a HBMAT member who wants to build rental units during that time? Will that member's project really require a rezoning? Will that member's project be for five or more units? Will there be Metro funding in the grant program to reimburse the rent that is under market rate? If the answer to these is no, there is no requirement that affordable units be included in the project.

Without the specificity of a live case and controversy, brought by someone who actually sought a rezoning, applied for a grant and asserted that being reimbursed dollar for dollar constitutes a taking, the Court would be dealing with future and contingent rights, which do not create standing.

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B. There is no private right of action to enforce this state law.

Plaintiff's Complaint contained two claims related to Metro's authority to enact the ordinances at issue in this lawsuit in light of the provisions of TENN. CODE ANN. § 66-35-102. Claim Two is entitled "state preemption," while Claim Three is entitled "ultra vires." (T.R. 1). Regardless of how the claims are worded, at their core, both were attempts to enforce Plaintiff's interpretation of § 66-35-102 to invalidate Metro's ordinance. Plaintiff had the burden of establishing its private right to bring such a lawsuit, and did not do so.

Tennessee courts have consistently held that the burden of proving the existence of a private right of action is on the plaintiff. *See Premium Finance Corp. of America v. Crump Ins. Services of Memphis, Inc.,* 978 S.W.2d 91, 93 (Tenn. 1998). The state law permitting a local government to create an incentive-based affordable housing program (in effect at the time this ordinance passed, but now superseded by HB-1143, as discussed in the Motion to Consider Post Judgment Facts and Dismiss) contains no private right of action:

> (a) A local governmental unit shall not enact, maintain or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property.
>
> (b) A local governmental unit shall not enact, maintain, or enforce any zoning regulation, requirement, or condition of development imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing. This subsection (b) shall apply to all current and future zoning regulations.
>
> (c) This section does not affect any authority of a local governmental unit to create or implement an incentive-based program designed to increase the construction and rehabilitation of moderate or lower-cost private residential or commercial rental units.

T.C.A. § 66-35-102.

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A private right of action must be expressly created:

(a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right.

(b) In the absence of the express language required by subsection (a), no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided in this section.

T.C.A. § 1-3-119 (emphasis added). The Supreme Court has read this statute very strictly, finding no private cause of action in the State's "tip" statute where an employee asserted she had been under paid by a private dining club. *Hardy v. Tournament Players Club at Southwind, Inc.,* 513 S.W.3d 427 (Tenn. 2017). Here too, no express cause of action was created in T.C.A. § 66-35-102. Enforcing this statute has been left to the State of Tennessee, and not given to private litigants.

Finally, Plaintiff points to the Tennessee Declaratory Judgment Act as a vehicle for its claims. But Tennessee courts have long held that "the Declaratory Judgment Act has not given the courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought." *Hill v. Beeler,* 286 S.W.2d 868, 871 (Tenn. 1956). Likewise, injunctive relief is a remedy, not a cause of action. *Goryoka v. Quicken Loan, Inc.,* 519 Fed.Appx. 926, 929 (6th Cir. Mar. 18, 2013).

For all these reasons, Plaintiff's challenge to the Metro ordinance was properly dismissed.

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CONCLUSION

The Trial Court determined that it was improper to allow this case to go forward, where there was no standing, the claims were not ripe, state inverse condemnation procedures had not been pursued whatsoever, and where the Legislature provided no private right of action. HBAMT had no parcel being affected by the ordinance. Because the Complaint failed to state a claim, it was correctly dismissed.

Respectfully submitted,

/s/ Lora Fox
Lora Barkenbus Fox, #17243
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Certificate of Service

A copy of this document has been served on Braden Boucek, Beacon Center of Tennessee, P

/s/ Lora Fox
Lora Barkenbus Fox

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