IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE,	)	
Plaintiff,	)	
v.	)	**No. 17-386-II**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Homebuilders Association of Middle Tennessee ("HBAMT") respectfully responds in opposition to the Motion to Dismiss filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). In response to Metro's arguments, HBAMT submits as follows:

I. Introduction

1) Under applicable case law, HBAMT was not required to seek compensation before lodging its taking claim challenging Metro's Ordinance because this is a facial challenge seeking equitable relief, not damages (compensation). 2) A pre-enforcement challenge to a facial taking claim is authorized under United States Supreme Court and Tennessee precedent; Metro's Ordinance has passed and will injure HBAMT's members. 3) This Court has equitable authority to issue injunctions barring illegal injury to property

as well as authority under the Declaratory Judgments Act ("DJA") to declare an ordinance invalid under state law. Examples abound of private individuals challenging local ordinances as exceeding the lawful authority delegated to it by the State, Constitution, or by charter.

II.
Legal Standard

Tennessee Rule of Civil Procedure 12.02(6) is a device for disposing of a complaint for "failure to state a claim upon which relief can be granted." Tenn. R. Civ. P. 12.02(6) (2015).[1] Such a motion "challenges only the legal sufficiency of the complaint, not 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). 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. The standard is lower still in a declaratory action where dismissal is "rarely appropriate." *Cannon Cty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005).

In a declaratory action, even a plaintiff who loses every claim has achieved relief from uncertainty. Declaratory actions are intended to "afford relief from uncertainty with respect to rights, status, and other legal relations." *Wade*, 178 S.W.3d at 730. Assuming HBAMT would lose, it "does not mean that the parties are not entitled to the relief from uncertainty that a declaratory judgment affords." *Id.*

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[1] Although Metro brings this as a motion to dismiss under Tennessee Rule of Civil Procedure12.02(6) – that is, a failure to state a claim – its argument is that HBAMT has not exhausted remedies or proven injury. These are justiciability questions that go to this Court's subject matter jurisdiction. *Norma Faye Pyles Lynch Family Purpose, LLC v. Putnam Cty.*, 301 S.W.3d 196, 203-04 (Tenn. 2009) (justiciability presents a question of jurisdiction). "A motion to dismiss for lack of subject matter jurisdiction falls under Tennessee Rule of Civil Procedure 12.02(1)." *Bernard v. Metro. Gov't of Nashville and Davidson Cty.* ,237 S.W.3d 658, 661 (Tenn. Ct. App. 2007) (quotation omitted).

For purposes of this Motion, the truth of "all relevant and material averments in the complaint" is taken as admitted. *Wade*, 178 S.W.3d at 727 (citations omitted). HBAMT is to enjoy the benefit of all reasonable inferences. *Id*.

III.
Response to Facts

Metro begins, in a section styled as "FACTS," by describing its Ordinance as "very limited in scope" and citing to the various provisions. Def's Mem. at 1-2. Much of this section strains the actual text of the Ordinance beyond its breaking point.

Metro's first point is that the Ordinance will only apply to rental units. *Id*. at 2 (citing Metro. Code § 17.40.780(B)(1)). A full examination of the Ordinance, however, belies this. Metropolitan Code Section 17.40.780(B)(1) initially provides that "the rental residential units shall be subject" to Metro's price control mandate, making it appear to contemplate rental units only. It then states that developers of "for-sale" units "may" participate in the incentives. Indeed, this section taken alone seems to apply only to rental units, but Metro did not stop there. In the same bill, Metro amended Code § 17.40.055 to mandate that "*all* proposed residential development that seeks to increase development entitlement beyond that permitted by the current base zoning *shall* comply with Section 17.40.780 (Inclusionary Zoning)" (emphasis added), thereby sweeping in *all* development, including for-sale units, under its mandates. What Metro made voluntary, it then countermanded and made mandatory.

Elsewhere in the Ordinance, Metro enacted laws that clearly contemplate for-sale units as well. For example, the price-control table has separate columns related to for-sale units. Metro. Code §17.40.780(A). And, the "Enforcement" section requires compliance reports from builders, forbidding owners of "for-sale developments" from being the party

responsible. *Id*. at 17.40.810(C). Naturally, Metro could only set demands on the method of compliance if compliance was required in the first place.

Metro then says the Ordinance will not apply unless developers seek to rezone a site involving five or more units. Def's Mem. at 2. The misleading implication is that the Ordinance will only impact very few projects because most projects won't need a rezone. The Complaint, which must be taken as true, relates that this demand would encompass virtually *all* future projects because Metro's current zoning map, with limited exceptions, "contains no known properties" that would allow for development without additional entitlements. Compl. at 7, ¶ 26. HBAMT otherwise expects to present proof that Metro has since manipulated its zoning map by taking away existing bonuses specifically to force homebuilders to seek out amendments and thus be subject to this allegedly "limited" ordinance. Def's Mem. at 2.

Metro next asserts that it will fully compensate the homebuilders for the loss of revenue, "dollar for dollar," Def's Mem. at 1-2, because the Ordinance will not apply unless Metro has "adequate" funding and Metro's separate "grant ordinance" (BL2016-342) provides for grants that pay the difference. This claim is unsupported by the statutory text – Metropolitan Code Section 17.40.780(B)(1) merely requires that "adequate financial incentives" be "available." The Ordinance does not so much as purport to define what "adequate" means. The guarantee of "dollar for dollar" compensation is not in this Ordinance.

The informal promise of full compensation is also conspicuously missing from the separate "grant ordinance," which is patently discretionary for Metro. It squarely states that Metro "may" make incentives grants. Metro. Code § 2.213.020(A). These

grants are separate from the mandates in the other ordinance. Nowhere are these discretionary grants tied to HBAMT's separate obligation to provide housing priced as Metro determines. It certainly does not require full compensation for the loss associated with compliance. The grants will be the difference between "average rent" for an unrestricted unit and the average for an affordable unit. Metro. Code § 2.213.020(A)(1). An "average" is not the same as full market value. Perhaps the builder, like any other investor, would like an *above* average return. Furthermore, the rate at which the homebuilder must sell might be less than the "average" for an affordable unit. Metro sets the prices in relation to percentage of Median Household Income ("MHI") Metro. Code §17.40.790(A), a completely separate metric from "average" that might be below it. In the end, even requiring the *average* amounts to a demand that the homebuilder seek less than full market value. Regardless, the grant ordinance fails to live up to a guarantee of "dollar for dollar" compensation.

IV.
Argument

A. HBAMT's taking claim is ripe for review by this Court because it is a facial challenge seeking invalidation of the Ordinance, not compensation.

HBAMT does not challenge a particular application of the Ordinance on a specific piece of property. Nor does HBAMT seek any compensation. Rather, HBAMT brings this action to challenge the constitutionality of Metro's Inclusionary Zoning Ordinance because it violates the Fifth Amendment to the United States Constitution and Article I, Section 21 of the Tennessee Constitution. United States Supreme Court and Tennessee precedent establish that such claims are ripe upon the law's enactment. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Lucas v. S. Carolina*,

505 U.S. 1003, 1013 n.4 (1992); *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville*, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005) (copy of opinion attached).

In an attempt to avoid defending the legality of the Ordinance, Metro improperly asks this Court to apply the federal prudential ripeness doctrine provided for in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), and find HBAMT's claim unripe. Metro's arguments are not only misleading, but they are fundamentally incorrect because *Williamson County* does not apply to HBAMT's claim because it is a facial taking claim that seeks only invalidation of a law and not compensation.

1) HBAMT asserts a facial challenge seeking equitable relief, not damages. That does not require exhaustion under the case law.

The Fifth Amendment to the United States Constitution prohibits the government from taking one's property without just compensation. U.S. Const., amend. V. There are several types of taking claims, with differing standards. The United States Supreme Court has made clear that the Taking Clause protects one from not only physical takings, but also from governments that misuse the power of land-use regulations.[2] In the words of Justice Holmes, a regulatory restriction amounts to a taking if it "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

A taking claim may be raised as an "as-applied" challenge or a "facial" challenge. The typical as-applied taking claim seeks just compensation (damages) after the fact of a taking. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987) (explaining that an as-applied challenge considers "the particular impact of government

[2] In 2014, the Supreme Court of Tennessee adopted federal takings jurisprudence and held that the Tennessee Constitution encompasses regulatory takings. *See Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 243-44 (Tenn. 2014).

action on a specific piece of property" and "requires the payment of just compensation"). However, a facial taking claim seeks equitable relief in the form of a declaration of unconstitutionality and/or an injunction stopping the enforcement of an unconstitutional regulation. A plaintiff asserting a facial claim challenges the mere enactment of the law and seeks invalidation, *not* just compensation.

HBAMT's taking claim is a facial challenge. Simply stated, the homebuilders do not seek damages. Rather, they seek only equitable relief in the form of a declaratory judgment that the Ordinance is an unconstitutional condition under both the Federal Constitution and Tennessee Constitution, and an injunction against enforcement. Compl. at 15-16. Through this suit, HBAMT asks this Court to invalidate the Ordinance. Not once has it requested compensation of any kind.

And its worth noting that, despite Metro's fundamental misunderstanding and mischaracterization of the Complaint, it did get one thing correct – as of the date of the Motion, none of HBAMT's members had been denied any development entitlements pursuant to the Ordinance, because the Ordinance had not yet gone into effect. Def's Mem. at 5. The fact that HBAMT filed the Complaint *prior* to the Ordinance's effective date, and the fact that at the time the Complaint was filed, HBAMT knew of no known application of the Ordinance, further supports characterization of the claims as a facial challenge rather than an as-applied one.

2) <u>HBAMT's facial taking claim was ripe the moment Metro passed the Ordinance</u>.

Metro argues that under the prudential[3] ripeness doctrine of *Williamson County*, HBAMT's facial challenge to invalidate the Ordinance will not ripen for this Court's review until HBAMT exhausts state court procedures that might provide them with compensation. Def's Mem. at 4. Metro misunderstands the application of *Williamson County*. The doctrine patently does not apply to facial challenges seeking to invalidate state laws or regulations. Such claims are "generally ripe the moment the challenged regulation or ordinance is passed."[4] *Suitum*, 520 U.S. at 736 n.10 (1997); *Lucas*, 505 U.S. at 1013 n.4 ("Facial challenges are ripe when the [ordinance] is passed."). While Metro may have been correct under different circumstances – if HBAMT had brought an as-applied challenge or sought just compensation – Metro is wrong because HBAMT brought a facial taking claim and seeks only equitable relief.

Decisions from the United States Supreme Court confirm that facial challenges that do not seek "just compensation," but invalidation of laws are ripe without exhaustion of state procedures. In *Yee v. Escondido*, 503 U.S. 519 (1992), the Supreme Court held that *Williamson County* does not apply to facial taking challenges. *Id*. at 533-34 (citing *Keystone*, 480 U.S. at 495). 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 to the extent to which these particular [plaintiffs] are compensated." *Id*. at 534. Rather, a facial challenge

[3] Because *Williamson County*'s requirements are prudential – not jurisdictional – ripeness rules, courts "may determine that in some instances, the rule should not apply and we still have the power to decide the case." *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013).

[4] Also, to the extent Metro suggests HBAMT's facial taking claim is unripe because the Ordinance does not go into effect until June 15, 2017, the United States Supreme Court disagrees. *See Suitum*, 520 U.S. at 736 n.10 (1997); *Lucas*, 505 U.S. at 1013 n.4.

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. Thus, facial taking challenges are "by their nature" immediately ripe because they "request[] relief distinct from the provision of 'just compensation.'" *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 340 n.23 (2005) (finding that petitioners' facial taking claims "were ripe, of course, under *Yee v. Escondido*").

Interestingly, this case is not the first one where Metro has asked a Tennessee state court to ignore United States Supreme Court precedent and improperly apply *Williamson County* to a facial challenge. Just ten days after the Supreme Court announced its opinion in *San Remo*, the Court of Appeals of Tennessee issued an opinion in which it discussed, and explicitly rejected Metro's invitation to apply *Williamson County* to the facial taking claim. Instead, the Court of Appeals held that a party is *not* required to exhaust administrative remedies in a direct challenge to the facial validity of an ordinance. In *Consolidated Waste Systems*, Metro argued, relying on *Williamson County*, that the plaintiff could not assert its substantive due process claim because it was grounded in an unripe taking claim. *Id*. at *84-85. After reviewing the *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), two-step ripeness test that Tennessee courts adopted, the Court of Appeals explained that "federal courts have developed specific ripeness requirements for regulatory takings claims that relate to state court action and local administrative decisions." *Consol. Waste*, 2005 Tenn. App. LEXIS 382, at *87.

The Court of Appeals ultimately rejected Metro's arguments and refused to apply *Williamson County* to determine whether the underlying taking claim was ripe for several

reasons. First, the Court explained that the *Williamson County* requirements do not apply to facial challenges, and thus the "takings claim itself would have been ripe for review to the extent it was based, like its due process claim, on a challenge to the relationship between the ordinances and a valid public interest." *Id*. at *89-93. Second, the Court found "there is no requirement that a party challenging a zoning ordinance on the basis it violates substantive due process on its face because it is not rationally related to a legitimate governmental interest must seek a final administrative answer to the ordinance's precise application." *Id*. at *93. Finally, the court noted, "while federal courts have used these requirements to avoid hearing local zoning disputes, Tennessee courts have *not* imposed similar requirements on parties challenging the constitutionality of a zoning ordinance." *Id*. at *97 (emphasis added).

The court continued to explain that as-applied challenges, or challenges to decisions *applying* zoning ordinances by local government, must be brought as direct actions under the common law writ of certiorari. *Id*. at *97-98. And, because Tennessee policy favors broad discretion with respect to zoning decisions and because review is largely, if not entirely, limited to the record produced by the zoning board, parties asserting as-applied challenges must exhaust their administrative remedies prior to filing suit. *Id*. at *98. However, "[t]he same policies and circumstances are not present in a challenge to a legislative action through enactment of zoning ordinances." *Id*. at *99. The court explained that, "[t]he enactment of ordinances or resolutions, creating or amending zoning regulations, is a legislative, rather than an administrative action" and that "[c]onsequently, court challenges to the validity of such ordinances are generally brought as actions for declaratory judgment." *Id*. As such, Tennessee courts do not require a

party to exhaust administrative remedies in a direct challenge to the facial validity of an ordinance.[5] *Id*.

Applying the Tennessee Declaratory Judgment Act to the facial challenge before it, the Court of Appeals explained:

> [I]n view of the nature of the claim made by Consolidated and the remedy sought, it would be inappropriate to require it to go to the Board of Zoning Appeals before seeking recourse in the courts. Where a party brings a facial challenge to the constitutional validity of a statue or ordinance, there is no requirement that the party first seek a ruling on that issue from the administrative body charged with applying or enforcing the legislation. *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 456 (Tenn. 1995). That is because administrative officials and bodies do not have the authority to declare a statute or ordinance unconstitutional. *Id*. at 452. 'The facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding.' *Id*. at 454. *See also City of Memphis v. Shelby Cty. Election Comm'n.*, 146 S.W.3d 531, 537 (Tenn. 2004).

Id. at *100-101. The Court ultimately concluded the plaintiff's facial challenges based on due process and equal protection grounds were not precluded by any ripeness requirement. *Id*. at *102. That same result is in order here.

3) Metro relies on *Wilkins v. Daniels*, a federal court case that is distinguishable from this action because HBAMT's state court action asserts a facial taking claim seeking invalidation of a law, and does not seek compensation.

Not only does Metro ignore Tennessee Court of Appeals precedent, but it also overstates the holding and reach of *Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014) when

[5] Notably, the Supreme Court of Tennessee has never discussed *Williamson County* and the Tennessee Court of Appeals did so in only three other opinions, none of which support Metro's contention that the *Williamson County* doctrine bars HBAMT's facial taking claim. *See Universal Outdoor, Inc. v. Tenn. Dep't. of Transp.*, 2008 Tenn. App. LEXIS 558, *24 (Tenn. Ct. App. Sept. 24, 2008) (adjudicating an as-applied taking claim for just compensation) (copy of option attached); *STS/BAC Joint Venture v. City of Mount Juliet*, 2004 Tenn. App. LEXIS 821, *23 (Tenn. Ct. App. Dec. 1, 2004) (explaining that *Williamson County* was inapplicable to the as-applied taking claim because *Williamson County*'s ripeness requirements apply only to federal court, even though the doctrine may be instructive when a taking claim brought in state court seeks just compensation) (copy of opinion attached); *In re Billing and Collections Tariffs of S. Cent. Bell*, 779 S.W.2d 375 (Tenn. Ct. App. 1989) (citing *Williamson County* for the purpose of supporting holding that phone rates did not constitute an unconstitutional taking of property).

it suggests that the Sixth Circuit held that *Williamson County* applies to ***all*** facial taking challenges regardless of the relief sought and regardless of whether the suit is brought in state or federal court. Def's Mem. at 6. *Wilkins* did no such thing. Metro's reliance on and interpretation of *Wilkins* is incorrect and illogical for several reasons.

First, the Sixth Circuit's declaration that *Williamson County* applies to facial challenges was limited in scope and clearly distinguishable from the state court action for invalidation brought by HBAMT – the Court was specifically addressing ripeness of taking claims in *federal*, not state, court and pertinently where the plaintiff sought just compensation, not invalidation of a statute or regulation. *See Wilkins*, 744 F.3d at 417 (discussing the application of *Williamson County* "[w]ith respect to just-compensation challenges"); *see also STS/BAC Joint Venture*, 2004 Tenn. App. LEXIS 821 (noting that *Williamson County*'s ripeness requirement applies only to federal courts).

Second, the court explained that *Williamson County*'s second prong serves important federalism interests because it requires litigants to address important issues of state policy in state courts. While *Williamson County*'s second prong would not have barred HBAMT from asserting its facial taking claim in *federal* court for the reasons discussed above, HBAMT recognizes that the issues presented in this case involve important issues of state policy as evidenced by its decision to file this action in *state* court. Thus, the federalism issues discussed in *Wilkins* are totally irrelevant to this action.

Third, similar to taking claims alleging violation of the public use requirement, requiring HBAMT to seek just compensation before it can assert a facial claim challenging the constitutionality of the Ordinance, makes no sense.[6] The Ordinance is

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[6] The Sixth Circuit explained that requiring a plaintiff asserting a public-use challenge to first seek just compensation "makes little sense" because compensation is irrelevant. *Id*. at n.6.

either constitutional or unconstitutional. If this Court ultimately agrees with HBAMT and finds the Ordinance unconstitutional, no amount of compensation could render it constitutional or repair it, because constitutional injury is irreparable. *See 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."); *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citations omitted). Finally, a review of the few cases citing *Wilkins* combined with the prudential nature of *Williamson County* simply does not support application by this court. None of the cases citing *Wilkins* dealt with invalidation of a state law or regulation. Rather, all of the cases citing *Wilkins* adjudicated claims where the plaintiffs sought just compensation (whether categorized as facial or as-applied).

Despite Metro's best efforts to argue that HBAMT's taking claim is not ripe for review, it cannot escape the reality that the moment it passed the Ordinance its constitutionality became reviewable by this court. It must face the reality and now defend its attempt to take property from its residents in violation of the United States and Tennessee Constitutions.

B. HBAMT's pre-enforcement facial taking claim was ripe the moment Metro passed the Ordinance because parties challenging the validity of an ordinance need not establish a distinct and present injury.

Metro wrongly contends that HBAMT has not presented a "distinct injury" and cannot do so until it shows that a member has the Ordinance applied against it when it seeks to rezone. Def's Mem. at 7. The standard Metro applies is not the proper standard

for a declaratory action, and further, application of such standard makes no sense for equitable cases such as this one, which seek prospective injunctive relief to *prevent* a harm from occurring.

1) Metro is incorrect. HBAMT need not show actual harm under the DJA.

The DJA only requires that the person have a "real interest." *Williams v. Am. Plan Corp.*, 392 S.W.2d 920, 922 (Tenn. 1965). That means a "bona fide controversy between parties having a real interest in their rights and duties[.]" *Id.* A legal controversy exists "when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between parties with real and adverse interests." *Norma Faye Pyles Lynch Family Purpose*, 301 S.W.3d at 203 (internal citations omitted). Courts are required to answer disputes that have "matured to the point that it warrants a judicial decision[,]" but not to "entangl[e] themselves in abstract disagreements[.]" *West v. Schofield*, 468 S.W.3d 482, 490-91 (Tenn. 2015) (citations and quotations omitted).

HBAMT need not show (contrary to Metro's argument, Def's Mem. at 6-7) that the Ordinance has actually harmed them. The courts are quite clear about this: "*It is not necessary that any breach should be first committed, any right invaded, or wrong done*." *Cty. of White House v. Whitley*, 979 S.W.2d 262, 265 (Tenn. 1998) (quotation omitted) (emphasis added); *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."). "Declaratory judgments are typically sought before a completed "injury-in-fact" has occurred." *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (citation omitted). The DJA is a vehicle designed precisely so citizens should not have to run afoul of a law

before they may challenge and have their rights and status adjudicated. "[A] citizen should be allowed to prefer official adjudication to public disobedience." *Id*. at 287 (citation and quotation omitted). Hence, to show standing, "a plaintiff in a declaratory judgment action need not show a present injury," just an actual case and controversy. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837-38 (Tenn. 2008).

In support of its opposite position, Metro solely relies on *City of Memphis*, but unlike the Ordinance challenged here, the law at issue in *City of Memphis* case had not yet passed and as the Court noted, "may never become the law." *City of Memphis*, 146 S.W.3d at 538. *But see Trading Stamp Co. v. Memphis*, 47 S.W. 136, 137 (Tenn. 1898) (enjoining Memphis from passing a clearly *ultra vires* ordinance). HBAMT challenges an Ordinance that has already passed. It passed in September 2016, and it will be effective by the time this Court hears the Motion. Further, Metro does not, and cannot, deny the Ordinance is obligatory, or that it intends on enforcing it. Thus, this case is nothing like *City of Memphis* because it does not present the "hypothetical, unripe question of whether the [O]rdinance, *if passed*, would be unconstitutional." 146 S.W.3d at 539 (emphasis added). Metro's assertion that HBAMT must "present harm being suffered" to support standing is flatly incorrect. Def's Mem. at 7, Notably, Metro cannot cite to a single case where courts declined to adjudicate an enacted, effective piece of legislation as unripe.

Relying on mostly unpublished cases, Metro further argues that Tennessee has not adopted a "public rights" exception. *Id*. This is not terribly relevant because HBAMT's pre-enforcement challenge relies on harms certain to occur to its members, but Tennessee does recognize both an exception to the justiciability doctrine for issues "of great importance to the public[,]" *see State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007), and the

concept of municipal taxpayer standing to challenge the misuse of public funds. *See Badgett v. Rogers*, 222 Tenn. 374, 378, 436 S.W.2d 292, 294 (Tenn. 1968). Those doctrines do not need to be resorted to here, however, for this pre-enforcement challenge.

An early Tennessee case illustrates the proper application of the DJA to a pre-enforcement challenge. In *Erwin Billiard Parlor v. Buckner*, the owners of a billiard hall brought a challenge of a law that made it unlawful to operate pool and billiard rooms for profit in certain situations. 300 S.W. at 566. 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. They may challenge it now, as explained below.

2) HBAMT has standing to mount a pre-enforcement challenge because its claims do not rest on contingent events and its members currently faces the hardship of choosing between compliance or disobedience.

The *correct* standard allows for pre-enforcement challenges when plaintiffs are, as HBAMT currently is, certain to be affected by the challenged law. The "central question" of ripeness is whether the case involves uncertain events "that may or may not occur." *B&B Enters. of Wilson Cty. v. City of Lebanon.*, 318 S.W.3d 839, 848 (Tenn.

2010). The answer is resolved in two questions: 1) are the issues in the case appropriate for judicial resolution; and, 2) will this Court's refusal to act cause hardship to the parties? *West*, 468 S.W.3d at 490. With respect to the first prong, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. at 491 (citation and quotation omitted). With respect to the second prong, a party suffers "hardship" when he "faces a choice between immediately complying with a burdensome law or risking serious criminal and civil penalties." *Id*. at 492 (citation and quotation omitted); *compare Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (stating that "denying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other").

HBAMT presents a ripe claim under the correct standard, even if it has not yet suffered injury. The Tennessee Court of Appeals has firmly held that facial challenges that lodge a taking claim are "generally ripe the moment the challenged regulation or ordinance is passed." *Consol. Waste Sys., LLC.*, 2005 Tenn. App. LEXIS 382, at *91 (quoting *Suitum*, 520 U.S. at 736 n.10); *accord. San Remo*, 545 U.S. at 323 n.23. HBAMT challenges the face of the Ordinance. Its complaint is therefore based on facts that are certain, not merely probable, and of "sufficient immediacy and reality" as to warrant adjudication. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The Ordinance has passed. It becomes effective by the time this Motion is heard. The Ordinance will undoubtedly harm HBAMT's members as they struggle to understand its impact on their investment. The text, not the application of the text in particular cases, is what matters.

Only hardship – not the maturation of facts – would result from waiting because the text will not change. The Ordinance radically alters the economics of building in Nashville. Metro does not and cannot deny that it will apply it on the effective date (which will occur before the hearing on the instant motion), or that HBAMT's members must immediately begin complying. *See Abbot Labs.*, 387 U.S. at 153 ("where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts … must be permitted …[.]") (abrog'td by *California v. Sanders*, 430 U.S. 99, 105 (1977) on APA regulation issues not at issue here). Because there is no doubt that Metro intends on enforcing the law, a justiciable controversy exists. *See Cummings v. Beeler*, 223 S.W.2d 913, 915-16 (Tenn. 1949) (challenged statute had not yet been enforced but would be). Simply put, HBAMT is entitled to know where it stands, and the facts are sufficiently developed to find that out. Answering these questions *before* incurring the cost and uncertainty of running afoul of the Ordinance is precisely why the DJA exists.

Metro poses a series of hypothetical questions in support of its argument, Def's Mem. at 8, ignoring both the standard for declaratory judgments but also the fact that these questions are answered in the Complaint, which must be taken as true for purposes of this Motion. "Is there an actual Home Builders Association member who wants to build rental units during that time?" *Id*. Yes, "HBAMT's 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," Compl. at 9, ¶ 38, just as they have done in the past. *Id*. at ¶ 39. "If so, will that member's project require a rezoning?" Def's Mem. at 8. Yes, as addressed in the above statement. Furthermore,

HBAMT intends to offer proof that Metro affirmatively took steps to take away existing bonuses specifically so homebuilders must request a rezone. "And will that project be for five or more units?" *Id*. Yes, again as addressed in the above statement. "Will there be a lack of funding from Metro in the grant program to reimburse the rent that is under market rate." This question suffers from two flaws. First, it assumes that the Ordinance requires "dollar for dollar" compensation; it does not, as shown above. Second, this does not go to whether HBAMT has standing. If Metro was providing full compensation it would, at most, go to the merit of one claim in the Complaint. These irrelevant questions are answered.

One final point: a requirement that the party actually suffer injury before bringing a matter to Chancery would mean that prospective injunctions never issue because this Court would always lack standing. As will be argued in more detail below, the issuance of injunctions to prospectively stop a party from injuring the property of another lies at the very heart of a chancery court's historic, equitable function. The power to grant injunctions has been reposed in Chancery "for centuries." *Memphis Bonding Co., Inc. v. Criminal Court of Tenn. 30th Dist.*, 490 S.W.3d 458, 464 (Tenn. Ct. App. 2015). Actual injury is not a requirement for standing in this Court.

C. As Chancery Courts have for centuries, this Court can issue injunctions to bar enforcement of an ultra vires municipal ordinance, as well as declarations on its validity.

Metro argues that HBAMT lacks a cause of action to challenge the lawfulness of its Ordinance as preempted by, and/or exceeding the authority delegated to it, by the

Tennessee legislature.[7] Def's Mem. at 8-9. This is incorrect for two reasons: 1) no cause of action is necessary to prospectively enjoin Metro from acting illegally; and, 2) the DJA squarely provides for a cause of action to challenge the validity of a municipal ordinance. Tennessee courts have allowed private plaintiffs to challenge local ordinances as violating state law.

1) Metro only has the powers delegated to it by the state.

To provide some context, the issue here concerns the interplay between state and local law. HBAMT's second and third claim assert that state law preempted Metro's mandatory approach for rental (but not for-sale) units, and never delegated the power to approach housing of any kind in this manner in the first place. Compl. at 12-15. Metro's Ordinance must fall within powers delegated to it by the state because the police power inherently belongs to the state, passing to a locality only when and as provided by an act of the General Assembly. *State ex rel. Lightman v. Nashville*, 60 S.W.2d 161 (Tenn. 1933); *SNPCO, Inc. v. City of Jefferson City,* 363 S.W.3d 467, 472 (Tenn. 2012). Localities then derive their authority only when they have been granted it. *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 711 (Tenn. 2001). A consolidated government like Metro is no less beholden to the state for its authority. *Haines v. Metro. Gov't of Davidson Cty.*, 32 F. Supp. 2d 991, 994 (M.D. Tenn. 1998) (citing *Barnes v. City of Dayton*, 392 S.W.2d 813, 817 (Tenn. 1965)). Municipal enactments that lack statutory authority are "*ultra vires* and void or voidable." *Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988). This holds true with land use. "Local governments lack inherent power to control the use of land within their boundaries."

[7] Although not stated, Metro's argument could not pertain to claim one, the taking claim. As a federal constitutional right, the Fifth Amendment violation may be asserted via 42 U.S.C. § 1983. This Court has jurisdiction to hear 1983 actions. *Martinez v. California*, 444 U.S. 277 (1980).

Family Golf of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cty., 964 S.W.2d 254, 257 (Tenn. 1997). Local governments "cannot effectively nullify state law on the same subject by enacting ordinances that ignore applicable state laws …[.]" *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 426 (Tenn. 2013).

2) This Equitable Court may enjoin future enforcement of an illegal ordinance as part of its inherent power to issue injunctions and prevent injury to property.

Metro's argument in this case is that, regardless of how egregiously it may have run afoul of Tennessee's carefully constructed constitutional structure, HBAMT as a private party cannot challenge the Ordinance absent explicit legislative enactment of a cause of action. Def's Mem. at 9-10. But this is a suit in equity so this Court has inherent authority to both enjoin Metro from enforcing an *ultra vires* Ordinance, and to protect private property.

Chancery courts assumed all of the inherent powers "rightfully incident to a court of equity." Tenn. Code Ann. § 16-11-101 (LexisNexis 2017); *J.S. Kelly & Co. v. Conner*, 123 S.W. 622, 627 (Tenn. 1909). The inherent powers of a chancery court include, among other things, all actions where an injunction is a substantial part of the relief, and actions to prevent illegally damaging a person's property. William H. Inman, *Gibson's Suits in Chancery* § 4 (7th ed. 1988). The historic purpose of Chancery is "to prevent [] the violation of the rights of property." *Id*. Thus, this Court can lay "its hand upon the would-be violator, and command[] him to … refrain from doing the wrong he was threatening," *id*. § 573, at 655, by issuing an injunction to prevent illegal actions from occurring. *See also* Tenn. Code Ann. §§ 16-11-101, 29-1-101 (LexisNexis 2017).

That means, at the very least, this Court has jurisdiction to enjoin Metro from enforcing an illegal ordinance even if it cannot do anything else. An Ordinance enacted without proper state authority is illegal. *See Baird*, 756 S.W.2d at 241. Injunctions are appropriate to halt enforcement of illegal or unconstitutional municipal actions. *See Barnes v. Ingram*, 397 S.W.2d 821, 824 (Tenn. 1965) ("[E]quity will enjoin a municipal officer from doing irreparable harm to someone by doing some act not authorized by the Constitution or the laws of this State.") (quotation omitted); 18 McQuillin Mun. Corp. § 52:24 (3d ed.) (passage of ordinances are legislative acts that a court will ordinarily not enjoin "unless it is beyond the scope of the powers of the municipality"). "[W]hen there is no legislative authority or power, injunction will lie. A municipal corporation has no discretion to do any act which is clearly illegal and beyond its powers." *Trading Stamp Co.*, 47 S.W. at 137; *see State Bd. of Med. Exam'rs v. Friedman*, 263 S.W. 75, 79 (Tenn. 1923) ("Where the proceedings are void, not merely irregular, injunction will lie, as one or the other may be appropriate to the relief sought."). *Trading Stamp Co*., in fact, involved an injunction over an illegal city law that had *not yet even passed*. No separate cause of action is required to enjoin Metro from acting illegally, *c.f. Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law."), because what HBAMT seeks, in part, is to keep an illegal action from happening — relief equitable courts such as this one have been granting since before there was a state called Tennessee.

3) <u>HBAMT is entitled to obtain a declaration under the DJA because the Ordinance affects its rights</u>.

The second problem with Metro's argument is that the DJA expressly provides:

> any person … whose rights, status, or other legal relations are affected by a statute, *municipal ordinance*, contract, or franchise, may have determined any question of constriction or *validity* arising under the instrument, statute, *ordinance*, contract, or franchise *and obtain a declaration of rights, status or other legal relations thereunder*.

Tenn. Code Ann. § 29-14-103 (LexisNexis 2017) (emphasis added). Furthermore, HBAMT is entitled to a liberal administration under the DJA, Tenn. Code. Ann. § 29-14-113 (LexisNexis 2017), "so as to make it of real service to the people and to the profession." *Hodges v. Hamblen Cty.*, 277 S.W. 901, 902 (Tenn. 1925). The DJA squarely gives HBAMT the authority to question the validity of an ordinance, under its very lenient terms.

The courts recognize the DJA as the correct vehicle for challenging whether a municipality exceeded its authority in enacting zoning ordinances:

> It is our opinion that an action for declaratory judgment, as provided by T.C.A. §§ 29-14-101 – 29-14-113 … is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of a county, city or other municipal legislative authority enacting or amending zoning legislation.

Fallin v. Knox Cty. Bd. of Comm'rs, 656 S.W.2d 338, 342 (Tenn. 1983); *accord Steppach v. Thomas*, 346 S.W.3d 488, 498 (Tenn. Ct. App. 2011). To Metro's point that HBAMT has no ability to challenge the validity of its Ordinance, Def's Mem. at 8: "It is well settled that a municipal ordinance may be declared void when 'not passed regularly or according to the forms of law.'" *Brumley v. Greenville*, 274 S.W.2d 12, 14 (Tenn. 1954) (citing cases). The Supreme Court affirmed that "[t]he Tennessee Declaratory Judgment Act is just such another general law conferring the power to challenge the validity and

construction of statutes and municipal ordinances." *State ex rel. Earhart*, 970 S.W.2d 948, 952-53 (Tenn. 1998). If HBAMT sought to enjoin the enforcement of a state *criminal* statute and it did not involve property, the answer might be different because this Court lacks subject matter jurisdiction over criminal law. *See Clinton Books, Inc. v. Cty. of Memphis*, 197 S.W.3d 749, 753-54 (Tenn. 2006). Dismissal of a suit contesting the validity of a civil, municipal ordinance, however, and one that profoundly affects the property rights of HBAMT's members would be erroneous. *See Holdredge v. Cleveland*, 402 S.W.2d 709, 714 (Tenn. 1966) (finding that a challenge to the validity of a zoning ordinance challenged as void "may be tested under our Declaratory Judgments Act …[.]". … We think the Chancellor was in error in holding to the contrary.").

The Tennessee Supreme Court, in *State ex rel. Lightman v. City of Nashville*, 60 S.W.2d 161, 162 (Tenn. 1932), countenanced the bringing of a private party suit challenging the validity of a municipal law interfering with the private party's property rights. The landowner challenged Nashville's zoning authority to deny him building permits needed to erect a "business house" on his property. This case was brought not even under the DJA, but as a simple relator action. *Id*. at 161. Sustaining the action because Nashville's "Council had no authority to enact a permanent zoning ordinance without meeting the requirements," *id*. at 63, of subsequent private acts, the Court explained, using language directly applicable to the case presented here:

> The power to restrain by local police regulation the property owner's right to pursue plans for buildings and repairs depends upon valid municipal ordinances, authorized by an empowering statute. For the police power belongs to the State, and passes to municipalities and local governing bodies only when and as conveyed by legislative enactment. 6 R.C.L., p. 240, sec. 229; 19 R.C.L., p. 800, sec. 108, *Farmer v. Nashville*, 127 Tenn. 509, 156 S.W. 189; *Nashville v. Link*, 12 Lea 498; *Long v. Taxing District*, 7 Lea 134; *Raleigh v. Daugherty*, 3 Lea 11.

> When the delegation of a police power is relied on by the municipality to support measures that curtail or impair the rights of ownership and use of private property, the organic rights to acquire, possess, and enjoy the use of property, and the guarantees of due process of law and equal protection of the laws assured to individuals must be regarded. There must be a valid statute delegating the power, and in determining whether the power was delegated and subsequently exercised by a valid ordinance or regulation the courts have always applied familiar rules of statutory construction.

*Id.*at 162. In other words, it was incumbent on *Nashville* to find state authorization for its zoning law that impacted its citizen's property rights, not the *citizen* to find state authorization to question Nashville's illegal zoning law. What Metro attempts here is an inversion of that standard, but it produces no legal support for flipping the onus as well as the constitutional order.

Many examples exist of private parties challenging the validity of municipal ordinances under the DJA. *See, e.g., Se. Greyhound Lines v. City of Knoxville*, 184 S.W.2d 4, 8 (Tenn. 1944) (construing injunctive suit challenging ordinance municipal tax assessment as invalid "as a bill seeking a declaratory judgment upon the validity of [the] ordinance"); *McHugh v. Mayor & Alderman of Morristown*, 208 S.W.2d 1021, 1022 (Tenn. 1948) (finding that while chancellor lacked jurisdiction to enjoin enforcement of criminal ordinance prohibiting storage of beer, "case though presents a proper case for a declaratory judgment"); *Witt v. McCanless*, 292 S.W.2d 392, 393 (Tenn. 1956) (allowing "residents, citizens and taxpayers and property owners" to file "suit… under the Declaratory Judgment Law for the purpose of having declared unconstitutional and invalid a City ordinance"); *see also Kirk v. Olgiati*, 308 S.W.2d 471, 473 (Tenn. 1957) (challenge to Chattanooga's Blue Law); *S. Ry. Co. v. City of Knoxville*, 442 S.W.2d 619 (Tenn. 1968) (challenge to ordinance requiring construction of automatic railroad

signals); *Mobile Home City of Chattanooga v. Hamilton Cty.*, 552 S.W.2d 86 (Tenn. 1977) (challenge to zoning regulation of mobile homes); *Fallin*, 656 S.W.2d at 342 (DJA proper remedy to challenge validity of zoning regulation); *Robertson Cty. v. Browning-Ferris Indus. of Tenn., Inc.*, 799 S.W.2d 662, 664 (Tenn. Ct. App. 1990) (zoning ordinance excluding landfills invalid under DJA); *ex rel. Earhart*, 970 S.W.2d at 952-54 (standing under DJA to challenge annexation ordinances as void); *Edwards v. Allen*, 216 S.W.3d 278 (Tenn. 2007) (improper zoning amendment regarding gun range). Courts have long reviewed claims that municipal laws are not authorized, or in conflict with state law, when filed by private parties, even in mere common law or relator suits. *See, e.g., Long v. Taxing Dist. Of Shelby Cty.*, 75 Tenn. 134 (1881); *Nashville v. Linck*, 80 Tenn. 499, (1883); *Marshall & Bruce Co. v. City of Nashville*, 71 S.W. 815, 816 (Tenn. 1902) (Nashville ordinance requiring union label on stationary violates charter); *Farmer v. Nashville*, 156 S.W. 189, 190 (Tenn. 1913) (Nashville lacked statutory authority to enact bylaw cutting off water to resident because of delinquent owner); *Mckelley v. City of Murfreesboro*, 36 S.W.2d 99 (Tenn. 1931) (individual citizen challenging validity of municipal zoning ordinance); *ex rel. Lightman*, 60 S.W.2d 161 (individual relator successfully challenged Nashville zoning ordinance); *Brumley*, 274 S.W.2d 12 (hotel owner successfully voided municipal ordinance not passed in accordance with the law); *Smith Amusement Co. v. Chattanooga*, 330 S.W.2d 320 (Tenn. 1959) (Chattanooga law banning pinball machines in derogation of state law); *Bartlett v. Hoover*, 571 S.W.2d 291 (Tenn. 1978) (same). Nowhere is there support for the notion that when localities, highly circumscribed in power by the Tennessee Constitution in the first place, violate the state's

most rudimentary constitutional structure, its affected citizens are without personal redress.

Tenn. Code Ann. § 1-3-119 does not support Metro. *See* Def's Mem. at 9. It forbids courts from creating or conferring a private cause of action in the absence of express language "except as otherwise provided in this section." Tenn. Code Ann. § 1-3-119(b) (LexisNexis 2017). This section otherwise provides that it does not impair causes of actions recognized before July 1, 2012, unless later amended to expressly bar a private cause of action. Tenn. Code Ann. § 1-3-119(c)(1) (LexisNexis 2017). Again, this Court assumes the inherent, historic powers and jurisdiction "rightfully incident to a court of equity." Tenn. Code Ann. § 16-11-101 (LexisNexis 2017). That gives this Court jurisdiction over matters tracing all the way back to England. *J.S. Kelly & Co.*, 123 S.W. at 627. If this power includes anything above all else, it includes "protection of rights of property." *In re Sawyer*, 124 U.S. 200, 210 (1888). The DJA also falls under this exception. It has been in existence since at least 1923, *see Nashville, C. & St. Ry. Co.*, 288 U.S. 249, 258 (1933), predating July 1, 2012 by a considerable margin. The case of *Hardy v. Tournament Players Club at Sw. Inc.*, 513 S.W.3d 427, 431 (Tenn. 2017) is thus distinguishable on the basic ground that the plaintiff in that matter sought monetary, not declaratory, relief and could not point to any equitable cause or statutory authorization for a private cause of action, like the DJA.

The legislative enactment of Tenn. Code Ann. § 66-35-102 prohibiting affordable housing mandates was cumulative of remedies; it did not override existing ones. As long held by the Supreme Court, a subsequently created statutory remedy is cumulative – not exclusive – when a common law right previously existed, unless specifically stated

otherwise. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992). As proven above, abundant authority demonstrates that the courts have long recognized the ability of citizens to challenge *ultra vires* municipal enactments. Thus, unless Tenn. Code Ann. § 66-35-102 expressly took away a cause of action, it is cumulative and not exclusive and should not be interpreted as providing (or not providing) the only remedy for municipalities that abuse their authority to address affordable housing.

V.
Conclusion

The Motion should be denied.

Dated: Respectfully submitted,

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