IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Home Builders Association of Middle Tennessee, Plaintiff, v. Metropolitan Government of Nashville & Davidson County, Defendant.	)))))))	No. 17-386-II

METRO'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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

I. DISTINGUISHING AMONGST THE VARIOUS TYPES OF TAKINGS CLAIMS.

A. 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).

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).
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.*").

B. Takings for "just compensation" are not ripe until compensation is sought.

For takings claims (physical or regulatory) where just compensation is required, the claim is not ripe until a two-pronged test is met: (1) the final decision is made by an administrative agency applying the regulations to the property and (2) the plaintiff has sought compensation through the procedures that the state has provided for doing so. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190-2 (1985); *see Phillips v. Montgomery Cty.*[1], 442 S.W.3d 233 (Tenn. 2014).

[1] The takings clause of the Tennessee Constitution, Art. I, § 21 encompasses regulatory takings to the same extent as the takings clause of the Fifth Amendment to the U.S. Constitution. *Phillips* at 233.

Williamson County's first requirement (administrative final decision) may not apply to *facial* "just compensation" challenges – but its second requirement does (plaintiff must seek compensation through state procedures). *Wilkins v. Daniels*, 744 F.3d 409, 417-418 (6th Cir. 2014) ("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.").

C. "Public use" challenges do not require that compensation be sought first.

"Public use" challenges, alleging that the taking is being taken for private purposes, are not subject to *Williamson County*'s requirements. *Id.* at 418 nt. 6; *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.")

D. Plaintiff is not making a public use challenge and, therefore, must exhaust state inverse condemnation procedures.

Plaintiff is not making a public use challenge (it does not allege that property is being taken for a non-public purpose). Instead, Plaintiff brings a "just compensation"-type claim[2] and expressly states that the property that allegedly will be taken is "for a public purpose":

[2] The Complaint seems to be making a *Nollan* and *Dolan*-type unconstitutional exactions takings claims. (Complaint, ¶¶ 46-49).

> 5. The Ordinance violates the Tennessee and United States Constitutions because it is an unconstitutional condition. Through the Ordinance, Metro conditions the approval of development entitlements needed to build developments over five units on a private property owner's surrender of its constitutional right to seek market rate value on their rental or for-sale properties. In doing so, Metro takes private property for a public purpose without providing just compensation.

(Complaint, ¶5, emphasis added).

A plaintiff must seek just compensation[3] for such a claim. (See Section A, above); *also 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.").

E. Courts should not pass on constitutional questions unless unavoidable.

While not directly bearing on takings law, courts must decline to opine on constitutional issues unless absolutely necessary. *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) ("[W]e have often stressed" that it is "importan[t] [to] avoid[d] the premature adjudication of constitutional questions," *Clinton v. Jones,* 520 U.S. 681, 690, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), and that "we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable...."); *Lamar Advertising of TN v. Chancellor City of Knoxville*, No. 03A01-9609-CH-00294, 1997 WL 170304 (Tenn. Ct. App. April

[3] There is also an entirely different procedural posture that may allow takings issues to be raised – as a defense in an administrative proceeding. This posture was recognized in *Horne v. Dept. of Agriculture*, 133 S.Ct. 2053 (2013).

11, 1997) ("[I]t is well established that a court will not pass on the issue of the constitutionality of a statute unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation. *West v. Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963). Courts should avoid dealing with constitutional questions abstractly or issuing advisory opinions. *State v. King*, 635 S.W.2d 113 (Tenn. 1982).").

II. THE CASE LAW THAT PLAINTIFF RELIES UPON IS OBSOLETE AND CONFLATED.

A. The tests articulated in *Yee* and *San Remo* are no longer good law.

In arguing that its facial challenge was ripe the moment the ordinance at issue was passed, Plaintiff 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 (Response, p. 8-9). But this line of case law is now 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

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 under the substantially advances theory:

> *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.

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 (6th Cir. 2014).

B. Plaintiff conflates the first and second requirement of Williamson County.

Plaintiff conflates the first and second requirement of *Williamson County* in its reliance on *Suitum* and *Lucas*. *Suitum v. Taho Reg'l Planning Agency,* 520 U.S. 725 (1997), *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992). For example, Plaintiff cites to this quote from *Lucas*:

> "Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question." (Response, p. 8).

Plaintiff cites this quote about the *first* requirement of *Williamson County* (final decision) for the proposition that Plaintiff doesn't need to meet the *second* requirement (seeking just compensation).

The question of whether the plaintiffs had sought just compensation before bringing suit was not an issue in either of those cases. *Lucas* was not a facial challenge – and it complied with the second Williamson County prong, by seeking compensation for the beach property:

> Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives.

Lucas at 1009 (emphasis added).

Similarly, *Suitum* complied with prong 2 of the Williamson County requirements by litigating the amount of compensation that would be provided. Id. at 743. ("She does not challenge the validity of the agency's regulations; her litigating position assumes that the agency may validly bar her land

development just as all agree it has actually done, and her only challenge to the TDR's raises a question about their value, not about the lawfulness of issuing them."). *Suitum* also relies on *Agins v. City of Tiburon* and its obsolete progeny (see discussion of *Yee*, *San Remo*, and *Lingle*, above in Section A).

Wilkins (and *Alto Eldorado*) make it clear that *Williamson County* consists of two are separate and distinct ripeness requirements. Plaintiff mistakenly conflates them and cites public use challenges as if they apply to just compensation cases. It also cites cases about the first prong of the *Williamson County* requirements as if they obviate the second requirement. These machinations cannot cure the problems with this case, which are that the type of challenge that Plaintiff seeks to bring is no longer available (a facial challenge seeking equitable relief); and the type of challenges that are available cannot be brought without complying with *Williamson County*.

C. *Consolidated Waste* stated that just compensation must be sought in state court before invalidating an ordinance based on takings.

Plaintiff contends that *Consolidated Waste* permits a facial challenge without meeting the second *Williamson County* requirement (Response, p. 9-11). *Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty.*, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005). Plaintiff also contends that a facial challenge is ripe when invalidation of an ordinance in state court is its goal. (Response, p. 11-13). 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* obviously involved a takings claim brought in state court. And the Court 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 involved 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 declined to extend these requirements to the plaintiff's substantive due process and equal protection challenges. *Id.* at 30.

Plaintiff also contends that the *Williamson County* requirements only apply in federal court, not state court, based on *STS/BAC Joint Venture v. City of Mt. Juliet,* 2004 WL 2752809 (Tenn. Ct. App. Dec. 1, 2004). In *STS/BAC Joint Venture,* the developer sought damages for a temporary taking, and the Court held that a state inverse condemnation proceeding should have been brought. This is the same as the requirement in federal court. *Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014). Because Plaintiff has not met the *Williamson County* requirements, its Complaint fails to state a claim.

III. PLAINTIFF HAS NOT ESTABLISHED STANDING TO BRING THIS LAWSUIT.

"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 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).

In other words, "[i]n order to invoke action by a court under the declaratory judgment act, the person seeking a declaratory judgment must allege facts which show he has a real, as contrasted with a theoretical, interest in the question to be decided and that he is seeking to vindicate an existing right under presently existing facts." *Burkett v. Ashley,* 535 S.W.2d 332, 333 (Tenn. 1976) (emphasis added).

Plaintiff bases its standing on the factual allegations in Paragraphs 38 and 39 of the Complaint, which state:

> 38. 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.
>
> 39. HBAMT's members have asked for additional development entitlements from Metro through amendments to the zoning map in the past.

Complaint, ¶ 38, 39. Plaintiff's Complaint does not allege an actual case and controversy based on "presently existing facts" as required by Tennessee law. Rather, Plaintiff has made conclusory averments related to a theoretical injury that it believes will occur in the future without any supporting factual basis.

Plaintiff's task is even more difficult here because, to demonstrate standing, an 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). The conclusory allegations made by Plaintiff are not sufficient for an organizational plaintiff – the effect on members must be shown with specificity:

> 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. Moreover, neither organization has asserted that any member either bid on a contract but was denied based on their sexual orientation or gender identification, or that any member would have bid on a Metro contract but for the repeal of the 2011 Metro Code amendment. Neither organization has established or alleged that a discriminatory policy or the repeal of a previous anti-discrimination protection prevented a member from bidding on a contract on an equal basis.

Id. at *16 (emphasis added). Because the elements of standing for an organizational plaintiff have not been met, this case must be dismissed.

IV. PLAINTIFF HAS NOT ESTABLISHED A PRIVATE RIGHT OF ACTION TO ENFORCE TENN. CODE ANN. § 66-35-102.

Plaintiff's Complaint contains two claims related to Metro's authority[4] 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." Regardless of how the claims are worded, at their core, both are attempts to enforce Plaintiff's interpretation of § 66-35-102 to invalidate Metro's ordinance. Plaintiff has the burden of establishing its private right to bring such a lawsuit, and has not done so.

Plaintiff points to the Chancery Court's general authority to issue injunctions and statutory authority pursuant to the Tennessee Declaratory Judgment Act to grant declaratory relief. But

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[4] Plaintiff questions Metro's authority to make efforts toward providing affordable housing in its community (Response, p. 20). Metro is authorized to provide affordable housing:

- The county legislative body is authorized to appropriate funds for affordable housing or workforce housing. TENN. CODE ANN. § 5-9-113. (Metropolitan governments have the powers of cities and counties. TENN. CODE ANN. § 7-2-108(a)).

- Any county having a metropolitan form of government may establish a housing trust fund... the funds provided for by this chapter shall be used to provide low income persons with safe and affordable housing. TENN. CODE ANN. § 7-8-101.

- In fact, the state law at issue in this lawsuit acknowledges the authority of a local government to create an incentive based program:

  "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." TENN. CODE ANN. § 66-35-102(c).

In Tennessee, a landowner does not have a legal right to rezone his or her land, or to otherwise place additional units on the parcel that have not already been approved by the local government. To do so, a landowner must take specific steps to obtain additional building rights on that parcel. *See MC Properties, Inc. v. City of Chattanooga*, 994 S.W.2d 132, 135–36 (Tenn. Ct. App. 1999) ("the Council has the power to zone property in its discretion, so long as it is rationally related to the welfare of the people... Waiting to rezone property until the road system can handle the additional traffic, is in the power of the legislative body, and if the Council's decision diminishes the value of property, it is in their legislative power to do so...). Accordingly, obtaining these additional building rights serves as an incentive for the landowner to include of affordable housing in the project. TENN. CODE ANN. § 66-35-102(c).

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).

The Court of Appeals has recently restated the rule that even when a plaintiff requests only declaratory and/or injunctive relief, a private right of action is required to support the claim:

> On appeal, Goodman does not analyze these factors or legal principles. Instead, he insists that "[t]here is no 'private right of action' issue in this case" to preclude the relief requested. Goodman contends that the question of whether a private right of action exists "relates solely to the issue of monetary damages." As such, Goodman claims that the trial court erred in dismissing his claims for declaratory judgment and injunctive relief (regarding the Metro Charter provision) due to the court's finding regarding the absence of a private right of action. Goodman asserts that "there is no need" for a private right of action and that the Tennessee Declaratory Judgment Act provides all the authority that is required for him to obtain the declaratory relief he sought. We disagree.
>
> Tennessee appellate courts have considered whether a private right of action existed in a number of cases seeking a declaratory judgment and/or injunctive relief...We reject Goodman's insistence that the Declaratory Judgment Act provides an independent basis for him to allege a violation of the Metro Charter regardless of any issue regarding a private right of action. " 'A litigant's request for declaratory relief does not alter a suit's underlying nature. Declaratory judgment actions are subject to the same limitations inherent in the underlying cause of action from which the controversy arose.' " *Carter v. Slatery*, No. M2015–00554–COA–R3–CV, 2016 WL 1268110, at *6 (Tenn. Ct. App. Feb. 19, 2016), *perm. app. denied* (Tenn. Aug. 18, 2016), *cert. denied*137 S. Ct. 669 (2017) (quoting 26 C.J.S. *Declaratory Judgments* § 124).[7]
>
> In sum, we discern no merit in Goodman's assertion that the trial court erred in requiring a "private right of action" to support his claim for declaratory and injunctive relief regarding the Metro Charter. Because this issue is dispositive, Goodman's challenge to the trial court's alternative holding regarding the meaning of the Charter provision is pretermitted...
>
> Ftnt 7: As aptly noted by the Sixth Circuit, the absence of a private right of action "stops [the] declaratory judgment action in its tracks." *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 907 (6th Cir. 2014). "No private right of action means no underlying lawsuit" and "no declaratory relief." *Id.*

Tennessee Firearms Ass'n v. Metro. Gov't of Nashville & Davidson Cty., No. M2016-01782-COA-R3-CV, 2017 WL 2590209, at *8–10 (Tenn. Ct. App. June 15, 2017) (emphasis added).

Because the Legislature has provided no private right of action under TENN. CODE ANN. § 66-35-102, the remedy of a declaration is not available in this case.

CONCLUSION

It would be improper to allow this case to go forward, where there is no standing, the claims are not ripe, state inverse condemnation procedures have not been pursued whatsoever, and where the Legislature has provided no private right of action under Tenn. Code Ann. § 66-35-102. Even for a facial challenge, just compensation must be sought, first, as a prerequisite for bringing such a challenge. In this case, none has been sought – and there is no parcel being affected and no way of measuring any allegedly adverse effect stemming somehow from the ordinance. Addressing this case would involve passing on a constitutional issue that is avoidable. Because the Complaint fails to state a claim, it must be dismissed.

Respectfully submitted,

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Certificate of Service

A copy of this document has been mailed and emailed to Braden Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219, on this 14th day of August, 2017.

Lora fox

Lora Barkenbus Fox