

COPY

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

MRB DEVELOPERS,)
APRIL KHOURY, HOME)
BUILDERS ASSOCIATION OF)
MIDDLE TENNESSEE, OLD)
SOUTH CONSTRUCTION LLC,)
ASPEN CONSTRUCTION, AND)
GREEN EGGS & HOMES,)

CASE No. 19-534-1

) JURY REQUESTED

PLAINTIFFS,)

v.)

THE METROPOLITAN)
GOVERNMENT OF NASHVILLE)
AND DAVIDSON COUNTY,)

DEFENDANT.)

FILED
2019 APR 22 PM 3:26
CLERK OF COURT
DAVIDSON COUNTY CL
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COMPLAINT

I. INTRODUCTION

Plaintiffs seek *only* prospective relief and restitution to remedy an ongoing violation of their constitutional rights. This case is about whether local governments may use their permitting authority to force private citizens to bear the cost of constructing public works (like sidewalks, curbs, and gutters) on property that is not their own or whether this practice attaches an unconstitutional condition on the

surrender of a fundamental right. Plaintiffs maintain that Nashville's sidewalk law, which imposes this requirement, is an unconstitutional condition circumventing their constitutional right to not have property taken except upon just compensation. Whether building sidewalks themselves, or paying the city a fee in lieu of constructing sidewalks, the sidewalk law forces property owner to surrender the right to receive compensation for a taking in exchange for a residential building permit. Even to obtain a permit to renovate a home worth twenty-five percent (25%) of the home's value, the property owner must agree to surrender rights-of-way on the property to Metro without any compensation. Metro's sidewalk law is the embodiment of what the Supreme Court has characterized as "gimmickry, which converted a valid regulation of land use into an 'out and out plan of extortion.'" *Dolan v. City of Tigard*, 512 U.S. 372, 385 (1994) (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

Plaintiffs cause no direct harm by obtaining building permits that is mitigated by requiring the construction of sidewalks as a permit condition. The city's enforcement is so unrelated to any potential impact of building a residential home under existing zoning that it even forces property owners to destroy perfectly functional sidewalks, and then rebuild them as non-conforming sidewalks ("zig-zag sidewalks"), or to build sidewalks that begin and end on the property owners' yard ("sidewalks-to-nowhere").



(Zigzag - Morrow Road)



(Sidewalk-to-nowhere - 59th Avenue)

1. This action is brought pursuant to Tenn. Code Ann. § 1-3-121 and 42 U.S.C. § 1983 arising from the Metropolitan Government of Nashville and Davidson County (“Metro’s”), enforcement of its sidewalk law found at Metro. Code § 17.20.120 (“the sidewalk law”).

2. Plaintiffs seek a declaratory judgment, permanent injunction, removal of any easements, rights-of-way, and restitution of the fees Metro illegally exacted.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to TENN. CONST. ART. I, § 21, Tenn. Code Ann. §§ 1-3-121, 16-11-101 *et seq.*, 29-14-102, and 29-14-103.

4. This Court also has jurisdiction under the Fifth and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983.

5. As the county where the causes of action giving rise to the Complaint arose and where Defendant resides, venue is proper in Davidson County under Tenn. Code Ann. § 20-4-101(a).

6. This Court has authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief with the force and effect of a final decree pursuant to Tenn. Code Ann. §§ 29-1-101 *et seq.*, 29-14-102, 29-14-103; 42 U.S.C. § 1983; and Tenn. R. Civ. P. 65 *et seq.*

7. This Court has authority to order restitution under Tenn. Code Ann. § 16-11-101, 42 U.S.C. § 1983, and this Court's inherent equitable authority.

8. Also, under Tenn. R. Civ. P. 65.04(7), this Court may consolidate an injunction hearing and advance it with a trial on the merits in order to promote a speedy and efficient resolution.

III. PARTIES

9. Plaintiffs are all property owners in Nashville who have complied and will be forced to comply with the sidewalk law. Plaintiffs include property owners who have unsuccessfully challenged the sidewalk condition in administrative proceedings, paid the in-lieu fee, constructed sidewalks, dedicated rights-of-way, refrained from developing their property because of the sidewalk law, and/or who will be forced to comply with the sidewalk law in the future.

10. April Khoury is an individual who is building a single-family residence at 6227 Robin Hill Road, Nashville, TN for her family in the West Meade neighborhood of Nashville. After April unsuccessfully contested the levelling of the sidewalk condition, she paid an in-lieu fee

under protest on September 18, 2018 in order to obtain a Metro-issued building permit for a single-family residence on a lot that already had an existing home she demolished to make way for the new residence.

11. Old South Construction LLC (“Old South”) is a limited liability general contractor company formed and existing pursuant to the laws of the State of Tennessee that constructs and remodels homes and light commercial properties in Metro Nashville and elsewhere. Old South unsuccessfully contested the curb and gutter condition for a property it developed at 4701 Dakota Avenue. Old South has paid the in-lieu fee as a condition of obtaining a Metro-issued building permit and will need more Metro-issued permits in the future to maintain its business.

12. Aspen Construction LLC (“Aspen”) is a limited liability general contractor company formed and existing pursuant to the laws of the State of Tennessee. Aspen’s main source of business is the construction of new, single-family homes, both custom and speculative. Aspen unsuccessfully contested the leveling of the sidewalk condition for a property it developed at 1001 9th Avenue, 917 and 919 South Street. Aspen has paid the in-lieu fee, dedicated rights-of-way, and/or constructed sidewalks, curbs, and gutters as conditions of obtaining Metro-issued building permits. Aspen will need more Metro-issued permits in the future to maintain its business, and intends to apply for them.

13. Rhonda Freeman is the Chief Financial Officer of MRB Developers LLC (“MRB”). MRB is a small, family-owned, limited liability general contractor company that constructs and remodels homes and

commercial buildings in Nashville and the surrounding area. MRB was formed and exists pursuant to the laws of the State of Tennessee. MRB has dedicated easements for sidewalks, paid fees in-lieu of constructing sidewalks and has constructed sidewalks, curbs and gutters as a condition of obtaining Metro-issued building permits. MRB presently is developing properties that require compliance with the sidewalk law. MRB will need, and plans to need, more Metro-issued residential building permits in the future to maintain its business.

14. Home Builders Association of Middle Tennessee (“HBAMT”) is a non-profit trade group dedicated to the promotion and protection of the home building industry in the Middle Tennessee area, including Nashville and Davidson County. HBAMT’s members have applied and will in the future apply for permits to construct new homes and remodel existing homes in areas that have and/or will require compliance with the sidewalk law. Those members include Old South and Aspen Construction. HBAMT’s members have complied with the sidewalk law by constructing sidewalks, curbs and gutters, and by paying the in-lieu fee. HBAMT’s members also will seek permits from Metro to improve homes with a value that exceeds twenty-five (25%) of the assessed value of all structures on the lot.

15. Green Eggs and Homes LLC (“Green Eggs”) is a developer of residential real estate primarily in the Nations’ neighborhood of Nashville. Green Eggs has paid the in-lieu fee as a condition of obtaining Metro-issued building permits. Green Eggs has not acquired new property since the implementation of the sidewalk law because

compliance makes development not economically viable. Green Eggs also refrained from constructing homes on at least one property it owns because compliance with the sidewalk law would be so costly as to render such development not economically viable. Green Eggs will need more Metro-issued permits in the future to maintain its business, and would apply for them but for the cost of complying with the sidewalk condition.

16. Plaintiffs are similarly situated because they all triggered the sidewalk law when they obtained building permits to construct single-family homes, and will trigger it again when they seek residential building permits in the future.

17. Plaintiffs are similarly situated in that they all did not need zoning changes to construct the homes.

18. Metro is a political subdivision of the State of Tennessee and a public corporation, capable of suing and being sued. Metro. Charter § 1.01.

19. Metro is a person within the meaning of Tenn. Code Ann § 29-14-101 and 42 U.S.C. § 1983.

20. At all times relevant to this Complaint, Metro acted under color of law.

IV. STATEMENT OF FACTS

Metro's Sidewalk Law

21. The sidewalk law provides that in specified areas of Nashville, a property owner must agree to construct sidewalks, curbs and gutters before Metro will issue a building permit to construct single or two-family residential homes. In some areas, Metro allows the property owner

to “contribute” a fee to Metro’s pedestrian benefit fund (“the in-lieu fee”).
See Exhibit 1.

22. Metro’s present version of the sidewalk law was enacted with BL2016-493, and is now codified as Metro. Code § 17.20.120. *See id.*

23. Under the prior version of the Code, there were no sidewalk requirements for single or two-family residential development.

24. The revised sidewalk law became effective on April 21, 2017.

25. Metro has continuously enforced the sidewalk law since its effective date.

26. Metro requires sidewalks for single or two-family construction when lots are:

- a. Within the urban zoning overlay (UZO);
- b. Within a quarter (1/4) mile of a center designated on the general plan;¹
- c. On a street in the major and collector street plan in the urban services district.

27. The Urban Zoning Overlay is an overlay district that was designed by Metro to protect the character of portions of the city that were developed in the urban core prior to the 1950s.

28. Properties on the opposite side of navigable waterways or controlled access highways from a center in the general plan are not subject to this provision.

¹ Metro has posted a copy of the NashvilleNext plan [here](https://www.nashville.gov/Government/NashvilleNext/The-NashvilleNext-Plan.aspx): <https://www.nashville.gov/Government/NashvilleNext/The-NashvilleNext-Plan.aspx> (last visited Apr. 22, 2019).

29. Metro also requires dedication of rights-of-way, if necessary, for any addition or renovation with a cost equal to or greater than twenty-five percent (25%) of the assessed value of all structures on the lot.

30. The dedication of rights-of-way and easements allows for present or future installation of a public sidewalk built to the standards of the metropolitan government.

31. Metro requires that all sidewalks be constructed according to standards approved Metro's Public Works Division.²

32. The in-lieu fee is an alternative way of complying with the sidewalk law in specified areas of the city or specified circumstances.

33. Paying the in-lieu fee is not an alternative way of complying under the following circumstances:

- a. When there is existing sidewalk in need of repair or replacement;
- b. To extend the existing sidewalk or sidewalk proposed by an abutting development;
- c. Existing sidewalk present on the same block face;
- d. Multi-family or nonresidential properties within the Urban Zoning Overlay;
- e. Multi-family or nonresidential properties along a street in the major and collector street plan.

² Metro posts the webpage with those standards here: <https://www.nashville.gov/Public-Works/Engineering-Details-and-Specifications.aspx> (last visited Apr. 22, 2019).

34. The amount of the in-lieu fee is the average linear foot sidewalk project cost, including new and repair projects, determined by July 1 of each year by the Department of Public Works, based on its review of sidewalk projects contracted for or constructed by the metropolitan government.

35. When a permit applicant pays an in-lieu fee, that fee is placed in a fund where it must be allocated within ten (10) years of receipt for spending within the same “pedestrian benefit zone” as the applicants’ property.

36. If not allocated within ten (10) years, the payment shall be refunded to the building permit applicant.

37. No administrative process exists whereby the sidewalk condition can be removed as a permit condition on constitutional grounds.

38. Any Plaintiff who appealed through available administrative processes did not succeed in the removal of the sidewalk condition altogether.

Effects on Plaintiffs

April Khoury

39. April and her family purchased a lot located at 6227 Robin Hill Road, Nashville, TN, on February 20, 2018.

40. She planned to tear down the home on the lot and build a new, single-family residence for her family.

41. April was unaware of the sidewalk law at the time of purchase.

42. 6227 Robin Hill Road is a corner lot.

43. One corner runs along Brook Hollow Road.

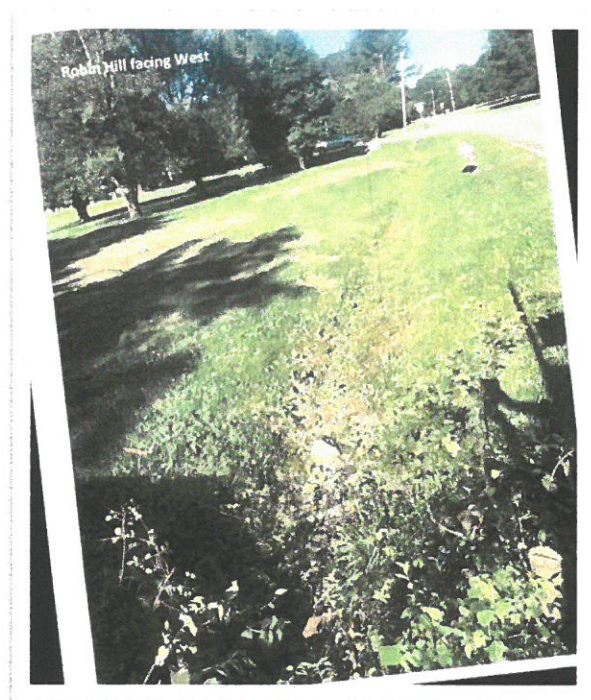
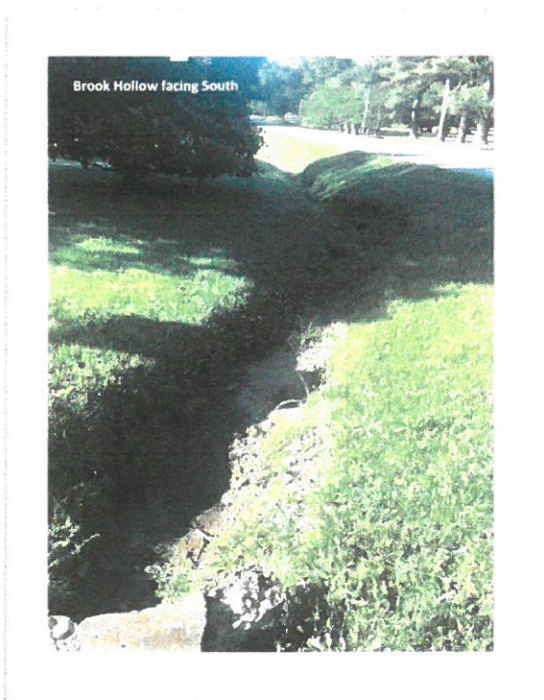
44. Brook Hollow Road is a street in the major and collector street plan in the urban services district.

45. Sidewalks were a requirement to construct a single-family residence on 6227 Robin Hill Road because the lot is within the urban services district and on a street in the major and collector street plan.

46. The lot did not have existing sidewalks.

47. No sidewalks connect to the lot.

48. The lot had a ditch for rainwater that is approximately three (3) to five (5) foot deep.



49. On April 23, 2018, April applied for a hardship variance, asking that she not be required to comply with the sidewalk law as a condition of her building permit

50. She cited as her grounds that she would have to fill in the ditches to build sidewalks.

51. Filling in the ditches would alter the drainage patterns of rainwater.

52. On June 7, 2018, April appeared in front of the Board of Zoning Appeals (“BZA”).

53. Neighbors showed up at the BZA hearing to support April’s request because the construction of sidewalks would affect water drainage in the neighborhood.

54. BZA member David Ewing said, “Councilperson came here and spoke [in support of April’s request]. She voted for it [the sidewalk law] as well as every other councilperson did. As I said to Councilman [Mike] Freeman, they’re the legislative body. We are not. They passed this law.”

55. Earlier at the BZA meeting on June 7, 2018, BZA member David Ewing said in reference to another sidewalk variance request on a corner lot arising out of Councilmember Freeman’s district:

But you know what, we’re not the legislative body. The Metro Council, as I always pointed out, passed this sidewalk bill unanimously. If there’s a fix, dear Metro council, corner lots, if that’s what you deem as not the spirit of the original bill, they can vote and amend the bill. But if not We’re getting corner lots every meeting.

56. BZA member David Ewing said, “that’s what the [in-lieu] fee is for.”

57. The BZA ordered April to pay an in-lieu fee for the frontage on Robin Hill Road.

58. On September 18, 2018 April, through her contractor, paid Metro an in-lieu fee of \$12,524.80.

59. The check denotes that the fee was paid under protest.

60. On September 20, 2018 Metro issued April's contractor building permit no. 2018059309.

61. The building permit specified that she had paid a sidewalk in-lieu fee.

62. As of this filing, April's home is currently under construction.

63. Metro has not refunded April's fee.

64. April continues to be affected because Metro has not provided restitution for the amount of the in-lieu fee.

Old South

65. Old South applied for a permit to develop a home located at 4701 Dakota Avenue.

66. Before Old South could get a permit to construct a new single-family home, Metro conditioned the permit on compliance with the sidewalk law, including the construction of curbs and gutters on Metro streets.

67. Metro required Old South to comply with the sidewalk law as a permit condition for 4701 Dakota Avenue.

68. Old South applied to the BZA for a variance on September 6, 2018, requesting not to build curbs and gutters.³

69. Old South argued at the appeal that the sidewalk law authorized construction of sidewalks, but not curbs and gutters.

70. BZA member David Ewing asked “what makes you think” that the obligation to construct curbs and gutters would not apply in this case, since the BZA had been applying it in other cases.

71. BZA member David Taylor asked where the right place was to challenge the Public Works’ standards.

72. Zoning Administrator Jon Michael said ultimately the answer was that any action was potentially subject to challenge in court.

73. BZA member David Ewing later said, “but as you know, if you were to get denied the sidewalk request from us and have to appeal to Chancery Court, you still don’t have a permit until Chancery Court were to rule in your favor.”

74. The BZA denied Old South’s request for a variance.

75. Zoning Administrator Jon Michael affirmed that the BZA had not altered the curb and gutter standards for anyone appearing in front of the BZA.

³ Metro posted a copy of the BZA hearing on Metro’s Youtube channel [here](https://www.youtube.com/watch?v=NXwuyrJ5Fs4&list=PLE64E913EE2902895&index=6):

<https://www.youtube.com/watch?v=NXwuyrJ5Fs4&list=PLE64E913EE2902895&index=6>. Old South’s appeal begins at appx. 2:30:00 (last visited on Apr. 22, 2019).

76. BZA member David Harper said he “looked forward” to seeing whether courts had a different opinion about whether the sidewalk law included a curb and gutter requirement.

77. On October 3, 2018, Old South paid the in-lieu fee of \$ 31,920.

78. On October 3, 2018, Metro issued Old South building permit no. 2018010919 to construct a single-family home at 4701 Dakota Avenue.

79. Metro has not refunded Old South’s fee.

80. Old South will build and renovate single family homes in the future that will require Metro-issued building permits.

81. Old South continues to be affected because Metro has not provided restitution for the amount of the in-lieu fee.

Aspen

82. Aspen constructed sidewalks, curbs and gutters as a condition of obtaining Metro-issued building permits at the following properties: 4107 Westlawn; 4109 Westlawn; 4111 Westlawn; and 1001 9th Avenue and 903 Archer Street.

83. On October 10, 2017, Aspen applied for a hardship variance from complying with the sidewalk law as a condition for building permits for 1001 9th Avenue and 903 Archer Street.

84. As grounds, Aspen cited that they would have to tear out a retaining wall and contiguous, functional sidewalks, and reconstruct new ones up to current specifications.

85. On November 20, 2017, the BZA entered a formal order granting the variance but requiring Aspen to follow Planning recommendations.

86. The recommendations required Aspen to build partial sidewalks to extend the existing sidewalks on Archer Street to the property line.

87. On December 11, 2017, Metro issued permit no. 2017078670 for 903 Archer Street.

88. Aspen paid in-lieu fees as a condition of obtaining Metro-issued building permits at the following properties: 4005 Nebraska; 1547 & 1549 Battlefield; 519 Acklen Park; 1102, 1104 & 1018 Kirkwood; 917 & 919 South Street; 702 & 704 Estes; 4114 & 4116 Oriole Place; 4209 & 4211 Utah.

89. Because the South Street properties were in the UZO, the in-lieu option was not available.

90. On March 19, 2018, Aspen applied for a variance to avoid building sidewalks or paying the in-lieu fee for 917 and 919 South Street.

91. As grounds, Aspen cited that the property had existing sidewalks in good repair.

92. As grounds, Aspen argued that they would have to destroy functional sidewalks and construct new ones under current standards that would disrupt "continuity along the block face."

93. Metro Planning Department recommended approval of Aspen's variance to not construct the sidewalks, but with the condition

that Aspen still contribute the in-lieu fee and dedicate a right-of-way along the property frontage to accommodate future sidewalks.

94. On May 10, 2018, the BZA heard Aspen's appeal.

95. The BZA granted a variance from the requirement to construct sidewalks, but still required Aspen to pay an in-lieu fee and dedicate a right-of-way.

96. On May 14, 2018, Aspen paid an in-lieu fee of \$9,879 for the South Street projects.

97. On May 14, 2018, Metro issued building permit nos. 2018015120 for 917 South Street and 2018015131 for 919 South Street.

98. Aspen applied for a single-family home building permit at 4121 Westlawn Drive on March 6, 2019.

99. According to Metro's sidewalk requirement mapping tool,⁴ in order to construct a single-family residence for 4121 Westlawn Drive "[s]idewalks ARE required for this project," but the in-lieu fee is an option.

100. The zoning examiner who started Aspen's permit for 4121 Westlawn determined that Aspen could pay the in-lieu fee.

101. According to Metro's ePermit website,⁵ Aspen paid the in-lieu fee of \$7,600 on March 12, 2019.

⁴ Metro's sidewalk requirement mapping tool is available online here: <http://maps.nashville.gov/SidewalkRequirements/> (last viewed Apr. 22, 2019).

⁵ Metro's ePermit website can be found here: <https://epermits.nashville.gov/#/> (last viewed Apr. 22, 2019).

102. Metro issued a building permit for 4121 Westlawn on March 12, 2019.

103. Metro has not refunded Aspen's fees or restored the right-of-way for any project.

104. In order to conduct its future business, Aspen will need Metro-issued building permits in areas that require compliance with the sidewalk law.

105. Aspen continues to be affected because Metro has not provided restitution for the amounts of the in-lieu fees.

MRB

106. MRB paid in-lieu fees as a condition of obtaining a Metro-issued building permit for the construction of two homes for a project at 5608 Pennsylvania Avenue A&B.

107. On November 28, 2017, Rhonda applied on behalf of MRB for permits to construct single family homes at both Pennsylvania Avenue properties.

108. On the scope of work portion for both properties listed on Metro's ePermit website, a note reads: "PUBLIC WORKS STAFF PLEASE NOTE: APPLICANT HAS OPTION TO PAY IN LIEU OF FEE."

109. Metro's ePermit website reads "Sidewalk Review For Bldg. App." as a "COND."

110. Metro's ePermit website lists an entry from November 30, 2017: "Sidewalk in-lieu of construction payment received 30 July 2018."

111. Metro issued permit nos. 2017075626 for 5608 A Pennsylvania Ave and 2017075643 for 5608 B. Pennsylvania Ave on November 30, 2017.

112. MRB complied with the sidewalk law as a condition of obtaining Metro issued permits to build two homes on a project at 5807 Morrow Road.

113. At the time MRB received these permits, the in-lieu fee was \$178 per linear foot.

114. The in-lieu fee would have approximated \$47,300.

115. An individual employed by Metro Codes told Rhonda that, in her experience, the BZA was not letting people out of complying with the sidewalk law if she appealed to the BZA.

116. Based on this advice, Rhonda concluded that any appeal to the BZA would be a futile waste of time.

117. MRB opted to construct sidewalks and offset the cost by building larger, more expensive homes.

118. MRB destroyed appx. 75 feet of existing sidewalks to conform to the new sidewalk specifications.

119. The sidewalks MRB destroyed were improved by Metro Public Works in 2017.

120. MRB spent \$1,250 tearing out the existing sidewalks.

121. The existing sidewalk was not in need of repair or replacement.

122. To conform with Metro sidewalk specifications, MRB reconstructed sidewalks with a wider grass strip.

123. To conform with specifications, MRB built new sidewalks that were 12 inches from where the old sidewalks were.

124. MRB also agreed to provide Metro with an easement for the new sidewalks.

125. MRB spent \$15,796 destroying and reconstructing the sidewalks.

126. The sidewalks at Morrow zigzag to connect to the neighboring sidewalks.

127. If the sidewalks had not comported with Metro's standards, Metro would not have issued MRB a certificate of use and occupancy.

128. MRB applied for building permits to construct single-family homes at 2016 and 2018 Scott Avenue on November 2, 2018.

129. On November 9, 2018, Metro issued permit nos. 2018069546 for 2016 Scott Avenue, and 2018069557 for 2018 Scott Avenue to MRB.

130. Both permits state "SIDEWALKS REQUIRED AND NOT ALLOWED TO CONTRIBUTE."

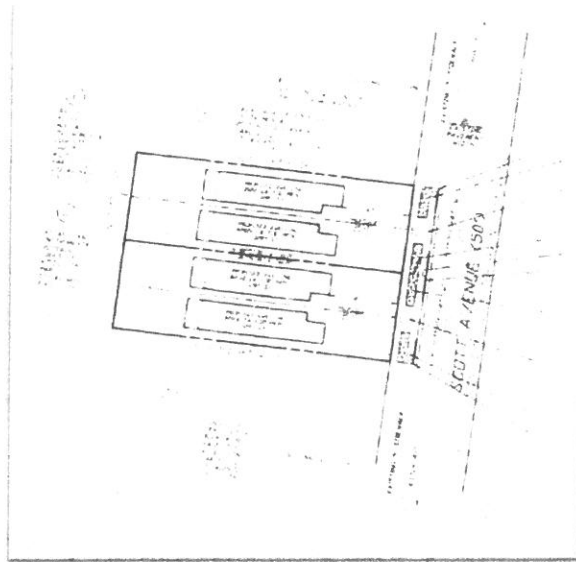
131. As of filing this complaint, MRB is constructing homes on Scott Avenue.

132. MRB will destroy the existing sidewalks in order to comply.

133. To conform with Metro sidewalk specifications, MRB must reconstruct sidewalks with a wider grass strip.

134. As a result, the sidewalks at Morrow will zigzag to connect to the neighboring sidewalks.

135. As depicted below, MRB formally drew up a plan to comply with Metro's requirement:



136. As shown, the sidewalks MRB will construct at Scott Avenue will zigzag to connect to the existing sidewalk.

137. If the sidewalks at Scott Avenue do not comport with Metro's standards, Metro will not issue a certificate of use and occupancy.

138. MRB will also comply with the sidewalk law as a condition of obtaining Metro issued permits for a property at 610 45th Avenue.

139. According to Metro's sidewalk requirement mapping tool, in order to construct a single-family residence for 610 45th Avenue, "[s]idewalks ARE required for this project," but the in-lieu fee is an option.

140. MRB expects to install sidewalks rather than pay because it will be cheaper than paying the in-lieu fee at this corner lot.

141. Sidewalks installed at 610 45th Avenue will not connect to any other sidewalks.

142. In order to conduct its future business, MRB will require Metro-issued building permits in areas that require compliance with the sidewalk law.

143. MRB continues to be affected because Metro has not provided restitution for the amounts of any in-lieu fees paid by MRB.

HBAMT

144. HBAMT has over 500 members, more than half of who are actual builders of homes or apartments in Middle Tennessee.

145. HBAMT's organizational purpose includes the promotion of the homebuilding industry in Middle Tennessee.

146. HBAMT disapproves of the sidewalk law because it increases the cost of housing and slows the rate of development.

147. HBAMT's members include Old South, Aspen, and other members who have paid the in-lieu fee or built sidewalks since the revised sidewalk law became effective.

148. Since the revised sidewalk law became effective HBAMT's members have both paid into the sidewalk fund and paid in-lieu fees.

149. HBAMT's members will apply for Metro-issued building permits to construct single-family residences in the future.

150. HBAMT's members will apply for Metro-issued permits to construct an addition or a renovation with a cost equal to or greater than twenty-five percent (25%) of the assessed value of all structures on the lot.

151. HBAMT continues to be affected because Metro has not provided restitution to its members for the amounts of the in-lieu fees.

Green Eggs and Homes

152. Green Eggs paid the in-lieu fee as a condition of obtaining a Metro-issued building permit for the construction of homes at 5400 Tennessee Avenue and 1303 54th Avenue N.

153. Green Eggs owns a parcel of land on California Avenue (ID 09102061800).

154. This parcel is listed as 0 California Avenue on Metro's property assessor's website.⁶

155. According to Metro's sidewalk requirement mapping tool, Green Eggs must build sidewalks or contribute to the in-lieu fund at California Avenue before Metro will issue a building permit for a one or two-family home.

156. Green Eggs is currently preparing an application for a building permit to construct a single or two-family residential home at the California Avenue property.

157. Metro will not issue Green Eggs a building permit for a single or two-family residential home at the California Avenue property unless Green Eggs agrees to comply with the sidewalk law, either by constructing sidewalks or paying the in-lieu fee.

158. Green Eggs owns 6119 New York Avenue.

159. 6119 New York Avenue is a corner lot.

⁶ Metro's website can be found [here](http://maps.nashville.gov/SidewalkRequirements/):
<http://maps.nashville.gov/SidewalkRequirements/> (last viewed Apr. 22, 2019).

160. According to Metro's sidewalk requirement mapping tool, Green Eggs must build sidewalks or contribute to the in-lieu fund at California Avenue before Metro will issue a permit for a one or two-family home.

161. Green Eggs has not requested a permit for the New York property due to the sidewalk law because this is a corner lot.

162. Green Eggs would request a permit for the New York property but for the obligation to construct sidewalks.

163. As of this filing, Green Eggs has a right of first refusal on 5406 Louisiana Avenue.

164. According to Metro's sidewalk requirement website, sidewalks are required for a project to construct one or two-family residential structures at that location.

165. Building sidewalks at 5406 Louisiana Avenue would be so expensive for Green Eggs as to make its right to build on the property not economically viable.

166. Green Eggs has not acquired any new properties in Davidson County since 2017 because the sidewalk law has made any potential investment return unattractive.

167. Green Eggs continues to be affected because it would develop the New York property but for the sidewalk law as a permit condition.

168. In order to conduct its future business, Green Eggs will require Metro-issued building permits in areas that require compliance with the sidewalk law.

169. Green Eggs continues to be affected because Metro has not provided restitution for the amounts of the in-lieu fees.

V. CLAIMS

A. Count One - U.S. Const., amend. V & XIV, Tennessee Const., Article I, Section 21 (Unconstitutional Conditions).

170. Plaintiffs re-allege the allegations in this Complaint as though set forth in this section.

171. The Supreme Court has repeatedly ruled in a variety of contexts that the government may not deny even a discretionary benefit to a person because the individual exercises a constitutional right. *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation without Representation of Wash.*, 461 U.S. 540, 545 (1983)). This principle, known as the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Id.*

172. The doctrine of unconstitutional conditions prohibits the government from requiring that an individual waive or surrender a constitutional right in exchange for some action from the government, including authorization to develop private property. *See Perry v. Sindermann*, 408 U.S. 593 (1972); *Koontz*, 570 U.S. at 619.

173. Through a series of cases, the Supreme Court developed an application of the unconstitutional conditions doctrine to the takings context.

174. The Takings Clause, found in the Fifth Amendment and applied to the states through the Fourteenth Amendment, enumerates

fundamental property rights. The Takings Clause prohibits the government from taking property without just compensation. U.S. CONST., AMEND. V.; TENN. CONST. ART. I, § 21.

175. The Takings Clause exists because the Founders did not envision a country where governments could strong-arm private parties into paying for things when the government would not. *See Dolan*, 512 U.S. at 384 (“One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

176. The Supreme Court has recognized that local governments may be tempted to abuse their land-use authority to try to circumvent the Fifth Amendment, and made clear that the Fifth Amendment also prohibits local governments from conditioning a discretionary benefit like a permit on private property owners agreeing to surrender their Fifth Amendment right. *Koontz*, 570 U.S. at 599; *see generally Dolan*, 512 U.S. at 374; *Nollan*, 483 U.S. 825.

177. To prevent governments from circumventing the Takings Clause and from trying to accomplish indirectly what they cannot do directly, the Supreme Court has ruled: “the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.” *Dolan*, 512 U.S. at 385.

178. In other words, the Takings Clause prohibits Metro from forcing landowners to choose between a permit and the right to receive just compensation for a taking.

179. Localities may constitutionally exact property or money from property owners as a condition of the exercise of their property rights only if:

a. The exaction directly mitigates a public impact arising from the property owners' exercise of their property rights; and,

b. The exaction is roughly proportionate in both nature and extent to the public impact arising from the property owners' exercise of their property rights.

180. Metro has required and continues to require property owners, including Plaintiffs, to surrender their right to receive just compensation in exchange for a permit: specifically by requiring Plaintiffs build sidewalks, donate a right of way, or pay the in-lieu fee, in exchange for a permit to build on their own property.

181. Metro imposes an unconstitutional condition on its building permits in violation of constitutional standards governing such exactions and as such, Metro effectuates a taking within the meaning of the State and Federal constitutions. *See Nollan*, 483 U.S. at, 837; *Dolan*, 512 U.S. at, 391; *Koontz*, 570 U.S. at 619.

182. These requirements lack any nexus to any alleged adverse impact with a public purpose directly caused by the developments Plaintiffs have sought and/or will seek to construct or renovate.

183. The costs imposed by these requirements are not roughly proportional to the size of any alleged adverse impact directly caused by Plaintiffs or any person triggering the sidewalk law.

184. Metro's decision to condition the issuance of permits on Plaintiffs' surrender of their right to only have property taken upon just compensation is unconstitutional on its face and as-applied and is void.

B. Count Two – Ultra Vires curb and gutter requirement.

185. Plaintiffs re-allege the allegations in this Complaint as though set forth in this section.

186. Under Tennessee law, a municipal action is *ultra vires* when the action was wholly outside the city's authority under charter or statute, or the action was not undertaken consistent with a mandatory provision of its charter or a statute. *See Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988).

187. Any attempt to undertake an action when a municipality has not enacted a law to authorize the act in the first place is *ultra vires*.

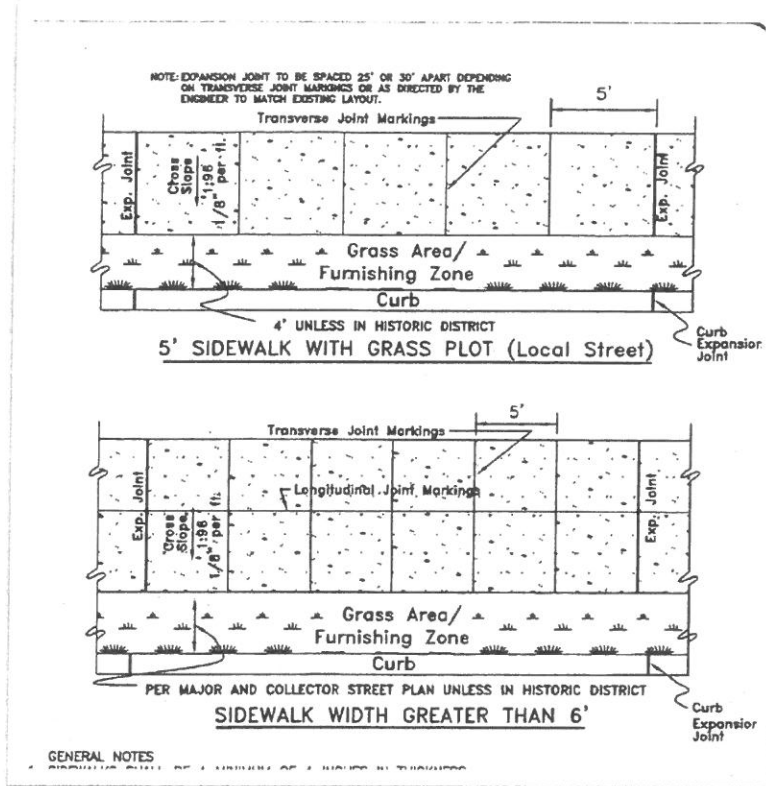
188. Separate and apart from the constitutionality of the sidewalk law, the sidewalk law only authorizes Metro to order the provision of sidewalks.

189. A sidewalk is a separate structure from curbs or gutters.

190. Metro Public Works design standards for a "Standard Concrete Sidewalk," (ST-210) depicts the curb separate from the sidewalk, divided by a grass strip:⁷

⁷ Found online here:

<https://www.nashville.gov/Portals/0/SiteContent/pw/docs/drawings/st%2>



191. The “Standard Concrete Sidewalk” design standards do not indicate that curbs and gutters are part of the sidewalks.

192. The “Standard Concrete Sidewalk” design standards do not provide any notice about the specifications for curbs and gutters.

193. Metro Public Works has separate plans for “Standard Curb with Gutter” (ST-200).

194. Even if Metro Public Works’ design standards for sidewalks did include curbs and gutters, Metro has changed the natural and ordinary meaning of the word, sidewalk, as used in the sidewalk law.

195. Metro's action in ordering curbs and gutters constructed as part of compliance with the sidewalk law is beyond the scope of its own ordinance, *ultra vires*, and void.

VI. REQUEST FOR RELIEF

Plaintiffs request of this Court the following relief:

196. Declare that the sidewalk law is unconstitutional.

197. Declare that a requirement to construct sidewalks, curbs, and gutters as a permit condition for single or two-family residential homes is an unconstitutional condition in violation of the Article I, Section 21 of the Tennessee Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

198. Declare that Metro has been and continues to be unjustly enriched through the imposition of the in-lieu fee on Plaintiffs.

199. Enjoin Metro from enforcing the sidewalk law.

200. Enjoin Metro from imposing the building of sidewalks, the dedication of rights-of-way, easements, or the payment of the in-lieu fee as a condition of a permit.

201. Mandate return of the in-lieu fees paid to Metro as restitution.

202. Mandate the return of any easements or right-of-way dedications members as restitution.

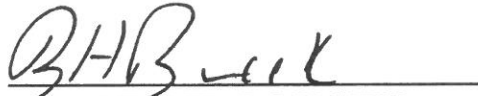
203. Mandate issuance of any Metro-issued residential home construction building permits with no condition to build sidewalks or pay the in-lieu fee.

204. Award attorneys' fees and costs in this action pursuant to 42 U.S.C. § 1988, and;

205. Such other relief as the Court deems just, equitable, necessary and proper.

Dated: April 22, 2019.

Respectfully submitted,



BRADEN H. BOUCEK

B.P.R. No. 021399

BEACON CENTER OF TENNESSEE

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braden@beacontn.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

Counsel	Counsel for	Via
Jon Cooper Director of Law Metro Courthouse Ste. 108 P.O. Box 196300 Nashville, TN 37219-6300 615/862.6341 jon.cooper@nashville.gov	Metro Nashville	<input type="checkbox"/> United States mail, postage prepaid <input checked="" type="checkbox"/> Hand delivery <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Fed Ex <input type="checkbox"/> CM/ECF

Dated: April 22, 2019.

Respectfully submitted,



BRADEN H. BOUCEK
B.P.R. No. 021399
BEACON CENTER OF TENNESSEE



Tel.: 615/383.6431
Fax: 615/383.6432
braden@beacontn.org

Counsel for Plaintiffs

EXHIBIT 1- BL2016-492 (Third Substitute Ordinance)

THIRD SUBSTITUTE ORDINANCE NO. BL2016-493

An ordinance amending Chapters 17.04, 17.20 and 17.40 of the Metropolitan Code pertaining to sidewalks (Proposal No. 2016Z-024TX-001).

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

Section 1. Section 17.20.120 (Provision of sidewalks) is hereby amended by deleting the section in its entirety and replacing with the following:

Sidewalks are required to facilitate safe and convenient pedestrian movements for the residents, employees and/or patrons, and to reduce dependency on the automobile, thus reducing traffic congestion on the community's streets and protecting air quality. This article shall not decrease the allowable floor area ratio for development.

A. Applicability.

1. Multi-family or nonresidential redevelopment. ~~The~~ All provisions of this section shall apply to the redevelopment of multi-family or nonresidential property when the property is located within the Urban Services District, or within a center designated in the general plan, or any of the property frontage is within a quarter mile of the boundary of a center designated in the general plan, or the property is on a street in the Major and Collector Street plan. Properties on the opposite side of navigable waterways or controlled access highways from a center designated in the general plan are not subject to this provision. Redevelopment of multi-family or nonresidential property shall include one or more of the following:
 - a. Construction of a new structure on a vacant lot, including lots on which all structures have been or are planned to be demolished; or
 - b. The cost value of any one renovation equal to or greater than fifty percent of the assessed value of all structures on the lot, or the value of multiple renovations during any five-year period equal to or greater than seventy five percent of the assessed value of all structures on the lot; or
 - c. The cost value of any one expansion equal to or greater than twenty-five percent of the assessed value of all structures on the lot, or the value of multiple expansions during any five-year period equal to or greater than fifty percent of the assessed value of all structures on the lot; or
 - d. The total building square footage of any one expansion is equal to or greater than twenty-five percent of the total square footage of all structures on the lot, or the total building square footage of multiple expansions during any five-year period is equal to or greater than fifty percent of the total square footage of all structures on the lot.
2. Single-family or two-family construction. Single-family or two-family construction when the property is within the Urban Zoning Overlay, or within a center designated in the general plan, or any of the property frontage is within a quarter mile of the boundary of a center designated in the general plan, or the property is on a street in the Major and Collector Street plan in the Urban Services District. Properties on the opposite side of navigable waterways or controlled access highways from a center designated in the general plan are not subject to this provision.

- a. All provisions of Section 17.20.120 shall apply to the construction of a new single-family or attached or detached two-family structure(s).
- b. Dedication of Right-of-Way and Easements required by subsection E of this section shall apply to all single-family and two-family permits for an addition or any renovation with a cost equal to or greater than twenty-five percent of the assessed value of all structures on the lot.

B. On-Site Sidewalk Installation For Multi-Family and Nonresidential Development. A continuous, all-weather internal sidewalk network, constructed to a minimum width of five feet shall connect all pedestrian building entryways to parking areas and all public rights of way. Sidewalks shall be designed and constructed to be distinguishable from driving surfaces.

C. Public Sidewalk Installation. The provisions of this subsection apply to all property frontage, regardless of whether sidewalks are provided in public right-of-way or pedestrian easements.

1. Construction of new sidewalks is required along the entire property frontage under any one or more of the following conditions, unless the property abuts a sidewalk segment that the Department of Public Works has funded and scheduled for construction:

- a. When there is eExisting sidewalk in need of repair or replacement.
- b. To extend the existing sidewalk or sidewalk proposed by an adjacent abutting development.
- c. Existing sidewalk present on the same block face.
- d. Multi-family or nonresidential properties within the Urban Zoning Overlay.
- e. Multi-family or nonresidential properties along a street in the Major and Collector Street Plan.

2. Sidewalk Design Standards.

- a. Sidewalks dimensions and required elements shall comply with the Major and Collector Street Plan or, for a street not in the Major and Collector Street Plan, the adopted standards of the Metropolitan Government. Design of sidewalks shall comply with approved Public Works' standards.
- b. Obstructions are prohibited within the required pedestrian travelway, but may be located within a grass strip/green zone or frontage zone. Prior to the issuance of use and occupancy permits, existing obstructions shall be relocated outside of the required pedestrian travelway.

D. Contribution to the fund for the pedestrian benefit zone as an alternative to sidewalk installation.

1. When a public sidewalk is required by subsection A, but installation is not required by subsection C of this section, the building permit applicant may make a financial contribution to the fund for the pedestrian benefit zone in lieu of construction. The value of the contribution shall be the average linear foot sidewalk project cost, including new and repair projects, determined by July 1 of each year by the Department of Public Works' review of sidewalk projects contracted for or constructed by the Metropolitan Government.

- a. ~~Multi family or nonresidential development. The value of the contribution shall be the average linear foot sidewalk project cost, excluding repair projects, determined by July 1 of each year by the~~

~~Department of Public Works' review of sidewalk projects contracted for or constructed by the Metropolitan Government.~~

- ~~b. Single family or two family construction. The value of the contribution shall be the average linear foot sidewalk project cost, including repair projects, determined by July 1 of each year by the Department of Public Works' review of sidewalk projects contracted for or constructed by the Metropolitan Government.~~
2. Any such contributions received by the Metropolitan Government shall be assigned and designated for implementation of the Strategic Plan for Sidewalks and Bikeways, as approved by the Planning Commission. The applicant's payment shall be allocated within ten years of receipt of the payment within the same pedestrian benefit zone as the property to be developed; otherwise, the payment shall be refunded to the building permit applicant.
 3. Contribution to the pedestrian network as an alternative to sidewalk installation required under this section shall be received by the Department of Public Works and written confirmation of the contribution sent to the Department of Codes Administration prior to the issuance of a building permit.

E. Dedication of Right-of-Way and Easements Required. Dedication of right-of-way and/or public pedestrian easement is required to permit present or future installation of a public sidewalk built to the current standards of the Metropolitan Government. For properties abutting an existing sidewalk or planned sidewalk identified in the Priority Sidewalk Network in the Strategic Plan for Sidewalks and Bikeways, all driveways, walkways and other improvements within public right-of-way or pedestrian easement shall be designed and graded in accordance with Public Works' design standards necessary to accommodate future sidewalk construction.

F. Improvements required or elected on public rights-of-way and/or public pedestrian easements under subsection C of this section shall be reviewed for compliance by the Department of Public Works. No building permit shall be issued by the Department of Codes Administration until the Department of Public Works has released the building permit. Prior to the Department of Codes Administration authorizing final use and occupancy, the Department of Public Works shall inspect and approve the sidewalk improvements in the public rights-of-way and/or public pedestrian easements.

Section 2. Section 17.20.125 (Right to appeal and seek variances) is hereby amended by deleting the section in its entirety and replacing with the following:

The provisions of Section 17.20.120 may be varied or interpretations appealed in conformance with Chapter 17.40, Administration and Procedures. The Board of Zoning Appeals may require a contribution to the pedestrian network, consistent with subsection DE of this section, an alternative sidewalk design, or other mitigation for the loss of the public improvement as a condition to a variance.

Section 3. Section 17.40.340 (Limits to jurisdiction) is hereby amended by deleting subsection B in its entirety and replacing with the following subsection B:

B. The board shall not grant variances within the following sections, tables, zoning districts, or overlay districts without first considering a recommendation from the Planning Commission.

Sections/Tables

Section 17.20.120 (Provision of sidewalks)
Section 17.28.103 (Underground utilities)

Zoning Districts

SP District

Overlay Districts

PUD

UDO

Institutional

Section 4. Section 17.04.060 (Definitions of General Terms) is hereby amended by adding the following definitions in alphabetical order:

"Pedestrian benefit zones" means the sixteen zones in which fees contributions in lieu of sidewalk construction may be collected, and where such fees contributions shall be spent for the safety and convenience of pedestrians. Pedestrian benefit zones are as follows:

Zone 1: Bounded by I-40 on the south; I-65 on the southeast; Cumberland River on the north; State Route 155 on the west. (North Nashville, Metro Center, Nations areas)

Zone 2: Bounded by Cumberland River and I-65 on the south; I-24 on the east; State Route 155 on the north and west. (Bordeaux area)

Zone 3: Bounded by Cumberland River on the south and east; State Route 155 on the north; I-24 on the east. (East Nashville, Parkwood areas)

Zone 4: Bounded by I-40 on the south; Stones River on the east; the Cumberland River on the north; I-24 on the west. (Spence Lane, Donelson areas)

Zone 5: Bounded by I-440, I-24, and State Route 155 on the south and east; I-40 on the north; I-65 on the west. (South Nashville, North Mill Creek areas)

Zone 6: Bounded by I-440 on the west and south; I-65 on the east; I-40 on the north. (Midtown area)

Zone 7: Bounded by the downtown interstate loop. (Downtown area)

Zone 8: Bounded by the county line on the south; I-65 on the east; I-440 and I-40 on the north; State Route 251, State Route 100, and Harpeth River on the west. (West Nashville, Green Hills areas)

Zone 9: Bounded by the county line on the west and south; Harpeth River, State Route 100, and State Route 251 on the east; I-40 on the north. (Bellevue, Pasquo, Harpeth River areas)

Zone 10: Bounded by I-40 on the south; State Route 155 on the east; Cumberland River on the north; county line on the west. (Newsom Station, Whites Bend, Cockrill Bend areas)

Zone 11: Bounded by Cumberland River and State Route 155 on the south; I-24 on the east and north; county line on the west. (Joelton, Beaman Park, Bells Bend areas)

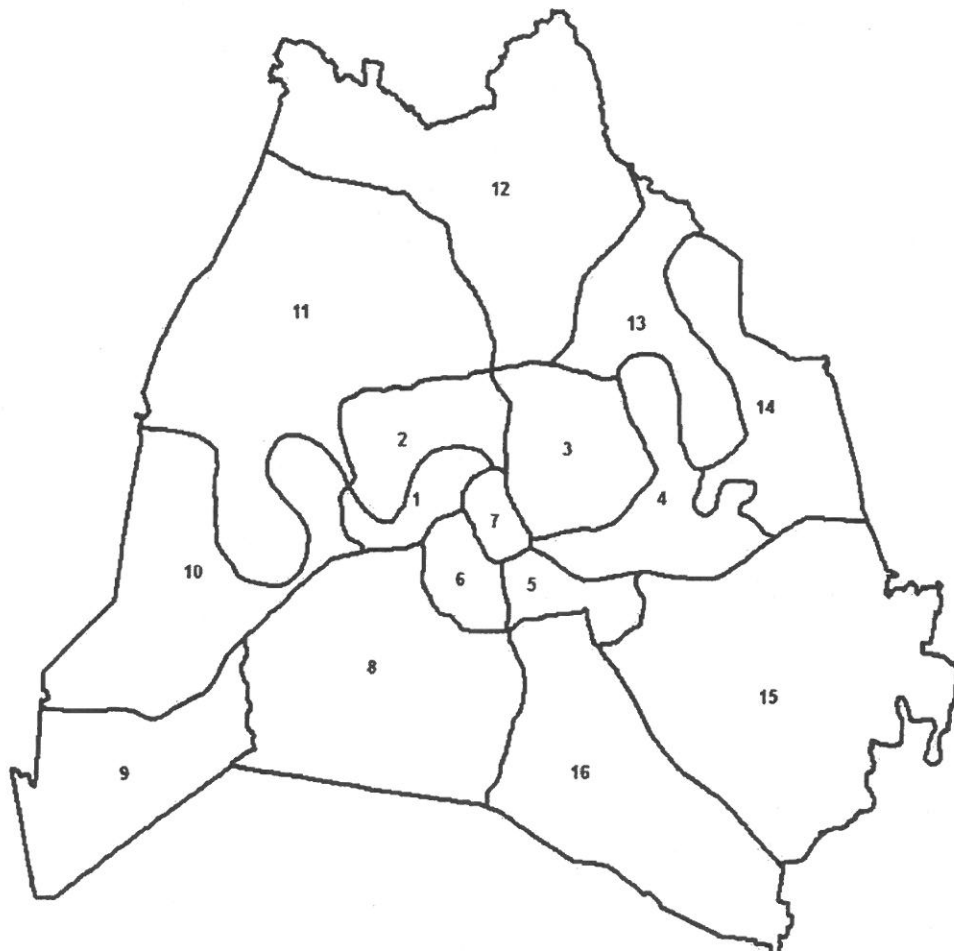
Zone 12: Bounded by State Route 155 on the south; I-65 on the east; county line on the north; and I-24 on the west. (Paradise Ridge, Union Hill, Goodlettsville areas)

Zone 13: Bounded by State Route 155 and Cumberland River on the south and east; county line on the north; I-65 on the west. (Madison, Neelys Bend, Rivergate areas)

Zone 14: Bounded by I-40 on the south; county line on the east; Old Hickory Lake and Cumberland River on the north and west; Stones River on the southwest. (Old Hickory, Lakewood, Hermitage areas)

Zone 15: Bounded by I-24 on the southwest; county line on the south and east; I-40 on the north; State Route 155 on the northwest. (Antioch, Priest Lake areas)

Zone 16: Bounded by county line on the south; I-24 on the east; I-440 on the north; I-65 on the west. (Grassmere, Southeast Nashville, Cane Ridge areas)



"Sidewalk" means all Streetside Elements included in the Major and Collector Street Plan and Streetside Elements for local streets required by other standards of the Metropolitan Government located within the public right-of-way or a pedestrian easement.


"Sidewalk, On-site" means pedestrian facilities located outside of the public right-of-way.

Section 5. Section 17.20.060 (Parking area design standards) is hereby amended by deleting subsection H in its entirety and replacing with the following:


H. Curbs. Curbs or other equivalent means shall be provided to prevent any vehicle using a parking area from encroaching on any public right-of-way, on-site sidewalk, required landscaping area or adjacent property.

Section 6. Be it further enacted, that this ordinance take effect July 1, 2017, and such change be published in a newspaper of general circulation, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

INTRODUCED BY:


Angie Henderson
Member of Council







Bucky Miller

Brutt A. Withers







Karen J. Pearson
Sharon M. Hunt

ask

H. W. Rhot
~~_____~~

304
M. M. Miller

D. J. [unclear]

~~_____~~

Jim Cooper

~~_____~~
Sara Lecher

Maria Johnson

Finan Bider
Mary Carolyn Roberts

~~_____~~

Vol. 10

John G. Hill
John Eric

Garbu Daniel
H. [unclear]

Way Ladue

Dorothy Blalock

John [unclear]

Bill P.

~~_____~~

ORIGINAL

METROPOLITAN COUNTY COUNCIL

THIRD
SUBSTITUTE Bill No. BL2016-493

**An ordinance amending Chapters 17.04,
17.20 and 17.40 of the Metropolitan Code
pertaining to sidewalks (Proposal No.
2016Z-024TX-001).**

Introduced _____

Passed First Reading _____

Amended _____

Passed Second Reading _____

THIRD SUBSTITUTE
FILED & *Passed Third Reading* APR 18 2017

Approved APR 19 2017

By _____
Metropolitan Mayor

Advertised APR 21 2017

Effective Date APR 21 2017

CERTIFICATION

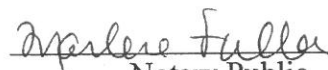
I, Elizabeth Waites, being the duly appointed Metropolitan Clerk of The Metropolitan Government of Nashville and Davidson County, do hereby certify that the foregoing is a true and exact copy of Third Substitute Ordinance No. BL2016-493 of The Metropolitan Government of Nashville and Davidson County, Tennessee which bill passed third and final reading by the Metropolitan Council on April 18, 2017, said action being recorded in Minute Book M69, page 129.

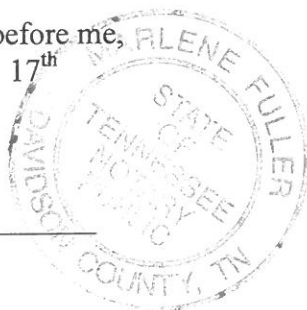
WITNESS MY HAND and the Seal of The Metropolitan Government of Nashville and Davidson County, Tennessee, this 17th day of April, 2019.


Metropolitan Clerk

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me,
by Elizabeth Waites, this 17th
day of April, 2019.


Notary Public



My Commission expires: 03/08/2021