IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

MRB DEVELOPERS, APRIL KHOURY, HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, OLD SOUTH CONSTRUCTION LLC, ASPEN CONSTRUCTION, and GREEN EGGS & HOMES, Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.	)	Case No. 19-534-I

MOTION TO DISMISS AND SEVER ANY REMAINING CLAIMS AND MEMORANDUM OF LAW IN SUPPORT

The Metropolitan Government hereby files this Motion pursuant to Tenn. R. Civ. P. 12.01(1), 20.01 and 21. Grounds for this motion are:

- Plaintiffs' claims for declaratory judgment and injunctive relief are now moot and should be dismissed, because the sidewalk ordinance has been significantly revised, and
- the Plaintiffs' remaining claims, seeking restitution under the previous sidewalk ordinance, are not properly joined together. They should be severed and proceeded with separately, because do not involve the same transaction, occurrence, or series of transactions or occurrences.

I. Plaintiffs' claims for declaratory judgment and injunctive relief should be dismissed as moot.

Plaintiffs' lawsuit challenges the constitutionality of Metro's sidewalk ordinance as codified at Metro Code 17.20.120. It is not clear whether it is making a facial or as applied challenge, or both. It mixes the two concepts and asks that the Court declare the law to be an unconstitutional exaction, enjoin Metro from enforcing the law and order restitution of in-lieu fees paid by the Plaintiffs. (Complaint, ¶¶ 196-203.)

However, on July 19, 2019, Ordinance BL2019-1659 was enacted and became law.[1] The new ordinance amends Metro Code 17.20.120 by "deleting it in its entirety and replacing" it with a new sidewalk law.

"Tennessee's courts believe[] that 'the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions.' Accordingly, they limit[] their role to deciding 'legal controversies.' A proceeding qualifies as a 'legal controversy' 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 LLC v. Putnam County,* 301 S.W.3d 196, 203 (Tenn. 2009). "Although a showing of present injury is not required in a declaratory judgment action, a real 'case' or 'controversy' must nevertheless exist." *Thomas v. Shelby Cty.,* 416 S.W.3d 389 (Tenn. Ct. App. 2011).

"A case must remain justiciable (remain a legal controversy) from the time it is filed until the moment of final appellate disposition." *Norma Faye Pyles Lynch Family Purpose LLC,* 301 S.W.3d 196, 203–04 (Tenn. 2009). "A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Id.* at 204. A case is moot when the prevailing party will be provided no meaningful relief from a judgment in its favor. *Knott v. Stewart Cnty.,* 207 S.W.2d 337, 338 (Tenn. 1948); *Cnty. of Shelby v. McWherter,* 936 S.W.2d 923, 931 (Tenn. Ct. App. 1996).

Because the law Plaintiffs are challenging has been repealed and amended, their claims for declaratory judgment and injunctive relief are now moot. *Hooker v. Haslam,* 437 S.W.3d 409, 417 (Tenn. 2014) ("Where the plaintiff challenged the constitutionality of a statute and the statute was repealed after the case was initiated but before it was heard, the repeal rendered the case moot, since the challenged statute was no longer the law of the land."); *see also, Tini*

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[1] A certified copy of BL2019-1659 is attached as Exhibit A.

Bikinis-Saginaw, LLC v. Saginaw Charter Tp., 836 F.Supp.2d 504, 519–20 (E.D. Mich. 2011) ("Indeed, declaring a repealed ordinance void and enjoining its enforcement ... would be an empty act. In the vernacular, declaring it void would be as meaningful as shooting a dead horse. And enjoining its enforcement, moreover, would be shooting the horse once again.").

Because these claims are now moot, Plaintiffs' claims for declaratory judgment and injunctive relief (whether they are making a facial or as applied challenge to the old ordinance) should be dismissed.

II. Plaintiffs are not properly joined, and any remaining claims for "restitution" should be severed and proceeded with separately.

Tenn. R. Civ. P. 20.01 provides, in pertinent part: "All persons may join in one (1) action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." (Emphasis added.)

Here, the Plaintiffs' allegations do not arise out of the same transaction or series of transactions. Rather, they involve the application of the sidewalk ordinance to distinct factual circumstances that must be analyzed in their own right. For example, the Plaintiffs built houses in different areas of town, so market prices will vary. Some Plaintiffs built sidewalks. Others paid into the in-lieu fund. Some requested variances from the BZA, while others did not. One Plaintiff paid into the in-lieu fund "under protest," while the others did not.[2]

Pursuant to Tenn. R. Civ. P. 21, the appropriate remedy for misjoinder is to have the Plaintiffs' individual claims "severed and proceeded with separately."

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[2] These facts could result in very different outcomes for each of the Plaintiffs given that the test for an unconstitutional exaction is the "rough proportionality" test. *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994) ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."). Such an analysis necessarily turns on the specific facts and circumstances at issue with each individual application of the sidewalk ordinance.