

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

MRB DEVELOPERS, APRIL KHOURY,)
HOMEBUILDERS ASSOCIATION OF)
MIDDLE TENNESSEE,)
OLD SOUTH CONSTRUCTION LLC,)
ASPEN CONSTRUCTION, and)
GREEN EGGS & HOMES,)
)
)
)
Plaintiffs,)
)
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v.)
)
)
METROPOLITAN GOVERNMENT OF)
NASHVILLE AND DAVIDSON)
COUNTY,)
)
Defendant.

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No. 19-0534-I

**MEMORANDUM AND ORDER ON MOTION TO DISMISS
AND SEVER REMAINING CLAIMS**

This matter came before the Court for hearing on August 23, 2019, on Defendant Metropolitan Government of Nashville and Davidson County's ("Metro") Motion to Dismiss and Sever any Remaining Claims. Plaintiffs filed a response in opposition to the motion. At the hearing, Metropolitan Attorney Catherine J. Pham appeared on behalf of Metro, and Attorney Braden H. Boucek appeared on behalf of Plaintiffs.

I. BACKGROUND AND STATEMENT OF CASE

Plaintiffs are property owners in Nashville, Davidson County, Tennessee. They filed their complaint on April 22, 2019, seeking prospective relief and restitution based on allegations of ongoing violations of their constitutional rights under Tenn. Code Ann. § 1-3-121 and 42 U.S.C. § 1983. They allege that Metro's then-existing sidewalk law, set forth at Metro Code § 17.20.120, required property owners in specified areas to construct sidewalks, curbs, and gutters before Metro

would issue building permits to construct single or two-family residential homes. Plaintiffs allege that Metro's enforcement of the sidewalk law was an unconstitutional taking of their property rights without just compensation under the 5th and 14th Amendments of the United States Constitution and Article I, § 21 of the Tennessee Constitution (Count One). They further allege that Metro's actions in ordering the construction of curbs and gutters as part of compliance with Metro's sidewalk law was beyond the scope of Metro's authority under the sidewalk law, *ultra vires*, and void (Count Two). Plaintiffs seek a declaration that the sidewalk law is unconstitutional under the United States and Tennessee Constitutions and that Metro has been unjustly enriched through the collection of fees and a permanent injunction against Metro from enforcing the sidewalk law. They further request the Court to mandate Metro's return of fees paid by Plaintiffs as restitution, mandate Metro's return of any easements and rights-of-way dedicated to Metro, mandate Metro's issuance of building permits without conditions imposed under the sidewalk law, and award attorneys' fees and costs.

After the complaint was filed, Metro enacted Ordinance BL2019-1659 effective July 19, 2019, which amends Metro's sidewalk law "by deleting [Metro Code § 17.20.120] in its entirety and replacing" it with a new sidewalk law. On August 5, 2019, Metro moved to dismiss Plaintiff's claims for declaratory and injunctive relief under Rule 12.01 of the Tennessee Rules of Civil Procedure on the grounds that those claims are now moot because the sidewalk law has been repealed and significantly amended. Metro further asserts that the remaining claims seeking restitution are not properly joined and should be severed under Rules 20 and 21 of the Tennessee Rules of Civil Procedure because they do not involve the same transaction or occurrence or series of transactions or occurrences.

The parties have submitted supplemental briefing discussing the recent Court of Appeals' decision in *Tennesseans for Sensible Election Laws v. Tenn. Bureau of Ethics and Campaign Finance*, No. M2018-01967-COA-R3-CV, 2019 WL 6770481 (Tenn. Ct. App. Dec. 12, 2019) ("*TSEL*"). In that case, the plaintiff brought a constitutional challenge as to a campaign statute that imposed an annual fee exclusively on nonpartisan multicandidate political action committees, but did not impose the fee on party-controlled political campaigns committees or individual contributors. *Id.* at *12. The statute subsequently was amended, in part, to remove the exemption for statewide political parties, but not as to individuals. The state asserted on appeal that the constitutional challenge was rendered moot by the amendment. The plaintiff argued that the amendment only partially cured the constitutional defect and the balance of the statute remained unconstitutionally discriminatory. *Id.* The Court of Appeals agreed, finding the constitutional challenge to the exemption of individuals was not moot. *Id.* at *13.

The Court finds the facts in this case distinguishable from the facts in *TSEL*. The statute at issue in *TSEL* was partially amended and removed only one of the two exemptions challenged by the plaintiffs. The Court found that the remaining exemption continued to present a justiciable claim of discriminatory treatment of individuals. *Id.* In contrast, Metro repealed in its entirety the former sidewalk law that is the subject of Plaintiffs' constitutional challenge. A new sidewalk law has been enacted by Metro in place of the repealed sidewalk law, and has never been applied to any of the Plaintiffs.

Under the facts and circumstances of this case, the Court concludes that Plaintiffs' claims for prospective relief declaring the former sidewalk law as unconstitutional should be dismissed on the grounds of mootness. Applying the factors identified in *Norma Faye Pyles*, the Court finds that the reason Metro alleges mootness is because the former sidewalk law has been repealed in its entirety and an amended sidewalk law enacted, this lawsuit is still in the early stages of the

proceedings, and there is a low probability that the issue will recur under the former sidewalk law. 301 S.W.3d at 204. While the issues raised by Plaintiffs are important to the public, those issues are not foreclosed and can be raised under the new sidewalk law, if necessary. Additionally, because this case involves cessation of conduct by a governmental entity, the Court recognizes the rebuttable presumption that Metro officials will act in good faith and in accordance with the amended law, and the burden of persuasion is shifted to Plaintiffs to demonstrate that their claims for prospective relief are not moot. *Id.* at 206. In the *Norma Faye Pyles* case, the court found that the county government had voluntarily changed its *practices* (as contrasted with amending its laws), but only with respect to the plaintiff and had not completely and permanently changed the challenged practices. *Id.* at 207. In contrast, Metro has repealed the challenged sidewalk law in its entirety and enacted an amended sidewalk law. Accordingly the Court concludes that Metro's motion to dismiss Plaintiffs' claims for declaratory judgment and injunctive relief should be granted on the grounds of mootness.

B. Metro's Motion to Sever Plaintiffs' Claims

Metro asserts that Plaintiffs are not properly joined under Rule 20.01 of the Tennessee Rules of Civil Procedure because their claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences. Metro suggests that the appropriate remedy is provided under Rule 21 to sever Plaintiffs' individual claims and proceed with them separately.

Plaintiffs argue that their claims are properly joined or, alternatively, should remain consolidated under Rule 42.01 because they involve a common question of law or fact and the court "may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays."

The Court finds that Plaintiffs' individual claims involve facts that are unique to their respective properties and will likely require separate determinations as to the appropriate

retrospective relief, if any, to which each Plaintiff may be entitled. This finding weighs in favor of severance of the claims under Rule 21. At this early stage of the proceedings, however, the Court finds there likely are common questions of law or fact regarding the former sidewalk law and its enforcement that would justify consolidation of the Plaintiffs' claims under Rule 42 for purposes of discovery or anticipated dispositive motions, even if separate trials ultimately may be appropriate. The Court finds that these issues can be best assessed and managed during the course of this litigation through Rule 16 scheduling and planning conferences, as necessary. Accordingly, the Court respectfully denies Metro's motion to sever Plaintiffs' claims, at this time, without prejudice to renew its request as the case progresses.

III. CONCLUSION

Based on Metro's motion to dismiss and to sever remaining claims, Plaintiffs' response in opposition, supplemental briefing of the parties, arguments of counsel, and the entire record in this cause, the Court finds that Metro's motion should be granted, in part, and denied, in part.

It is, accordingly, ORDERED that Metro's motion to dismiss Plaintiffs' declaratory judgment and injunctive relief claims seeking prospective relief on the grounds of mootness is hereby GRANTED and Plaintiffs' claims for prospective declaratory judgment and injunctive relief are hereby DISMISSED.

It is further ORDERED that Metro's motion to sever Plaintiffs' remaining individual claims for retrospective relief is hereby DENIED, at this time, without prejudice to renewing the request as the case progresses.



PATRICIA HEAD MOSKAL
CHANCELLOR, PART I