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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,	)	**Case No. 19-534-I**
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE METROPOLITAN GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

In this action challenging the application of Metropolitan Ordinance No. BL2016-493 ("the Sidewalk Ordinance") to Plaintiffs' properties under the Fifth Amendment to the United States Constitution and Article I, § 21 of the Tennessee Constitution, the Court should enter judgment in favor of the Metropolitan Government of Nashville and Davidson County pursuant to Tennessee Rule of Civil Procedure 56. The Sidewalk Ordinance is a generally applicable land-use regulation with strong links to legitimate public interests, not an exaction subject to the heightened *Nollan/Dolan* standard of review that Plaintiffs demand. Applying the appropriate standard of review for this generally applicable regulation — the *Penn Central* regulatory takings test — the Sidewalk Ordinance is constitutional because it is legislatively imposed, generally applicable, and well-linked to the public good it was meant to achieve. Furthermore, Plaintiffs are not entitled to the restitution of fees or easements collected under the Sidewalk Ordinance.

STATEMENT OF FACTS

I. THE SIDEWALK ORDINANCE'S HISTORY AND PURPOSES

In 2017, the Metropolitan Council passed an ordinance requiring property owners who built new single-family homes either to build sidewalks or pay a fee in lieu of sidewalk construction. (BL2016-493, Exhibit 1 to Compl.)[1] In 2019, the Council amended this section of the zoning code to its current form. (Metro. Code § 17.20.120, Ex. 1 to Def.'s Mot. Summ. J.) The 2017 ordinance stated its purposes, which included:

- Offering safe, convenient walkways for residents, employees, and patrons; and
- Reducing dependency on cars, thus reducing traffic and protecting air quality.

(BL2016-493, Ex. 1 to Compl.)

II. THE SIDEWALK ORDINANCE'S REQUIREMENTS AND VARIANCE PROCESS

Relevant here, the Sidewalk Ordinance applies to new single-family home construction in densely developed parts of the city. (BL2016-493(A)(2), Ex. 1 to Compl.) When a property owner applies for a building permit, the Sidewalk Ordinance requires sidewalks to be built along the property's street frontage. (BL2016-493 (C)(1) and (2).) As an alternative to building a sidewalk, the Sidewalk Ordinance allows an in-lieu fee for all or part of the street frontage. (BL2016-493(D), Ex. 1 to Compl.) The in-lieu fee is predetermined according to a per-linear-foot cost that the Department of Public Works sets each year. (*Id.*)

If a property owner pays an in-lieu fee, the city must allocate the money within ten years to sidewalk or bikeway projects within the same "pedestrian benefit zone" as the property subject to the in-lieu fee. (BL2016-493(D)(2), Ex. 1 to Compl.) These zones are defined elsewhere in the city's zoning code. (Metro. Code § 17.04.060, Ex. 1 to Compl.)

[1] This action challenges BL2016-493, the 2017 version of the ordinance, as applied to Plaintiffs' properties. That ordinance is attached to Plaintiff's Complaint as Exhibit 1.

If a property owner disagrees with how the Sidewalk Ordinance applies, he or she can appeal the Sidewalk Ordinance's application to the Board of Zoning Appeals ("BZA"), which can grant a variance in the form of a fee in lieu of sidewalk construction, an alternate design, or "other mitigation." (Metro. Code § 17.20.125, Ex. 1 to Compl.)

III. THE SIDEWALK ORDINANCE'S APPLICATION TO PLAINTIFFS

Plaintiffs, one homeowner (April Khoury) and three development companies (Aspen, MRB, and Old South),[2] argue that the Sidewalk Ordinance unconstitutionally took their property. (Compl. ¶¶ 171-184 (Count I).)[3] Together, they demand restitution of in-lieu fees and easements. (*Id.* ¶¶ 201-202.)

MRB built sidewalks on three of its six properties that are still at issue in this lawsuit; MRB and all other Plaintiffs paid in-lieu fees for all other properties. (Compl. ¶¶ 9-13, 58, 77, 88, 96, 106, 117, 128-132, 138-40.) The only property for which any Plaintiff (MRB) granted an easement for purposes of sidewalk construction is 5807 Morrow Road. (Def.'s Statement of Undisputed Material Facts ("SUMF") ¶¶ 2, 4, 6, 9, 11, 13, 15, 17, 19, 20.) This list shows the remaining Plaintiffs, their properties, how each property complied with the Sidewalk Ordinance, and the corresponding sections of Plaintiffs' Complaint:

Plaintiff	Address	Outcome	Complaint
April Khoury	6227 Robin Hill Rd.	BZA granted variance request 6/7/2018; paid $12,524.80 in-lieu fee 9/18/18	¶¶ 39-64
Old South	4701 Dakota Ave.	BZA denied variance request 9/6/2018; paid $31,920 in-lieu fee 10/3/18	¶¶ 65-81
Aspen	919 South St.	BZA granted variance request 5/10/2018; paid $9,879 in-lieu fee 5/14/18 (also covering 917 South Street)	¶¶ 88-97
Aspen	917 South St.	BZA granted variance request 5/10/2018; paid $9,879 in-lieu fee 5/14/18 (also covering 919 South Street)	¶¶ 88-97

[2] The Court dismissed all other plaintiffs and properties on December 31, 2020.
[3] The Court dismissed Count II of the Complaint, which alleged that a requirement to build curbs and gutters was beyond the scope of the Metropolitan Government's authority under the Sidewalk Ordinance, on January 6, 2020.

MRB	5608-A Pennsylvania	No variance request; paid $9,880 in-lieu fee 7/30/18 (also covering 5608-B Pennsylvania)	¶¶ 106-111
MRB	5608-B Pennsylvania	No variance request; paid $9,880 in-lieu fee 7/30/18 (also covering 5608-A Pennsylvania)	¶¶ 106-111
MRB	5807 Morrow Rd.	No variance request; built sidewalk; granted easement	¶¶ 112-127
MRB	2016 Scott Ave.	No variance request; built sidewalk	¶¶ 128-137
MRB	2018 Scott Ave.	No variance request; built sidewalk	¶¶ 128-137
MRB	610 45th Ave. N.	No variance request; paid $9,774.73 in-lieu fee 9/9/19	¶¶ 138-141

Aspen, MRB, and Old South sold their properties at issue in this lawsuit. (SUMF ¶¶ 1, 3, 5, 8, 10, 12, 14, 16, 18.) April Khoury still owns 6227 Robin Hill Road.[4]

PROCEDURAL HISTORY

In 2019, the Metropolitan Council enacted Ordinance BL2019-1659, which deleted the 2017 Sidewalk Ordinance and replaced it with a new ordinance. On January 6, 2020, upon the Metropolitan Government's motion to dismiss, the Court dismissed Plaintiffs' claims for declaratory and injunctive relief as moot due to the repeal of the 2017 ordinance. On December 31, 2020, upon the Metropolitan Government's motion for judgment on the pleadings, the Court dismissed several Plaintiffs and properties on grounds of ripeness, standing, and timeliness. Remaining in the lawsuit are Plaintiffs' claims for restitution of in-lieu fees and an easement for the properties listed above.

LEGAL STANDARD

Summary judgment may "isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). It should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[4] This information is available on the Davidson County Property Assessor's public website (last accessed March 30, 2022): https://www.padctn.org/prc/property/123258/print.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

The Metropolitan Government bears the initial burden of demonstrating that an essential element of the non-moving party's case is lacking. *Celotex,* 477 U.S. at 323; *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). When the moving party meets this burden, it shifts to the non-moving party, who must produce evidence to establish a genuine dispute of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Rye*, 477 S.W. 3d at 264.

ARGUMENT

I. THE SIDEWALK ORDINANCE IS A CONSTITUTIONAL LAND USE REGULATION ACCORDING TO THE *PENN CENTRAL* STANDARD OF REVIEW.

Plaintiffs contend that the Sidewalk Ordinance is an exaction that falls under the demanding standard of review developed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Nollan/Dolan*"), but this standard does not apply. As many courts have held, the Supreme Court's default test for regulatory takings laid out in *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("*Penn Central*"), applies to legislative land use regulations such as the Sidewalk Ordinance, and the ordinance passes this standard.

Just last year, this Court found that the Sidewalk Ordinance "is a generally applicable legislatively imposed condition to which the constitutional doctrine of an exaction/taking does not apply under current law." *Joni Elder d/b/a Dogtopia v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.,* No. 20-897-III, slip op. at *2 (May 27, 2021). Months later, the United States District Court for the Middle District of Tennessee rejected the same arguments Plaintiffs make here and applied *Penn Central* to uphold the current version of the ordinance. *Knight v. Metro. Gov't of Nashville & Davidson*

Cty., No. 3:20-CV-00922, 2021 WL 5356616, at *9-13 (M.D. Tenn. Nov. 16, 2021). This Court should also apply the *Penn Central* test for the following reasons.

A. According to the Supreme Court, the *Penn Central* Regulatory Takings Test Is the Right Standard of Review for Legislative Land Use Regulations Such as the Sidewalk Ordinance.

For generations, the Supreme Court has held that government land use regulations that go "too far" can take property in violation of the Fifth Amendment's takings clause. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922). The Supreme Court has unanimously stated that its regulatory takings jurisprudence, specifically the *Penn Central* balancing test, is the default framework to apply when landowners challenge land use regulations under the takings clause. *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005). The Tennessee Constitution covers regulatory takings to the same extent as the federal takings clause. *Phillips v. Montgomery Cty*., 442 S.W.3d 233, 244 (Tenn. 2014).

"The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538 (quoting *Mahon*, 260 U.S. at 415). To find the answer, the *Penn Central* test weighs factors including a regulation's economic impact on the landowner, its effect on his or her investment-backed expectations, and the character of the government's action. *Penn Central*, 438 U.S. at 124. Unless a landowner can show that "the interference with [the] property is of such a magnitude that there must be an exercise of eminent domain and compensation to sustain it," *id.* at 136, there is no taking.

B. *Penn Central* Applies to Legislative Land Use Regulations Because They Do Not Implicate the Practical Issues Present in Administrative Exactions.

When a landowner challenges a property regulation under the Fifth Amendment, the Supreme Court has suggested that the standard of review depends on whether the regulation is administrative or legislative. See *Dolan*, 512 U.S. at 385, 391 n.8. In a *Nollan/Dolan* administrative exaction, a government body (usually unelected) applies land

use conditions *ad hoc* to a particular property, often in response to a permit application. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013). In a *Penn Central* legislative land use regulation, elected representatives set conditions in statutes or ordinances without considering a particular property; the conditions later apply automatically. *See Dolan*, 512 U.S. at 385; *San Remo Hotel L.P. v. City and Cty. of San Francisco*, 41 P.3d 87, 104 (Cal. 2002).

This distinction between *Nollan/Dolan* administrative exactions and *Penn Central* legislative regulations makes a constitutional difference because it matters which branch of government regulates property, namely how the government regulates (through elected officials or not) and how the regulation can be changed (through the political process or not). In other words, it is not just *who* regulates property but *how* and *why* the regulation happens and *where* the landowner can turn for a remedy.

These factors bear directly on the risk for extortion in land use permitting, the central concern that goaded the Supreme Court into developing *Nollan/Dolan*. *See Dolan*, 512 U.S. at 387. In an administrative exaction, an unelected body can impose conditions on a landowner so fanciful and capricious as to amount to "gimmickry." *Id*. A stringent test is therefore appropriate to restrain the administrative arms of government. But a legislative land use regulation such as the Sidewalk Ordinance poses a low risk of extortion, and is therefore properly considered under *Penn Central,* for two main reasons.

First, legislative regulations bind the administrative discretion that can easily lead to extortion. Regulations like the Sidewalk Ordinance apply evenly to broad categories of properties. *Knight*, 2021 WL 5356616, at *10; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (en banc). Thus, there is little risk that the government will extract concessions from landowners because legislation has already set fees and

conditions. *See, e.g.*, *San Remo Hotel*, 41 P.3d at 104 ("[N]o meaningful government discretion enters into either the imposition or the calculation of the in-lieu fee.").

This binding of administrative discretion means that legislative land use regulations do not draw a "direct link between the government's demand and a specific parcel of real property" that justified *Nollan/Dolan* scrutiny in *Koontz*. 570 U.S. at 614. Regulations without this link do not implicate the "central concern" of *Nollan* and *Dolan*: "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Id.*

To illustrate, the North Carolina Court of Appeals contrasted several factors common to legislative land use regulations with an administrative exaction scenario: "[t]he Fees are predetermined, set out in the Ordinance, and non-negotiable; the Fees are not assessed on an ad hoc basis or dependent upon the landowner's particular project [. . .] but, unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property." *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 14-15 (N.C. Ct. App. 2020) (citing *Koontz*, 570 U.S. at 613). Thus, a legislative regulation is different from a situation where a government agency can dangle a carrot or brandish a stick before imposing fees or conditions, easily abusing power through gimmickry or pretext. *See Koontz*, 570 U.S. at 604-05; *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39 (Cal. 1996).

Second, legislative land use regulations offer a remedy that administrative exactions lack "because the group affected can use the elective processes to petition for change in the law." *San Remo Hotel, L.P. v. San Francisco City and Cty.*, 364 F.3d 1088, 1096 (9th Cir.

2004). Courts need not intervene when a landowner can participate in the political process and lobby for more lenient regulations or vote for representatives who will roll back property regulations that go "too far."

Relatedly, legislative land use regulations are often crafted with input from landowners and developers. The Sidewalk Ordinance certainly was. (Sidewalk Ordinance Stakeholder Meeting Notes, attached to Def.'s Mot. Summ. J. as Exhibit 2.) Thus, Plaintiffs could have participated in the public comment process that shaped the Sidewalk Ordinance, just as former Plaintiff Home Builders Association of Middle Tennessee did. (*Id.* at 13.) They may still petition their councilmembers or elect new ones to change the effects of the Sidewalk Ordinance. But asking this or any court for relief upends what should be a local, citizen-driven process and asks the judiciary to act as a zoning review board, "a task for which courts are not well suited." *Lingle*, 544 U.S. at 544.

C. The *Penn Central* Test is Also Doctrinally and Practically Suitable for Legislative Land Use Regulations Such as the Sidewalk Ordinance.

Penn Central is also the appropriate standard in this case because the Sidewalk Ordinance is a classic example of "a public program adjusting the benefits and burdens of economic life to promote the common good." *Knight*, 2021 WL 5356616, at *12 (quoting *Penn Central*, 438 U.S. at 124). The Sidewalk Ordinance is designed to balance the impacts of development in denser areas of Nashville with a public need for safe transportation options as well as landowners' economic and possessory interests. Relevant to this balancing act, the Sidewalk Ordinance only affects property rights that touch city streets, which the Metropolitan Government builds and maintains. (BL2016-493(A), Ex. 1 to Compl.) Contrast *Nollan*, *Dolan*, and *Koontz*, where the government intervened to protect natural, God-given features: the Pacific coastline of Ventura County, California; a creek

running through the outskirts of Portland, Oregon; and central Florida wetlands. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 378; *Koontz*, 570 U.S. at 599-600.

Because the Metropolitan Government created the road and sidewalk network that the ordinance advances, it has a strong interest in balancing landowners' development activities with the public interest in a safe transportation network that benefits all Nashvillians. Moreover, the Metropolitan Government already has a setback interest in the strip of land next to city streets; Plaintiffs have never been free to use the land subject to sidewalk easements as they pleased. *See* Metro. Code §§ 17.04.060, 17.12.030; *see also Knight*, 2021 WL 5356616, at *12 (observing that this setback restriction means that the Sidewalk Ordinance "does not change the use of [Plaintiffs'] properties or unduly restrict their rights of use").

These factors also bear on fairness, another fundamental theme in takings cases that *Penn Central* addresses well. Indisputably, the Sidewalk Ordinance imposes costs on homeowners. But in return, it gives the city a more complete sidewalk network, which means higher property values, less traffic, better air quality, and safer streets for the homeowner. Accordingly, the *Penn Central* test, which was designed for such a balancing of interests, is the best doctrinal and practical framework for this type of regulation.

D. Nashville's Sidewalk Ordinance Is a Generally Applicable Legislative Regulation.

The Sidewalk Ordinance is precisely the kind of legislative land use regulation that most courts have analyzed under *Penn Central*, not *Nollan/Dolan*, for several reasons. First, the ordinance says whether it applies to a given property.[5] The ordinance explains what areas of the city it covers, as well as which kinds of development trigger its provisions.

[5] The Metropolitan Government's website also shows when and where the Sidewalk Ordinance applies. *See* https://maps.nashville.gov/SidewalkRequirements.

(BL2016-493(A), Ex. 1 to Compl.) Second, the ordinance explains when paying a fee in lieu of sidewalk construction is an option. (BL2016-493(D), Ex. 1 to Compl.) If a permit applicant qualifies for an in-lieu fee, the applicant can choose to build the sidewalk or pay the in-lieu fee. (*Id.*) Third, the amount of an in-lieu fee for any given property is predetermined according to the formula written into the ordinance. (*Id.*) Fourth, the ordinance states that its requirements can be varied or removed by the Board of Zoning Appeals. (Metro. Code § 17.20.125, Ex. 1 to Compl.)

In these ways, the Sidewalk Ordinance is similar to regulations upheld in recent cases from Maryland and North Carolina. *E.g.*, *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 810 (Md. 2018); *Anderson Creek Partners*, 854 S.E.2d at 14. The ordinance, not an administrative or adjudicative body, dictates when and where it applies. It grants no discretion as to its application. It specifies when an applicant can pay an in-lieu fee and the amount of that fee; thus, any fees are predetermined and uniformly applied. Its requirements can be removed or changed according to unique hardships, but it applies automatically to clearly defined development activities in clearly defined parts of Nashville. Accordingly, it is a legislative land use regulation that should be analyzed under *Penn Central*. *Knight*, 2021 WL 5356616, at *10.

II. THE SIDEWALK ORDINANCE PASSES THE *PENN CENTRAL* TEST.

Applying the *Penn Central* test, the Court should examine the Sidewalk Ordinance's economic impact on Plaintiffs, its effect on their investment-backed expectations, and the character of the Metropolitan Government's action. *Phillips*, 442 S.W.3d at 240 (citing *Penn Central*, 438 U.S. at 124). Plaintiffs cannot show that "the interference with [their] property is of such a magnitude that there must be an exercise of eminent domain and compensation to sustain it," *Penn Central*, 438 U.S. at 136, so their claims fail.

A. The Sidewalk Ordinance's Economic Impact Is Minimal.

The Sidewalk Ordinance's economic impact cannot amount to a taking. As shown in the following table, the economic impact of the ordinance only ran to a small fraction of any Plaintiff's property value:[6]

Plaintiff	Address	In-lieu fee as a percentage of sale price or appraised value[7]
April Khoury	6227 Robin Hill Rd.	**0.8%**: $12,524.80 in-lieu fee / $1.5m appraised value (2019)
Old South	4701 Dakota Ave.	**3.3%**: $31,920 in-lieu fee / $960,000 sale price
Aspen	917 and 919 South St.	**0.6%**: $9,879 in-lieu fee / $1.45m total sale price
MRB	5608-A and B Pennsylvania Ave.	**0.9%**: $9,880 in-lieu fee / $989,900 total sale price
MRB	610 45th Ave. N.	**1.5%**: $9,774.73 in-lieu fee / $631,000 sale price

Furthermore, sidewalks increase the value of property, as the Tennessee Supreme Court recognized more than 175 years ago:

> A sidewalk well paved would therefore add greatly to the comfort of all who might pass that way, and the owners of the lots would share largely in the advantages it would afford. The ordinance is general in its character, operating on all persons owning property on the particular streets designated. The plaintiff in error derived a benefit from the operation of the law, not only in the comfort his own pavement afforded, but from the pavements made by other persons who owned lots in town. The fact that these pavements exist must add to the value of property in that town, and in the general appreciation of property the plaintiff in error will derive a proportional advantage.

Mayor & Aldermen v. Maberry, 25 Tenn. 368, 373 (Tenn. 1845).

Indeed, these properties have all increased in value; for example, 6227 Robin Hill Road is now appraised at $1.8 million,[8] and 4701 Dakota Ave. is now appraised at

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[6] The current version of the Sidewalk Ordinance caps in-lieu fees at three percent of a permit's total construction value. (Metro. Code § 17.20.120(D)(1), Ex. 1 to Def.'s Mot. Summ. J.)

[7] Sale prices for each property can be found at SUMF ¶¶ 1, 3, 5, 8, 10, 12, 14, 16, 18. The appraised value of 6227 Robin Hill Road as of 2019 is available at https://www.padctn.org/prc/property/123258/card/1/historical.

$665,400.[9] Plaintiffs cannot show that the Sidewalk Ordinance diminished the value of their properties or otherwise had a major economic effect.

B. The Ordinance Does Not Meaningfully Interfere With Investment-Backed Expectations.

The Sidewalk Ordinance does not interfere with investment-backed expectations for five reasons. First, because the ordinance is a legislative creation, Plaintiffs had the chance to participate in its drafting and public comment process. Second, the ordinance was in effect before Plaintiffs bought or developed their properties. (Compl. ¶¶ 39, 90, 107, 128, 138-41.) Thus, the ordinance did not inject uncertainty into Plaintiffs' development activities. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) ("A reasonable restriction that predates a landowner's acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property."). Third, the Sidewalk Ordinance applies during the permit application process, so property owners must discover it before construction starts. Fourth, for each Plaintiff, the cost of compliance with the Sidewalk Ordinance ran to a small percentage of value, leaving their investment-backed expectations intact. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). Finally, as mentioned above, the cost of compliance can be eliminated or reduced by a variance procedure.

C. The Character of The Metropolitan Government's Action Is Beneficial To Property Owners And Does Not Unduly Restrict Their Property Rights.

For years, Tennessee courts have found that sidewalks benefit the public as well as individual property owners. *O'Haver v. Montgomery*, 111 S.W. 449, 452 (Tenn. 1908); *Arnold v. City of Knoxville*, 90 S.W. 469, 475 (Tenn. 1905); *Maberry*, 25 Tenn. at 373; *see also Dolan,* 512 U.S. at 387-88 ("Pedestrians and bicyclists occupying dedicated spaces for

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[8] https://www.padctn.org/prc/property/123258/card/1.
[9] https://www.padctn.org/prc/property/84356/card/1.

walking and/or bicycling remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.") (internal alterations omitted). Thus, requiring sidewalk construction and allocating in-lieu fees to nearby sidewalk and greenway projects enhances the value, desirability, and safety of Plaintiffs' properties and neighborhoods.

For the same reason, the Metropolitan Government's action qualifies as a "public program adjusting the benefits and burdens of economic life to promote the common good," not a "physical invasion by government," a situation where "a taking may more readily be found." *Penn Central*, 438 U.S. at 124; *see also Murr,* 137 S. Ct. at 1951 ("This rule strikes a balance between property owners' rights and the government's authority to advance the common good . . .").

Finally, as noted above, Nashville's setback ordinance undermines any argument that the Sidewalk Ordinance unduly restricts Plaintiffs' rights of use. *See State By & Through Dep't of Transp. v. Lundberg,* 788 P.2d 456, 457-58 (Or. App. 1990); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) ("the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). Thus, the character of the ordinance's requirements and benefits shows that it does not effect a taking under *Penn Central*.

III. IF THE COURT DOES NOT APPLY THE *PENN CENTRAL* TEST, IT SHOULD APPLY THE "REASONABLE RELATIONSHIP" TEST USED IN TENNESSEE AND OTHER STATES.

If the Court declines to apply *Penn Central*, it should instead apply the "reasonable relationship" test adopted by courts in Tennessee, California, Colorado, and Ohio.[10] This

[10] *See Home Builders Ass'n of Middle Tenn. v. Williamson Cty.*, No. M201900698COAR3CV, 2020 WL 1231386, at *4 (Tenn. Ct. App. Mar. 13, 2020) ("*HBAMT*"); *San Remo Hotel*, 41 P.3d at 105; *Krupp,* 19 P.3d at 693-94; *Home Builders Ass'n of Dayton & the Miami Valley*

test asks two questions. First, is there a reasonable relationship between the regulation, the development activity, and the public need in question? *San Remo Hotel*, 41 P.3d at 105-06; *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek,* 729 N.E.2d 349, 354 (Ohio 2000). Second, is there a reasonable relationship between the cost of the condition and the cost of the public need? *San Remo Hotel*, 41 P.3d at 105-06; *Krupp*, 19 P.3d at 693-94.

This test satisfies the two elements that the Supreme Court requires for any takings standard of review. First, it considers the magnitude and character of the condition's burden on property rights. *Lingle,* 544 U.S. at 542. Second, it considers how regulatory burdens are distributed among property owners. *Id.*; *see also* Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *Nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENVTL. L. REV. 237, 289-90 (2017). Thus, it protects landowners against extortionate land-use exactions while preventing the kind of judicial interference that troubled the dissenting justices in *Koontz*. 570 U.S. at 626 (Kagan, J., dissenting).

Confusingly, the Ohio Supreme Court and the Tennessee Court of Appeals call this the "dual rational nexus" test. The Ohio Supreme Court seems to have used this label because the court attributed the test's factors to *Nollan/Dolan.*[11] The Tennessee Court of

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v. Beavercreek, 729 N.E.2d 349, 354, 356 (Ohio 2000). The *HBAMT* decision applied this test to an impact fee, not a regulatory taking or an exaction. It is not clear whether Tennessee appellate courts would apply this standard in either of these contexts.

[11] *Beavercreek*, 729 N.E.2d at 354. The *Beavercreek* court stated that the "dual rational nexus" test was "based on" *Nollan/Dolan* and applied to a generally applicable impact fee, but its analysis left out the individualized determination that *Nollan/Dolan* requires. *Id.* at 356-57. The Oregon Supreme Court later called this omission "questionable," and the decision has been criticized for its lack of consistency. *E.g.*, *Rogers Mach., Inc. v. Washington Cty.*, 45 P.3d 966, 978 n.13 (Or. App. 2002); Hansen, *supra*, at 266-68. Thus, the *Beavercreek* court's approach is more accurately described as a mislabeled "reasonable relationship" test.

Appeals, however, adopted the test's name and factors without deciding whether it was in fact a relabeled *Nollan/Dolan* analysis. *HBAMT*, 2020 WL 1231386, at *4. The Tennessee Court of Appeals did not cite either *Nollan* or *Dolan* in its selection or application of the test. *Id.* In any event, the "dual rational nexus" label is misleading because neither court applied *Nollan/Dolan* to a particular property. Therefore, it is more accurate to say that Ohio and Tennessee courts have applied versions of the reasonable relationship test to generally applicable land use regulations. *See* Hansen, *supra,* at 288-89.

A. There Is a Reasonable Relationship Between The Sidewalk Ordinance's Requirements And The Public Interest It Serves.

Applying the first prong, there is a reasonable relationship between the Sidewalk Ordinance and the development activity it regulates, as well as the public good it serves. Sidewalk easements have long been considered reasonable conditions on development to alleviate traffic congestion. *Dolan*, 512 U.S. at 395. Furthermore, as the ordinance states, sidewalks offer safe places to walk, connect neighborhoods, and protect air quality. (BL2016-493, Ex. 1 to Compl.) Nashville's population and built environment are growing rapidly, and its sidewalk network has not kept pace. Thus, requiring developers to build sidewalks is reasonably related to the development activity that the ordinance regulates. Likewise, collecting an in-lieu fee to build sidewalks is reasonably related to development. These fees are allocated for sidewalk projects in the same pedestrian benefit zone, ensuring that this money is spent for the same purpose, and in the same area, as the related development activity. (BL2016-493 (D)(2), Ex 1 to Compl.) In Plaintiffs' cases, their in-lieu fees were promptly allocated to sidewalk projects in the same areas of town as their affected properties. (In-Lieu Fee Accounting, attached to Def.'s Mot. Summ. J. as Exhibit 3.)

Crucially, the Sidewalk Ordinance does not apply to all development activity. Only new construction as well as significant expansions and renovations trigger its

requirements. (BL2016-493(A), Ex. 1 to Compl.) In this way, the ordinance is tailored to development activity that is likely to significantly increase traffic and/or increase the number of people living at a given address. It is self-evident that building new homes on vacant land or replacing small homes with larger homes can lead to higher population density, which in turn can increase pedestrian traffic.[12] Likewise, building more car parking increases the potential for traffic congestion nearby, among other negative effects.[13] Accordingly, there is a reasonable relationship between the goals of the Sidewalk Ordinance and requiring sidewalk construction or in-lieu fees for development activities that increase population density and traffic.

B. There Is A Reasonable Relationship Between The Cost Of Compliance With The Ordinance And The Cost Of The Related Public Need.

The Sidewalk Ordinance satisfies the second prong of the reasonable relationship test for two reasons. First, if a permit applicant builds a sidewalk, he or she need only build along the road frontage of the property. (BL2016-493(C), Ex. 1 to Compl.) Second, if an applicant pays an in-lieu fee, the cost is predetermined and limited to a reasonable amount. These fees are set with a simple formula: the length of road frontage multiplied by a preset cost-per-linear foot amount. (BL2016-493(D)(1), Ex. 1 to Compl.) The cost is posted on the Metropolitan Government's website; for 2021, it was $186 per linear foot.[14] This is lower than the $837 per-linear-foot average that the Metropolitan Government actually pays to build sidewalks because the Department of Public Works removes especially expensive projects from the average calculation and reduces the cost-per-linear-foot figure even

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[12] *See generally* NashvilleNext Vol. V: Transportation, Access Nashville 2040 at 35, available at https://www.nashville.gov/departments/planning/nashvillenext/nashvillenext-plan.

[13] *Id.* at 56-57.

[14] https://www.nashville.gov/Planning-Department/Long-Range-Planning/Transportation-Planning/Sidewalks.aspx

further. (Declaration of Brad Freeze, attached to Def.'s Mot. Summ. J. as Exhibit 4.) The road frontage of a given property can also be found online.[15] Taken together, these factors ensure that the cost of complying with the ordinance is reasonably related to the cost of providing sidewalks. *See Bldg. Indus. Ass'n-Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1059 (N.D. Cal. 2018), *aff'd*, 775 F. App'x 348 (9th Cir. 2019) (finding that a generally applicable development fee limited to one percent of development costs "does not cause a large enough loss of value to amount to a facial regulatory taking.").

IV. *NOLLAN/DOLAN* IS A SPECIAL APPLICATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE THAT SHOULD NOT BE FURTHER EXTENDED INTO FIFTH AMENDMENT JURISPRUDENCE.

As noted above, *Nollan/Dolan* is a "special application" of the unconstitutional conditions doctrine that bars the government from twisting a landowner's arm into surrendering constitutional rights in exchange for discretionary benefits. *Lingle*, 544 U.S. at 530; *Koontz*, 570 U.S. at 604. *Nollan/Dolan* is doctrinally unfit for evaluating legislative land use regulations, which helps explain why the Supreme Court has never applied the standard in that context. Numerous lower courts have followed suit, finding that *Nollan/Dolan* does not apply outside of an administrative exaction scenario.

A. The Unconstitutional Conditions Doctrine as Applied in *Nollan/Dolan* Is Inappropriate for Analyzing Legislative Land Use Regulations.

The unconstitutional conditions doctrine has traditionally protected rights that the government can chill with ease, especially free speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Thus, it is an unwieldy tool for takings cases, especially building permit cases, which implicate "mutually beneficial transaction[s]" that lack the same coercive power dynamics as free speech cases. *Dolan*, 512 U.S. at 407 n.12, 407-08 (Stevens, J., dissenting);

[15] *See, e.g.*, the Metropolitan Nashville and Davidson County Property Assessor's website, www.padctn.org, and the Metropolitan Planning Department's Parcel Viewer, https://maps.nashville.gov/ParcelViewer/.

see also Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 609-12 (2009). Therefore, it would be wrong to apply the *Nollan/Dolan* test for administrative exactions to legislative land use regulations, just as it is wrong to apply physical takings standards to regulatory takings cases, and vice versa. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 323-324 (2002).

Furthermore, the Supreme Court's choice of the unconstitutional conditions doctrine to support *Nollan/Dolan* suggests that the test should only apply to administrative exactions. A unanimous high court seemed to agree on this much in *Lingle,* branding *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. Notably, the court made this categorical statement after discarding the "substantially advances" test from *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), which *Nollan* and *Dolan* had both applied. *Nolan*, 483 U.S. at 835, 836 n.3; *Dolan*, 512 U.S. at 387. The Court declared the "substantially advances" test doctrinally unfit for takings cases, as well as practically unwise because of how it invited judicial policymaking:

> The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, 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. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Lingle, 544 U.S. at 544.

At the end of this analysis, the high court noted that "the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established." *Id.* at 545. The court's very next move, contrasting *Nollan* and

Dolan as administrative exaction cases, "signals that *Nollan* and *Dolan* do not extend beyond requirements imposed on a case-by-case basis to cover conditions that are imposed legislatively." Siegel, *supra*, at 608-09. The *Lingle* court's subsequent citation aimed at administrative exactions supports this argument: "see also *Del Monte Dunes*, supra, at 702, 119 S.Ct. 1624 (emphasizing that we have not extended this standard 'beyond the special context of [such] exactions')." *Lingle,* 544 U.S. at 547 (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702 (1999)). This Court should heed these signals from a unanimous Supreme Court and decline to extend *Nollan/Dolan* to the Sidewalk Ordinance.

B. The Supreme Court Has Never Applied *Nollan/Dolan* to Legislative Land Use Regulations.

The Supreme Court has applied *Nollan/Dolan* scrutiny to administrative exactions because they can be easily abused as "out-and-out plan[s] of extortion." *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 837). *Nollan*, *Dolan*, and *Koontz* each concerned *ad hoc*, adjudicatory conditions on specific properties. *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80, 385; *Koontz,* 570 U.S. at 601-02, 614.

As noted above, legislative land use regulations pose no constitutional threat because they do not draw a "direct link between the government's demand and a specific parcel of real property." *Koontz*, 570 U.S. at 614. Unsurprisingly, then, the Supreme Court has never held that *Nollan/Dolan* applies to legislative land use regulations. *See Del Monte Dunes*, 526 U.S. at 702; *Lingle*, 544 U.S. at 546 (describing *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions"); *Koontz*, 570 U.S. at 604, 614. Many lower courts refuse to cross this line, declining to extend *Nollan/Dolan* outside of administrative exactions. *See, e.g.*, *Action Apartment Assn. v. City of Santa Monica*, 82 Cal. Rptr. 3d 722, 731-32 (Cal. App. 2d Dist. 2008) ("Both the United States and

California Supreme Courts have explained the two part *Nollan/Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative general zoning decisions."); *see also* Hansen, *supra*, at 239-40, 255-64; John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 53-55 (2014).

C. Most Courts Presented With the Question Have Not Extended *Nollan/Dolan* to Legislative Land Use Regulations.

As the example above shows, it is no surprise that lower courts disagree on whether *Nollan/Dolan* applies to legislative land use regulations. The Supreme Court has noted the schism: "For at least two decades . . . lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of cert.) (citations omitted).

State and federal courts in Alabama, Alaska, Arizona, California, Colorado, Georgia, Kansas, Maryland, Minnesota, North Carolina, Oregon, Tennessee, and Washington, and even the Ninth Circuit, have recognized a doctrinal difference between administrative exactions and legislative land use regulations.[16] Courts in Illinois, South Dakota, Texas, and Virginia have applied *Nollan/Dolan* to legislative land use regulations.[17]

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[16] *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007-08 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003); *Home Builders Ass'n of Cent. Ariz*, 930 P.2d at 999-1000; *Ehrlich*, 911 P.2d at 447 ("[I]t is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment[.]"); *Cal. Bldg. Indus. Assn. v. City of San Jose*, 351 P.3d 974, 979, 989-90 (Cal. 2015), *cert. denied*, 577 U.S. 1179 (2016); *Krupp*, 19 P.3d at 695-97; *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Georgia*, 450 S.E.2d 200, 203 n.3 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Harris v. City of Wichita, Sedgwick Cty., Kan.*, 862 F. Supp. 287, 293-94 (D. Kan. 1994), *aff'd,* 74 F.3d 1249 (10th Cir. 1996); *Dabbs*, 182 A.3d

Recent cases from Maryland and North Carolina, as well as the United States District Court for the Middle District of Tennessee, continue a quarter-century trend of confining *Nollan/Dolan* to administrative exactions. *See Dabbs*, 182 A.3d 798, 813 n.21 (collecting cases); *Anderson Creek Partners*, 854 S.E.2d at 442-43; *Knight,* 2021 WL 5356616, at *9. In *Dabbs*, the Maryland Supreme Court held that *Nollan/Dolan* did not apply to a local ordinance that imposed development fees on broad classes of properties. *Id.* at 812-13. The court reviewed the *Nollan/Dolan/Koontz* framework, analyzed the legislative nature of the ordinance, and concluded:

> There is no analogy to the Koontz scenario present here. The [] Ordinance is imposed broadly on all properties, within defined geographical districts, that may be proposed for development. The legislation leaves no discretion in the imposition or the calculation of the fee, i.e., the [] Ordinance demonstrates how the fees are to be imposed, against whom, and how much.

Id. at 810-11.

In 2020, the North Carolina Court of Appeals reviewed a legislative development fee and adopted the *Dabbs* court's reasoning:

> We hold that impact and user fees which are imposed by a municipality to mitigate the impact of a developer's use of property, which are generally imposed upon all developers of real property located within that municipality's geographic jurisdiction, and which are consistently imposed in

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at 810; *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Anderson Creek Partners,* 854 S.E.2d at 14; *Rogers Mach.*, 45 P.3d at 983; *Knight*, 2021 WL 5356616, at *10; *City of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash. 2006) (en banc) ("[N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."); *Douglass Properties II, LLC v. City of Olympia*, 479 P.3d 1200, 1207 (Wash. App. 2d 2021); *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008).

[17] *See Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995); *Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 1026 (D.S.D. 2002), *aff'd in part, vacated in part, remanded sub nom.*, 362 F.3d 512 (8th Cir. 2004); *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 642-43 (Tex. 2004); *National Ass'n of Home Builders v. Chesterfield Cty.*, 907 F. Supp. 166, 168 (E.D. Va. 1995).

> a uniform, predetermined amount without regard to the actual impact of the developers' project do not invoke scrutiny as an unconstitutional condition under Nollan/Dolan nor under North Carolina precedent.

Anderson Creek Partners, 854 S.E.2d at 443; *id.* at 442-43 (recapping the *Dabbs* holding).

Finally, last year, the United States District Court for the Middle District of Tennessee reached the same conclusion after considering the same arguments against the current version of the Sidewalk Ordinance:

> [T]he *Nollan/Dolan* standard of review is not applicable to the challenges to the constitutionality of the Sidewalk Ordinance and its application to the plaintiffs, insofar as that application constituted a legislative rather than adjudicative action. The Sidewalk Ordinance, as applied, does not pose a significant risk of abuse of power or overreaching by land-use officials . . . given the general applicability of the Sidewalk Ordinance, the defined procedure for calculating the in-lieu fee, and the cap on that fee, the risk of an "extortionate" demand such as that made in *Koontz* simply does not exist.

Knight, 2021 WL 5356616, at *10.

Considering the sound constitutional arguments in the cases above, this Court should not extend *Nollan/Dolan* beyond administrative exactions. Rather, this Court should join the "numerous courts that have concluded that legislative 'exactions' that apply generally, rather than only to specific parcels of real property, should not be governed by the *Nollan/Dolan* standard of review." (*Id.*)

V. PLAINTIFFS ARE NOT ENTITLED TO RESTITUTION OF EASEMENTS OR FEES.

Plaintiffs seek restitution in this action, but the remedy for a taking is just compensation. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176 (2019) ("Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable."). Just compensation is a legal remedy, not an equitable one. *Del Monte Dunes*, 526 U.S. at 710-11 ("[I]n determining just compensation, 'the question is what has the owner lost, not what has the taker gained.'") (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195

(1910)). Restitution is an equitable remedy here because Plaintiffs assert a Fifth Amendment takings claim, and the remedial question is what they lost, not what the Metropolitan Government gained. *See Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

Nor can Plaintiffs establish that the Metropolitan Government has been unjustly enriched. *Cline v. Red Bank Util. Dist.*, 250 S.W.2d 362 (Tenn. 1952), is instructive on this point. In *Cline*, a property owner sued a utility district to recover money she paid to extend the district's sewer line in order to serve seven houses that she built. *Id.* at 362-63. The property owner claimed that when the district took over her sewer extension and charged the people living in the seven houses for its use, the district unlawfully converted her property. *Id.* The Tennessee Supreme Court rejected the argument that the utility district had been enriched because there was no evidence that it profited from the takeover of the sewer extension and the fees it collected from the extension's users. *Id.* at 364. The Court also noted: "If Mrs. Cline's property increased in value, due to this desirable improvement, her right to reimbursement for it is wholly without reason." *Id.*

Here, as in *Cline*, Plaintiffs' properties likely increased in value as a result of the benefits of Nashville's sidewalk network. As presented above, the Tennessee Supreme Court recognizes that sidewalks enhance property values, not just of the properties that they abut, but nearby properties as well. *Maberry*, 25 Tenn. at 373. Accordingly, Plaintiffs are not entitled to restitution of easements, rights-of-way, or in-lieu fees.

Finally, MRB, Aspen, and Old South have sold the properties at issue in this lawsuit. It is not clear why they, as opposed to the current owners of these properties, would be entitled to restitution of easements or rights-of-way. Moreover, these developer Plaintiffs are not entitled to restitution of in-lieu fees, given that they admit to passing the

cost of compliance to their customers in at least one instance. *See* Compl. ¶ 117 ("MRB opted to construct sidewalks and offset the cost by building larger, more expensive homes.").

CONCLUSION

The Court should find that the Sidewalk Ordinance is constitutional as a valid land use regulation under the *Penn Central* standard or, alternatively, the "reasonable relationship" standard. The *Nollan/Dolan* standard has no application in this case. Moreover, Plaintiffs are not entitled to the equitable relief they seek. Accordingly, the Court should enter summary judgment in favor of the Metropolitan Government.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
WALLACE W. DIETZ (#9949)
DIRECTOR OF LAW

/s/John W. Ayers
ALLISON L. BUSSELL (#23538)
ASSOCIATE DIRECTOR OF LAW
JOHN W. AYERS (#37494)
ASSISTANT METROPOLITAN ATTORNEY
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
allison.bussell@nashville.gov
will.ayers@nashville.gov
Counsel for the Metropolitan Government

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by electronic mail and the Court's electronic filing system to:

Jason Coleman
Beacon Center
201 4th Ave. N., Suite 1820
Nashville, TN 37219
jason.coleman@beacontn.org

on this the 8th day of April, 2022.

/s/John W. Ayers
John W. Ayers