IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAMES KNIGHT AND JASON MAYES,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 3:20-cv-00922**
	)	**Judge Trauger**
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
	)	
Defendant.	)	

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

In this action challenging the constitutionality of Metropolitan Code of Laws § 17.20.120 *et seq*. ("the sidewalk ordinance") as well as its application to Plaintiffs' properties, the Court should enter judgment in favor of the Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") pursuant to Federal Rule of Civil Procedure 56 for two reasons. First, the sidewalk ordinance is not an exaction as Plaintiffs claim. It is a generally applicable, constitutional land-use regulation with strong links to legitimate state interests. Second, even if the Court finds that the sidewalk ordinance is an exaction, it is not subject to heightened scrutiny, and it is constitutional because it is legislatively imposed, generally applicable, and reasonably related to the public good it was designed to achieve. Additionally, regardless of the standard of review, Plaintiffs are not entitled to the restitution of fees or easements collected under the sidewalk ordinance.

STATEMENT OF FACTS

A. The Sidewalk Ordinance's History And Purposes

In 2017, the Metropolitan Council amended Nashville's zoning code to require property owners who build new single-family homes either to build sidewalks or pay a fee in lieu of sidewalk construction.[1] (Ordinance No. BL2016-493, attached as Exhibit 1.) In 2019, the Council amended this section of the zoning code again, namely Metropolitan Code of Laws § 17.20.120 *et seq.*, to its current form.[2] (BL2019-1659, Metro. Code § 17.20.120, Doc. No. 1-2.) The legislation amending the sidewalk ordinance in 2019 stated several policy goals:

- Offering "a wider variety of safe transportation options in a rapidly growing Nashville";
- Coordinating walking and biking infrastructure with Nashville's General Plan, Strategic Transit Plan, and Strategic Plan for Sidewalks and Bikeways;
- "Providing a safe and designated path for connecting to schools, parks, libraries, businesses, and transit," thereby increasing property values;
- Providing a sidewalk network that meets the General Plan's safety and design standards;
- Building a complete sidewalk network in a timely and cost-effective manner; and
- Reducing pedestrian deaths on Nashville's streets.

(*Id.*)

The text of the sidewalk ordinance also states several purposes, including:

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[1] The 2017 sidewalk ordinance also applied to other development activities not germane to this action, such as multifamily development and certain kinds of renovations and expansions. The current sidewalk ordinance shares this trait. *See* Metro. Code §17.20.120(A)(1)-(2), Doc. No. 1-2 at 3.

[2] Plaintiffs challenge the sidewalk ordinance's current form. (Compl. ¶¶ 10-11, Doc. No. 1.)

- Offering safe and convenient walkways for Nashvillians;
- Reducing dependency on cars, thus reducing traffic congestion and protecting air quality;
- Increasing homeowner and community health and social connections; and
- Improving pedestrian safety.

(*Id*. at 1-2.)

B. The Sidewalk Ordinance's Requirements And Variance Process

Relevant here, the sidewalk ordinance applies to new single-family home construction. (Metro. Code § 17.20.120(A)(2), Doc. No. 1-2 at 3.) When a property owner applies for a permit to build a new home, the sidewalk ordinance requires sidewalks to be built along the property's street frontage. (Metro. Code § 17.20.120(C)(1) and (2), Doc. No. 1-2 at 4-5.) As an alternative to building a sidewalk, the sidewalk ordinance grants the Metropolitan Government's Zoning Administrator the authority to allow an in-lieu fee for all or part of a property's street frontage. (Metro. Code § 17.20.120(A)(3)(b), Doc. No. 1-2 at 3.) The in-lieu fee is predetermined according to a per-linear-foot cost that the Department of Public Works sets each year. (Metro. Code § 17.20.120(D)(1), Doc. No. 1-2 at 5.) In-lieu fees are capped at three percent of a permit's total construction value. (*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. (Metro. Code § 17.20.120(D)(2), Doc. No. 1-2 at 5.) These zones are defined elsewhere in the Metropolitan Government's zoning code. (Metropolitan Code of Laws § 17.04.060, attached as Exhibit 2.)

If a property owner disagrees with how the sidewalk ordinance applies, there are two paths for relief. First, the Zoning Administrator may approve an alternate sidewalk

design or waive the ordinance's requirements altogether if there is a hardship such as "utilities, a ditch or drainage ditch, historic wall(s) or stone wall(s), tree(s), [or] steep topography." (Metro. Code § 17.20.120(A)(3)(a), Doc. No. 1-2 at 3.) Second, a property owner 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 appropriate mitigation." (Metro. Code § 17.20.125, Doc. No. 1-2 at 6.)

C. The Sidewalk Ordinance's Application To Plaintiffs

Plaintiff James Knight bought property at 411 Acklen Park Drive in Nashville in 2017. (Compl. ¶¶ 27-28, Doc. No. 1.) He levelled the 790-square foot home on the lot in 2018. (The Metropolitan Government's Statement of Undisputed Material Facts ("SUMF") ¶ 3.) Knight then applied for a permit to build a 2,651 square-foot, single-family home with a 323 square-foot garage and porches totaling 468 square feet. (SUMF ¶ 5.) In October 2019, Knight asked the Zoning Administrator for a variance from the sidewalk ordinance's requirements. (Compl. ¶¶ 43-44, Doc. No. 1.) The Zoning Administrator denied Knight's request in January 2020 on the Planning Department's recommendation. (SUMF ¶ 6.) Knight then appealed to the Board of Zoning Appeals, which heard his case on May 21, 2020. (SUMF ¶ 7.) The BZA denied Knight's request. (SUMF ¶ 8.) To date, Knight has not paid an in-lieu fee, built a sidewalk, or granted an easement for a sidewalk at 411 Acklen Park Drive. (Compl. ¶¶ 73-74, Doc. No. 1; SUMF ¶ 9.)

Plaintiff Jason Mayes acquired the vacant lot at 167 McCall Street in Nashville in 2018. (Compl. ¶¶ 75-76, Doc. No. 1; SUMF ¶ 10.) In November 2019, Mayes applied for a permit to build a new single-family home with 2,375 square feet of living space and a 640 square-foot, two-car garage. (SUMF ¶ 11.) That same month, Mayes requested a waiver from the sidewalk ordinance's requirements. (Compl. ¶ 86, Doc. No. 1.) In December 2019, the Planning Department recommended denying Mayes's waiver request. (SUMF ¶ 12.)

Mayes paid an in-lieu fee of $8,883,21 on January 21, 2020. (Compl. ¶ 94, Doc. No. 1.) Meanwhile, Mayes appealed the Planning Department's decision to the Board of Zoning Appeals, which heard his case on March 5, 2020. (SUMF ¶ 13.) The BZA denied Mayes's request for a variance because he had the option to pay an in-lieu fee. (SUMF ¶ 14.) The in-lieu fee that Mayes paid was allocated for a sidewalk project in the same pedestrian benefit zone in 2020. (SUMF ¶¶ 15-16.) To date, Mayes has not built a sidewalk or dedicated an easement for a sidewalk at 167 McCall Street. (SUMF ¶ 17.)

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). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

The Metropolitan Government, as the party seeking summary judgment, 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. When the moving party meets this burden, it then shifts to the non-moving party, who must produce specific evidence to establish a genuine dispute of material fact for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The Court must view all facts and inferences to be drawn in the light most favorable to the non-moving party, which must respond with affirmative evidence that supports its claims and stakes out a genuine dispute of material fact. *Cleveland v. Frontstream DTI, LLC*, 531 F. App'x 541, 543 (6th Cir. 2013); *Celotex,* 477 U.S. at 324.

The Supreme Court considers summary judgment to be a proper procedure to promote judicial economy and reduce litigation costs. *Celotex,* 477 U.S. at 327; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is "regarded not as

a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex,* 477 U.S. at 327.

ARGUMENT

I. THE SIDEWALK ORDINANCE IS A GENERALLY APPLICABLE LAND USE REGULATION, NOT AN EXACTION, AND IT IS CONSTITUTIONAL UNDER RATIONAL BASIS REVIEW.

The sidewalk ordinance is a legislative land use regulation that applies automatically in specific parts of Nashville, blind to the unique features of individual properties or permit applications. Therefore, the Court should uphold the ordinance under rational basis review and decline Plaintiffs' request to scrutinize it under the Supreme Court's unconstitutional conditions framework.

A. Land Use Regulations Reasonably Related To The Public Welfare Are Constitutional Exercises Of The Government's Police Power.

The Supreme Court has stated that "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). Therefore, when a land use regulation bears a reasonable relationship to the public welfare, it is generally constitutional as a valid exercise of police power. *Euclid,* 272 U.S. at 395; *Mobile Home City of Chattanooga v. Hamilton Cty.*, 552 S.W.2d 86, 87 (Tenn. Ct. App. 1976). To overturn a generally applicable land use regulation such as the sidewalk ordinance, a plaintiff must show, under a rational basis standard, that the regulation is "arbitrary and irrational." *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543-44 (2005).

Tennessee cities may use their police powers to "provide for the harmonious development of the municipality . . . , for the coordination of streets . . . , for adequate open spaces . . . , and for a distribution of population and traffic which will tend to create

conditions favorable to health, safety, convenience and prosperity . . . . " TENN. CODE ANN. § 13-4-303 (concerning subdivision regulations). Near the turn of the last century, the Tennessee Supreme Court held that a similar ordinance requiring sidewalk construction and maintenance was a valid exercise of municipal power in *O'Haver v. Montgomery*, 111 S.W. 449, 452 (Tenn. 1908). The ordinance required landowners in certain areas of Memphis to build sidewalks. *Id* at 450. While the sidewalk ordinance was not a central issue in the case, the court addressed its constitutionality, stating that "while [such statutes] should be strictly construed in favor of the personal liberty of the individual citizen and his rights of property, the courts should ever be mindful of the needs of large masses of people grouped together in cities, and the necessity of efficient government." *Id.* at 452.

O'Haver predates modern takings jurisprudence, but the same principle still applies today: generally applicable land-use regulations are constitutional unless they are arbitrary and unreasonable. *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860, at *5 (Tenn. Ct. App. June 30, 2005) (citing *Euclid*, 272 U.S. at 395) ("A zoning ordinance is the product of legislative action and, before it can be declared unconstitutional, a court must find that the provisions are clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."); *see also Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 238 n.6 (Tenn. 2014) (citing cases) ("[W]e have reviewed land use regulations and zoning ordinances under a rational basis test and tended to uphold such enactments as proper exercises of the state's police power.").

B. The Sidewalk Ordinance Satisfies Rational Basis Review.

The sidewalk ordinance applies broadly and automatically, as discussed in more detail in Section II.C below. The ordinance identifies precisely when and where it applies, and its purposes and requirements were clearly set forth by the Metropolitan Council.

It is well-established that sidewalks benefit the public as well as individual property owners. *O'Haver,* 111 S.W. at 452; *Arnold v. City of Knoxville*, 90 S.W. 469, 475 (1905); *Mayor & Aldermen v. Maberry*, 25 Tenn. 368, 373 (1845). *See also Dolan,* 512 U.S. at 387-88 ("Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling remove potential vehicles from streets, resulting in an overall improvement in total transportation system flow.") (internal alterations omitted). The sidewalk ordinance recites this principle and lists related benefits, stating that "[s]idewalks 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." (Metro. Code § 17.20.120, Doc. No. 1-2 at 2.)

Plaintiffs cannot show that the ordinance is arbitrary or unreasonable. In light of the principles cited above, building sidewalks and/or collecting in-lieu fees for sidewalk construction redounds to the benefit of property owners whose properties have sidewalks, as well as all Nashville citizens. *Clark v. Urb. Growth Prop. Ltd. P'ship*, No. CIV. 03-1440-JE, 2004 WL 2980182, at *5 (D. Or. Dec. 17, 2004) ("Nor is it an unconstitutional taking to require property owners to construct and maintain the . . . public sidewalk. The ordinance in question substantially advances legitimate state interests . . .") (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Plaintiffs cannot plausibly argue that requiring sidewalk construction and/or funding as part of the building permit process in Nashville is unrelated to public safety, traffic mitigation, or air quality. Thus, the ordinance has a substantial relationship to public health and safety, and it is constitutional on its face and as applied to Plaintiffs' properties.

II. EVEN IF THE SIDEWALK ORDINANCE IS AN EXACTION, A DEFERENTIAL STANDARD OF REVIEW APPLIES BECAUSE IT IS LEGISLATIVE, NOT ADJUDICATORY.

If the Court concludes that the sidewalk ordinance is an exaction, the standard of review that Plaintiffs seek does not apply. In fact, a more lenient "reasonable relationship" standard of review should apply because the ordinance is a legislatively imposed land use condition, not an adjudicatory exaction where the government demands money or property on an *ad hoc* basis. Alternatively, the Supreme Court's *Penn Central* test for regulatory takings applies, and the sidewalk ordinance is constitutional under either standard.

A. A Brief Review Of Regulatory Takings Jurisprudence

More than 20 years ago, Justice Kennedy observed that regulatory takings cases "are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in judgment and dissenting in part). The morass has not cleared since then, so a brief summary of the concept will provide context for the standards of review discussed below.

It all starts simply enough: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.[3] The most obvious kind of Fifth Amendment taking is a *per se* taking where the government confiscates or occupies a citizen's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-34 (1982). In those cases, the rule is simple: "[t]he government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). But the government can also take property within the meaning of the Fifth Amendment when it enforces a regulation "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537-38. This is a regulatory taking, and the rule in these cases sounds simple but is more

[3] The Fifth Amendment's protections extend to the states through the Fourteenth Amendment. *Dolan*, 512 U.S. 374 at 383.

complicated to apply: the government must pay just compensation to a property owner when a regulation "goes too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

How far is "too far" depends on which kind of regulatory taking is alleged. There are four, and the first two are considered *per se* takings where the government (1) requires a property owner to allow a permanent encroachment, or (2) regulates property so intensely so as to "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original)). Third, there is an adjudicative or administrative exaction, where the government "may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 (1987) *and Dolan*, 512 U.S. at 374). The intermediate level of scrutiny that applies in adjudicative exactions is known as the *Nollan/Dolan* test, and it applies to dedications of land as well as money payments. *Koontz*, 570 U.S. at 619.[4] Fourth, any other kind of regulatory taking is subject to a balancing test that considers the economic impact of the regulation, how much it interferes with

[4] *Koontz* is controlling authority, but the decision is not consistent with prior Supreme Court precedent. Specifically, the five-justice majority in *Koontz* did not cite, let alone engage with, the high court's prior unanimous statement that *Nollan/Dolan* "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999). Accordingly, *Koontz's* basis for extending *Nollan/Dolan* to permit denials has been questioned. *See* John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 19-35 (2014). Further, the majority's decision in *Koontz* to expand *Nollan/Dolan* to money payments is inconsistent with the statements of the majority and dissenting justices in *E. Enters.*, 524 U.S. at 540, 554, who agreed that an obligation to pay money did not fall within the ambit of a takings claim.

investment-backed expectations, and the character of the government's action. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("*Penn Central*").

This case concerns the fourth kind of regulatory taking. Specifically, to the extent that Nashville's sidewalk ordinance is a taking at all, it is a generally applicable, legislative land use condition, not an adjudicative exaction that falls under *Nollan/Dolan* unconstitutional conditions scrutiny. Accordingly, for the reasons discussed in Section II.D below, the court should apply the "reasonable relationship" test used by a number of states. If the Court does not apply the reasonable relationship test, it should apply the *Penn Central* test for the reasons presented in Section II.E below.

B. *Nollan/Dolan* Does Not Apply to Legislative Land Use Exactions.

i. An Overview Of Adjudicatory And Regulatory Exactions

There are two kinds of land-use exactions in the realm of unconstitutional land use conditions: adjudicatory and legislative. *See Dolan*, 512 U.S. at 385, 391 n.8. In adjudicatory exactions, land-use conditions apply case-by-case to particular properties. *Koontz*, 570 U.S. at 614. In legislative exactions, conditions are imposed in statutes or ordinances; the application is automatic. *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).

Courts apply the *Nollan/Dolan* intermediate level of scrutiny to *ad hoc* adjudicatory exactions because they can be abused as "out-and-out plan[s] of extortion." *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 837). Accordingly, courts may strike down exactions "that lack an essential nexus and rough proportionality" to the impacts of proposed land uses. *Koontz*, 570 U.S. at 606. *Nollan, Dolan,* and *Koontz*, the leading cases in this area, 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.

On the other hand, legislative land use conditions are not extortionate because they do not implicate "the central concern of *Nollan* and *Dolan*," which depends on a "direct link between the government's demand and a *specific parcel* of real property." *Koontz*, 570 U.S. at 614 (emphasis added). Legislative land use conditions set parameters ahead of time; therefore, the risk of extortion is low "because there is no discretionary application and 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 County*, 364 F.3d 1088, 1096 (9th Cir. 2004) *cert. granted in part*, 543 U.S. 323 (2005).

ii. The Majority Of Courts Distinguish Between Legislative And Adjudicatory Exactions.

As several courts have recognized, the United States Supreme Court has never held that *Nollan/Dolan* scrutiny applies to legislative exactions. *See, e.g., Dabbs v. Anne Arundel Cty.*, 458 Md. 331, 352 (2018) ("The exactions concept protects citizens against abuses of power by land-use officials concerning proposed quasi-judicial or administrative action for permit or other development approvals relative to an individual parcel of land. There is no analogy to the *Koontz* scenario present here."); *Action Apartment Assn. v. City of Santa Monica*, 82 Cal.Rptr.3d 722, 731-32 (Cal. App. 2 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* 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, 239-40, 255-264 (2017); Echeverria, 22 N.Y.U. ENVTL. L.J. at 53-55 (2014).

No surprise then that lower courts disagree on whether the *Nollan/Dolan* test applies to legislative land use conditions. *See, e.g., McClung v. City of Sumner*, 548 F.3d

1219, 1227 (9th Cir. 2008) (finding that "legislative land determinations" do not fall under the "*Nollan/Dolan* framework"); *compare Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 1026-27, (D.S.D. 2002) *aff'd in part*, 362 F.3d 512 (8th Cir. 2004) (applying *Nollan/Dolan* to an eminent domain statute). The Supreme Court is aware of the discord: "For at least two decades, however, 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*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.) (citations omitted).

Courts in Alabama, Alaska, Arizona, California, Colorado, Georgia, Kansas, Maryland, Minnesota, North Carolina, Oregon, and Washington, as well as the Ninth Circuit, recognize a doctrinal difference between adjudicative and legislative exactions.[5] Indeed, Justice Kagan has observed that *Dolan* suggests this distinction:

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[5] *See St. Clair County 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 Association of Central Arizona v. City of Scottsdale,* 930 P.2d 993, 999-1000 (Ariz. 1997) (noting that *Dolan* did not apply to a generally applicable legislative decision by the city); *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996) ("[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[.]"); *California 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 v. Breckenridge Sanitation District*, 19 P.3d 687, 695-97 (Colo. 2001) (en banc); *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*, 458 Md. at 352; *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 14 (N.C. Ct. App. 2020); *Rogers Mach., Inc. v. Washington County*, 181 Or. App. 369, 400 (2002) (evaluating a "generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee," the court was "persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan*'s heightened scrutiny test does not extend to development fees of that kind."); *City of Olympia v. Drebick*, 156

> The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination [ ] classifying entire areas of the city."

Koontz, 570 U.S. at 628 (Kagan, J., dissenting) (quoting *Dolan,* 512 U.S. at 385) (internal citations omitted) (alterations in original).

Courts in Illinois, South Dakota, Texas, and Virginia have applied *Nollan/Dolan* scrutiny to legislative land use conditions.[6] The Sixth Circuit has not decided the issue.[7]

iii. Recent Cases From Maryland, North Carolina, And Tennessee Show Why *Nollan/Dolan* Does Not Apply To Legislative Exactions.

Three recent cases from Maryland, North Carolina, and Davidson County Chancery Court show why *Nollan/Dolan* scrutiny should not apply to generally applicable legislative land use conditions such as Nashville's sidewalk ordinance. First, in *Dabbs*, the Maryland Supreme Court held that *Nollan/Dolan* scrutiny did not apply to a local ordinance that imposed development fees on broad classes of properties. 458 Md. at 355-57. The court

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Wash.2d 289, 301-02 (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*, 16 Wash. App. 2d 158, 171 (Wash. Ct. App. 2021); *McClung*, 548 F.3d at 1227.

[6] *See Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995); *Dakota, Minn. & E. R.R. Corp.*, 236 F. Supp. At 1026-27; *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 642-43 (Tex. 2004); *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166, 168 (E.D. Va. 1995).

[7] The Sixth Circuit recognizes a difference between legislative and administrative functions in the context of substantive due process challenges to zoning ordinances. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1220-21 (6th Cir. 1992). Therefore, the court may recognize such a difference in exactions claims, given the overlapping considerations in both areas of the law. *See Lingle*, 544 U.S. at 540-41.

reviewed the doctrine of unconstitutional exactions, analyzed the legislative nature of the development fees, 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.**

458 Md. at 352 (emphasis added).

Last year, the North Carolina Court of Appeals reviewed a legislatively-imposed development fee and followed 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 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 14 (emphasis added).

Earlier this year, a Davidson County Chancery Court judge concluded that Nashville's 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. The Metropolitan Gov't of Nashville and Davidson Cty., Tenn.,* No. 20-897-III, at *2 (May 27, 2021) (slip op.) (copy attached as Exhibit 3). The court noted that the ordinance applies broadly, sets fees in advance, and offers an individualized variance process to remove, rather than apply, its requirements. *Id.* at *12-14.

These three cases affirm that legislative land use conditions pose a low risk of extortion compared to adjudicative exactions. This is because generally applicable land use ordinances apply blindly, imposing uniform conditions on broad categories of properties. *Krupp*, 19 P.3d at 696; *Home Builders Ass'n of Cent. Ariz*, 930 P.2d at 999-1000. Thus, there

is less risk of the government extracting concessions from property owners because the fees and conditions have already been imposed by the legislation. *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."). Moreover, legislative land use conditions do not involve 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. Conditions without that direct 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.*

Contrast where a government agency can dangle a carrot and brandish a stick at property owners *before fees or conditions are imposed*. In those cases, the government can easily abuse that power by imposing unconstitutional conditions. *See Koontz*, 570 U.S. at 604-05; *Ehrlich*, 911 P.2d at 438-39.

To further illustrate the difference, the *Anderson Creek Partners* court noted that "[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." 854 S.E.2d at 14-15 (citing *Koontz*, 570 U.S. at 613). The court's analysis focused on when and how the fees were applied:

> [T]he fees were predetermined and are uniformly applied—not levied against the Developers on an ad hoc basis—and thus do not suggest any intent by the County to bend the will or twist the arm of the Developers. Therefore, we hold that the Developers' pleadings failed to present a constitutional takings

> claim under current federal and state unconstitutional conditions jurisprudence as a matter of law.

Id. at 15.

These cases continue a trend, now in motion for more than a quarter century, of not applying *Nollan/Dolan* to legislatively imposed exactions. *See Dabbs*, 458 Md. 331, 356 n.21 (collecting cases). The Court should follow this reasoning and reject Plaintiffs' attempt to extend *Nollan/Dollan* beyond the realm of adjudicative exactions.

iv. Applying *Nollan/Dolan* To Legislative Exactions Would Be Inconsistent With The Supreme Court's Reasoning In *Koontz*.

In addition to the precedent cited above, applying *Nollan/Dolan* to legislative exactions would not be consistent with the Supreme Court's approach to the two kinds of financial burdens that land use regulations can impose on landowners. In the first kind of burden, to which *Nollan/Dolan* certainly applies, "the monetary obligation burden[s] . . . ownership of a *specific* parcel of land." *Koontz*, 570 U.S. at 613 (emphasis added). Indeed, *Koontz* hinged on "the direct link between the government's demand and a specific parcel of real property." *Id.* at 614.

The other type of financial burden, which is not governed by *Nollan/Dolan*, involves "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 615. Justice Alito contrasted these two types of burdens, noting that "the power of taxation should not be confused with the power of eminent domain" and pointed out that the Court has "little trouble" distinguishing between such powers of "eminent domain" and "taxation." *Id.* at 617. Thus, there is an analytical distinction between financial burdens on *specific* properties compared to *classes* of properties. *See* Hansen, *Let's Be Reasonable*, 34 PACE ENVTL. L. REV. at 264-66. Applying *Nollan/Dolan* to both kinds of burdens would not account for this distinction because that test was designed to evaluate adjudicatory exactions on specific properties.

v. Applying *Nollan/Dolan* To Legislative Exactions Would Improperly Insert Courts Into Legislative Affairs.

In *Lingle,* the Supreme 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." 544 U.S. at 545. The high court affirmed this principle while striking down the "substantially advances" test for regulatory takings first mentioned in *Agins*, 447 U.S. at 260. The Court found the "substantially advances" test doctrinally unfit for takings cases, but also practically unwise because of the risk for 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.

The same reasoning applies here because applying *Nollan/Dolan* to a legislative exaction such as the sidewalk ordinance would require the Court to substitute its judgment for that of the Metropolitan Council. *San Remo Hotel*, 41 P.3d at 106 ("Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause."); *McClung*, 548 F.3d at 1227-28 ("To extend the *Nollan/Dolan* analysis here would subject any regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers.").

Therefore, the Court should refrain from wading into the myriad policy considerations that the Metropolitan Council weighed while amending the ordinance. Rather, the Court should apply the reasonable relationship standard of review discussed in

Section II.D below, which accords appropriate deference to the city's police powers while ensuring that the sidewalk ordinance is not extortionate.

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

The sidewalk ordinance is precisely the kind of legislative land use condition that most courts have not subjected to *Nollan/Dolan* scrutiny for four reasons. First, the ordinance itself says whether it applies to a given property.[8] The ordinance explains what areas of the city it covers, as well as the specific development activities that trigger its provisions. (Metro. Code § 17.20.120(A), Doc. No. 1-2 at 2.) Second, the ordinance explains when paying a fee in lieu of sidewalk construction is an option. (Metro. Code § 17.20.120(D), Doc. No. 1-2 at 5.) 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, and the total amount of an in-lieu fee is capped at three percent of the total construction value of the permit. *Id*. Fourth, the ordinance states that its requirements can be varied or removed by the Zoning Administrator, whose decision can be appealed to the Board of Zoning Appeals. (Metro. Code § 17.20.125, Doc. No. 1-2 at 6.)

In these ways, the ordinance is similar to the regulations in *Dabbs* and *Anderson Creek Partners*. 458 Md. at 352; 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 how much that fee will be; 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

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

defined development activities in clearly defined parts of Nashville. Accordingly, the sidewalk ordinance should not be subject to *Nollan/Dolan* scrutiny.

D. If The Sidewalk Ordinance Is An Exaction, It Should Be Analyzed Under The "Reasonable Relationship" Standard Adopted By Several States.

i. Overview Of The Reasonable Relationship Test

If the Court finds that Nashville's sidewalk ordinance is an exaction that effects a taking, it should apply the "reasonable relationship" test adopted by courts in Tennessee, California, Colorado, and Ohio.[9,10] This test asks two questions. First, is there a reasonable relationship between the exaction and the development activity as well as the public need in question? *San Remo Hotel*, 41 P.3d at 105-06; *Beavercreek*, 729 N.E.2d at 354. Second, is there a reasonable relationship between the cost of the exaction 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 exaction'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* Hansen, 34 PACE ENVTL. L. REV. at 289-90. 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). It also avoids judicial policymaking, unlike the "substantially advances" test that the Supreme Court rejected in *Lingle,* 544 U.S. at 544. This test also

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[9] *Home Builders Ass'n of Middle Tennessee 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 v. Beavercreek*, 729 N.E.2d 349, 354, 356 (Ohio 2000).

[10] This is not the same as the "reasonable relationship" test that the Supreme Court adopted and renamed in *Dolan*, 512 U.S. at 390-91. The key difference is that while *Nollan/Dolan* requires an individualized determination as to a particular property, the reasonable relationship test examines the ordinance on its face. *See Rogers Machinery*, 45 P.3d at 982.

balances the "two realities of the permitting process" that the Supreme Court recognized in *Koontz:* the "special vulnerability of land use permit applicants to extortionate demands for money" and the fact that "many proposed land uses threaten to impose costs on the public that dedications of property can offset." 570 U.S. at 604-05, 619; *see also* Hansen, 34 PACE ENVTL. L. REV. at 257-64.

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 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. In fact, the court did not cite either case 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 both Ohio and Tennessee courts have applied versions of the reasonable relationship test to generally applicable land use conditions. *See* Hansen, 34 PACE ENVTL. L. REV. at 288-89.

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

Applying the first prong of this test, there is a reasonable relationship between the sidewalk ordinance and the development activity it regulates, as well as the public good it serves. Dedications of land for sidewalks have long been considered reasonable conditions on development to alleviate traffic congestion. *Nollan*, 483 U.S. at 854 (Brennan, J.,

[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. *Rogers Mach.*, 45 P.3d at 978 n.13; Hansen, 34 PACE ENVTL. L. REV. at 266-68. Accordingly, the *Beavercreek* court's approach is more accurately described as a mislabeled "reasonable relationship" test.

dissenting); *Dolan*, 512 U.S. at 395. Furthermore, as the ordinance states, sidewalks separate cars and people, preserve air quality, enhance connectivity within neighborhoods, and raise property values. (BL2019-1659, Doc. No. 1-2 at 1.) Nashville's population and built environment are growing rapidly, and its sidewalk network has not kept pace. *Id.* 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. (Metro. Code § 17.20.120(D)(2), Doc. No. 1-2 at 5.)

Crucially, the ordinance does not apply to all development activity. Only new construction as well as significant expansions and renovations trigger its requirements. (Metro. Code § 17.20.120(A), Doc. No. 1-2 at 2-3.) In this way, the ordinance is tailored to development activity that is likely to increase the number of people living at a given address or significantly increase traffic. Plaintiffs' circumstances illustrate this fact. Knight wanted to build a house triple the size of the small house that previously sat on his property, with a garage to boot. (SUMF ¶¶ 3-5.) Mayes built a similar-sized house, also with a two-car garage, on vacant land. (SUMF ¶¶ 10-11.) 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

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

effects.[13] Accordingly, there is a reasonable relationship between the goals of the sidewalk ordinance and requiring sidewalk construction or funding from development activities that increase population density and traffic.

iii. 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. (Metro. Code § 17.20.120(C), Doc. No. 1-2 at 4-5.) The ordinance does not require a landowner to build sidewalks anywhere else. If building a sidewalk would be a hardship because of topography, buried utilities, or other factors, the Zoning Administrator can approve an alternative sidewalk plan or vary the ordinance's requirements in whole or in part. (Metro. Code § 17.20.120 (A)(3)(a), Doc. No. 1-2 at 3.) Furthermore, if a property has a great deal of road frontage, the ordinance allows an in-lieu fee for only part of the frontage. (Metro. Code § 17.20.120(A)(3)(b), Doc. No. 1-2 at 3.)

Second, if an applicant pays an in-lieu fee, the cost is predetermined and limited to a reasonable amount. These fees are calculated with a simple formula: the length of road frontage multiplied by a preset cost-per-linear foot amount. This cost is set according to "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." (Metro. Code § 17.20.120(D)(1), Doc. No. 1-2 at 5.) The cost is posted on the Metropolitan Government's website.[14] For 2021, it is $186 per linear foot.[15] The road frontage of a given property can

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

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

[15] *Id.*

also be found online.[16] In-lieu fees are capped at three percent of the total construction value of a building permit. (Metro. Code § 17.20.120(D)(1), Doc. No. 1-2.) 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.").

For these reasons, the sidewalk ordinance bears a reasonable relationship to the development activity it regulates, the public good it serves, and the costs it imposes on property owners. As such, it does not take property within the meaning of the Fifth Amendment.

E. The Sidewalk Ordinance Also Passes the *Penn Central* Test.

The Court need not go further to decide this matter, but because there is no controlling authority on point, this section offers an alternative standard if the Court declines to apply the reasonable relationship test to the sidewalk ordinance. In that event, the Court should apply the *Penn Central* test. *See Lingle*, 544 U.S. at 538 (noting that *Penn Central* applies to takings challenges that are not *Nollan/Dolan* adjudicative land use exactions, per se physical takings, or total regulatory takings); *Mead v. City of Cotati*, 389 Fed. App'x. 637, 638 (9th Cir. 2010), *cert. denied*, 563 U.S. 1007 (2011) ("A generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests . . . Instead, the proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed [in *Penn*

[16] *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/.

Central].") (internal citations omitted); *Koontz,* 570 U.S. 595, 621, 629 (Kagan, J., dissenting).

Under this test, the Court should examine the ordinance's economic impact on Plaintiffs, its effect on their investment-backed expectations, and the character of the governmental action. *Phillips v. Montgomery Cty*., 442 S.W.3d 233, 240 (Tenn. 2014) (citing *Penn Central*, 438 U.S. at 124). Unless Plaintiffs can 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, there is no taking, and Plaintiffs are not entitled to relief.

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

The sidewalk ordinance's economic impact cannot amount to a taking. The Metropolitan Council limited the amount of an in-lieu fee to three percent of the value of a building permit. (Metro. Code § 17.20.120(D)(1), Doc. No. 1-2 at 5.) Thus, the economic impact of the ordinance will never be more than a small fraction of any given development activity's cost. As for Mayes, the in-lieu fee did not stop him from building his home. According to his appraisal, he built a slightly larger size home than envisioned in his building permit, including a porch and garage. (167 McCall Street Appraisal, Exhibit 8 to the Metropolitan Government's Statement of Undisputed Material Facts.) Mayes's in-lieu fee ultimately ran to 1.6 percent of his home's $550,000 appraised value. (*Id.*)

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.

Maberry, 25 Tenn. at 373.

Indeed, Plaintiffs concede that their properties have suffered no diminution in value because of the sidewalk ordinance. (SUMF ¶ 1.) Moreover, Knight has not paid an in-lieu fee or granted an easement to the Metropolitan Government. (SUMF ¶ 9.) Any economic impact on his property is purely speculative:

> Plaintiff assumes that even if it pays the fee the sidewalk will never be built [], but this conclusion rests on speculation. And speculation cannot defeat a properly supported motion for summary judgment . . . Plaintiff fails to show that *Nollan/Dolan*'s nexus requirement compels the City either to construct sidewalks immediately or pay compensation. **In any event, plaintiff . . . has not paid fees in lieu**[.] **The record shows that . . . the City negotiated with plaintiff for construction of the required sidewalks. The fact that these negotiations have so far proved unsuccessful does not equate to pretext or extortion.**

2701 Mountain Glen CT, LLC v. City of Woodland Park, Colorado, No. 20-1040, 2021 WL 1187407, at *4 (10th Cir. Mar. 30, 2021) (emphasis added).

Knight cannot argue that he is entitled to carrying costs or other economic impact because he chose to sit on his land while challenging the sidewalk ordinance and allowed his building permit to expire. (411 Acklen Park Drive Building Permit, Ex. 2 to Declaration of Joey Hargis; *see also* Nashville ePermits website, https://epermits.nashville.gov/#/permit/3713881?page=1&searchText=411%20acklen%20park%20d&searchCode=ADDR&searchType=permit&orderBy=fullAddress%20ASC,permitNumber%20ASC (last accessed August 26, 2021); *Mira Mar Dev. Corp. v. City of Coppell, Texas*, 421 S.W.3d 74, 101 (Tex. App. 2013).

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

The sidewalk ordinance does not interfere with investment-backed expectations for two reasons. First, the sidewalk ordinance (or a prior version) has been in effect for more than four years. (2017 Sidewalk Ordinance, Ex. 1.) Anyone who buys property in Nashville has therefore been on notice of its requirements since 2017. 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."). Second, the sidewalk ordinance applies during the permit application process, so property owners must discover it before construction starts. Here, both Plaintiffs acquired their properties after the ordinance's requirements took effect and discovered its requirements, at the latest, when they applied for building permits. (SUMF ¶¶ 3, 5, 10-11.) In addition, the sidewalk ordinance limits the cost of compliance to a small percentage of construction costs, which cannot be said to interfere with investment-backed expectations. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). Finally, as mentioned above, the cost of compliance is limited in the ordinance's text and can be eliminated or reduced by two different variance procedures. Accordingly, Plaintiffs cannot argue that it interfered with their investment-backed expectations.

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

As explained above and in the ordinance itself, sidewalks benefit the city of Nashville as well as individual property owners. 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 this same reason, the character of the Metropolitan Government's action fits in the category of a "public program adjusting the benefits and burdens of economic life to promote the common good" rather than 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 . . . governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration.").

Finally, Nashville has a setback ordinance that prohibits development without a permit within a 20-foot buffer zone next to the road. (Metropolitan Code of Laws § 17.04.060, 17.12.030; SUMF ¶ 2.) Because Plaintiffs cannot use the strip of land next to the road as they please in the first place, the sidewalk ordinance does not change the use of their properties or otherwise unduly restrict their rights of use. *Lundberg*, 100 Or. App. at 603-04; *Cedar Point Nursery,* 141 S. Ct. at 2079 ("the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the land owner's title.'" (quoting *Lucas,* 505 U.S. 1003 at 1028-29). Thus, the character of the sidewalk ordinance's requirements and benefits compels a conclusion that it does not effect a taking under *Penn Central*.

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

Plaintiffs seek restitution in this action (Compl. ¶¶ 165-66, Doc. No. 1), 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."). In any event, Knight is not entitled to restitution at all because he has not built a sidewalk, dedicated an easement, or paid an in-lieu fee. (SUMF ¶ 9.) Indeed,

Knight does not have an active building permit for 411 Acklen Park Drive. (411 Acklen Park Drive Building Permit, attached as Exhibit 2 to Hargis Decl.) Mayes has only paid an in-lieu fee and has not dedicated an easement or built a sidewalk. (SUMF ¶¶ 15, 17.)

Just compensation is a legal remedy, not an equitable one. *Del Monte Dunes at Monterey*, 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).

As presented above, Plaintiffs have not suffered an unconstitutional taking; therefore, they are not entitled to just compensation. Moreover, Plaintiffs concede that the sidewalk ordinance has not diminished the value of their properties. (SUMF ¶ 1.) The Supreme Court stated that diminution of value is related to the "central concern" of an exaction claim. *Koontz*, 570 U.S. at 614. Accordingly, Plaintiffs are not entitled to the relief they seek, even if the Court finds that they have brought a valid exaction claim.

Nor can Plaintiffs claim that the Metropolitan Government has been unjustly enriched. The case of *Cline v. Red Bank Util. Dist.*, 250 S.W.2d 362 (1952), is instructive on this point. In *Cline*, a property owner sued a municipal 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 idea 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 the 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.

CONCLUSION

The Court should find that Nashville's sidewalk ordinance is a generally applicable land use condition that passes rational basis review and not an unconstitutional taking of property. Should the Court conclude that the sidewalk ordinance is an exaction, it should uphold the ordinance under any standard of review because it is legislatively imposed, generally applicable, and reasonably related to the development activities it regulates as well as the public benefits it was designed to serve. Finally, 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,

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