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

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| MRB DEVELOPERS,<br>APRIL KHOURY, *et. al*, | ) | |
| v. | ) | Case No. 19-534-I |
| METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY. | ) | Hon. Patricia H. Moskal |

**PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs respectfully submit this Reply to Metro's Response to Plaintiffs' Motion for Partial Summary Judgment.

## ARGUMENT

### I. The Sidewalk Mandate is Not a Mere Background Restriction on Use.

For the first time, Metro suggests in its Response to Plaintiffs' Motion for Partial Summary Judgment that this case should turn on background principles of state law. Metro's Response at 2. Metro is correct that the "United States Supreme Court has long held that some background restrictions on property use arising from state law cannot serve as a basis for takings claims." *Id.* However, the mere fact that various "Tennessee towns and cities have had the authority to require

property owners to build sidewalks," *id.*, does not mean that physically taking, or in the case of Metro's sidewalk ordinance—taking an easement or requiring that Plaintiffs agree to provide an easement for construction of sidewalks in the future—is a mere background restriction on land use that can never form the basis of a takings claim.

Not all Tennessee cities require property owners to build or pay for sidewalks.[1] That some have found a way to lawfully require provision of sidewalks does not mean that Metro's method of exacting public infrastructure from Plaintiffs is not an unconstitutional condition placed on their right to receive a lawful building permit that must be analyzed under *Nollan*, *Dolan*, and *Koontz*. The cases Metro relies on for the proposition that provision of sidewalks is a background principle of state law, *see* Metro's Response at 3-4, mostly pre-date incorporation of the Takings Clause against the states, *see Chicago, Burlington and Quincy Railway v. Chicago*, 166 U.S. 226 (1897), and all pre-date the Supreme Court's first pronouncement of the legal test for exactions in *Nollan*. 483 U.S. 825.

Furthermore, those same cases reference sidewalk requirements applied in wholly different ways than the sidewalk mandate Plaintiffs challenge. For example, in *Mayor & Aldermen of Franklin v. Maberry*, the legislature passed a law providing that "the mayor and aldermen of Franklin shall have the power to cause foot pavements and sidewalks to

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[1] Plaintiffs are unaware of any other city in Tennessee, or in the United States, that conditions otherwise properly zoned and lawful building permits for single-family homes on the private provision of sidewalks.

be constructed in the streets of said town, and on the public square, by the owner or owners of lots adjoining the same…" 25 Tenn. 368, 371-72 (quotations omitted). The mayor and alderman of Franklin then passed an ordinance stating: "It shall be the duty of *every owner* of a lot or part of a lot on Main stree…" *Id.* (quotations omitted). The relevant difference with Metro's ordinance should be obvious: The ordinance at issue in *Maberry* required *every owner* to provide sidewalks. It did not hold benefit hostage until property owners agreed to provide sidewalks. And it did not foist the cost of providing valuable public infrastructure for all on some. The provision was truly generally applicable in its requirement that all owners provide and maintain sidewalks.

The same is true of the provision at issue in *O'Haver v. Montgomery*. 11 S.W. 449 (1908), *overruled on other* grounds, *State v.* Jackson, 503 S.W.2d 185 (Tenn. 1973). The *O'Haver* Court held that a "city corporation may pass an ordinance requiring the owner *of every lot*…" to provide sidewalks. *Id.* at 373 (citations omitted) (emphasis added). Again, that ordinance required all owners—not just new purchasers, or owners looking to improve their properties—to provide sidewalks. If that was how Metro had attempted to go about financing sidewalks a few years ago, the situation would be very different, and Plaintiffs would likely not be before this Court.

## II. Metro's Reliance on *Joni Elder d/b/a Dogtopia v. a*nd *Knight v. Metro* is Misplaced.

In 2021, this Court analyzed the current version of the Metro's sidewalk ordinance, concluding that it was 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). But there are a couple of issues with Metro's reliance on this case. First, in its Motion to Dismiss, Metro insisted that the "new ordinance amends Metro Code 17.20.120 by deleting it in its entirety and replacing it with a new sidewalk law." Metro's MTD at 2. In its Reply, Metro argued that Plaintiffs were incorrect to assert that the operative language and constitutional injury remained the same. Metro's Reply (to Plaintiffs' Response to Metro's MTD) at 2. They cannot now turn around and argue that the decision in *Dogtopia* must be followed because the version that Plaintiffs' challenge is "identical to the current version in every material way." Metro's Response at 6.

Additionally, as the Supreme Court recently clarified in *Fulton*, a law is not "generally applicable" when there is any discretion as to its application. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877-78 (2021) ("A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'") (citations omitted). In arguing that the sidewalk mandate is generally applicable Metro now claims that, "[w]hile the Board of Zoning Appeals ("BZA") can vary the ordinance's requirements after it applies, sidewalk construction and/or in-lieu fees are not open to negotiation." Metro's Response at 6. But that directly contradicts Metro's earlier assertion that "the ordinance states that its requirements can be varied or removed by the Board of Zoning Appeals." Metro's MSJ Br. at 11 (citing Metro. Code § 17.20.125). Indeed,

the language of the ordinance is clear: "The provisions of Section 17.20.120 may be varied or interpretations appealed […] The Board of Zoning Appeals may require a contribution to the pedestrian network consistent with the subsection D of this section, an alternative sidewalk design, or other mitigation for the loss of the public improvement as a condition to a variance." Metro. Code § 17.20.125. The sidewalk ordinance is not generally applicable.

Metro's reliance on *Knight v. Metro* is also unsound.[2] *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, Case No. 3:20-cv-00922, 2021 U.S. Dist. LEXIS 221927572 (M.D. Tenn. 2021). Once again, the *Knight* Court was considering the current version of the sidewalk mandate, not the version Plaintiffs challenge here. And there the Court acknowledged that "The Sixth Circuit has recently applied *Koontz* to a situation that appears facially similar to the one presented in this case." *Id.* at *18 (citing *F.P. Dev., LLC v. Charter Twp. Of Canton*, 16 F.4th 198 (6th Cir. 2021). More importantly, the position the court relied on in *Knight* to determine that the essential nexus and rough proportionality test should not apply to Metro's sidewalk ordinance has since been repudiated by the Ninth Circuit. *Id.* at 22-30.[3]

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[2] The court's decision in *Knight* is currently on appeal before the Sixth Circuit. *See Knight v. Metro*, Case No. 21-6179.

[3] *See Ballinger v. City of Oakland*, 24 F.4th 1287, 1298-99 (9th Cir. 2022). No matter how "remarkable" Metro finds it, Metro's Response at 12, the fact remains that the Ninth Circuit has repudiated its jurisprudence requiring differential treatment of legislative and adjudicative exactions. *Ballinger*, 24 F.4th at 1298 (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008)).

## CONCLUSION

This Court should grant Plaintiffs' Motion for Partial Summary Judgment and apply the essential nexus and rough proportionality test established by the Supreme Court in *Nollan*, *Dolan*, and *Koontz*, to Plaintiffs' claims.

Dated: August 10, 2022.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following by electronic mail and via submission to the Court's E-File system:

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Respectfully submitted,

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