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

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

Metro's misconceptions about the proper legal standard to apply to its sidewalk ordinance are illustrated beautifully by one excerpt from its brief: "The 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 regulations happens and *where* the landowner can turn

for a remedy." Metro's MSJ at 7. While completely understandable that Metro wishes this were the case,[1] the Supreme Court has been perfectly clear: when determining whether and what type of a taking has occurred, it does not matter which branch of government is doing the regulating, how and why the regulations are instituted, or where property owners can turn for a remedy. *Stop the Beach Renourishment*, 560 U.S. at 713-14 ("The Takings Clause … is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor. … There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."); *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) ("Our cases have often described use restrictions that go 'to far' as 'regulatory takings.' But that label can mislead. Government action that physically appropriates property is no less a physical taking because it arises from a regulation. … The essential question is not … whether the government action at issues comes garbed as a regulation (or statute, or ordinance, or miscellaneous decrees). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property

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[1] These considerations may be relevant to determining the weight of the nature/character of government action factor under *Penn Central's* ad-hoc balancing test, 438 U.S. 104, but they are not relevant to determining whether a regulation attaches an unconstitutional condition—to receipt of an otherwise lawful building permit—or simply restricts how property may be used.

owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place."). Metro's sidewalk ordinance does not merely adjust the benefits and burdens of public life by restricting how owners may continue to use their own property, such as by creating set-backs, or changing zoning from mixed-use to commercial. Instead, holding lawful building permits hostage until property owners agree to waive their right to receive just compensation for a taking amounts to an appropriation of Plaintiffs' property rights.

SUMMARY

Metro's sidewalk ordinance requires property owners to agree to build or pay for sidewalks and grant Metro a public easement for those sidewalks before Metro will issue otherwise lawful building permits. The sidewalk mandate is not a simple land-use regulation that would traditionally be analyzed under *Penn Central Tansportation Co. v. New York City*, 438 U.S. 104 (1978). Rather, the ordinance amounts to "conditioning approval of development on the dedication of property to public use." *Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999). Fifth Amendment challenges to such conditioning must be analyzed under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), using the essential nexus and rough proportionality test. The Supreme Court has itself dispelled the very idea that Metro advances—namely, that conditioning a building permit on agreeing to provide a public easement and building or paying for sidewalk installation can be characterized as a mere restriction on

use. *Nollan*, 483 U.S. at 831 (dispelling dissent's contention that requiring an easement along a strip of private property in exchange for a building permit was a "mere restriction on its use.")

Penn Central's ad-hoc factual inquiry is insufficient for analyzing exactions, which the Supreme Court has repeatedly explained are more akin to a per se or physical takings than to simple restrictions on use imposed by regulations. *Lingle*, 544 U.S. 528, 547 (2005) (Required dedications of property were "so onerous that, outside the exactions context, they would be deemed per se physical takings."); *see also Koontz*, 570 U.S. at 614 ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.") Applying the Nollan/Dolan test to Metro's sidewalk ordinance aligns perfectly with Supreme Court precedent and does not inappropriately extend the unconstitutional conditions doctrine or Takings Clause jurisprudence. The unconstitutional conditions doctrine, of which exactions are a "special application," has been applied to strike down legislative enactments across different areas of law. Likewise, the Supreme Court has never stated that the Nollan/Dolan test applies *only* to adjudicative, administrative exactions. After the Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021), it is clearly the essential nexus and rough proportionality test established in *Nollan* and *Dolan* that is the appropriate legal standard to apply to Plaintiffs' claims.

ARGUMENT

I. Metro's Sidewalk Ordinance is an Unconstitutional Permit Condition, not a Simple Land Use Regulation Appropriate for Analysis under *Penn Central*.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This guarantee is "indispensable to the promotion of individual freedom." *Cedar Point*, 141 S. Ct. 2063, 2071 (2021). Preservation of property rights through the Takings Clause is essential because it "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id.* (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017)). The Takings Clause protects individual self-determination by checking government power, ensuring that that government may not take private property for public use without paying for it.

An unconstitutional taking can occur in three ways. One type occurs when the government physically takes possession of property, known as a per se physical taking. *Id.*; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Second, the government may impose regulations that go "too far" to "restrict an owner's ability to use his own property." *Cedar Point*, 141 S. Ct. at 2071, 2078; *accord Lingle*, 544 U.S. at 537-38. The third way occurs when the government "require[s] property owners to cede a right of access as a condition of receiving certain benefits[.]" *Cedar Point*, 141 S. Ct. at 2079; *accord Lingle*, 544 U.S. at 538. Under this third category, the government typically withholds a development permit until a property owner dedicates a

portion of his or her property for public use. *See Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

Metro insists that *Penn Central* provides the proper legal framework for analyzing the constitutionality of its sidewalk ordinance, (*see* Metro's MSJ at 1, 6, 9, 10, 11), but Metro's position confuses regulatory takings and the "special context" of permit conditions. *See Lingle*, 544 U.S. at 538. Not every ordinance is a land use regulation subject to *Penn Central*. *Cedar Point*, 141 S. Ct. at 2072 (finding that labeling every legislative land use restriction a regulatory taking "can mislead" and holding that the per se physical taking standard applies and "*Penn Central* has no place" even when the government relies on a regulation to physically take property). Land use regulations govern how landowners use their property by limiting features like density, height, width, and other characteristics that may create a nuisance or jeopardize citizen health and safety. *See id.* at 2079 (citing *Lucas v. S.C. Coastal*, 505 U.S. 1003, 1028-29 (1992)). Those regulations derive directly from the traditional police power granted to municipalities. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Contrast those regulations with permit conditions, or exactions, which are specifically defined as "land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702. Permit conditions do not merely regulate how a landowner uses his or her property; they deprive a landowner of his or her property outright. They are "so onerous that, outside the exactions context, they would be deemed per se physical takings." *Lingle*, 544 U.S. at 547; *see also Koontz*, 570 U.S. at 614 ("[W]hen the government

commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.") (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). Because they improperly hold property hostage in exchange for a benefit, unconstitutional permit conditions are a total perversion of the traditional police power.

The *Penn Central* regulatory takings standard is insufficient precisely because land-use exactions are more akin to per se physical takings. The Supreme Court made the distinction between regulatory takings and permit conditions clear in *Nollan* when it dispelled the dissent's contention that requiring an easement along a strip of private property in exchange for a building permit was a "mere restriction on its use." 483 U.S. at 831. Metro insists that the sidewalk ordinance amounts to a mere land-use restriction, but labeling the permit condition as such "is to use words in a manner that deprives them of all their ordinary meaning." *Id.* As the Court clarified in *Nollan*—and then again in *Dolan* and *Koontz*—when the government requires landowners to dedicate land for public use, it deprives the owner of his or her constitutional rights in at least two different ways. First, it deprives the owner of the right to exclude others from his or her property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan*, 483 U.S. at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)); *Dolan*, 512 U.S. at 384. Second, it burdens property ownership by forcing a property owner to "transfer an interest in property . . . to the government." *Koontz*, 570 U.S. at 613.

Metro does both through its sidewalk ordinance, which requires property owners to convey real property or money to the government and to set aside easements for public use.

"A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 570 U.S. at 612. If Metro had simply arrived at Plaintiffs' homes to notify Plaintiffs it was installing sidewalks on their properties, or to demand that Plaintiffs hand over money to install sidewalks down the street, Metro would no doubt be engaged in a per se physical taking. *See id.*; *Nollan*, 483 U.S. at 831. Merely working the sidewalk installation and dedication requirements into the permitting process does not change the injury or the appropriate constitutional inquiry; Metro is still appropriating Plaintiffs' property for public use without just compensation. In this way, unconstitutional conditions are more like per se physical takings than regulatory takings. Simply codifying the permit condition into law does not automatically render it a land use restriction subject to *Penn Central*. *Cedar Point*, 141 S. Ct. at 2072.

II. Applying *Nollan*, *Dolan*, and *Koontz* to Legislatively Imposed Permit Conditions Does Not "Extend" the Unconstitutional Conditions Doctrine or the Supreme Court's Takings Jurisprudence.

Contrary to Metro's assertions, applying *Nollan*, *Dolan*, and *Koontz* to its sidewalk mandate would not "extend" the unconstitutional conditions doctrine, nor would it be out of line with the Supreme Court's takings jurisprudence. To the contrary, evaluating provisions like Metro's sidewalk mandate under the doctrine—using the essential nexus

and rough proportionality test—is innate to the purposes behind both the doctrine and the Takings Clause.

A. *The Unconstitutional Conditions Doctrine Applies Regardless of which Branch of Government is Involved in Burdening Constitutional Rights.*

The unconstitutional conditions doctrine is rooted in a series of mid-Nineteenth Century Supreme Court cases decided in response to protectionist state laws conditioning the ability of foreign companies to do business in their states.[2] *See*, *e.g.*, *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855) (invalidating state statute that conditioned approval of business license for out-of-state companies on waiving the right to remove lawsuits to federal courts). In its original formulation, the doctrine held that "the power of the state is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. Railroad Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926); *see also*

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[2] Rather than limiting the doctrine to any particular constitutional provision, the Supreme Court applies the doctrine whenever the government conditions an approval or provision of a benefit on an individual's surrender of a constitutional right. *See*, *e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (Fourth Amendment); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (freedom of the press); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (interstate travel); *Perry v. Sindermann*, 408 U.S. 593 (1972) (free speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (freedom of religion); *Speiser v. Randall*, 357 U.S. 513 (1958) (free speech); *Hanover Ins. Co. v. Harding*, 272 U.S. 494 (1926) (Commerce Clause); *W. Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910) (Due Process Clause).

Martin v. Hunter's Lessee, 14 U.S. 304, 340 (1816) (The U.S. Constitution is "the supreme law of the land, and … every state shall be bound thereby."); *see also Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33 (1922) ("[T]he sovereign power of a state is subject to the limitations of the supreme fundamental law.").

This restriction on "the power of the state," *see Frost & Frost*, 271 U.S. at 594, expressly includes the legislative power. That balancing also embraces the rule of deferring to legislative judgment, until legislation imposes conditions forcing individuals to surrender fundamental rights guaranteed by the United States Constitution. The Supreme Court has repeatedly explained that, while state legislatures have broad authority to regulate—including by attaching conditions to permits, licenses, or other discretionary benefits—that authority does not include the ability to condition receipt of even discretionary benefits on a requirement that a person waive or surrender a constitutional right. *Ivanhoe Irr. Distr. v. McCracken*, 357 U.S. 275, 294-95 (1958); *see also Lafayette*, 59 U.S. at 407 ("This consent [to do business] may be accompanied by such conditions [the state] may think fit to impose; … provided they are not repugnant to the constitution or laws of the United States."); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.").

As a result, the Supreme Court has routinely invalidated legislation that imposed unconstitutional conditions requiring individuals to waive

a variety of different constitutional rights. *See*, *e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006) (invalidating provisions of a federal statute conditioning receipt of funding on law schools allowing military recruiters onto campus); *Miami Herald*, 418 U.S. 241 (holding state statute requiring newspapers to provide political candidates with free space to reply to any adverse article is subject to the unconstitutional conditions doctrine); *Memorial Hosp.*, 415 U.S 250 (invalidating state statute requiring one-year residency in a county as a condition of receiving medical care); *Sherbert*, 374 U.S. 398 (invalidating provision of state unemployment statute conditioning benefits on waiving right to religious practice); *Speiser*, 357 U.S. 513 (invalidating provision of state constitution requiring individuals to swear an oath not to advocate for the overthrow of government as a condition to tax exemption benefits); *Frost & Frost Trucking*, 271 U.S. 583 (invalidating state law requiring out-of-state trucking company to dedicate personal property to public use as a condition of permission to use state highways); *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]") Additionally, in refuting the *Dolan* dissenting opinions' insistence that exactions imposed through neutral regulations did not warrant heightened scrutiny, the Court explicitly relied on *Marshall*, 436 U.W. 307. *Dolan*, 512 U.S. at 392. *Marshall* struck down an Occupational Safety and Health Act condition placed on commercial business that allowed warrantless searches. *Marshall*, 436 U.S. at 323.

Although the unique nature of land-use regulation compelled the Court to develop a "special application" of the unconstitutional conditions doctrine for the Fifth Amendment, the rationale for that special application is the same as that which animates the broader doctrine. It preserves government discretion to impose lawful conditions while policing against demands that fall outside of government's lawful authority. *Koontz*, 570 U.S. at 604-05; *see also Nollan*, 483 U.S. at 841. That rationale applies to all branches of government in the context of takings claims, as it does in unconstitutional conditions cases involving a variety of constitutional rights.

B. *The Test Established in* Nollan, Dolan, *and* Koontz *Enforces a Constitutional Provision that Applies to All Branches of Government.*

Recently the Supreme Court held in *Cedar Point* that an uncompensated taking is unconstitutional regardless of "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree.)[.]" *Cedar Point*, 141 S. Ct. at 2072 (2021). And that makes perfect sense; the text of the Fifth Amendment is categorical and unconditional, providing: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. That unambiguous language makes no distinction between legislative and administrative adjudicatory takings. The history of the Amendment and the scholarship devoted to it likewise show no basis for such a distinction.

The purpose of the Fifth Amendment Takings' Clause was to protect against all uncompensated takings. The roots of the clause reach

"back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). Under Clause 28, any "constable or other bailiff" was forbidden from taking "corn or other provisions from any one [sic] without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." *Id.* (internal citations omitted). Chapter 31 of Magna Carta flat-out prohibited "the king or his officers taking timber" without the consent of the landowner. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 564 (1972). Blackstone concluded that Magna Carta's protections of property meant that "only the legislature could condemn land." *Id.* "Eminent domain—the physical taking of land—arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. *Id.* From its inception, the Takings Clause and its protections against uncompensated takings has applied to legislative acts.

Supreme Court precedent is clear that a taking is a taking, regardless of which branch of government is acting. *Stop the Beach Renourishment*, 560 U.S. at 713-14 ("The Takings Clause … is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor. … There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."). The Supreme Court has frequently explained that the essential nexus and rough proportionality test is designed to ensure that government does not

"thwart the Fifth Amendment right to just compensation" by using its permitting authority to coerce property owners into waiving their constitutional right to receive just compensation in return for securing necessary approvals use their property. *See*, *e.g.*, *Koontz*, 570 U.S. at 606. This naturally supports the conclusion that the requirements established in *Nollan*, *Dolan*, and *Koontz* apply to legislative regulatory conditions just as they do to administrative adjudicative conditions. The Just Compensation clause equally binds legislative and executive administrative bodies. *Cedar Point*, 141 S. Ct. at 2072; *see also Webb's Fabulous Pharmacies*, 449 U.S. at 164 (holding "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may" take money without just compensation).

C. *The Fifth Amendment's Taking Clause Does Not Distinguish Between Administrative and Legislative Takings.*

Metro fails to support its conclusory statement that "[t]he Supreme Court's choice of the unconstitutional conditions doctrine to support *Nollan*/*Dolan* suggests that the test should only apply to administrative exactions" and not include takings effected through legislation. Metro's MSJ Br. at 19. Instead, the Supreme Court has expressed that the essential inquiry in takings cases is not about "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—*by whatever means*—or has instead restricted a property owner's ability to use his own property." *Cedar Point*, 141 S. Ct. 2072 (emphasis added); *accord Stop the Beach*

Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713 (2010) ("Condemnation by eminent domain . . . is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. *But the particular state actor is irrelevant*.") (emphasis added).

The Supreme Court's reasoning in *Cedar Point* should be dispositive. When assessing a challenge to a regulation that allowed members of the public to enter private property, the Court emphasized the statutory origin of the regulation before finding that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id*. at 2072. *Cedar Point* involved a *per se* physical taking rather than a permit condition, but the Court explicitly compared permit conditions—like the easement requirement in *Nollan*—to *per se* physical takings. *Id*. at 2073 ("We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*.")

The Court's comparison in *Cedar Point* aligns with previous comparisons. *See Lingle*, 544 U.S. at 547 ("*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings."); *Nollan*, 483 U.S. at 831-32 ("We think a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."); *Koontz*, 570 U.S. at 614 ("[W]hen the government commands the relinquishment of funds linked to a specific,

identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.") (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). Thus, the Supreme Court often compares land use conditions that require dedications of property and easements to physical takings, *not* to regulatory takings. Because Metro's sidewalk ordinance requires Plaintiffs to set aside portions of their property and either install sidewalks or pay Metro an in-lieu fee, the ordinance is similar to a *per se* physical taking, not a regulatory taking.

Metro also mischaracterizes the Supreme Court's statements about the *Nollan*/*Dolan* test in *Lingle*. Metro concludes that the Court's observation that "both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions," *Lingle*, 544 U.S. at 546, means *Nollan* and *Dolan* can *only* apply to administratively imposed conditions. However, the Supreme Court was merely describing the types of conditions apparently at issue in those cases to contrast the *Nollan*/*Dolan* test with the "substantially advances" test it rejected in that case. *See id.* at 545-48. Nothing in *Lingle* stands for the

proposition—or even indicates—that the Nollan[3]/Dolan[4] test only applies to adjudicative actions.

Metro claims that in *Dolan*, "the Supreme Court has suggested that the standard of review [for an unconstitutional permit condition] depends on whether the regulation is administrative or legislative." Metro's MSJ Br. at 6. But like in *Lingle*, the Court in *Dolan* did no such thing; it was merely descriptive language. *See Dolan*, 512 U.S. at 384. Its only mention of a difference between legislative and adjudicative decisions came when pointing out a difference between the regulation in *Dolan* with the ones upheld in *Village of Euclid* and *Pennsylvania Coal*. *Id.* at 385. But importantly, it repudiated Metro's basis for claiming the regulatory

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[3] The condition in *Nollan* was legislatively imposed. *Nollan*, 483 U.S. 828-30. The Coastal Commission applied the condition without an individual evaluation of the property or of the Nollans' plans for construction. *Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719, 724 (1986) ("[N]o findings were made, no evidence was in the record other than the application, submission and the executive director's statement of reasons and no hearing was held."). The statutorily required condition was standard under existing law and applied based on the plain language of the California Public Resources Code, *Nollan*, 483 U.S. at 828; see Cal. Pub. Res. Code Sec. 30212(a) (2013), and it was enforced uniformly when beachfront property owners applied for building permits. *Nollan* 483 U.S. at 829. (The Commission "had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and [] of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property.").

[4] The condition in *Dolan* also had legislative origins, coming from a city land-use planning ordinance requiring dedication as a condition to obtain development permits. 512 U.S. at 377-78.

takings test applies when it distinctly contrasted permit conditions—which require landowners to hand property over to the government, like Metro's sidewalk ordinance did here—from land use restrictions, like zoning ordinances, that only limit how one uses property. *Id*. Indeed, its analysis in *Dolan* rested entirely on the essential nexus and rough proportionality test, and it never said that the City of Tigard's regulation would have passed constitutional muster if directly promulgated by a legislative body rather than an adjudicative one. Thus, Metro's reliance on these two Supreme Court cases is misplaced.

III. The "Reasonable Relationship" Test has No Place in Constitutional Takings Analyses.

Metro would prefer any test other than the correct essential nexus and rough proportionality test established in *Nollan*, *Dolan*, and *Koontz*, and spends the majority of its brief arguing that this Court must employ anything else, including the "reasonable relationship" test akin to Fourteenth Amendment rational basis review.[5] Metro's MSJ Br. at 14-

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[5] Metro suggests that "courts have applied some versions of the reasonable relationship test to generally applicable land use regulations." Metro's MSJ Br. at 16. But even if this were the correct legal standard, Metro's sidewalk ordinance is not "generally applicable." Metro's MSJ Br. at 10-11. Yes, the ordinance lays out where city sidewalks are required, and attempting to obtain a building permit in those areas triggers the requirement to build or pay. However, as Metro notes, "the ordinance states that its requirements can be varied or removed by the Board of Zoning Appeals." *Id*. at 11 (citing Metro. Code § 17.20125). That discretion undermines the idea that the ordinance is generally applicable. *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

16.

In *Nollan,* the majority opinion rejected the dissent's effort to employ rational basis review. 483 U.S. at 840-41. Likewise, in *Dolan*, the Supreme Court declined to incorporate the "reasonable relationship" test into its exactions analysis precisely "because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." 512 U.S. at 391. The Court rejected the idea that a "city's conditional demands for part of petitioner's property," could be treated as a mere "business regulation" when the law is challenged "on the ground that it violates a provision of the Bill of Rights." *Id*. at 392. If it were so simple to skirt judicial review, then warrantless searches of a business, or a prohibition on advertising, would likewise fall under the rational basis test. *Id*. The same logic applies to the Fifth Amendment. *Id*. ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

Under the Fifth Amendment, it doesn't matter if a law has a public purpose that is rationally related to taking private property. *See Nollan*,

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providing 'a mechanism for individualized exemptions.'") (citations omitted). It is certainly no more generally applicable than the laws at issue in *Nollan*, *Dolan*, and *Koontz*. An administrative body had some discretion about which building permits to grant or deny in all three cases. *Nollan*, 483 U.S. at 828-29; *Dolan*, 512 U.S. at 379-82; *Koontz*, 570 U.S. at 600-602.

483 U.S. at 841 ("The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization."); *see also Lingle*, 544 U.S. at 547 ("In neither [*Nollan* nor *Dolan*] did the Court question whether the exaction would substantially advance *some* legitimate state interest.") (emphasis in original). An exaction must still meet the essential nexus and rough proportionality requirements. *Cedar Point*, 141 S. Ct. at 2079. When Metro leverages its permitting authority to coerce the surrender of property, it must comply with the Fifth Amendment, regardless of the legitimacy of its goals. *See Nollan*, 483 U.S. at 841-42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.").

Plaintiffs bring a Fifth Amendment takings claim based on the requirement to provide sidewalks as a condition of receiving an otherwise lawful building permit. They do not challenge Metro's ability to build sidewalks, just Metro's attempt to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49. When the government demands property as a condition of receiving a permit, as it does here, it is a taking and neither the reasonable relationship test—or the Fourteenth Amendment rational basis test it mimics—apply.

IV. Restitution is the Appropriate Remedy for Plaintiffs' claims.[6]

The proper remedy for Plaintiffs'—with the possible exception of just compensation for the taking of an easement at 5807 Morrow Road—is restitution. Metro has been unjustly enriched through its unlawful exaction of in-lieu fees from Plaintiffs, and the appropriate remedy is restitution, a remedy broadly recognized under 42 U.S.C. § 1983 and unjust enrichment.

Unjust enrichment applies where: 1) plaintiff conferred a benefit on defendant; 2) defendant appreciated the benefit; and 3) it would be unjust for the defendant to retain the benefit. *Lawyers Title Ins. Corp. v. United Am. Bank of Memphis*, 21 F. Supp. 2d 785, 805 (W.D. Tenn. 1998) (quoting *B & L Corp. v. Thomas & Thorngren, Inc.*, 917 S.W.2d 674, 680 (Tenn. Ct. App. 1995)). Tennessee state and federal courts routinely allow plaintiffs to sue municipalities under a theory of unjust enrichment. *See Lebanon v. Baird*, 756 S.W.2d 236, 245 (Tenn. 1988); *Sircy v. Metro. Gov't of Nashville & Davidson County*, 182 S.W.3d 820-21 (Tenn. App. 2005); *Noel v. Metro Gov't of Nashville & Davidson County*, 2014 U.S. Dist. LEXIS 10252 at *12 (M.D. Tenn. January 28, 2014) ("Claims of unjust enrichment may lie against municipal entities, just as they can against private parties.") (citing *Baird*, 756 S.W.2d at 245)); *Halpern 2012, LLC v. City of Ctr. Line*, 806 Fed. Appx. 390, 391 (6th Cir. 2020).

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[6] Plaintiffs understood the matter of remedies to be reserved for a later date, after determination of which legal standard will be applied to determine it Metro's sidewalk ordinance passes constitutional muster.

Metro's reliance on *Cline v. Red Bank Util. Dist.*, 250 S.W.2d 362 (Tenn. 1952) is unavailing. Metro MSJ Br. at 24. Not only is diminution in value not a consideration in an exaction claim, but that case turned on the Court's determination that there was "no competent evidence" of a contract. *Cline*, 250 S.W.2d at 363. Unlike Plaintiffs here, the plaintiff in *Cline* sued on a theory that the utility district has made an implied contract to reimburse her for building a private sewer line. *Id.* In contrast, Plaintiffs here are not seeking reimbursement for public infrastructure they elected to build on an implied contract theory.

Plaintiffs' conferred a benefit on Metro by paying in-lieu fees; that benefit appreciated when Metro used those funds to construct sidewalks at locations different from Plaintiffs' homes; and because the fees were collected pursuant to an unconstitutional exaction, it would be unjust to allow Metro to keep that benefit.

CONCLUSION

The Court should find that the *Nollan/Dolan* test applies to Plaintiffs' claims and grant Plaintiffs' Motion for Partial Summary Judgment.

Dated: August 5, 2022.

Respectfully submitted,

s/ Meggan S. DeWitt

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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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