IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Home Builders Association of Middle Tennessee, Plaintiff, v. Metropolitan Government of Nashville & Davidson County, Defendant.	))))))	No. 17-386-II

MOTION TO DISMISS

The Metropolitan Government brings this Motion to Dismiss under TENN. R. CIV. P. 12.02(6), on grounds that the Complaint fails to state a claim, because:

- The case is not ripe for bringing a takings claim, because Plaintiff has not sought compensation through the ordinance or state law,
- Plaintiff does not have standing, and there is no private right of action for Plaintiff to enforce state law.

A memorandum of law and notice of filing are filed contemporaneously.

Respectfully submitted,

Lora Fox

Lora Barkenbus Fox, #17243
Catherine J. Pham, #28005
Metropolitan Attorneys
108 Metropolitan Courthouse
P.O. Box 196300
Nashville, Tennessee 37219

NOTICE OF HEARING

THIS MOTION IS EXPECTED TO BE HEARD ON THE 23RD DAY OF JUNE, 2017 AT 9 A.M, OR AS SOON THEREAFTER AS POSSIBLE. FAILURE TO FILE AND SERVE A TIMELY WRITTEN RESPONSE TO THIS MOTION MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING BY THE COURT.

Certificate of Service

A copy of this document has been mailed to Braden Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219, on this 6th day of June, 2017.

Lora Fox

Lora Barkenbus Fox

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

Home Builders Association of Middle Tennessee, Plaintiff, v. Metropolitan Government of Nashville & Davidson County, Defendant.	))))))	No. 17-386-II

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

The Metropolitan Government files this Memorandum of Law in support of its Motion to Dismiss. The Motion to Dismiss is brought under TENN. R. CIV. P. 12.02(6), on grounds that the Complaint fails to state a claim. It fails to state a claim because:

- The case is not ripe for bringing a takings claim, because Plaintiff has not sought compensation through the ordinance or state law,
- Plaintiff does not have standing, and there is no private right of action for Plaintiff to enforce state law.

FACTS

The Metropolitan Government has decided that affordable housing is such an important need in this community that it will subsidize affordable rental units, dollar for dollar. It has done this through Substitute Ordinance BL 2016-133 (Exhibit A - which provides incentives for building affordable housing) and Ordinance BL 2016-342 (Exhibit B - which provides grants that will subsidize, dollar for dollar, the amount lost in reduced rent).[1]

Substitute Ordinance BL 2016-133, "the incentive ordinance," goes into effect nine months from its passage (it passed September 16, 2016, so it takes effect on June 16, 2017). (Exhibit A,

[1] Certified copies of these ordinances (Exhibits A & B) are submitted along with a Notice of Filing. Although Rule 12 motions are generally decided on the pleadings, courts may consider documents referred to in the Complaint if the documents are central to the plaintiff's claim. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (copies of the ordinance challenged in the lawsuit and the related city charter and code provisions did not raise matters of law or fact that were outside the pleadings).

Amendment 1) It does not apply to any projects that were filed prior to June 16, 2017. (Exhibit A, Sec. 7). And, the ordinance is very limited in scope.

First, it will only apply to rental units. (Exhibit A, Sec. 1 (Metro Code § 17.40.780.B.1)). It will not apply to housing being sold, unless a builder selling housing asks to participate. *Id.*

Second, it will not apply to a project built under its current zoning. It will apply only if a developer seeks to rezone a site so that additional rental units can be built, or when public resources or property is provided for development. *Id.* It will not apply to a project building four or fewer rental units – it will apply only if a developer plans to build five or more rental units on a site. (*Id.*, Metro Code § 17.40.780.B.2).

Third, it will not apply unless Metro has adequate funding for grants that offset the amount lost in reduced rent. (*Id.*, Metro Code § 17.40.780.B.1). If the funding ends, the obligation to rent at a lower rate ends. *Id.* Fourth, the incentive ordinance sunsets on December 31, 2019. (*Id.*, Metro Code § 17.40.820.A).

Fifth, if the incentive ordinance applies to a site, it requires a certain number of the units be rented at an amount lower than market rate – and Ordinance BL 2016-342, "the grant ordinance," *provides grants that pay the difference between the rent for a market unit and the rent for an affordable housing unit.* (Exhibit B)

The Home Builders Association of Middle Tennessee "is a non-profit trade group dedicated to the promotion and protection of the home building industry in the Middle Tennessee area, including Metro Nashville." (Complaint, ¶ 12.) The Home Builders Association states that its members build rentals and for sale units in Nashville and projects of five or more units. (*Id.*, ¶¶ 33-34). It states that its members "will request additional development entitlements from Metro through amendments to the zoning map for most, if not all, of their projects of five (5) or more units going forward." (*Id.*, ¶ 38.)

ANALYSIS

I. THIS CASE IS NOT RIPE BECAUSE PLAINTIFF HAS NOT SOUGHT COMPENSATION THROUGH THE ORDINANCE OR THROUGH STATE LAW.

A regulatory takings claim is not ripe *until the regulation has actually been applied* to the property at issue:

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue...
>
> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," *Penn Central Transp. Co. v. New York City*, 438 U.S., at 123, 98 S.Ct., at 2659, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Id.*, at 124, 98 S.Ct., at 2659. See also *Ruckelshaus v. Monsanto Co.*, 467 U.S., at 1005, 104 S.Ct., at 2874; *PruneYard Shopping Center v. Robins*, 447 U.S., at 83, 100 S.Ct., at 2041; *Kaiser Aetna v. United States*, 444 U.S., at 175, 100 S.Ct., at 390. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-2 (1985) (emphasis added). The Supreme Court determined that following administrative procedures and using Tennessee's inverse condemnation statute are mandatory prerequisites to bringing a takings claim under the 5th Amendment:

> The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance,...The [Planning] Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements... there is no evidence that respondent applied to the Board of Zoning Appeals for variances from the zoning ordinance... [R]esort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances, but leaves open the possibility that respondent may develop the

> subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.
>
> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so...if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.
>
> Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. § 29–16–123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§ 29–16–101 to 29–16–121. The State is prohibited from "enter[ing] upon [condemned] land" until these procedures have been utilized and compensation has been paid the owner, § 29–16–122, but if a government entity does take possession of the land without following the required procedures, "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way...." § 29–16–123.
>
> The Tennessee state courts have interpreted § 29–16–123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations. See *Davis v. Metropolitan Govt. of Nashville,* 620 S.W.2d 532, 533–534 (Tenn.App.1981); *Speight v. Lockhart,* 524 S.W.2d 249 (Tenn.App.1975). Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

Williamson Cty., supra at 172, 193–97; also *Gabhart v. City of Newport*, 208 F.3d 213, 2000 WL 282874, at *3 (6th Cir. 2000) ("*Williamson County* clearly compels the conclusion that Gabhart's Fifth Amendment takings claim is not ripe. First, the City's decision is not final because Gabhart has failed both to submit his plat to the Newport Regional Planning Commission and to seek a variance from the regulations. Moreover, Gabhart's claim is not ripe because he has not sought compensation through the State of Tennessee's inverse condemnation procedures.").

Since the time that the Supreme Court decided *Williamson County*, the Tennessee Supreme Court has determined that the Tennessee Constitution's section governing takings of property (Const. Art. 1, § 21) encompasses regulatory takings to the same extent as the Takings Clause of the Fifth

Amendment to the United States Constitution. *Phillips v. Montgomery Cty.*, 442 S.W.3d 233 (Tenn. 2014). The Court also held that a regulatory takings claim is not ripe until a Commission makes a "final decision" regarding a property:

> The County has not disputed the ripeness of the Property Owners' claim. We recently held in *B & B Enterprises of Wilson County, L.L.C. v. City of Lebanon,* 318 S.W.3d 839, 846–49 (Tenn.2010), that a regulatory takings claim ripens when a Planning Commission makes a "final decision" regarding a property, rather than at the conclusion of judicial review of the administrative decision; thus, we held that the statute of limitations on an inverse condemnation claim begins to run at the moment the Planning Commission's final decision was issued.

Id. at 238 (emphasis added). The Court also stated that it would be preferable to hold an inverse condemnation in abeyance until a writ of certiorari process had been exhausted:

> Nothing prevents the parties in an inverse condemnation action from requesting, or the trial court from granting, a stay of that action until judicial review of the administrative decision is concluded. Indeed, such a course is preferable. Once judicial review of the administrative decision is final, the trial court in the inverse condemnation action will be better able to determine both the existence and scope of the alleged regulatory taking.

Id., nt 7 (emphasis added).

In this case, the Home Builders Association has not applied for a rezoning to build a rental property of 5 or more units. It has not applied for a grant that will reimburse any lost rental revenue for an affordable unit. If the Home Builders Association goes through a rezoning, and the conditions that would require subsidized units be included are met, it must then apply for a grant that provides reimbursement for lost rental income. At that point, there will be a decision about how the regulations will be applied to the land at issue. If the Home Builders Association disagrees with the amount of the grant, or is refused a grant, *Williamson County* and *Phillips v. Montgomery* require that it pursue state remedies through an inverse condemnation lawsuit. It may also appeal that grant decision through a writ of certiorari.

It is possible that the Home Builders Association will argue that it is making a facial constitutional challenge, instead of an as-applied challenge, and that this can be done without specifics. However, this argument has been rejected by the Sixth Circuit:

> Appellants contend that *Williamson County* is inapplicable to facial challenges. Their argument oversimplifies Takings Clause jurisprudence. With respect to just-compensation challenges, while *Williamson County* 's first requirement may not apply to facial challenges, its second requirement—that plaintiffs must seek just compensation through state procedures—does. *See Alto Eldorado P'ship v. Cnty. of Santa Fe,* 634 F.3d 1170, 1177 (10th Cir. 2011) ("Courts considering claims alleging a ... taking without just compensation, even when characterized as facial claims, have applied the second *Williamson County* requirement...." (citing *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo,* 548 F.3d 1184, 1190 n. 13 (9th Cir. 2008); *Cnty. Concrete Corp. v. Twp. of Roxbury,*442 F.3d 159, 168 (3d Cir. 2006); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina,* 493 F.3d 404, 407 (4th Cir. 2007))).

Wilkins v. Daniels, 744 F.3d 409, 417–18 (6th Cir. 2014) (emphasis added).

II. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE BL 2016-133 AND THERE IS NO PRIVATE RIGHT OF ACTION ALLOWING IT TO ENFORCE STATE LAW.

In addition to the takings claim, Plaintiff alleges that Metro does not have the authority to pass an inclusionary zoning ordinance, and that its ordinance is pre-empted by state law. However, Plaintiff does not have standing to bring such claims, and there is no private right of action allowing it to enforce state law.

A. Plaintiff does not have standing to challenge Metro's ordinance.

To demonstrate standing, the organizational plaintiff must establish that:

(1) its members would otherwise have standing to sue in their own right;
(2) the interests it seeks to protect are germane to the organization's purpose; and
(3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Howe v. Haslam, No. M2013-01790-COA-R3CV, 2014 WL 5698877, at *6 (Tenn. Ct. App. Nov. 4, 2014).

Standing for individual members requires that they show the three *Lujan* factors:

> To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992) (citations omitted).

Tennessee has not adopted a "public rights" exception to the requirement of standing. *Howe*, 2014 WL 5698877 at *7, *citing City of Chattanooga v. Davis,* 54 S.W.3d 248, 280–81 (Tenn.2001). Being very interested in a matter is not sufficient. *State, ex rel. Deselm v. Tennessee Peace Officers Standards Comm'n*, No. M2007-01855-COA-R3-CV, 2008 WL 4614523, at *3 (Tenn. Ct. App. Oct. 16, 2008) (affirming dismissal for lack of standing where Plaintiffs claimed that their special interest or injury was being "public spirited citizens" trying to protect local taxpayers.); *Moyers v. Sherrod* 525 S.W.2d 126, 128 (Tenn. 1975) ("Private citizens, as such, cannot maintain an action complaining of the wrongful act of public officials unless such private citizens aver special interest or a special injury not common to the public generally."). The Complaint must present the harm being suffered. *Howe*, at *16 ("In the case now before us, however, neither the TEP nor the TTPC has identified any member who was in fact adversely impacted by the repeal of the 2011 amendment to the Metro Code.").

For example, in *Coleman v. Henry* a "citizen, taxpayer and qualified voter" sought a declaratory judgment to determine the duty of a Senator's campaign manager to file a financial statement of campaign expenditures. 201 S.W.2d 686, 687 (Tenn. 1947). The Tennessee Supreme Court determined that the plaintiff did not have standing to bring the suit:

> The complainant as a 'citizen, taxpayer and qualified voter' has no such special interest in the matters upon which a declaration is sought as entitled him to a declaration. The general rule is that a party having only such interest as the public generally has, can not maintain an action for a Declaratory Judgment... Future and contingent rights, and remote possibilities, are not properly the subject of a declaration.

Id. at 687 (emphasis added, citations omitted).

Here, the Home Builders Association does not present a distinct injury. It presents the conclusory statement that its members "will request additional development entitlements from Metro through amendments to the zoning map for most, if not all, of their projects of five (5) or more units going forward." (*Id.*, ¶ 38.) But this generalized statement does not address whether the specific contingencies of the ordinance will be met. Is there an actual Home Builders Association member who wants to build rental units during that time? If so, will that member's project require a rezoning? And will that project be for five or more units? Will there be a lack of funding from Metro in the grant program to reimburse the rent that is under market rate? If the answer to any of these questions is no, there has been no injury to support standing.

Of course, with the ordinance not going into effect until mid-June 2017 and then later sunsetting in 2019, it remains to be seen whether any Home Builders Association member will be subject to the terms of the ordinance at all. *See City of Memphis v. Shelby Cty. Election Comm'n*, 146 S.W.3d 531, 538-39 (Tenn. 2004) ("[W]e decline to pass upon the constitutionality of a measure that is not now the law and may never become the law.").

Without the specificity of a live case and controversy, brought by someone who actually seeks a rezoning, applies for a grant and asserts that being reimbursed dollar for dollar constitutes a taking, the Court is dealing with future and contingent rights, which do not create standing.

B. There is no private right of action to enforce this state law.

Tennessee courts have consistently held that the burden of proving the existence of a private right of action is on the plaintiff. *See Premium Finance Corp. of America v. Crump Ins. Services of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998). The state law permitting a local government to create an incentive-based affordable housing program, but not a mandatory one, contains no private right of action:

(a) A local governmental unit shall not enact, maintain or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property.

(b) A local governmental unit shall not enact, maintain, or enforce any zoning regulation, requirement, or condition of development imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing. This subsection (b) shall apply to all current and future zoning regulations.

(c) This section does not affect any authority of a local governmental unit to create or implement an incentive-based program designed to increase the construction and rehabilitation of moderate or lower-cost private residential or commercial rental units.

Tenn. Code Ann. § 66-35-102.

A private right of action must be expressly created:

(a) In order for legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right.

(b) In the absence of the express language required by subsection (a), no court of this state, licensing board or administrative agency shall construe or interpret a statute to impliedly create or confer a private right of action except as otherwise provided in this section.

Tenn. Code Ann. § 1-3-119 (emphasis added). The Supreme Court has read this statute very strictly, recently finding no private cause of action in the State's "tip" statute where an employee asserted she had been under-paid by a private dining club. *Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427 (Tenn. 2017).

Here too, no express cause of action is provided in Tenn. Code Ann. § 66-35-102. Enforcing this statute has been left to the State of Tennessee and not given to private litigants. For this reason, Plaintiff's challenge to Metro's ordinance must be dismissed.

CONCLUSION

It remains to be seen whether a developer will seek a rezoning for rental units, whether the grants will be available at that time, and, if so, whether they will be able to articulate a takings claim based on a dollar-for-dollar reimbursement. Until then, this lawsuit is premature and should be dismissed.

Respectfully submitted,

Lora Barkenbus Fox, #17243
Catherine J. Pham, #28005
Metropolitan Attorneys
108 Metropolitan Courthouse
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