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IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

MRB DEVELOPERS, APRIL KHOURY, HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, OLD SOUTH CONSTRUCTION LLC, ASPEN CONSTRUCTION, and GREEN EGGS & HOMES,	)	**Case No. 19-534-I**
Plaintiffs,	)	
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

METRO'S MOTION FOR JUDGMENT ON THE PLEADINGS

[TENN. R. CIV. P. 12.03]

Pursuant to Tenn. R. Civ. P. 12.03, the Metropolitan Government requests that this Court enter judgment in its favor because all but three Plaintiffs' claims against Metro fail as a matter of law, on these grounds:

- Claims related to properties where the Plaintiff did not seek a variance from the Board of Zoning Appeals are not ripe;
- Claims that accrued prior to April 22, 2018 should be barred by the one-year statute of limitations; and
- HBMAT should be dismissed for lack of standing.

SUMMARY OF FACTS

Plaintiffs brought this lawsuit seeking to invalidate Metro's sidewalk ordinance, Ordinance No. BL2016-493, on constitutional grounds. Plaintiffs allege that Metro's enforcement of the sidewalk ordinance was an unconstitutional taking of their property rights without just compensation under the 5th and 14th Amendments of the United States Constitution and Article I, § 21 of the Tennessee Constitution (Count One). Complaint, p. 25-28, ¶¶ 171-184. They further allege that requiring the construction of curbs and gutters was beyond the scope of

Metro's authority under the sidewalk ordinance, and it is therefore *ultra vires* and void (Count Two). *Id.*, p. 28-30, ¶¶ 186-195.

At issue in this lawsuit, the sidewalk ordinance requires the construction of new sidewalks along the frontage of a lot when a property owner proposes to new construction of a single family or two-family home that is within the Urban Zoning Overlay, within a Center designated in the General Plan, within a quarter mile of a Center designated in the General Plan (unless the property is on the opposite side of a river or access controlled highway from a center), or on a street in the Major and Collector Street Plan. Complaint, Ex. 1. Under certain circumstances, a property owner can pay into the in-lieu fund as an alternative to constructing sidewalks. *Id.*

The Plaintiffs include individuals and companies that allege to have been affected by the sidewalk ordinance in various ways. Some Plaintiffs constructed sidewalks, while others paid into the in-lieu fund. Complaint, p. 4, ¶ 9. Also, included in the lawsuit is HBAMT, "a non-profit trade group dedicated to the promotion and protection of the home building industry in the Middle Tennessee area, including Nashville and Davidson County." *Id.*, p. 6, ¶ 14. Plaintiffs allege that "[w]hether building sidewalks themselves, or paying the city a fee in lieu of constructing sidewalks, the sidewalk law forces property owner to surrender the right to receive compensation for a taking in exchange for a residential building permit." *Id.*, p. 2.

After the Complaint was filed, Metro enacted Ordinance BL2019-1659, which amended Metro's sidewalk ordinance by deleting it in its entirety and replacing it with a new ordinance. Upon motion by Metro, the Court dismissed Plaintiffs' claims for declaratory and injunctive relief on mootness grounds. Remaining in the lawsuit are Plaintiffs' claims for return of the in-lieu fees paid and any easements or right-of-way dedications as "restitution." Complaint, p. 30,

¶¶ 201-202. Here is a list of the Plaintiffs, the Address at issue, status of the property, the paragraphs of the Complaint where the status is shown, and Metro's position on whether it must be dismissed now (✗) or whether it survives this motion (✓):

April Khoury	6227 Robin Hill Rd	BZA ruled on their request for a variance on 6/7/2018; Plaintiff paid in lieu fee "under protest"	¶¶ 39-64	✓
Old South	4701 Dakota Ave	BZA ruled on their request for a variance on 9/6/2018	¶¶ 65-81	✓
Aspen	4107 Westlawn	Plaintiff did not appeal to the BZA for a variance	¶ 82	✗
Aspen	4109 Westlawn	Plaintiff did not appeal to the BZA for a variance	¶ 82	✗
Aspen	4111 Westlawn	Plaintiff did not appeal to the BZA for a variance	¶ 82	✗
Aspen	1001 9th Ave S	BZA ruled on their request for a variance on 11/20/2017 (more than a year before filing suit)	¶¶ 82-87	✗
Aspen	903 Archer St	BZA ruled for on their request for a variance on 11/20/2017 (more than a year before filing suit)	¶¶ 82-87	✗
Aspen	4005 Nebraska	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	1547 Battlefield Dr	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	1549 Battlefield Dr	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	519 Acklen Park	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	1102 Kirkwood	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	1104 Kirkwood	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	1018 Kirkwood	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	919 South St	BZA ruled on their request for a variance on 5/10/2018	¶¶ 88-97	✓
Aspen	917 South St	BZA ruled on their request for a variance on 5/10/2018	¶¶ 88-97	✓
Aspen	702 Estes	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	704 Estes	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	4114 Oriole Pl	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	4116 Oriole Pl	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	4209 Utah	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗
Aspen	4211 Utah	Plaintiff did not appeal to the BZA for a variance	¶ 88	✗

Aspen	4121 Westlawn	Plaintiff did not appeal to the BZA for a variance	¶¶ 98-103	✕
MRB	5608 A Pennsylvania	Plaintiff did not appeal to the BZA for a variance	¶¶ 106-111	✕
MRB	5608 B Pennsylvania	Plaintiff did not appeal to the BZA for a variance	¶¶ 106-111	✕
MRB	5807 Morrow Rd	Plaintiff did not appeal to the BZA for a variance	¶¶ 112-127	✕
MRB	2016 Scott Ave	Plaintiff did not appeal to the BZA for a variance	¶¶ 128-137	✕
MRB	2018 Scott Ave	Plaintiff did not appeal to the BZA for a variance	¶¶ 128-137	✕
MRB	610 45th Ave N	Plaintiff did not appeal to the BZA for a variance	¶¶ 138-141	✕
Green Eggs	5400 Tennessee Ave	Plaintiff did not appeal to the BZA for a variance	¶ 152	✕
Green Eggs	1303 54th Ave N	Plaintiff did not appeal to the BZA for a variance	¶ 152	✕
Green Eggs	0 California Ave	Plaintiff has never filed for a building permit	¶¶ 153-157	✕
Green Eggs	6119 New York Ave	Plaintiff has never filed for a building permit	¶¶ 158-162	✕
Green Eggs	5406 Louisiana	Plaintiff does not own this property	¶¶ 163-165	✕

ANALYSIS

I. STANDARD OF REVIEW

A motion for judgment on the pleadings is in effect a motion to dismiss for failure to state a claim upon which relief can be granted. *Wolf v. Clack*, No. E200901126COAR3CV, 2009 WL 5173715, at *2 (Tenn. Ct. App. Dec. 30, 2009). The standard of review for a motion for judgment on the pleadings is, as recently stated by the Tennessee Court of Appeals as follows:

> In reviewing a trial court's grant of judgment on the pleadings under Rule 12.03, we are bound to regard as false all allegations of the moving party that are denied by the non-moving party, and to accept all well-pleaded facts of the non-moving party, and the reasonable inferences that may be drawn therefrom, as true. *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn.1991). "Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *Id.* In our review of this case, "all of the facts alleged by the Plaintiff in this case must be taken as true and the issue then before us is whether upon those facts the Plaintiff's complaint states a cause of action that a jury should have been entitled to decide." *Id.*

Frankenberg v. River City Resort, Inc., 2013 WL 3877617 (Tenn. Ct. App. Apr. 11, 2013).

II. CLAIMS RELATED TO PROPERTIES WHERE THE OWNER DID NOT FILE AN APPEAL TO THE BOARD OF ZONING APPEALS SHOULD BE DISMISSED BECAUSE THEY ARE NOT RIPE.

The United States Supreme Court has determined that exhaustion of administrative procedures is a mandatory prerequisite to bringing a takings claim under the Fifth Amendment:

> As the Court has made clear in several recent decisions, 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. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 1981, for example, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.*, effected a taking because:
>
> > There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." 452 U.S., at 297, 101 S.Ct., at 2371 (footnote omitted).

Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193-195 (1985) (emphasis added) (overruled on other grounds);[1] *see also, Gabhart v. City of Newport*, 208 F.3d 213, 2000 WL 282874, *3 (6th Cir. 2000) ("*Williamson County* clearly compels the conclusion that Gabhart's Fifth Amendment takings claim is not ripe. …[T]he City's decision is not final because Gabhart has failed both to submit his plat to the Newport

[1] Recently, in *Knick v. Township of Scott, Penn.*, 139 S.Ct. 2162, 2167 (2019), the Supreme Court overruled the second prong of the *Williamson County* ripeness test, the state-litigation requirement. However, the Court did not overrule long-standing precedent that a takings claim is not ripe until the property owner "obtained a final decision regarding the application of the ordinance and regulations to its property…" *Williamson Cnty.*, 473 U.S. at 173.

Regional Planning Commission and to seek a variance from the regulations.").[2]

The law in effect at the time that the Plaintiffs applied for building permits, Metro Code § 17.20.125, stated: "The provisions of Section 17.20.120 may be varied or interpretations appealed in conformance with Chapter 17.40, Administrations and Procedures. The Board of Zoning Appeals may require a contribution to the pedestrian network consistent with subsection D of this section, an alternative sidewalk design, or other mitigation for the loss of public improvement as a condition of a variance."

Despite the availability of this administrative remedy, which might have obviated the requirement that they build a sidewalk or pay into the in-lieu fund, most of the Plaintiffs did not seek variances from the sidewalk ordinance from the Board of Zoning Appeals. Rather, they simply complied with the provisions of the sidewalk ordinance as written by paying into the in-lieu fund or constructing sidewalks.[3] In fact, according to the Complaint, only April Khoury (for 6227 Robin Hill Road), Old South (for 4701 Dakota Avenue), and Aspen (for 903 Archer Street, 4005 Nebraska Avenue, 919 South Street and 917 South Street) sought variances from the Board of Zoning Appeals.

Pursuant to *Williamson County*, the claims being made by Plaintiffs' who sought no variance are not ripe for review by this Court and should be dismissed.

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[2] The takings clause of the Tennessee Constitution, Art. I, § 21 encompasses regulatory takings to the same extent as the takings clause of the Fifth Amendment to the U.S. Constitution. *Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 233 (Tenn. 2014).

[3] It should be noted that according to the Complaint, Green Eggs and Homes has never filed an application for a building permit for 0 California Avenue (¶¶ 153-157) or 6119 New York Avenue (¶¶ 158-162), and they do not even own 5406 Louisiana Avenue (¶¶ 163-165). These claims are entirely speculative – they are based on "hypothetical and contingent future events that may never occur." *West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015). Therefore, they should be dismissed because they are not yet ripe for review.

III. CLAIMS RELATED TO PROPERTIES WHERE A FINAL DECISION WAS ISSUED BY THE BOARD OF ZONING APPEALS PRIOR TO APRIL 22, 2018 SHOULD BE DISMISSED BECAUSE THEY ARE OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS.

Plaintiffs brought this lawsuit pursuant to 42 U.S.C. § 1983 on April 22, 2019. *See* Complaint, p. 3, ¶ 1. The statute of limitations period for § 1983 action in Tennessee is one-year. *Trent v. Anderson,* 2010 WL 3155193, *3 (Tenn. Ct. App. Aug. 10, 2010) (citing *Sharpe v. Cureton,* 319 F.3d 259 (6th Cir. 2003)). Therefore, Plaintiffs should have brought their claims within one year after accrual of the claim. *Gray v. 26th Judicial Drug Task Force,* 1997 WL 379141, *2 (Tenn. Ct. App. July 8, 1997).

As the lawsuit was filed on April 22, 2019, any claims that accrued before April 22, 2018 are barred by the statute of limitations. In the context of a regulatory takings claim involving a decision by the Planning Commission, the Tennessee Supreme Court held that the "claim ripens when the Planning Commission makes a 'final decision' regarding a property, rather than at the conclusion of judicial review of the administrative decision." *Phillips v. Montgomery County.,* 442 S.W.3d 233, 238 (Tenn. 2014) (citing *B & B Enterprises of Wilson County., LLC v. City of Lebanon,* 318 S.W.3d 839, 846-49 (Tenn. 2010)). Therefore, the statute of limitations "begins to run at the moment the Planning Commission's final decision was issued." *Id.*

Here, according to the Complaint, Plaintiff Aspen were granted a variance from the Board of Zoning Appeals for 1001 9th Avenue and 903 Archer Street on *November 20, 2017*. Complaint, p. 15-16, ¶ 83-85. Because Aspens' waited more than a year before filing of the Complaint, its' claims are barred by the statute of limitations.

IV. HBAMT CANNOT ESTABLISH ORGANIZATIONAL STANDING.

HBAMT is a Plaintiff in this lawsuit based on the following allegations in the Complaint:

HBAMT

144. HBAMT has over 500 members, more than half of who are actual builders of homes or apartments in Middle Tennessee.

145. HBAMT's organizational purpose includes the promotion of the homebuilding industry in Middle Tennessee.

146. HBAMT disapproves of the sidewalk law because it increases the cost of housing and slows the rate of development.

147. HBAMT's members include Old South, Aspen, and other members who have paid the in-lieu fee or built sidewalks since the revised sidewalk law became effective.

148. Since the revised sidewalk law became effective HBAMT's members have both paid into the sidewalk fund and paid in-lieu fees.

149. HBAMT's members will apply for Metro-issued building permits to construct single-family residences in the future.

150. HBAMT's members will apply for Metro-issued permits to construct an addition or a renovation with a cost equal to or greater than twenty-five percent (25%) of the assessed value of all structures on the lot.

151. HBAMT continues to be affected because Metro has not provided restitution to its members for the amounts of the in-lieu fees.

Complaint, p. 22, ¶¶ 144-151.

Based on the allegations in the Complaint, it appears that HBAMT is asserting that it has organizational standing. "To establish standing, an association … must show 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." *American Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 626 (Tenn. 2006).

HBMAT cannot establish that the third prong of the organizational standing test has been met because participation of its individual members is required in this lawsuit. *See Union County Educ. Ass'n v. Union County Bd. of Education*, 2014 WL 4260812, *9 (Tenn. Ct. App. Aug. 24, 2014) ("Where an association seeks only a prospective remedy, it is presumed that the

relief to be gained from the litigation 'will inure to the benefit of those members of the association actually injured.' [Hunt, 422 U.S.] at 515. Accordingly, requests made by an association for prospective relief generally do not require the individual participation of the organization's members. Conversely, where an association seeks a remedy such as money damages, the participation of its individual members is necessary to determine the particular damages to which each affected member is entitled.") (quoting *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 624 (Mo. 2011) (emphasis added).

This Court has dismissed Plaintiffs' request for prospective relief. *See* January 5, 2020 Memorandum and Order, p. 5 ("Under the facts and circumstances of this case, the Court concludes that Plaintiffs' claims for prospective relief declaring the former sidewalk law as unconstitutional should be dismissed on the grounds of mootness."). All that remains in this lawsuit are Plaintiffs' as-applied claims, which the Court determined "involve facts that are unique to their respective properties and will likely require separate determinations as to the appropriate retrospective relief, if any, to which each Plaintiff may be entitled." *Id.*, p. 6-7.

Because these as-applied claims require the participation of its individual members to determine what damages they each may be entitled to, HBAMT does not meet the third prong of the organizational standing test, and it should be dismissed as a Plaintiff.

CONCLUSION

The Complaint references thirty-six individual properties and five individual Plaintiffs. All but six of the properties should be dismissed because the Plaintiffs failed to request variances from the Board of Zoning Appeals, and therefore, those claims are not ripe. Two of the properties appealed to the Board of Zoning Appeals by Aspen are outside of the one-year statute of limitations, so those claims should also be dismissed. The individual Plaintiffs and properties

remaining would be April Khoury (6227 Robin Hill Road), Old South (4701 Dakota Avenue), and Aspen (919 South Street and 917 South Street).

Finally, the Court should also dismiss HBAMT from this lawsuit because it cannot establish the third prong of the organizational standing test is met because its individual members are required as participants in this lawsuit.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
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THIS MOTION IS EXPECTED TO BE HEARD ON THE 6TH DAY OF MARCH, 2020 AT 9:00 A.M. IF NO RESPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION MAY BE GRANTED.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been emailed to:

Braden H. Boucek
Beacon Center of Tennessee
P.O. Box 198646
Nashville, TN 37219

on this the 21st day of February, 2020.

/s/ Catherine J. Pham
Catherine J. Pham