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,	)	
Plaintiffs,	)	**Case No. 19-534-I**
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

The Court should enter judgment in favor of Defendant, the Metropolitan Government of Nashville and Davidson County, on all claims except those relating to 6227 Robin Hill Road, 4701 Dakota Avenue, 917 South Avenue, and 919 South Avenue. The remaining claims fail as a matter of law as follows:

- Most of Plaintiffs' claims are not ripe because they did not seek a variance from the Board of Zoning Appeals ("BZA") on most properties.
- A one-year statute of limitations applies to all claims alleging an unconstitutional taking, so claims that accrued before April 22, 2018 are time-barred.
- HBAMT should be dismissed for lack of standing because the one-plaintiff rule does not apply to a prudential standing challenge, and this case requires individualized determinations of relief for unique parcels of property.

For these reasons, outlined in more detail to follow, the Court should grant judgment in favor of Defendant on all claims except those relating to 6227 Robin Hill Road, 4701 Dakota Avenue, 917 South Avenue, and 919 South Avenue.

I. THE RIPENESS REQUIREMENT IN *WILLIAMSON COUNTY* APPLIES TO PLAINTIFFS' CLAIMS, RENDERING MOST OF PLAINTIFFS' CLAIMS NOT RIPE.

A. *Williamson County* Applies to an Exaction Case.

In response to the Metropolitan Government's argument that Plaintiffs did not exhaust their claims through an appeal to the BZA, Plaintiffs first assert that *Williamson County*'s exhaustion requirement does not apply to exaction cases. (Pls.' Resp. at 4-9.) This is inaccurate on several fronts.

First, Plaintiffs cite no controlling case to support their position, as to the state[1] or federal claims. Plaintiffs assert that "[t]he only known instance of a court even being presented with the novel argument that *Williamson County* applies to exactions led to the court rejecting it," citing *Talismanic Props., LLC v. Tipp City, Ohio*, No. 3:16-cv-285, 2016 WL 6829649 (S.D. Ohio Nov. 21, 2016), *vacated on other grounds*, 309 F. Supp. 3d 488 (S.D. Ohio 2017). (Pls.' Resp. at 8.) Plaintiffs mischaracterize *Talismanic*'s holding. In the relevant portion of the opinion, the court simply noted that it had "found no case within the Sixth Circuit finding that a property owner must avail themselves of state procedures—or that adequate procedures even exist under state law—in the context of a taking by imposition of 'unconstitutional conditions.'" *Id.* at *3. Then the court assumed without deciding that *Williamson County* applied and concluded that it had jurisdiction. *Id.*

Second, the concept of *Williamson County*'s exhaustion requirements applying to exaction cases is not the novel argument that Plaintiffs contend it is. In *Home Builders Association of Middle Tennessee v. Metropolitan Government of Nashville and Davidson County*, the plaintiff, who was represented by the same counsel who represents Plaintiffs in

[1] The Tennessee Supreme Court has held that "article I, section 21 of the Tennessee Constitution encompasses regulatory takings to the same extent as the Takings Clause of the Fifth Amendment to the United States Constitution" because of "the textual similarities" between the federal and Tennessee Takings Clauses. *Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 244 (6th Cir. 2014). There likewise is no rationale for treating exaction cases differently than they are treated under federal law.

this case, argued that *Williamson County*'s exhaustion requirement did not apply to exaction cases. *Home Builders*, Slip op. Granting Def.'s Mot. to Dismiss at 6 n.3 (included in Appendix of Authority filed contemporaneously herewith). The trial court rejected the argument, noting, "this Court finds no authority excluding exaction cases from the *Williamson County* and *Phillips* requirements." *Id.*

Unable to identify applicable law to support their position, Plaintiffs instead argue that exactions are more like physical takings than regulatory takings and, therefore, *Williamson County* should not apply. But exaction cases are equally or more similar to regulatory takings than physical takings. This case indisputably challenges the impact of regulation on particular properties. Moreover, Plaintiffs' claims for relief contradict their Plaintiffs' assertion that "exactions *do* involve a physical transfer of property, making them more analogous to a physical taking." (Pls.' Resp. at 7.) Plaintiffs' claims for relief simply are not available if their property has been taken. When property is taken through the application of a condition, it is what the U.S. Supreme Court refers to as a "consummated taking," which is compensated through "a particular remedy"—just compensation—as explained in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013):

> That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law by of the cause of action—whether state or federal—on which the landowner relies.

Id. at 608 (emphasis in original).

But Plaintiffs aren't claiming just compensation. They want equitable relief. But they aren't entitled to any form of equitable relief for the *taking* of property. As a result, if,

as Plaintiffs now seem to contend, the Metropolitan Government took their property, then all of their claims for relief must be dismissed.

B. <u>This Case Requires Consideration of Adjudicative Decisions.</u>

Plaintiffs next assert that they are challenging a legislative enactment, not an adjudicative decision, which renders *Williamson County*'s exhaustion requirement inapplicable. (Pls.' Resp. at 9-12.) Plaintiffs seem to suggest that facial challenges do not require administrative review, stating, "Nothing that would happen at the BZA would matter." (Defs.' Resp. at 10.) If Plaintiffs had brought *only* a facial challenge seeking *only* to invalidate the law, that might make sense. But Plaintiffs also assert claims for relief in this case, which are based on specific application of the ordinance at issue to particular properties.

The distinction between legislative and administrative functions, both of which administrative agencies typically perform, is sometimes hard to identify. *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 160, 162 (Tenn. Ct. App. 1992). "Rulemaking is essentially a legislative function because it is primarily concerned with considerations of policy." *Id.* at 160-61. "Adjudication, on the other hand, involves *individual rights or duties and the determination of disputed factual issues in particular cases*." *Id.* at 161 (emphasis added).

Plaintiffs cannot argue on one hand that BZA review would have no impact on their claims while at the same time arguing that they *individually* are entitled to relief. The ordinance at issue states explicitly that its provisions "may be varied or interpretations appealed in conformance with Chapter 17.40." BL2016-493, Section 2 (Ex. to Compl.). As a result, the BZA had explicit authority under the challenged ordinance to grant, and could have granted, a variance to any Plaintiff, which would have precluded that Plaintiff from obtaining specific relief in this case.

Regardless of what they now claim,[2] Plaintiffs' facial challenge seeking to invalidate the law was properly dismissed when the substitute ordinance was passed. *See CMR D.N. Corp. v. City of Philadelphia,* 703 F.3d 612, 624 (3d Cir. 2013) ("[I]n a facial challenge, the remedy is the striking down of the regulation. In the case of an as-applied challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to the plaintiff's property and/or damage.") (quoting *Eide v. Sarasota Cty.*, 908 F.2d 716, 722 (11th Cir. 1990). And their individual claims for relief that remain are more accurately labeled as-applied challenges because they are asking the Court to consider how the statute "operate[d] in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations." *See City of Memphis v. Hargett*, 414 S.W.3d 88, 107 (Tenn. 2013). Thus, the claims are subject to the *Williamson County* ripeness requirement.[3]

C. The One Plaintiff Rule Is Not Responsive to the Metropolitan Government's Prudential Standing Argument.

Plaintiffs next argue that where one plaintiff has standing in a lawsuit, the court may review the case as to all other plaintiffs. (Pls.' Resp. at 11-12.) The "one plaintiff rule" is only relevant to whether a party has standing under Article III of the U.S. Constitution, or what courts commonly call "constitutional standing." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 70 n.2 (2006). The U.S. Supreme Court draws a clear line between "Article III [*constitutional*] standing, which enforces the Constitution's case-or-controversy requirement . . . and *prudential* standing, which embodies 'judicially self-

[2] In response to the Metropolitan Government's motion to dismiss in this case, Plaintiffs asserted that "it does not matter until the remedies stage of the proceeding" whether they were asserting a facial or as applied challenge. (Resp. to Mot. to Dismiss at 1 n.1.) That is inaccurate, given their newfound position that the *Williamson County* exhaustion requirement does not apply to this case *because* they are asserting a facial challenge.

[3] In addition, if Plaintiffs assert *only* a facial challenge, they must establish that the statute is unconstitutional *in every potential application*. *Waters v. Farr*, 291 S.W.3d 873, 921 (Tenn. 2009); *City of Memphis*, 414 S.W.3d at 103. Given the discretion afforded the BZA to exempt any property it chooses, Plaintiffs would have an uphill climb.

imposed limits on the exercise of federal jurisdiction.'" *U.S. v. Windsor*, 570 U.S. 744, 757 (2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis added)). Tennessee courts follow the same path with different terminology. *City of Memphis*, 414 S.W.3d at 98 ("Our jurisprudence recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing.").

The Metropolitan Government's argument under *Williamson County*, however, is a ***prudential justiciability*** issue, not one of constitutional justiciability. In *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), the Supreme Court explained:

> The only issue presented is whether Suitum's claim of a regulatory taking of her land in violation of the Fifth and Fourteenth Amendments is ready for judicial review under ***prudential ripeness principles***.[7] There are two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* explained that a plaintiff must demonstrate that she has both received a "final decision regarding the application of the [challenged] regulations to the property at issue" from "the government entity charged with implementing the regulations" and sought "compensation through the procedures the State has provided for doing so." . . . Because only the "final decision" prong of *Williamson* was addressed below and briefed before this Court, we confine our discussion here to that issue.

Id. at 733-34. The Court then explained that the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction" and noted that only prudential ripeness was at issue in the case. *Id.* at 734 n.7.

The one plaintiff rule, which applies to constitutional justiciability, does not negate application of *Williamson County*'s prudential justiciability requirement. Plaintiffs' reliance on the rule is simply non-responsive to whether Plaintiffs' claims are ripe under *Williamson County*.

D. <u>The Futility Exception to *Williamson County*'s Exhaustion Requirement Does Not Apply Here.</u>

Only three plaintiffs applied for variances from the sidewalk ordinance: April Khoury (for 6227 Robin Hill Road), Old South (for 4701 Dakota Avenue), and Aspen (for 917

and 919 South Street).[4] (Compl. ¶¶ 39-64, 65-81, 88-97.) The rest have agreed to build sidewalks, paid the in-lieu fee without asking the BZA for a variance, or done nothing. (*Id.* ¶ 9.) Plaintiffs claim that applying for variances would be futile because of how Ms. Khoury and Old South fared in their trips to the BZA. (Pls.' Resp. at 12-14.) This argument is unavailing.

Claims like those raised here are ripe when an administrative body with authority to grant a variance has applied the sidewalk ordinance to a particular property. *See Williamson County*, 473 U.S. at 186; *Seguin v. City of Sterling Heights*, 968 F.2d 584, 587 (6th Cir. 1992). The question of ripeness after a final administrative decision under *Williamson County* is "a factual determination, taking into account all relevant statutes, ordinances, and regulations, that the decisionmaker has arrived at a final determination with respect to the permit applicant's use of her property, and that that determination is one which will allow a court to determine whether a regulatory taking has taken place." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 525 (6th Cir. 2004). In other words, "plaintiffs must . . . answer the conceptually distinct question of whether there is a final decision for [a] court to review." *Miller v. City of Wickliffe, Ohio*, 852 F.3d 497, 504 (6th Cir. 2017).

In the context of a taking, it is well-settled that courts may not render advisory opinions when it is unclear how far challenged land-use regulations extend:

> [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. . . . As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

[4] The body of Defendant's Motion for Judgment on the Pleadings incorrectly stated that Aspen had applied for a variance for the property at 4005 Nebraska Avenue. The table on page 3 of the motion correctly identified 4005 Nebraska Avenue as having no application for a variance. Plaintiff's Complaint notes that an in-lieu fee was paid, and no variance was sought for this property. (Compl. ¶ 88.)

Palazzolo v. Rhode Island, 533 U.S. 606, 620-21 (2001).[5]

The "futility" exception to this rule excuses a landowner from submitting applications for variances "for their own sake" if doing so would be futile, or if there is no doubt about the land's permitted use or value. *Id.* at 622. But "at least one meaningful application must be submitted as a prerequisite to a plaintiff's attempt to benefit from the futility exception." *Seguin*, 968 F.2d at 589. Furthermore, a plaintiff may not invoke the futility exception when a BZA is expressly authorized to grant variances from the challenged regulation, even if the plaintiff argues the BZA would be "impotent" to do so. *Id.* at 588-89. This exception is commonly applied in cases where landowners and government entities have reached an impasse, or in situations where prolonged delays give rise to a "war of attrition." *Lilly Investments v. City of Rochester*, 674 F. App'x 523, 527 (6th Cir. 2017).

While the exception does not apply to facial challenges because administrative bodies lack the authority to decide the constitutionality of legislation, *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty*., No. M2002-02582-COA-R3CV, 2005 WL 1541860, at *30, *51 n.40 (Tenn. Ct. App. June 30, 2005), "a landowner must give a land-use authority an opportunity to exercise its discretion." *Palazzolo*, 533 U.S. at 620.

As described above, Plaintiffs' facial challenge was dismissed when the Metropolitan Council enacted a new ordinance to replace the one at issue here. Now, Plaintiffs assert claims and seek remedies specific to their own properties, which is more accurately labeled an as-applied challenge. Plaintiffs contend that because Ms. Khoury and Old South did not receive variances from the BZA, any other attempts to secure variances would be futile. (Pls.' Resp. at 12-14.) But Plaintiffs' position conflicts with well-established case law

[5] The only case that Plaintiffs cite as authority on the doctrine of futility is inapposite because it addressed administrative exhaustion in the context of medical plan benefits, not property takings. *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391 (Tenn. Ct. App. 2003).

requiring "one meaningful application" to assert futility. *See Seguin*, 968 F.2d at 589. Indeed, Plaintiffs cite no authority to support the proposition that they may rely on *others'* variance applications to establish futility. And speculating about what would have happened if Plaintiffs had requested variances from the BZA is precisely the kind of theoretical and abstract opinion that justiciability doctrines prevent. *See Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 203 (Tenn. 2009) (quoting *State v. Wilson*, 70 Tenn. 204, 210 (1879)).

For these reasons, comments from BZA members about Ms. Khoury or Old South's applications (Pls.' Resp. at 12-13) simply are not probative of whether other Plaintiffs' applications would have resulted in variances, which could have been based on any number of topographical or other issues.[6] The Court should therefore dismiss claims related to all properties for which Plaintiffs never asked the BZA to exercise its discretion. (*See* Table, Def.'s Mot. J. Pleadings at 3-4.)

II. PLAINTIFF'S CLAIMS ARE SUBJECT TO A ONE-YEAR STATUTE OF LIMITATIONS, AND ANY CLAIMS ACCRUING BEFORE APRIL 22, 2018 ARE TIME-BARRED.

A. Tenn. Code Ann. § 12-1-206 Establishes a One-year Statute of Limitations for Plaintiffs' State Constitutional Claims.

Because Plaintiffs proceed under Tenn. Code Ann. § 1-3-121, which provides no statute of limitations, they allege that a general ten-year statute of limitations for Tennessee constitutional claims applies. (Pls.' Resp. at 15-16.) But the authority on which Plaintiffs rely does not support the proposition that *all* constitutional claims in Tennessee are subject to a ten-year statute of limitations. Rather, "*when no specific statute of limitations can be identified as applicable*, the general ten-year statute of limitations

[6] Plaintiffs' position that "it would not have mattered if Metro denied Plaintiffs' permits altogether because Plaintiffs refused to agree to comply" (Pls.' Resp. at 9 n.4) is unsupported, speculative, and belied by their own allegations. The Complaint alleges that "Plaintiffs are all property owners in Nashville *who have complied* and will be forced to comply with the sidewalk law." (Compl. ¶ 9 (emphasis added).)

applies" to claims for declaratory relief alleging violations of the Tennessee Constitution. *Nunn v. Tennessee Dep't of Corr.*, 547 S.W.3d 163, 189 (Tenn. Ct. App. 2017) (emphasis added).

Plaintiffs proceed under Tenn. Code Ann. § 1-3-121, which provides no specific statute of limitations. (Pls.' Resp. at 15.) But Plaintiffs also allege a takings claim under the Tennessee Constitution. And Tenn. Code Ann. § 12-1-206 unequivocally provides that *all state law takings claims* are governed by the one-year period of limitations in Tenn. Code Ann. § 29-16-124. Plaintiffs claim this section does not apply here because Plaintiffs are not seeking just compensation, but restitution. (Pls.' Resp. at 20-21.) They note that the Definitions section of the same Part states that an "'[u]nconstitutional taking' or 'taking' means the taking of private property by government action such that compensation to the owner of that property is required by either: (A) The fifth or fourteenth amendment to the Constitution of the United States; or (B) The Constitution of Tennessee, Art. 1, § 21." Tenn. Code Ann. § 12-1-202(3). This argument should be rejected.

First, Section 12-1-202(3) does not use the term "just compensation," which is a term of art under takings law. In addition, "compensation" is not defined in the Section to mean *only* "just compensation" as the Takings Clause defines the term. Rather, the expansive language of Tenn. Code Ann. § 12-1-206 establishes the General Assembly's desire to use the term "takings" broadly and to apply a uniform statute of limitations to all claims arising under the Takings Clauses. *Id.* (applying a one-year statute of limitations to "any proceedings claiming a government action is an unconstitutional taking"). Moreover, as noted in Section I.A. above, Plaintiffs' response claims that their property has been taken. (Pls.' Resp. at 7.) The *only* remedy for a taking is just compensation, which is a legal remedy, not an equitable one. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710-11 (1999). Plaintiffs' contradictory assertions that their claims are akin to

physical takings when it serves their purposes (*e.g.*, to preclude application of the ripeness doctrine) but not physical takings when it does not serve their purposes (*e.g.*, to preclude one-year statute of limitations and permit unconventional relief) should be rejected.[7]

Plaintiffs next assert that if the one-year statute of limitations in Tenn. Code Ann. § 29-16-124 applies, the statute does not start running until the Metropolitan Government takes possession of property and commences improvements. (Pls.' Resp. at 23.) But Tennessee courts have held that in regulatory takings claims, the "triggering event" that starts the statute of limitations in § 29-16-124 "is the date the landowner knew that the government was depriving it of the economic use of its property." *Little v. City of Chattanooga*, No. E201800870COAR3CV, 2019 WL 1308264, at *11 (Tenn. Ct. App. Mar. 21, 2019) (quoting *B & B Enters. of Wilson Cty., LLC v. City of Lebanon*, 318 S.W.3d 839, 846 (Tenn. 2010)). In a regulatory takings context, the statute of limitations begins to run when a government agency such as a planning commission issues a final decision. *See Phillip*., 442 S.W.3d at 245 n.7 (citing *B & B Enters.*, 318 S.W.3d at 847). In *Little*, the court rejected the plaintiff's argument that the case involved a physical taking, noting that the plaintiff's injury was "not the loss of the use of her property due to a physical invasion by the City, but the loss of the use of her property for the specific purpose of ingress and egress caused by the City's reclassification of the property as a right-of-way." *Id.* at *12 (Tenn. Ct. App. Mar. 21, 2019)

The same is true of Plaintiffs' allegations. They argue that the Metropolitan Government's *ordinance* constitutes an unconstitutional exaction by requiring them to build sidewalk or dedicated property. The allegations are much more akin to the allegations in *Little* than a case in which a physical invasion has occurred. Thus, any claims brought by

[7] This distinction further highlights the unique, as-applied, nature of Plaintiffs' claims. What, if anything, Plaintiffs are entitled to depends, in part, upon whether their property has been subjected to a "consummated taking" under *Koontz*.

Plaintiffs who sought a variance from the sidewalk ordinance more than one year after a final decision from the Board of Zoning appeals are time-barred, either because: (1) they had notice that the government was depriving them of an economic use; or (2) because the government agency with authority to grant variances from the sidewalk ordinance had issued a final decision.

B. Plaintiffs' Section 1983 Claims Are Governed by a One-Year Statute of Limitations, Which Does Not Change Based on the Nature of the Right Asserted.

Plaintiffs assert that because they seek a return of property and not damages, the statute of limitations for their claims under Section 1983 is three years, not one. (Pls.' Resp. at 16.) The statute of limitations for a Section 1983 action is the "state statute of limitations applicable to personal injury actions under the law of the state in which the § 1983 claim arises." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). In Tennessee, that is the one-year limitations period in Tenn. Code Ann. § 28-3-104(a). *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 547 (6th Cir. 2000).

Courts have rejected the notion that Section 1983 actions dealing with injuries to property fall under the three-year statute of limitations provided in Tenn. Code Ann. § 28-3-105 because the statute of limitations in a Section 1983 claim does not change depending on the nature of the right being asserted. *See Porter v. Brown*, 289 F. App'x 114, 117 (6th Cir. 2008) (*citing City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 124 n.5 (2005)). "Instead, all § 1983 constitutional claims generally are subject to the statute of limitations for personal injury torts under the law of the State in which the claim arises—no matter how the plaintiff chooses to characterize the underlying harm." *Id.*; *see also Risser v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, No. 3:09-0386, 2009 WL 1974747, at *4-*5 (M.D. Tenn. July 7, 2009) (holding that a Section 1983 claim for damage to personal property was

governed by the one-year statute of limitations for personal torts and not the three-year statute of limitations for property torts).

Cases to which Plaintiffs cite do not support their contention that a longer statute of limitations should apply to their Section 1983 claims. In *Nunn*, the court ruled that the plaintiff's claims for declaratory relief under Section 1983 were subject to Tennessee's one-year statute of limitations despite not being claims for damage. *Nunn*, 547 S.W.3d at 178-179 & n.10. The Court specifically emphasized that "[b]ecause Congress failed to provide a specific statute of limitations for section 1983 actions, federal courts have looked to the state statute of limitations 'most analogous' to the particular 1983 action." *Id.* at 178 n.10. The Court also noted that "[t]o eliminate confusion and conflicting decisions, the United States Supreme Court has declared that section 1983 claims are best characterized as personal injury actions, and 'a State's personal injury statute of limitations should be applied to all § 1983 claims.'" *Id.*

Plaintiffs also cite an Ohio district court case for the proposition that fees unjustly collected can be returned as restitution outside the statute of limitations for a Section 1983 action. (Pls.' Resp. at 18-19.) But the case concerned restitution of a fee for service, not a government taking of property, and the court's analysis of the statute of limitations that applied to the Section 1983 claim was in the context of certifying a class action. *Thompson v. City of Oakwood, Ohio*, 307 F. Supp. 3d 761, 780, 784 (S.D. Ohio 2018). Nor does *Cruse v. City of Columbia*, 922 S.W.2d 492 (Tenn. 1996), support Plaintiff's position because that case applied a three-year statute of limitations for injury to property in a Government Tort Liability Act action, not a Section 1983 action. *Id.* at 497.

For these reasons, Plaintiffs' Section 1983 claims are governed by the one-year statute of limitations in Tenn. Code Ann. § 28-3-104(a).

C. The Continuing Violations Doctrine Does Not Apply Here.

Plaintiffs argue that the Metropolitan Government commits a continuing violation that tolls any statute of limitations as long as it retains in-lieu fees, rights-of-way, and easements. (Pls.' Resp. at 19-20.) This doctrine does not apply because: (1) the doctrine rarely applies in Section 1983 cases, and (2) the injuries Plaintiffs claim are residual effects of past decisions, not new or repeated acts.

Federal courts in the Sixth Circuit employ the continuing violations doctrine most commonly in Title VII cases, but rarely in Section 1983 actions. *Sharpe v. Cureton*, 319 F.3d 259, 267 (6th Cir. 2003). The Sixth Circuit applies the following test for a continuing violation in the context of a Section 1983 action: "a continuous violation exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiff accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided." *Broom v. Strickland*, 579 F.3d 553, 555 (6th Cir. 2009).

"[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Eidson*, 510 F.3d at 635 (quoting *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999)). Furthermore, when a plaintiff invokes this doctrine to toll a statute of limitations, courts "look to what event 'should have alerted the average lay person to protect his rights.'" *Nunn*, 547 S.W.3d at 180 (quoting *Cox v. Shelby State Cmty. Coll.*, 48 F. App'x 500, 507 (6th Cir. 2002)).

Plaintiffs cannot establish that their injuries accrue continuously. The injuries they allege stem from the *effects* of their acquiescence to the sidewalk ordinance and/or the BZA's past decisions, not renewed or repeated acts. Plaintiffs allege no recurring or continual acts that would support the unusual measure of applying the continuing violation doctrine to their Section 1983 claims.

D. Because Plaintiffs' Claims Are Subject to a One-Year Statute of Limitations, Plaintiffs' Claims Arising Before April 22, 2018 Are Time-Barred.

Whether applying Section 12-2-206 for state law claims or Section 28-3-104(a) for Section 1983 claims, a one-year statute of limitations applies to all of Plaintiffs' claims, as presented above. Aspen applied for variances from the BZA for the property at 1001 9th Avenue and 903 Archer Street. (Compl. ¶¶ 83-84.) The BZA issued final decisions on those properties on November 20, 2017. (*Id.* ¶¶ 85-86.)

As described above, the statute of limitations began running on claims related to these properties on that date, which was when Plaintiffs were on notice of a final decision implicating their rights in those properties. *Phillips*, 442 S.W.3d at 245 n.7; *Nunn*, 547 S.W.3d at 180. Any takings claim Aspen had for those properties began running on November 20, 2017, at the latest, and their one-year statute of limitations expired on November 20, 2018, roughly four months before this lawsuit was filed. Aspen's claim concerning 1001 9th Avenue and 903 Archer Street are therefore time-barred.

III. THE ONE-PLAINTIFF RULE DOES NOT APPLY HERE, AND HBAMT DOES NOT OTHERWISE MEET THE CRITERIA FOR ORGANIZATIONAL STANDING.

A. The One-Plaintiff Rule Relates to Constitutional Standing, Not Prudential Standing, and Does Not Automatically Confer Standing on HBAMT.

As before, Plaintiffs contend that because one plaintiff has standing to challenge the sidewalk ordinance, all plaintiffs, including HBAMT have standing. (Pls.' Resp. at 11, 24.) But again, Plaintiffs' argument conflates constitutional standing with prudential (or, non-constitutional) standing. The one plaintiff rule applies in the constitutional standing context. *Rumsfeld*, 547 U.S. at 52 n.2. But the Metropolitan Government's motion seeks dismissal of HBAMT on prudential standing grounds.

In *Warth v. Sedlin*, 422 U.S. 490 (1975), the U.S. Supreme Court examined the issue of organizational standing, making clear that it is a matter of *prudential*, not *constitutional*, standing:

> Moreover, the source of the plaintiff's claim to relief assumes critical importance ***with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes***. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

Id. at 500-01 (emphasis added) (internal citations omitted); *see also* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481, 554 n.3 (2017) (examining the one-plaintiff rule and clarifying that it arises in the context of constitutional standing).

A fundamental principle of prudential standing is the presumption against granting third parties standing to assert the rights of others:

> [A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.

Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) (internal citations and quotation marks omitted). This prudential principle may be relaxed at a court's discretion, but not on the basis of the one-plaintiff rule. Rather, courts look to the nature of the relationship between the parties and whether anything hinders a party's ability to vindicate its own interests. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).[8]

[8] Moreover, Tennessee is one of seven states that has not formally adopted the one-plaintiff rule. Chris Conrad, *Judicial Power in the Laboratory: State Court Treatment of the One Good Plaintiff*

B. HBAMT Lacks Organizational Standing Because It Cannot Show That This Lawsuit Does Not Require Its Members' Individual Participation.

HBAMT cannot assert organizational standing either for its own interests or its members' because: (1) it has alleged no injury to its own interests that this Court can redress; (2) it has not identified how the sidewalk ordinance affects its own interests at this stage in the litigation; and (3) its members must participate in this lawsuit, both with respect to the claims and relief.

To assert organizational standing on behalf of others, HBAMT 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 or the relief requires the participation of individual members in the lawsuit.

Id. at 511; *ACLU v. Darnell,* 195 S.W.3d 612, 626 (Tenn. 2006*); Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

It is undisputed that the first two prongs of this analysis are satisfied here; the question is whether the claims or the relief Plaintiffs seek require HBAMT's individual members to participate in these proceedings. But even if the third prong of the *Darnell* analysis is discretionary, as Plaintiffs suggest (Pls.' Resp. at 25-26), the Court should apply it for two reasons: (1) there is no relief to grant HBAMT at this stage in the case; and (2) any relief the court can grant to HBAMT's members hinges on individual determinations related to separate and unique properties, none of which HBAMT owns. Whether Plaintiffs

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Rule, 108 Geo. L.J. 767, 798 & n.213 (2020). A relatively recent opinion is instructive on this matter. In *Hayes v. City of Memphis*, the Tennessee Court of Appeals considered whether several historical organizations, their individual members, and other plaintiffs had constitutional standing to challenge a city's decision to rename three parks. No. W2014-01962-COA-R3-CV, 2015 WL 5000729, at *1 (Tenn. Ct. App. Aug. 21, 2015). The chancery court dismissed all plaintiffs for lack of standing, but the Court of Appeals partially reversed, holding that one of the organizations could demonstrate Article III standing. *Id.* at *12. The court then specifically affirmed the dismissal of all other organizations as well as the individual members of the organization found to have standing. *Id.* at *1, *12-*13. Though the holding did not directly address the one-plaintiff rule, it suggests that Tennessee courts may not consider it binding.

label their claims for relief as damages or restitution is immaterial: The individual plaintiffs, and not HBAMT, would be entitled to *any* relief the Court can grant.

Plaintiffs further contend that the third *Darnell* prong does not apply when a case raises a pure question of law. (Pls.' Resp. at 27.) This approach may be appropriate where, for example, the sole question before a court is whether an official has correctly interpreted legislation, and an organization's members can pursue individual relief through other avenues. *Int'l Union, UAW v. Brock*, 477 U.S. 274, 287-88 (1986). But an organization cannot bring claims on behalf of its members when "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Warth*, 422 U.S. at 515-16.

This case presents questions of law and fact. The parties ask this Court to determine what relief, if any, to grant individual plaintiffs depending on whether they complied with the sidewalk ordinance, applied for variances, built sidewalks, or paid in-lieu fees. These considerations will be peculiar to each individual plaintiff, and this Court is the forum in which these plaintiffs must seek relief. Thus, the claims and relief require the participation of HBAMT's individual members, and HBAMT does not satisfy the requirements for organizational standing. *Darnell*, 195 S.W.3d at 626.

IV. CONCLUSION.

In summary, the Court should enter judgment in favor of the Metropolitan Government on all claims except those relating to 6227 Robin Hill Road, 4701 Dakota Avenue, 917 South Avenue, and 919 South Avenue, which were appealed to the BZA and filed within one year of the underlying decision. Moreover, HBAMT has no standing in this case and should be dismissed as a plaintiff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by electronic mail and the electronic filing system to:

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on this the 17th day of June, 2020.

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