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

MRB DEVELOPERS, APRIL KHOURY, et. al, Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.	)))))))))))	Case No. 19-534-I

RESPONSE IN OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

The Court should not grant Metro's motion for judgment on the pleadings. Metro makes three distinct arguments. In Section II, Plaintiffs show that their claims are properly ripe for review. In Section III, Plaintiffs demonstrate that their claims are not barred by the appropriate statute of limitations. In Section IV, HBAMT shows that it easily meets the standard for associational standing. Moreover, everyone one of Metro's arguments fails because of the one-plaintiff rule. It provides that if even one plaintiff satisfies the standing requirement, then under the one-plaintiff rule, it establishes standing for all plaintiffs. Metro acknowledges that multiple Plaintiffs satisfy its erroneous standards.

Summary of Argument

1. Plaintiffs' claims are ripe for review for four (4) reasons. **First**, exaction style takings like the ones at issue are not susceptible to ripening under the second prong of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193-95 (1985), a prudential rule for federal courts. Courts reject the idea that exactions takings are subject to the *Williamson County* ripening rule, unlike regulatory takings. Unlike a regulatory taking, there is no need to determine whether the regulation of property still in the possession of the owner goes "too far" such that it amounts to a "taking" of a property, which the administrative process can help establish. **Second**, even regulatory takings claims ripen upon enactment when the taking is legislatively mandated like the ones raised here. **Third**, Metro admits that some Plaintiffs have run the administrative gambit. Under the one-plaintiff rule–which allows for consideration of claims when even *one* plaintiff is appropriately postured–Plaintiffs' claims are ripe. **Fourth**, taking the facts in the complaint as true, it would have been futile for Plaintiffs to attempt exhaustion, as the Board of Zoning Appeals (BZA) has consistently demonstrated. (Compl. ¶ 57, 14 ¶ 74, 17 ¶ 95.)

2. Plaintiffs' claims are not barred by any statute of limitations for four (4) reasons. **First**, the Court of Appeals recently ruled in *Nunn v. Tenn. Dep't of Corr.*, 547 S.W.3d 163, 189-90 (Tenn. Ct. App. 2017), that the statute of limitations for Tennessee constitutional claims is ten (10) years, not one (1). **Second**, even under § 1983, the relevant time frame is three (3) years since Plaintiffs do not seek damages, but rather,

restitution and return of property. **Third**, while Metro continues to deprive Plaintiffs of their property, the statute of limitations has not begun to run. **Fourth**, the statute of limitations for inverse condemnations has no applicability to an exaction taking.

3. HBAMT has associational standing for three (3) reasons. **First**, HBAMT is covered by the one-plaintiff rule since Metro acknowledges that at least three (3) Plaintiffs (April Khoury, Aspen, and Old South) have standing. **Second**, HBAMT meets the individual participation standard for parties Aspen and Old South, who will be directly affected by the Court's decision in this case. **Third**, neither the nature of HBAMT's claims nor the relief sought requires individual member participation. As a matter of prudence, courts may require individual member participation, but that is only for matters involving *damages*, which Plaintiffs do not seek. This case turns on legal questions that do not require individual member participation.

Argument

I. Standard of Review

Motions for judgment on the pleadings are governed by Tenn. R. Civ. P. 12.03:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable

> opportunity to present all material made pertinent to such a motion by Rule 56.

When deciding a 12.03 motion, "all of the facts alleged in the complaint must be taken as true and then the issue is whether those facts state a cause of action that should be decided by a jury." *Gray v. McDonald's Corp.*, 874 S.W.2d 44, 45 (Tenn. App. 1993). "Conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment." *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991) (quotations omitted).

II. Plaintiffs' Claims are Ripe for Review.

Plaintiffs' claims are ripe for review. In Section II.A, Plaintiffs demonstrate that the ripening required by the second prong of *Williamson Cty.*, 473 U.S. at 193-195, which Metro cites (Def.'s Mot. J. on Pleadings at 5), is a rule for regulatory takings, not exactions takings. Section II.B demonstrates that even if this was a regulatory takings, Plaintiffs' challenge a legislatively imposed taking that does not require administrative exhaustion. In Section II.C, Plaintiffs show that taking their case to an administrative body would have been futile. In Section II.D, Plaintiffs show that the one-plaintiff rule provides standing to all plaintiffs.

A. Exactions created by the application of unconstitutional conditions are not regulatory takings and do not require ripening under *Williamson County*.

The courts recognize distinct forms of takings claims, each with a separate body of jurisprudence. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547-48 (2005); *Phillips v. Montgomery Cty.*, 442 S.W.3d 233,

240, n. 9 (Tenn. 2014) (noting two types of *per se* regulatory takings—permanent physical invasion and deprivation of all economically beneficial use—then *Penn Central* takings, and observing that the Supreme Court was "careful to approve" exactions style takings in *Lingle*).

Because a *Penn Central* regulatory taking does not involve a *per se* regulatory taking, the Court has developed a test that has been described as "ad hoc, factual" and "requiring careful examination and weighing of all the relevant circumstances." *Phillips*, 442 S.W.3d at 240 (quotations and citations omitted). The overarching question asks whether the regulatory burden "goes too far," despite the regulation not divesting the owner of title to the property. *Pennsylvania Coal*, 260 U.S. at 415; *see also Penn Central Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124, 130-31 (1978) (courts look to a complex set of factors articulated in *Penn Central* to reach an ad-hoc determination on the basis of the facts in each case). The need to establish that a regulation amounts to a taking naturally leads to the administrative ripening requirements established in *Williamson County*, 473 U.S. at 186 ("[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*.") (emphasis added). The point of ripening through administrative processes is to analyze the slippery *Penn Central* criteria in order to establish that a taking has occurred. *See Phillips*, 442 S.W.3d

at 238 n. 7 ("[A] regulatory takings claim ripens when a Planning Commission makes a 'final decision' regarding a property.").

The justification for the *Williamson County* rule is particular to the regulatory takings analysis because of the need to determine that the regulation is a "taking" in the first place.[1] *See id.* After all, the property owner still retains ownership of the land. Moreover, given the need to determine whether a regulation's cost goes "too far," it is important that the future toll of the regulation be tallied. Those are questions that an administrative body before a federal court intervenes in a state matter. That is why *Williamson County* exists. It is a precondition so as to determine both the "existence and scope of the alleged regulatory taking." *See Phillips*, 442 S.W.3d at 238 n. 7 (final decision from administrative agency enables the court to "determine both the existence and scope of the alleged regulatory taking"). As shown next, none of that has anything to do with an exaction.

Exactions occur when a government entity "condition[s] the approval of a land-use permit on the owner's relinquishment of a portion

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[1] Moreover, it is a rule particular to federal courts, rooted in concerns about federalism that have no sway in state court. *See STS/BAC Joint Venture v. City of Mount Juliet*, 2004 Tenn. App. LEXIS 821 (Tenn. Ct. App. Oct. 3, 2003) (copy of opinion attached) (*Williamson County* applies to federal courts while noting it may be instructive when plaintiffs seek just compensation); *see Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014). Even for federal courts, it is prudential, *see Lucas v. S. Cal.*, 505 U.S. 1003, 1012 (1992), and often forgiven. *See, e.g.*, *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013).

of his property [absent] a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 570 U.S. at 599 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). Instead of merely placing a regulatory burden on property but not divesting the owner of title, *see Pa. Coal*, 260 U.S. at 415, exactions *do* involve a physical transfer of property, making them more analogous to a physical taking. Indeed, in *Lingle*, the Supreme Court recognized that exactions are a form of a physical taking, albeit one accomplished by coercive pressure instead of outright force. *See Lingle*, 544 U.S. at 547.[2] (Exactions are a "special application of the 'doctrine of unconstitutional conditions,'" better understood as a type of forced waiver to consent to what would otherwise be "deemed *per se* physical takings.")[3]

Exactions do not require the court to "determine both the existence and scope" of a regulatory burden. *Phillips*, 442 S.W.3d at 238 n. 7. As

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[2] Nor could Metro argue that *Lingle* abolished exactions style takings when it overruled the "substantially advances" test employed in *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Lingle*, 544 U.S. at 545-46 (emphasizing that the *Lingle* holding "does not require us to disturb any of our prior holdings," including *Nollan* and *Dolan*). The Supreme Court's most recent exactions case was the 2013 case of *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595.

[3] The unconstitutional conditions doctrine prevents government from denying a benefit–even a discretionary one–to someone because they exercise a constitutional right. The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604, 608.

illustrated in the present case, there is not a need to determine the "existence" of a property rights deprivation. Metro has Plaintiffs' property. (*See e.g.*, Def.'s Ans. ¶ 96). The question of whether those takings are constitutional is "unconcerned with the degree or type of burden a regulation places upon property." *Lingle*, 544 U.S. at 547. Permit conditions are unconstitutional unless they have a nexus to a problem caused by the property owner's intended use of the permit. *See Koontz*, 570 U.S. at 599. Nor is there a need to determine "scope." What makes exactions unconstitutional is the government's "[e]xtortionate demands," *id*. at 596, that property owners "'alone [] bear burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Phillips*, 442 S.W.3d at 239 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320-21 (2002)). The future cost of the regulation on the property has nothing to do with anything. Neither the "existence and scope" of the law or its application to Plaintiffs come to bear on whether the sidewalk law is extortionate, and Metro never explains why it would.

Metro produces no authority applying *Williamson County* to an exaction style taking. The 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. *See Talismanic Props., LLC v. Tipp City*, 2016 U.S. Dist. LEXIS 160921, at *8-9 (S.D. Ohio 2016) (rejecting the argument 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'")

reconsidered and vacated on other grounds by Talismanic Props., LLC v. Tipp City, 309 F. Supp. 3d 488 (S.D. Ohio 2017).[4] Metro stretches the reach of *Williamson County*, a prudential rule for federal courts often forgiven by federal courts. *See Town of Nags Head*, 724 F.3d at 545,

Metro mistakenly thinks that a regulatory takings case used in federal courts has relevance to an exactions case in state court. Plaintiffs do not need any additional ripening.

B. Plaintiffs Challenge a Legislatively Mandated Condition, Not an Administrative Application.

Plaintiffs do not need to exhaust a condition that was legislatively imposed, even under regulatory takings law. Ripeness under *Williamson County* "prevent[s] courts from reaching the merits prematurely." *Wilkins v. Daniel*, 744 F.3d 409, 418 (6th Cir. 2014). The United States Supreme Court and Tennessee precedents establish that regulatory takings challenges to legislative enactments are ripe upon the law's passage. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n. 10 (1997); *Lucas*, 505 U.S. at 1013 n. 4; *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville*, 2005 Tenn. App. LEXIS 382, at *91 (Tenn. Ct. App. June 30, 2005) (copy of opinion attached) ("'[S]uch facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed.'") (quoting *Suitum*, 520 U.S. at 736). When a

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[4] In fact, it would not have mattered if Metro denied Plaintiffs' permits altogether because Plaintiffs refused to agree to comply. *See Koontz*, 570 U.S. at 619. *Koontz* established that even permit denials can rise to the level of an exaction. *See Koontz*, 570 U.S. at 612, 619.

regulatory taking is legislatively imposed, then there is no need to wonder if it will be applied, which is the whole point of the *Williamson County* rule in the first place. "If anything," once it is shown that a plaintiff has a defined property interest, avoiding the legal question of whether a taking has occurred does a "does a disservice" to *Williamson County's* intended purpose. *See Wilkins*, 744 F.3d at 418, Metro has never claimed Plaintiff's do not have a property interest at issue. Nothing that would happen at the BZA would matter. The sidewalk law imposes the taking. It is a law, and administrative boards cannot ignore the law, or even rule upon its constitutionality. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 842-43 (Tenn. 2008) (emphasis added) (quoting *Richardson v. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995)). Constitutional challenges to legislatively imposed takings ripen upon enactment.

Plaintiffs challenge a condition dictated by law, not an administrative body that may ultimately choose not to impose it. (Compl. ¶ 1.) There is no doubt that Plaintiffs needed to comply with the sidewalk law if they were to obtain a permit for a new home. (Compl. Ex. 1.) Indeed, as shown extensively below, that is exactly what BZA told Plaintiffs who did what Metro demands and attempted an administrative appeal.[5] Plaintiffs were not required to ask Metro to flaunt its own law.

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[5] Even the "revised" sidewalk law, which vests a measure of discretion in the Zoning Administrator, is itself evidence that under the original version of the law at issue here, there was no choice but to comply, either through construction of sidewalks or, in some cases, payment of in-lieu

C. The one-plaintiff rule applies here.

Exhaustion does not apply to unconstitutional condition claims, but the "one plaintiff rule" does. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (one party with standing is sufficient to satisfy justiciability requirements); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding that determinations do not need to be made for additional parties once it is decided that one party has standing). "[T]he rule permits a court to proceed to adjudicate the merits of the entire case, *as to all plaintiffs*, as long as one of them has standing." Aaron-Andrew P. Ruhl, *One Good Plaintiff is Not Enough*, 67 Duke L. J. 2017 481, 487 (2017). "The one-plaintiff rule is applied with considerable frequency. It has been invoked in more than two dozen Supreme Court cases […] and it has figured in several of the highest-profile cases of the last several years." *Id.* at 484 (2017) (citing *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017) (en banc) (litigation over President Trump's travel ban)); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (DACA program); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Affordable Care Act's individual mandate); *Mass. v. EPA*, 549 U.S. 497, 518 (2007) (climate change); *Bostic v. Schaefer*, 760 F.3d 352, 379-71 (4th Cir. 2014) (same-sex marriage). Metro admits that multiple individual properties and plaintiffs have exhausted available administrative remedies. (Def.'s Mot. for J. Pleadings at 3

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fees. Metro Code § 17.20.120(A)(3).

(acknowledging April Khoury, Old South, and Aspen petitioned the BZA).) That acknowledgment is dispositive and makes short work of Metro's *entire* ripeness argument.

D. Plaintiffs are not required to take the futile action of asking the BZA to ignore the law.

Futility is an exception to exhaustion requirements. The Tennessee Court of Appeals has explained "[t]raditional exhaustion principles also include an exception for instances when resort to the administrative route is futile or the remedy inadequate." *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391, 396 n. 3 (Tenn. Ct. App. 2003) (quotations omitted). Plaintiffs are not required to spend time engaging in a futile process to receive an answer when the answer is known in advance.

The BZA repeatedly stressed that it would institute the sidewalk condition because it was the law, even in cases of extreme hardship. Consider the examples of Plaintiffs April Khoury and Old South. April was required to build sidewalks on a corner lot over a ditch for drain water that was three to five (3-5) feet deep, in a neighborhood that had no sidewalks whatsoever. (Compl. at 11 ¶¶ 42-48.) Because building sidewalks would require filling the ditch and altering the neighborhood water drainage patterns, April applied to the BZA for a variance. (Compl. at 11-12 ¶¶ 49-51.) Despite having the full support of her neighbors and *a councilperson who voted for the law* at the hearing (Compl. ¶ 54), the BZA denied her request for relief from the mandate. In so doing, the BZA expressed their view that the whole council voted for the sidewalk law, and "they're the legislative body. We are not. They passed this law."

(Compl. ¶¶ 52-57.) If the BZA was not going to grant April's request, then any request for an exemption of the mandate was futile.[6]

The BZA was even more blunt to Old South, telling it to take its challenge to court. When Plaintiff Old South asked for relief, BZA member David Ewing asked why the BZA should not apply the same requirements that it had been applying it in other cases. (Compl. at 14 ¶¶ 68-70.) Zoning Administer Jon Michael confirmed that the BZA had not altered the standards for *anyone* appearing in front of the BZA. (Compl. ¶ 75.) The BZA then *directed* Old South to take the challenge to court. At the same time, David Ewing reminded them, "but as you know, if you were to get denied the sidewalk request from us and have to appeal to Chancery Court, you still don't have a permit until Chancery Court were to rule in your favor." (Compl. ¶¶ 71-73.) Even more to the point, BZA member David Harper said he "looked forward" to seeing whether courts had a different opinion about whether the sidewalk law included a curb and gutter requirement. (Compl. at 15 ¶ 76.) The court is where Metro's BZA *told* Old South to go. Now that Old South and other Plaintiffs are in court, Metro has said not to be in court. Both Old South and April have shown that the BZA itself thought it was a pointless exercise to ask them to waive the law.

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[6] It bears emphasizing that the BZA disavowed its ability to grant a variance in the presence of a council member who was pleading with the BZA to grant April's request.

The facts in the Complaint easily demonstrate futility. For purposes of rejecting Metro's motion, these are the only facts that matter. *See Trigg v. Middle Tenn. Elec. Membership Corp.*, 533 S.W.2d 730, 732-33 (Tenn. Ct. App. 1975). Any suggestion in Metro's motion that perhaps the result may have been different in other cases is unsupported. (Def.'s Mot. for J. on Pleadings at 3, 4, 6.) Based on the Complaint, the *most* BZA would do was allow Plaintiffs to pay a fee into the sidewalk fund in-lieu of having the required sidewalks constructed. (Compl. at 12-13 ¶¶ 52-57, 19 ¶ 115.) But that does not solve the problem. *See Koontz*, 570 U.S. at 612, 619 (recognizing that an in-lieu fee is still an unconstitutional exaction). Drawing "all the inferences that can be reasonably drawn from the pleaded facts," *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 352 n.1 (Tenn. 2008) (citing *Lanier v. Rains*, 229 S.W.3d 656, 660 (Tenn. 2007), settles the exhaustion issue.

The BZA would have treated all Plaintiffs exactly as they treated April and Old South. At best, they would have offered them a choice in the form of the exaction: build or pay. The other Plaintiffs do not need to expend needless time and energy to repeatedly demonstrate futility.

III. Plaintiffs' claims are not time-barred.

Plaintiffs' claims are not time-barred. In Section III.A, Plaintiffs show that the appropriate statute of limitations for Tennessee constitutional claims, and Tenn. Code Ann. § 1-3-121, is ten (10) years, not one (1). Plaintiffs next show in Section III.B that under § 1983, the proper statute of limitations is three (3) years. In Section III.C, Plaintiffs show that the clock does not commence running so long as Metro

continues to deprive Plaintiffs of their rights. Section III.D shows that the statute of limitations for inverse condemnations is not germane because this is not and could not be an inverse condemnation action.

A. The proper statute of limitations for Plaintiffs' claims is ten (10) years.

Recent precedent is determinative. The Court of Appeals held that the statute of limitations for Tennessee constitutional law claims is (10) years, not one (1) year. *See Nunn*, 547 S.W.3d at 189-90. The Court of Appeals also held that statutory causes of action that lack a specific statute of limitations likewise fall under the general ten (10) year provision. *Id.* at 188. In *Nunn*, the Court applied the general statute to the Uniform Administrative Procedures Act (UAPA). *Id.*

Plaintiffs do not have a one (1) year statute of limitations given the causes of action. Plaintiffs rely on the Tennessee Constitution, Article I, § 21 and Tenn. Code Ann. § 1-3-121, in addition to claims under § 1983. (Compl. at 3 ¶ 1, 25-26 ¶ 174.) And just like the UAPA, Tenn. Code Ann. § 1-3-121 has no specific statute of limitations expressly provided. *See* Tenn. Code Ann. § 1-3-121. Thus, it is a case "[w]here no specific statute of limitations can be identified [and so] the general 10-year statute of limitations applies." *Nunn*, 547 S.W.3d at 188. That means Plaintiffs fall under the general ten (10) year statute of limitations under both Tenn. Code Ann. § 1-3-121, and the Tennessee Constitution. Metro concedes that all Plaintiffs easily fall within that ten (10) year period. (Def.'s Mot. for J. on Pleadings at 7.) Plaintiffs' actions are timely.

Metro is correct that Plaintiffs also rely on § 1983 (Def.'s Mot. for J. on Pleadings at 7), but that does not shorten the statute of limitations. *Nunn* held that different causes of action are not swept up together under the same statute of limitations for a § 1983 claim, even where a different action is being used to achieve the same result. 547 S.W.3d at 187-88 ("A section 1983 claim is supplementary to whatever relief is afforded by state common-law or statutory remedies.") (quotations omitted). In other words, the longer statute of limitations governs. Plaintiffs' reliance on § 1983 as an alternate cause of action does not lessen the time limit under the relevant statute of limitations.

The statute of limitations is ten (10) years, not one (1).

B. <u>For § 1983 claims that seek the return of property, not damages, the relevant statute of limitations is three (3) years</u>.

Even under § 1983, the statute of limitations is three (3) years, not one (1) because Plaintiffs seek a return of property, not damages. Section 1983 does not have its own statute of limitations, so the relevant time frame within which claims can be brought under § 1983 is borrowed from each state's most analogous statute of limitations. *Owens v. Okure*, 488 U.S. 235, 240 (1989). Metro is correct that Tennessee courts often look to Tenn. Code Ann. 28-3-104(a)(1)(B) in determining an appropriate statute of limitations under § 1983. (Def. Mot. J. Pleadings at 7). The statute of limitations under § 28-3-104(a)(1)(B) is one (1) year. But that all rests upon Tenn. Code Ann. § 28-3-104(a)(1)(B) actually being the state's most analogous statute.

That statute is not the most analogous when Plaintiffs do not seek damages. Tenn. Code Ann. § 28-3-104(a)(1)(B) applies to "[c]ivil actions *for compensatory or punitive damages*, or both, brought under the federal civil rights statutes." (emphasis added). Plaintiffs do not bring a civil action for "compensatory or punitive damages or both." *Id*. Plaintiffs do not seek damages of any kind. (Compl. at 1 ("Plaintiffs seek *only* prospective relief and restitution to remedy an ongoing violation of their constitutional rights."); (Compl. at 3 ¶ 2) ("Plaintiffs seek a declaratory judgment, permanent injunction, removal of any easements, rights-of-way, and restitution of the fees Metro illegally exacted.").) The courts are very clear that restitution and return of property are not damages, but rather equitable remedies. *See Thompson v. City of Oakwood*, 307 F. Supp. 3d 761 (S.D. Ohio 2018) (treating damages and restitution differently); *Freeman v. Kelvinator, Inc.*, 1979 U.S. Dist. LEXIS 14828 (E.D. Mich. 1979) (specifying difference between damages and the equitable relief of restitution).

Because Plaintiffs seek a return of property as their remedy, the most analogous state provision is Tenn. Code Ann. § 28-3-105(1). It provides a three (3) year statute of limitations to "[a]ctions for injuries to personal or real property." *See Cruse v. City of Columbia*, 922 S.W.2d 492, 497 (Tenn. 1996) (Where "the statute upon which plaintiff bases her cause of action does not contain a limitation period ... [t]he applicable time period for causes of action for injuries to, detention of, or conversion of property is three years as set forth in Tenn. Code Annotated Section 28-3-105."). Tenn. Code. Ann. § 28-3-105(1) is the most analogous

provision to Plaintiffs' requested relief. The statute of limitations even under 1983 would be three (3) years.

A recent case out of Ohio is illustrative. *Thompson*, 307 F. Supp. 3d at 761. Plaintiff property owners sued the City of Oakwood, alleging that an ordinance governing "pre-sale" inspections of property imposed an unconstitutional condition on the lawful transfer of property, coercing citizens into waiving their Fourth Amendment rights. *Id.* at 766-69, 778. Those plaintiffs requested a permanent injunction, declaratory relief, damages, and restitution of the illegally exacted fees. *Id.* After suit was filed, the City amended their ordinance, effectively mooting prospective relief[7] and argued that any fees collected outside of Ohio's two (2) year statute of limitations under § 1983 were time-barred. *Id.* at 784. The court distinguished between damages and restitution of the fees, observing that the city was immune from tort claims for damages, but "Plaintiffs paid the $60 fee to Oakwood for the inspection of their property. It would be inequitable to allow Oakwood to retain that money when it was collected pursuant to a[n] unconstitutionally coercive ordinance." *Id.* at 780. This persuasive ruling is directly on point. The Court can still institute the equitable remedy of returning property even

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[7] Unlike Metro's recent version of the sidewalk ordinance–which "amended" the ordinance while preserving the entirety of the constitutional injury at issue in this case–the City of Oakwood cured its unconstitutional condition by creating a warrant procedure and specifying that assertion of one's Fourth Amendment rights could not serve as grounds for prosecution. *Thompson*, 307 F. Supp. 3d at 767.

if it could not award damages for actions falling outside the relevant statute of limitations.

Restitution is not subject to the state's standard § 1983 statute of limitations. And restitution is all Plaintiffs have ever sought.

C. The time for any statute of limitations should not begin to run while Metro continuously violates Plaintiff's property right.

The time for any statute of limitations should not begin to run while Metro maintains ownership of and continues to use Plaintiffs' property. In *Nunn*, the Court of Appeals recognized the continuing violation doctrine that tolls statutes of limitation among federal courts. 547 S.W.3d at179-180 (while noting "conflicting federal decisions"). The Court of Appeals relied on the Sixth Circuit test in the context of a § 1983 action: a "'continuous violation' exists if: (1) the defendants engage in continuing wrongful conduct" (in this case, by continuing to keep Plaintiffs' property and fees); "(2) injury to the plaintiffs accrues continuously"; "and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided." *Id.* (quoting *Broom v. Strickland*, 579 F.3d 553, 555 (6th Cir. 2009)).

Metro is continuing to violate Plaintiffs' rights by retaining and using their property. Based on the Complaint, Metro still has Plaintiffs' property in the form of in-lieu fees, rights-of-way and easements. (Compl. ¶ ¶ 63 (April), 79 (Old South), 103 (Aspen), 143 (MRB), 151 (HBAMT), 169 (Green Eggs), 201-202 (demanding return of in-lieu fees, rights-of-way, and easements). At any point, if Metro returns the property, further injury would be avoided. Continuous use of Plaintiffs' property by Metro

is an additional and continuing action. Any applicable statute of limitations should not begin running while Metro holds Plaintiffs' property.

D. An exactions style taking is not an inverse condemnation action.

On June 1, 2010—the day this response was due—Metro injected a new argument arguing for a separate limitations in a pleading styled "Notice of Filing of Supplemental Authority." In it, Metro directs the Court for the first time to Tenn. Code Ann. § 12-1-106. It provides that any proceeding claiming a governmental action is an unconstitutional taking shall commence within the same limitations as provided under the inverse condemnation statutes, Tenn. Code Ann. §§ 29-16-123, 124, which is one (1) year. Metro's tardy notice does not change the analysis for this exaction style taking. Tenn. Code Ann. § 12-1-206, like the inverse condemnation statutes, only applies to takings claims *seeking just compensation*. The part definitions set forth that the statute is limited to unconstitutional takings "such that compensation to the owner is required" by either state or federal constitution. Tenn. Code Ann. § 12-1-202(3) (defining "unconstitutional taking").

Plaintiffs do not seek just compensation. (Compl. at 1, 3 ¶ 2) One of the defining characteristics of an exaction is that they are not actionable for just compensation. In an exaction, Metro hasn't taken property outright, but rather coerced the property owner into surrendering it. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). That is why the Supreme Court disallows permit

conditions unless the government can show an essential nexus and rough proportionality to the proposed development's impacts, not upon a finding of a lack of just compensation. *See Koontz*, 570 U.S. at 605-06. In fact, an exaction can be a taking "even though no property of any kind was ever taken" because an owner might refuse to agree to the condition. *Id.* 607 (quotation omitted). There is simply nothing to compensate, just an unconstitutional removal of the "[e]xtortionate demands for property." *Id.* Federal and state court consistently find that exactions are remedied with an injunction. *See Nollan*, 483 U.S. at 828-29 (observing that the superior court struck down the contested condition); *id.* at 837-42 (holding that the contested condition was "not a valid regulation"); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 278-80 (5th Cir. 2012); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 851 (9th Cir. 2001); *Dobbs Ferry Dev. Assoc. v. Bd. of Trustees*, 81 A.D.3d 945, 946 (N.Y. App. Div. 2011) (invalidating requirement that property owner pay an in-lieu fee or dedicate park land as a condition for site plan approval proper); *Pulte Homes of N.Y., LLC v. Town of Carmel Planning Bd.*, 84 A.D.3d 819, 820 (N.Y. App. Div. 2011) (explaining that the proper remedy for an unconstitutional condition, payment of a recreation fee as a condition for site approval, is invalidation); *Paulson v. Zoning Hearing Bd.*, 712 A.2d 785, 791 (Pa. Commw. Ct. 1998) (invalidating condition found to violate *Nollan*'s essential nexus test); *Lexington-Fayette Urban Cty. Gov't v. Schneider*, 849 S.W.2d 557, 560 (Ky. Ct. App. 1992) (invalidating a requirement that a property owner dedicate land and build an additional road and bridge as a condition to receiving a

development entitlement violated the unconstitutional conditions doctrine); *Bd. of Supervisors v. Fiechter*, 566 A.2d 370, 373 (Pa. Commw. Ct. 1989) (relying on *Nollan* to invalidate a condition requiring proper owners to dedicate street-side property as a condition for subdivision application approval); *Paradyne Corp. v. State of Fla. Dept. of Transp.*, 528 So. 2d 921, 927 (Fla. Dist. Ct. App. 1988) (applying *Nollan* to find the condition invalid); *Ill. Dep't of Transp. v. Amoco Oil Co.*, 528 N.E.2d 1018, 1023-24 (Ill. App. Ct. 1988) (finding that a condition violating the *Nollan* test is "improper and should not be enforced"); Scott Woodward, *The Remedy for a "*Nollan/Dolan *Unconstitutional Conditions Violation,"* 38 Vt. L. Rev. 701, 714-15 (2014) ("In general, the remedy for an unconstitutional conditions violation is invalidation of the condition" rather than compensation) (collecting cases from federal and state courts applying *Nollan*, *Dolan*, *Koontz*); *see also Wilkins*, 744 F.3d at 418 n. 6 (requiring a plaintiff seeking equitable relief to seek just compensation "makes little sense" because compensation is irrelevant). Indeed, the Supreme Court has recognized the existence of taking claims that "requested relief distinct from the provision of 'just compensation." *San Remo Hotel, L.P. v. City and Cty of San Francisco*, 545 U.S. 323, 345 (2005).

In none of the Supreme Court's exactions cases has it ever ordered just compensation as a remedy. And in *Koontz*, the Supreme Court recognized that an exaction is unconstitutional, even when the property owner has refused to surrender the property, in which case there is nothing to justly compensate. Exactions are thus totally distinct from

regulatory takings or even other forms of physical takings because they do not become constitutional merely upon just compensation. Plaintiffs have not asked to be justly compensated, just that the condition be lifted and their property returned to them.

At any rate, even if this law applied, Metro cannot show that Tenn. Code Ann. § 29-16-124 operates to bar any Plaintiff. This provision commences twelve (12) months "after the land as actually been taken possession of, and the work of internal improvement begun." Until such time as Metro can show that it has actually taken possession of Plaintiffs' property and begun the work of internal improvements, it has failed to carry its burden of proof in a Motion for Judgment on the Pleadings.

IV. HBAMT has associational standing.

HBAMT is a proper plaintiff. In Section IV.A, Plaintiffs show once again that under the one-plaintiff rule, that April Khoury, as well as Aspen and Old South–both HBAMT members–have standing is sufficient to establish standing for all other Plaintiffs. In Section IV.B, HBAMT shows that it meets the standard for associational standing because two (2) HBAMT members are individual participants. In Section IV.C, Plaintiffs show that individual member participation is not a prerequisite to lodging this mostly legal challenge where Plaintiffs do not request damages.

Associational standing requires that "its members would otherwise have standing to sue in their own right," that "the interests [the association] seeks to protect are germane to the organization's purpose," and that "neither the claim asserted, nor the relief requested, requires

the participation of individual members in the lawsuit." *ACLU v. Darnell*, 195 S.W.3d 612, 626 (Tenn. 2006). The associational standing doctrine does not require the participation of HBAMT's individual members for three (3) reasons:

First, under the one-plaintiff rule, HBAMT has standing. *See Rumsfeld*, 547 U.S. at 52 n.2 (one party with standing is sufficient to satisfy justiciability requirements); *Bowsher*, 478 U.S. at 721 (finding that determinations do not need to be made for additional parties once it is decided that one party has standing). The individually named non-HBAMT member Plaintiffs' standing is sufficient to confer standing on HBAMT. Additionally, while Metro argues that Aspen failed to exhaust administrative processes on some of their properties and that others are barred by the statute of limitations, (Def. Mot. J. Pleadings at 3), they do not contend that April Khoury, Aspen or Old South lack standing to sue. Under the one-plaintiff rule, that these three (3) Plaintiffs are appropriately postured is sufficient for the case to proceed with HBAMT as a plaintiff.

Second, Metro ignores that individual members of HBAMT are participating. Aspen and Old South–who will benefit from a declaratory judgment that Metro's sidewalk ordinance was unconstitutional–are also individual plaintiffs. (Compl. ¶ 147.) HBAMT satisfies Metro's standard as Metro admits, (Def.'s Mot. J. Pleadings at 7-8), even HBAMT's individual members do not need to participate to confer associational standing.

Member participation, even when required, does not require participation of all an association's members. When considering the standing of individual members of an association, it is only necessary to determine "whether enough information was supplied as *to one or more identified members*" of an organization so as to provide a proper basis for finding associational standing. *Mich. Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 782 (W.D. Mich. 2002) (emphasis added) (*vacated, on other grounds in Mich. Pork Producers v. Campaign for Family Farms*, 544 U.S. 1058 (2005)) The last prong of the test for associational standing is "best seen as focusing on [] matters of administrative convenience and efficiency." *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 557 (1996). Courts have found that an organization has standing when one member has standing to sue in their own right. *See*, *e.g.*, *John Roe #2 v. Ogden*, 253 F.3d 1225, 1230 (10th Cir. 2001) (where because one member of group had standing such that they could sue in their own right, that was sufficient to confer standing on the group). Aspen and Old South have standing. This establishes HBAMT's associational standing.

Third, neither the nature of the claims asserted nor the nature of the relief requested actually require the participation of individual members. (Def. Mot. J. Pleadings at 8 ("HBAMT cannot establish that the third prong of the organization standing test has been met because participation of its individual members is required in this lawsuit.").) The participation of individual members is not necessary given the nature of Plaintiffs' requested relief. Associational standing requires that "its

members would otherwise have standing to sue in their own right," that "the interests [the association] seeks to protect are germane to the organization's purpose," and that "neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Darnell*, 195 S.W.3d at 626.

HBAMT easily meets the first requirements because HBAMT is an association with over 500 members, over half of whom are actual builders in Middle Tennessee, their organizational purpose includes promotion of the homebuilding industry in Middle Tennessee, and they disapproved of Metro's sidewalk mandate because it increased the cost of housing and slowed the rate of development in Middle Tennessee. (Compl. ¶¶ 144-46.) The only disputed factor is the third one: whether individual members must be parties to the suit. As said above, the suit contains individual members, but more to the point, the third factor is not required in all cases. *Brown Group*, 517 U.S. at 557.

The third prong of the test–that "neither the claim asserted nor the relief requested require participation by individual members," *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)–is both unnecessary as a prudential matter, and fulfilled by the fact that the HBAMT members seeking restitution are also individually named plaintiffs in this case. (Compl. ¶ 147.) As Metro points out (Def.'s Mot. J. Pleadings at 9) "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." *Union County Educ. Ass'n v. Union County Bd. of Edu.*, 2014

Tenn. App. LEXIS 525, *22 (Tenn. Ct. App. Aug. 24, 2014) (emphasis added). Again, Plaintiffs do not seek damages. They seek restitution. (Compl. 3 ¶ 2.) Because all Plaintiffs, including HBAMT, do not seek damages, it is not necessary for individual association members to involve themselves in the case for the court to consider Plaintiffs' claims with HBAMT as a plaintiff.

Perhaps most importantly, the third prong of associational standing is not required in matters of "pure law," which is what this case involves.[8] "[W]hen a case raises a pure question of law, the Court does not need to 'consider the individual circumstances of any aggrieved [] member.'" *Nat'l Ass'n of Letter Carriers v. United States Postal Serv.*, 604 F. Supp. 2d 665, 670 (S.D.N.Y. 2009) (quoting *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America v. Brock*, 477 U.S. 274, 287 (1986)). Where, as with Plaintiffs here, "the issue involves resolution of a question of law, and leaves resolution of individual eligibility to be determined later, individual participation is not required." *Parents League for Effective Autism Servs. V. Jones-Kelley*, 565 F. Supp. 2d 895, 902 (S.D. Ohio 2008). That was the case for a Union that litigated the relevant legal issues on behalf of the group, even though each individual's unique claim would eventually have to be considered to

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[8] Metro has previously alluded to "distinct factual circumstances that must be analyzed in their own right," (Def.'s Mot. Dismiss at 3) but does not actually say what distinct factual circumstances could possibly bear on the constitutionality of the sidewalk mandate.

determine what benefits were due to each member. *Brock*, 477 U.S. at 287.

Plaintiffs' claims turn on a legal question unrelated to any member's individual circumstances: Does Metro's demand that permit applicants build or pay for city sidewalks place an unconstitutional condition on the right to receive land-use permits? Although discovery is ongoing, this is a legal question that will turn on the ordinance itself because the ordinance is the basis for requiring Plaintiffs to comply with the mandate. The Court's January 6 Order dismissed Plaintiffs' request for *prospective* relief, but the ultimate legal question of whether the sidewalk mandate was an unconstitutional permit condition is still very much alive. And any vindication for Plaintiffs must begin with that *legal* finding.

There is no reason, prudential or otherwise, why individual member participation is necessary to facilitate review.

Conclusion

Metro's Motion to Grant Judgment on the Pleadings should be denied.

Dated: June 1, 2020. Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, by the following means:

Counsel	Counsel for	Via
Allison Bussell Metro Courthouse Ste. 108 P.O. Box 196300 Nashville, TN 37219-6300 615/862.6341 Allison.Bussell@nashville.gov	Metro Nashville	☐United States mail, postage prepaid ☐Hand delivery ☐Fax ☒Email ☐Fed Ex ☒CM/ECF

Dated: June 1, 2020. Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK

Unpublished authority

STS/BAC Joint Venture, 2004 Tenn. App. LEXIS 821 (Tenn. Ct. App. Oct. 3, 2003);

Consol. Waste Sys., LLC v. Metro. Gov't of Nashville, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005)