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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 TO DISMISS AND SEVER ANY REMAINING CLAIMS

The Court should not grant Metro's motion to dismiss any of Plaintiffs' claims as moot or to sever. Despite the amendments to the sidewalk ordinance, this Court remains as capable of delivering relief from the constitutional infraction as it was when the case was filed making the case not moot by definition. Moreover, Plaintiffs are properly joined in their challenge to Metro's application of a facially unconstitutional ordinance.[1]

[1] Metro expresses confusion as to whether Plaintiffs' challenge is facial or as-applied, even as it concedes that it does not matter. (Def's Mot. at 1-3). In fact, it does not matter until the remedies stage of the proceeding because "[t]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a

Background

This case is about whether Metro can constitutionally require persons to build city sidewalks, curbs, and gutters (or pay an in-lieu fee as an alternative) as a condition of receiving a permit to construct a new single or two-family residence even in the absence of evidence that the construction of the home caused the problem of a lack of city sidewalks. Plaintiffs challenge this as an unconstitutional condition (Claim One) and further contend that Metro has never enacted a law, constitutional or otherwise, including the curb and gutter installation (Claim Two).

Metro's sidewalk law is found at Metro Code § 17.20.120(A)(2). Metro originally implemented the sidewalk condition in BL2016-493. (Compl. at ¶ 22). The aspect of the ordinance at issue is its application to the construction of single or two-family homes. Under Metro Code § 17.20.120(A)(2), Metro requires the construction of sidewalks in specified portions of the city when any person seeks a permit to build a single or two-family home in those areas. (*Id.* at ¶ 26; Metro Code § 17.20.120(A)(2)). For persons who renovate a home worth 25% of the assessed value, they must dedicate right-of-ways and easements to the city for the construction of future sidewalks. (*Id.* at ¶¶ 29, 30; Metro Code § 17.20.120(A)(2)(b)). Sidewalks must conform to standards determined by Metro's public works division, and Metro enforces those standards so as to mandate construction of curbs and gutters on the nearby city roads. (*Id.* at ¶¶ 31, 66). In some circumstances, a person may opt instead to pay

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constitutional challenge." *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

an in-lieu fee to Metro's pedestrian fund. (*Id.* at ¶¶ 32-33, 35). BL2016-492 came into effect on April 21, 2017. (*Id.* at Ex. 1).

Plaintiffs filed suit on April 22, 2019. (*Id.*) Plaintiffs include individuals, builders, and the Homebuilders Association of Middle Tennessee (HBAMT) who argue: 1) the sidewalk law is an unconstitutional condition; and, 2) that the curb-and-gutter requirement is not part of the law and thus *ultra vires*. They requested a declaration to that effect, an injunction against enforcement of the existing sidewalk law and a return of the in-lieu fees, easements and right-of-ways. (*Id.* at ¶¶ 196-203).

On June 4, 2019, Metro filed BL2019-1659, captioned "[a]n ordinance amending Sections 17.20.120 and 17.20.125 of Title 17 of the Metropolitan Code pertaining to the provision of sidewalks." (Def.'s Mot. at Ex. A). As pertains to single or two-family construction, the bill removed renovations of 25%, but otherwise kept the sidewalk law as a condition for all new single or two-family homes. (*Id.* at A(2)). The bill otherwise expands the availability of a waiver process. The bill was signed into law on July 17, 2019 and becomes effective on September 1. (*Id.*)

Metro filed a motion to dismiss on August 5, 2019. Metro argued that the amended sidewalk law moots Plaintiffs' "claims" for declaratory and injunctive relief,[2] and that Plaintiffs are misjoined because their permits arose out of separate transactions.

[2] A declaration or injunction is not a claim or a substantive cause of action but rather a remedy. *C.f., Goryoka v. Quicken Loan, Inc.*, 519 Fed. App.

Summary of argument

For two years, Metro imposed its sidewalk condition on homeowners, forcing them to privately bear the cost of paying for public infrastructure. In April of 2019, Plaintiffs filed suit and Metro abruptly changed its tact, undertaking to amend the law before then moving to dismiss the case on the grounds of mootness. None of the changes in the amended law renders the controversy moot, but the tactic vindicates the courts' well-grounded skepticism of "maneuvers designed to insulate a decision from review." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

Mootness occurs when it is "impossible for a court to grant 'any effectual relief whatever'" to Plaintiffs should they prevail. *Id.* (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). Metro's amended sidewalk law does nothing to eliminate a live controversy. It continues to reflect Metro's view that it can condition its building permits upon the relinquishment of the constitutionally protected right to not have property taken except upon just compensation even without any showing that the permit condition is related to a public problem caused by the building of the home. This was, and continues to be, exactly what the Supreme Court has called "gimmickry, which converted a valid regulation of land use into an 'out and out plan of extortion.'" *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)). The expanded waiver

926, 929 (6th Cir. 2013) ("district court correctly found that these requests are remedies and are not causes of action.").

provisions (Ex. A; 17.20.120(A)(3)), may narrow the number of instances in which Metro will impose this condition, but it still is the default condition that will apply whenever a person seeks to build a new home, regardless of whether they actually caused the loss of a city-sidewalk. Because the amended law "operates in the same fundamental way as the old statute," the challenge is not moot. *Green Party v. Hargett*, 700 F.3d 816, 823 (6th Cir. 2012) (internal citations omitted).

Moreover, Plaintiffs have demanded a return of their property in the form of in-lieu fees, easements and right-of-ways. This is plainly a form of retroactive relief that this Court can deliver in any event.

The seeming purpose of Metro's claim of voluntary cessation under the amended ordinance is to frustrate judicial review and would thus justify injunctive relief to foreclose the possibility of Metro returning to its ways, assuming it has stopped requiring sidewalks in exchange for a permit (which it has not). Metro has a burden to meet. Yet Metro has made no effort to meet its "formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). So while the controversy is anything but moot, and Metro never so much as tries to show that it would never resume its unconstitutional activity in any event, the case continues to confirm precisely why voluntary cessation must be viewed with a "critical eye." *Knox*, 567 U.S. at 307.

Nor are Plaintiffs improperly joined. Their claims arise from the same series of transactions – from Metro's application of a facially unconstitutional ordinance – and also implicate the same questions of

law and fact regarding the constitutionality of Metro's sidewalk ordinance. This satisfies Tennessee's logical relationship test for permissive joinder. Severance would be the embodiment of wasteful judicial inefficiency. Even if Plaintiffs' cases did not involve the same series of transactions, they would be perfect for consolidation under Rule 42.01 because they all involve a common question of law and fact. The Court should deny Defendant's motion in its entirety.

I. Metro has failed to establish that the case, or any claims, are moot.

This Court remains capable of delivering some sort of judicial relief, notwithstanding the amendments to the sidewalk law. Moreover, Metro makes no effort to carry its burden of showing it could never resume the challenged behavior, assuming it ever stopped.

A. Legal standard and overview.

Metro fails in its effort to stop review of this unconstitutional law. A case is moot only when it is "impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox*, 567 U.S. at 307 (quoting *Erie*, 529 U.S. at 287)). So long as the parties "have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Id.* (emphasis added) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)). In Tennessee, where no constitutional limitation imposes a case-or-controversy requirement, standing doctrines such as mootness are nothing more than "self-imposed rules to promote judicial restraint," not a constitutional prerequisite. *Norma Faye Pyles*, 301

S.W.3d at 202-03. A case is moot when it "no longer serves as a means to provide some sort of judicial relief to the prevailing party." *Id.* at 204.

As the Tennessee Supreme Court explained, its decisions "reflect a jaundiced attitude," about permitting a litigant to "frustrate judicial review" and then be free to resume the same conduct after a case is dismissed. *Norma Faye Pyles Lynch Family Purpose, LLC v. Putnam Cnty.*, 301 S.W.3d 196, 205 (Tenn. 2009). Likewise, the federal courts are wary of "maneuvers designed to insulate a decision from review," *Knox*, 567 U.S. at 307. That skepticism applies both when considering whether the constitutional infraction is likely to continue, but also when considering whether a change in law actually succeeds in eliminating any ongoing controversy. Stated bluntly, the already "heavy burden," *Norma Faye Pyles*, 301 S.W.3d at 205, of convincing a court of mootness is heavier still when the effort appears *directed* at mooting a case. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952).

Plaintiffs continue to have a concrete interest on three levels. First, the amended sidewalk law maintains the challenged unconstitutional condition; second, Plaintiffs request the return of their property, as well as attorney's fees; third, Metro's claim of voluntary cessation is insufficient to moot anything because Metro makes no showing that it would never impose the permit condition again.

B. <u>This Court can deliver prospective declaratory and injunctive relief because the amended law maintains the unconstitutional condition</u>.

The amended sidewalk ordinance does not moot any of Plaintiffs' claims. "A case will generally be considered moot when the prevailing

party will be provided no meaningful relief from judgment in its favor." *County of Shelby v. McWherter*, 936 S.W.2d 923, 931 (Tenn. App. 1996). While "[r]epeal of a challenged law, can in some cases, render a case or controversy moot, *a case or controversy 'does not cease to exist merely by virtue of a change in the applicable law*.'" *Sullivan v. Benningfield*, 920 F.3d 401, 411 (6th Cir. 2019) (emphasis added) (citing *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997) and quoting *Hamilton Cty. Educ. Ass'n v. Hamilton Cty. Bd. of Educ.*, 822 F.3d 831, 835 (6th Cir. 2016)). In fact, "where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, 'the case remains alive and suitable for judicial determination.'" *Id.* at 410-11 (quoting *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 460 F.3d 717, 720 (6th Cir. 2006)). As the *Benningfield* Court succinctly stated, "before voluntary cessation of a practice could ever moot a claim, the challenged practice must have *actually ceased*." *Id.* at 411 (emphasis in original) (citing *Cleveland Branch, N.A.A.C.P.* 263 F.3d 513, 531 (6th Cir. 2001)). Even had the challenged behavior stopped at the time of amendment, a "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, In.*, 455 U.S. 283, 289 (1982)). Here, the challenged practice has not only not "actually ceased," it explicitly continues.

The constitutional problem asserted by Plaintiffs is that building a new home has no part in creating the "problem" (lack of conforming sidewalks) that Metro seeks to address through its ordinance. Any examination will falter on the first step of the nexus (required

relationship between the land use and the problem to be cured) and rough proportionality (exaction must be in proportion to the problem and no greater) test. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) ("a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' *between the government's demand and the effects of the proposed land use*.") (emphasis added) (citing *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374). Besides, contrary to Metro's assertion, the original ordinance was not "repealed." (Def.'s Mot. at 2). BL2019-1659 is an ordinance "*amending* Sections 17.20.120 and 17.20.125 of Title 17 of the Metropolitan Code pertaining to the provision of sidewalks." (Def.'s Mot. at Ex. A) (emphasis added). The key question is whether the amendments have made it so the constitutional problem has "actually ceased." *Benningfield*, 920 F.3d at 411.

The unconstitutional condition remains. Where an old law or ordinance is amended and its replacement is so "sufficiently similar" that the two laws "present the same controversy," a claim will not likely be mooted. *Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ.*, 822 F.3d 831, 835-36 (6th Cir. 2016). A side-by-side comparison of the original and amended ordinances reveals not only that Metro continues to impose the sidewalk condition in exchange for a permit, but that much of the language is identical. BL2019-1659 introduces some changes, but not to the application to the construction of single and two-family homes. This changes include a waiver provision allowing for the waiver of sidewalk requirements "[w]here there is an existing substandard

sidewalk, insufficient right-of-way, existing physical feature on the property such as utilities, a ditch or drainage ditch, historic wall(s) or stone wall(s), tree(s), steep topography, or other hardship." But that addition does nothing to ameliorate the constitutional violations. The requirements of the sidewalk ordinance are not unconstitutional by virtue of the hardships they create. They are unconstitutional because they exact property absent the requisite nexus and proportionality between the intended land use and the problem that Metro seeks to solve. It is the absence of a nexus and proportionality, not "hardship," that violates "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation," *Armstrong v. United* States, 364 U.S. 40, 49 (1960), and unconstitutionally "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* Metro may not foist the cost of providing public works on individual property owners whose land use does absolutely nothing to contribute to the need for those public works. It simply does not matter whether the condition amounts to a hardship in Metro's estimation. A waiver for those properties and property owners who find themselves in situations that are absurd or particularly burdensome does not cure the constitutional infraction.

Therefore, this Court is still able to deliver prospective declaratory and injunctive relief regarding the applicability of the sidewalk mandate to new single and two-family homes. The ordinance, even as amended, "operates in the same fundamental way as the old statute." *Hargett*, 700 F.3d at 823 (internal quotations omitted). The amended ordinance does not moot this Court's ability to deliver meaningful relief.

The cases that Metro relies on regarding mootness, (Def's Mot. at 2-3), *Hooker v. Haslam*, 437 S.W.3d 409 (Tenn. 2014) and *Tini Bikini-Saginaw, LLC v. Saginaw Charter TP.*, 836 F. Supp. 2d 504 (E.D. Mich. 2011)), are inapplicable. Those cases both involve statutory repeal and cessation of the challenged conduct, not cosmetic amendments to a law that maintains the challenged portion. As explained above, not only was the sidewalk ordinance not repealed, but the unconstitutional conditions contained in the original reappear in the new ordinance under identical language. This makes all the difference. Unlike the cases Metro cites, the challenged ordinance is still "the law of the land." *Haslam*, 437 S.W.3d at 417. A ruling would be anything but advisory.

It remains a very real certainty that Metro will continue to impose the sidewalk mandates on Plaintiffs going forward even if the Plaintiffs themselves did nothing to cause a lack of city sidewalks. This Court remains able to deliver prospective relief in the face of Metro's superficial alterations to the sidewalk law.

C. <u>This Court can deliver retrospective relief as well</u>.

Even if prospective relief was moot, declaratory relief, restitution and attorney's fees would still be not only appropriate, but necessary to Plaintiffs' remaining claims. By requesting restitution and return of property – to include a return of the in-lieu fees, easements, and rights-of-way (Compl. ¶¶ 201, 202) – Plaintiffs "preserve[] [a] … backward-looking right to challenge the original law." *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 461 (6th Cir. 2007). "[W]here a claim for injunctive relief is moot, relief in the form of damages for a past constitutional violation is not affected." *Gottfried v. Med. Planning*

Servs., 280 F.3d 684, 691 (6th Cir. 2002). A request for return of the unlawfully exacted property is sufficient to maintain Plaintiffs' request for declaratory relief. *See Shell v. Williams*, No. M2013-00711-COA-R3-CV, 2014 Tenn. App. LEXIS 12, at *32-33 (Tenn. Ct. App. Jan. 14, 2014) ("without a request for damages or *specific performance regarding the return of the removed property*, this Court can offer [] no meaningful relief") (emphasis added). "[A] declaratory judgment is *normally* a prelude to a request for other relief, whether injunctive or monetary." *Pund v. City of Bedford*, 339 F. Supp. 3d 701, 710 (N.D. Ohio, 2018) (emphasis in original) (citing *Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003)). "Plaintiffs in this case are not seeking an empty declaration. Declaratory relief is part and parcel of their claim for monetary relief, which is live." *Id.* (internal quotations omitted). Plaintiffs do not seek damages, but nevertheless granting restitution of exacted fees and return of exacted property necessarily entails a declaration that the sidewalk ordinance was/is unconstitutional. Indeed, Metro appears to recognize that restitution remedies are viable in any event. (Def.'s Mot. at 3) ("any remaining claims for 'restitution' should be severed and proceeded with separately").

Furthermore, Metro conspicuously has not promised to pay back Plaintiffs' attorney fees and costs as sought in the Complaint. (Compl. at ¶ 204.) This too is plainly "any" form of effectual relief that the amended law has not addressed. *See Knox*, 567 U.S. at 307 (quoting *Erie*, 529 U.S. at 287). While an interest in attorney's fees is ordinarily "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480

(1990), here there remains a live controversy, and the Tennessee Constitution lacks a case or controversy requirement to begin with. *See Norma Faye Pyles*, 301 S.W.3d at 202-03. Furthermore, although the Supreme Court has cautioned against "carrying forward a moot case solely to vindicated a plaintiff's interest in recovering attorneys' fees," *Friends of the Earth*, 528 U.S. 192 n. 5, it has never done so in the face of "maneuvers designed to insulate a decision from review by the Court." *Knox*, 567 U.S. at 307.

In sum, Metro's attempt to frustrate judicial review not only casts considerable doubt on its claim that it will respect Plaintiffs' rights going forward, *see* Part D, but falls short of giving them everything they need to fully redress the prior constitutional violation. The possibility of effectual relief remains obvious.

D. Metro fails to support its claim of voluntary cessation.

In this instance, Metro argues that it has voluntarily ceased engaging in the challenged conduct because the amendments have mooted this Court's ability to deliver relief. To prevail when arguing voluntary cessation, Metro bears a "'heavy' burden to demonstrate mootness in the context of voluntary cessation." *Sullivan*, 920 F.3d at 410 (quoting *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003)). Indeed, "[a] defendant's voluntary cessation of a challenged practice does not moot a case." *League of Women voters of Ohio v. Brunner*, 548 F.3d 463, 473 (6th Cir. 2008) (internal citations omitted). Metro must make it "absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *Id.* (internal citations omitted). Dismissal based on voluntary cessation "would permit a resumption of the challenged

conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307. This is not an exception to mootness principles, but rather an application of them because, in order to moot a case based on voluntary cessation it must be totally clear that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cleveland Branch, N.A.A.C.P.*, 263 F.3d at 530-31 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

Here, Metro does not so much as argue, let alone establish, that it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). Indeed, Metro never acknowledges the wrongfulness or even the merits of the challenged sidewalk condition. (Def.'s Mot. at 1-3). That gives rise to a concern that Metro believes itself "free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Absent some finding that the sidewalk condition is unconstitutional, Metro gives every indication that this condition is able to recur, and indeed, will.

Plaintiffs' claims are not moot, and the Court can still grant all forms of requested relief.

II. Plaintiffs are properly joined as their claims arise from the same series of transactions and are tied together by the same legal questions.

Plaintiffs' claims should remain together – they all arise out of Metro's application of the same facially unconstitutional ordinance, and all concern the same questions of law and fact. Keeping them together advances the goal of promoting judicial economy whereas severance

would create exponentially more and purely duplicative work for this Court, Metro, and Plaintiffs. With no mention of unfairness resulting from joinder even made by Metro, the case should remain as-is.

Tennessee R. Civ. P. 20.01 provides:

> All persons may join in one (1) action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Id. See also Carr v. Higdon, 665 S.W.2d 382, 383 (Tenn. Ct. App. 1983) ("The […] permissive joinder statute [i]s identical to Rule 20 of the Federal Rules (upon which Rule 20.01 of the Tennessee Rules of Civil Procedure is also based).").

"The Supreme Court has encouraged the joinder of claims and remedies." *Stojcevski v. Cty. of Macomb*, 143 F. Supp. 3d 675, 682 (E.D. Mich. 2015). "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966). Consistent with this policy, "courts [] employ a liberal approach to permissive joinder of claims *and* parties in the interest of judicial economy." *Alexander v. Fulton County*, 207 F.3d 1303, 1323 (11th Cir. 2000).

To determine whether a transaction or series of transactions has occurred, Tennessee uses a "logical relationship" test. *Fred's Finance Co. v. Fred's of Dyersburg, Inc.,* 741 S.W.2d 903, 909 (Tenn. App. 1987)). "To determine whether permissive joinder [i]s proper, this Court adopted the

'logical relationship' test which permits reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events [i]s not necessary." *Woods v. Fields*, 798 S.W.2d 239 (Tenn. Ct. App. 1990). Similarly, "[t]he words 'transaction or occurrence' are given a broad and liberal interpretation." *LASA Per L'Industria Del Marmo Societa Per Azioni of Lasa, Italy v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969)). "Rule 20 clearly contemplates joinder of claims arising from a 'series of transactions or occurrences' — a single transaction is not required." *In re EMC Corp.*, 677 F.3d at 1356 (quoting Fed. R. Civ. P. 20(a)). "Transactions or occurrences satisfy the series of transactions or occurrences requirement of Rule 20(a) if there is some connection or logical relationship between the various transactions or occurrences. A logical relationship exists if there is some nucleus of operative facts or law." *Mymail, Ltd. v. Am. Online, In.*, 223 F.R.D. 455, 456 (E.D. Tex. 2004). "[T]he indicia articulated in Rule 20(a) identify the circumstances in which joint proceedings are considered efficacious in civil cases. The crucial factor is the existence of common questions of law or fact, a consideration which largely determines whether or not joinder is economical." *Jean v. Meissner*, 90 F.R.D. 658, 661 (S.D. Fla. 1981).

While courts favor liberal joinder, *see Gibbs*, 383 U.S. at 724, "[t]he question of whether a particular factual situation constitutes a single transaction or occurrence requires a case-specific inquiry." *Stojcevski*, 143 F. Supp. 3d at 682 (internal quotation and citation omitted). In the absence of any hardship to parties if Plaintiffs' claims continue together, the Court should exercise its discretion to try the challenge to Metro's

ordinance once instead of (at least) seven separate times. Tenn. R. Civ. P. 20 Adv. Com. May 17, 2005 ("Where the liberality of the permissive joinder provisions works a hardship on a particular party or parties, the court is empowered to order separate trial or make other orders necessary to prevent delay of prejudice."). The "court [should be] guided by the underlying purpose of joinder, which is to promote trial convenience and expedite the resolution of disputes, thereby eliminating unnecessary lawsuits." *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002) (internal citations omitted).

Plaintiffs are properly joined in this case, and keeping them together promotes judicial efficiency. All claims center on Metro's insistence on and application of an unconstitutional ordinance. These claims share common questions of law and fact. That is, they all involve the legal question of whether a nexus and proportionality exists between the sidewalk condition and the building of a new home. They also involve a common question of fact because nothing indicates that Metro ever considered the relationship between building a home and sidewalks when enacting the law, or in any of the Plaintiffs' instances. It could have also been the case that each project involves distinct questions of fact relating to the impact of the home on the neighborhood, at least in theory,[3] but it

[3] Metro alludes to "distinct factual circumstances that must be analyzed in their own right," (Def's Mot. at 3) but does not actually say that there are distinct factual circumstances that it considered before imposing the condition. That is because there are none. As the face of the ordinance itself makes plain, the condition applies to anyone who seeks a permit in specified areas of the city, not the "market price," (*id.*) something that would be irrelevant to the nexus analysis in the first place.

does not appear that Metro ever made any fact-specific determinations in leveling the sidewalk condition on any plaintiff. Even if it had, it would still be a much more efficient use of resources to keep Plaintiffs together and weave in any distinct facts to the common questions.

Metro fails to suggest that they would suffer any sort of hardship should the Court try Plaintiffs' claims together. Tenn. R. Civ. P. 20 Adv. Com. May 17, 2005 ("Where the liberality of the permissive joinder provisions *works a hardship on a particular party or parties*, the court is empowered to order separate trial or make other orders necessary to prevent delay of prejudice.") (emphasis added). Neither does Metro discuss how severing the claims would do anything other than waste judicial resources. What would be gained by breaking this case into a series of seven or more cases? It is to no one's benefit to have seven of the same depositions, seven of the same motions for summary judgment, and potentially seven nearly identical trials. Yet that is precisely what would follow if the Court grants Metro's motion to sever Plaintiffs' claims.

Finally, regardless of whether Plaintiffs' permits involve the same series of occurrences, their cases should all be consolidated under Rule 42.01. Rule 42.01 states: "When actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated or heard jointly, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." "Misjoinder of parties is not ground for dismissal of an action," Tenn. R. Civ. P. 21, in any event, so at the very least, Plaintiffs' claims should be consolidated.

> Consolidation is proper when there are 'actions involving a common question of law or fact pending before a court.' For joinder of parties in one action, on the other hand, the additional 'transaction or occurrence' test must be satisfied. The claims by or against the parties must be 'in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences.' When, therefore, multiple claims that will entail decisions on common issues of law or fact cannot be joined because of limitations on joinder, consolidation may provide a beneficial alternative for achieving judicial economy.

City of New Johnsonville v. Handley, No. M2003-00549-COA-R3-CV, 2005 Tenn. App. LEXIS 499, *31-32 (Tenn. Ct. App. August 16, 2005) (quoting Robert Banks, Jr. & June F. Entman, TENNESSEE CIVIL PROCEDURE § 6-5(b) (1999)). Plaintiffs' claims are properly joined, but failure to minimally treat them as consolidated would run contrary to both the rules of civil procedure and established jurisprudence considering the fairness to parties and wise use of judicial resources. Rather than joinder working a hardship on Metro – which they do not so much as suggest that it would – severance would, in fact, work a hardship by creating duplicative proceedings and wasting the time of all involved parties.