IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JAMES KNIGHT, JASON MAYES, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.	)	Case No. 3:20-cv-00922 Judge Trauger

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully file this Memorandum in Support of their Motion for Summary Judgment.

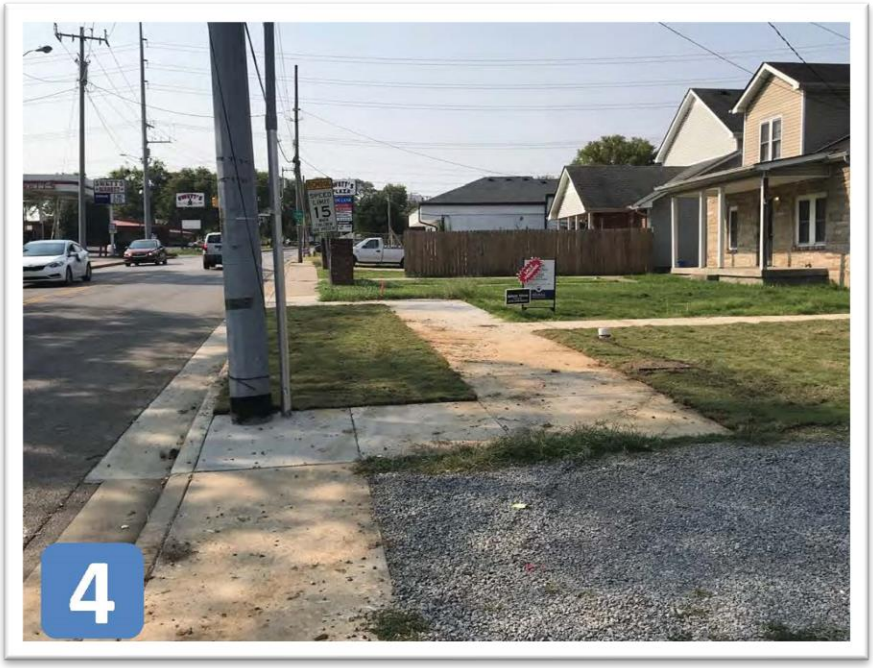
INTRODUCTION

"Sidewalks to nowhere" infamously dot the streets of Nashville. But how did they get there? And why? Nashville claims that due to poor planning since the 1950s, the city is now experiencing a shortage in pedestrian walkways. *See Strategic Plan for Sidewalks and Bikeways*, WalknBike Nashville, at 57 (2017) ("*WalknBike*");[1] (*see also* Declaration of Braden H. Boucek ("Boucek Decl.") ¶ 6, Ex. 3 at MG 000770.) To make up for that alleged shortage and Metro's inability to pay for sidewalks, the city passed an ordinance that requires property owners seeking permits to build single- and two-family homes to install sidewalks on their property or "contribute"

[1] https://filetransfer.nashville.gov/portals/0/sitecontent/pw/docs/transportation/WalknBike/WalknBikeFinalPlan.pdf.

an in-lieu fee to Metropolitan Government of Nashville and Davidson County's ("Metro") Pedestrian Benefit Zone Fund. *See* BL2019-1659, codified at Metro Code § 17.20.120 *et seq.* The sidewalk ordinance's applicability depends solely on where in the city the property is located, not on a determination that the property owner's intended use has any public impact, or even if they require a variance from zoning. If property owners reject the conditions and decline to build the mandated sidewalk or pay the in-lieu fee, they must forego their new home construction permit altogether. It is clear that Metro does not want to pay for sidewalks. Sidewalks are expensive. Metro spends an average of $837 per linear *foot* to install sidewalks. (Plaintiffs' Statement of Undisputed Material Facts ("SUMF") ¶ 13.) And Metro's fiscal portrait is grim, with massive shortfalls in unfunded infrastructure projects like sidewalks.[2] It is also clear that many properties subject to the ordinance don't even have sidewalks or connect to any sidewalks nearby. The result: sidewalks throughout the city zigzag and end abruptly, leading pedestrians to nowhere.

[2] Just before it enacted the current version of the sidewalk ordinance in 2019, Nashville was ranked as one of the worst run cities in 2018, largely because of its outstanding debt obligations. https://www.tennessean.com/story/money/2018/07/10/tennessee-worst-run-cities-united-states-chattanooga/771325002/. *See* Fed. R. Evid. 902(6). In 2018, Metro had $1.7 billion in approved capital projects to include sidewalks that were unfinanced. https://www.tennessean.com/story/news/2018/09/18/nashville-council-bonds-capital-projects/1347458002/. And in September of 2018, Nashville approved $775 million in bonds just to cover its past underfunded debt. Current Mayor John Cooper called this "[v]ery bracing news." *Id.* Nashville's finances cannot cover its ambitious sidewalk goals.



(Boucek Decl. ¶ 6, Ex. 3 at MG 000806, 832.)

The sidewalk ordinance places the burden to remedy the city's longstanding *public* problem on *private* property owners—a problem that they did not create. However tempting it may be to use permits to remedy poor city planning, it is unconstitutional. *See Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013). Permit applicants are "especially vulnerable to . . . coercion . . . because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Id*. at 605. Although governments may impose conditions that require property owners to address public harms that will directly stem from their intended land use, governments cannot impose permit conditions on property owners to redress problems that are wholly unrelated to the proposed land use. For that reason, the Supreme Court frequently strikes down permit conditions that are nothing more than "gimmickry, which convert[] a valid regulation of land use into an out-and-out plan of extortion." *Dolan v. City of Tigard*, 512 U.S. 372, 385 (1994) (internal quotation marks and citation omitted).

The requirement to build or pay for sidewalks in Metro Nashville is extortionate, unconstitutional, and results in Metro's unjust enrichment. In building new homes allowable under existing zoning, Plaintiffs do nothing to create or even exacerbate the perceived lack of city sidewalks. Metro cannot require individuals to bear the cost of addressing public infrastructure problems that are the result of seventy years of poor city planning. Through the sidewalk ordinance, Metro violates the unconstitutional conditions doctrine by taking property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

FACTUAL BACKGROUND

Nashville has a long and complicated history with sidewalks. What few sidewalks were built originally were in older parts of the city, predating growth into suburban areas, leaving much of Nashville without sidewalks. *WalknBike* at 57. When the city conducted an inventory of its sidewalks in 2002, it found that only ".5% of sidewalk blocks, or 36 blocks, are free of problems," and that 44.1% of the sidewalk blocks "have more than ten problems." *Chaplin v. Metro Gov't of Nashville*, Case No. M2007-02158-COA-R3-CV, 2009 Tenn. App. LEXIS 261, at *10 (Tenn. Ct. App. Apr. 20, 2009). In short, Nashville's "history leaves a fragmented network for walking and bicycling that will take decades to remedy." *WalknBike* at 57. Jim Knight owns a vacant lot at 411 Acklen Park Drive. (SUMF ¶ 14.) The lot does not have sidewalks or connect to them, but Metro's sidewalk requirement database indicated that he must build sidewalks when he began to plan to construct a new home in 2018. (Id. ¶¶ 16-17.) Even though his project manager, Erick Stevenhagen, learned from Metro's Public Works Department that constructing a sidewalk would create stormwater runoff issues, (id. ¶ 18), Metro demanded that he either build sidewalks or pay an in-lieu fee of $7,600. (Id. ¶¶ 17, 19.) When the BZA refused to remove the condition, Jim refused to comply. (Id. ¶ 20.) He has not built a home on the Acklen Park property. (Id. ¶ 21.) He has not renewed his permit because he must satisfy the condition, but if it was removed, then he would proceed. (Id.)

Jason Mayes owned a vacant lot at 167 McCall Street. (Id. ¶ 21.) He intended to build a home for his family. (Id. ¶ 25.) This lot did not connect to sidewalks either, yet Metro's sidewalk database indicated that he must build them on his property. (Id. ¶¶ 24-25.) Jason asked the Zoning Administrator, Jon Michael, to remove the condition, but he would only concede so far as to allow

Jason to pay the in-lieu fee instead. (Id. ¶ 25.) With carrying costs mounting, Jason paid the fee of $8,883.21 and got his permit. (Id. ¶¶ 25-26.) Jason appealed to the BZA seeking the return of his fee, but the BZA denied his request. (Id. ¶ 27.) The BZA reasoned that it found "no unique hardship for the property," and that Jason's in-lieu contribution "supplements Metro's annual sidewalk capital program by increasing sidewalk construction funds[.]" (Id.) He completed the construction of his home, but Metro has not returned his fee. (Id. ¶ 28.) Metro designated Jason's in-lieu contribution to the construction of a sidewalk nearly three miles away from his home. (Id. ¶ 29.) His lot still does not have a sidewalk or connect to one. (Id. ¶ 30.)

Prior to implementing the sidewalk ordinance, Metro presented the advantages and disadvantages of relying on a city capital project or on private developers to fund new sidewalks. Among the advantages, Metro explained that the city would save time and money if private property owners were required to install sidewalks on their "own property." (SUMF ¶¶ 10-11.) And recently, when considering repealing the in-lieu option altogether so as to give property owners no choice but to build sidewalks, Metro's sidewalk committee stated that "[private] developers should be required to contribute to the betterment of their neighbors, who will be there long after the developer has sold their property." (Id. ¶ 12.)

LEGAL STANDARD OF REVIEW

I. Summary Judgment Standard

Summary judgment is appropriate only when the pleadings demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Motions for summary judgment may (but need not) be supported by affidavits, declarations, and other materials

in the record. Fed. R. Civ. P. 56(c)(1)(A)–(B). The Court can also take judicial notice of public records and government documents available from reliable internet sources. *See ARJN #3 v. Cooper*, No. 3:20-cv-00808, 2021 U.S. Dist. LEXIS 22286, at *25-26 (M.D. Tenn. Feb. 5, 2021).

II. Constitutional Standard

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. Const. amend. V. It is also well settled that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This principle, known as the unconstitutional conditions doctrine, "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. Over time, the Supreme Court has extended the unconstitutional conditions doctrine to Fifth Amendment takings claims. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987); *Dolan*, 512 U.S. at 385; *Koontz*, 570 U.S. at 604-05. In the land-use context, an unconstitutional condition is called an "exaction." *See Dolan*, 512 U.S. at 377. The Supreme Court has repeatedly ruled that the government cannot condition a discretionary benefit—such as the issuance of a home building permit—in exchange for a waiver or surrender of conditional rights—such as the right to receive just compensation for a taking. *See Koontz*, 570 U.S. at 619. That is because "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

A. An essential nexus must exist between a government-imposed condition and a proposed land use.

The Supreme Court first recognized the constitutional limits of land-use exactions in *Nollan.* There, the Court determined that any demand attached to a permit must share an essential nexus with the intended land use and any public problems it might create. 483 U.S. at 837. In *Nollan*, the government refused to grant property owners a building permit unless and until they agreed to grant a public easement across their beachfront property. *Id*. at 828. The government claimed that the landowners' proposed land use would increase private use of the beach and erect a "psychological barrier" between the general public and the beach. *Id*.

The Supreme Court rejected the government's argument, finding that there must be an "essential nexus" between the exaction and the impact of a proposed land use. *Nollan*, 483 U.S. at 837. The condition imposed by the government could not meet this standard because allowing the public to walk across the property would not lower any "psychological barrier" to accessing the public beaches, "reduce[] any obstacles to viewing the beach created by the new house," or "remedy any additional congestion." *Id*. at 838-39. The Court concluded that the condition was "an out-and-out plan of extortion" because there was no connection between the condition and any burden created by the property owners' request to build. *Id*. at 837. The Court determined that the government merely wanted to obtain an easement on the property "to serve some valid governmental purpose, but without payment of compensation" as required by the Fifth Amendment. *Id*. at 836-37.

B. A government-imposed condition must be roughly proportional to the proposed land use.

Soon after, the Supreme Court found that a condition must also be roughly proportional to the impact of a proposed land use. *Dolan*, 512 U.S. at 391. In *Dolan*, the government conditioned approval of building expansion and paving permits on a property owner's agreement to improve a storm drainage system and grant an easement along her property for public use. *Id*. at 379-80. The government reasoned that paving a parking lot as the property owner intended would cause drainage issues. *Id*. The government also claimed that adding a bike trail would alleviate increased traffic and congestion created by the building expansion. *Id.* at 381-82.

Again, the Supreme Court struck down the government-imposed conditions. Although it found that the government could require property owners to offset impacts on the community through various means, including "[d]edications for streets, sidewalks, and other public ways [which] are generally reasonable exactions to avoid excessive congestion from a proposed property use," the Court held that development exactions can become extortionate when not properly limited. *Id*. at 395, 383-84. Thus, the Court held that the government must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. at 391. "No precise mathematical calculation is required," but the government "must make some effort to quantify its findings[.]" *Id*. at 395.

The Court concluded that the government failed to meet its burden of justifying the exaction. "If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere. But that is not the case here." *Id*. at 394 (citation omitted). Similarly, while a building expansion might increase traffic, the city

failed to produce evidence that a bike or pedestrian path was likely to alleviate any traffic created by the proposed use. *Id.* at 395 (quotation omitted).

C. The government must establish an essential nexus and rough proportionality for all government-imposed conditions on property, including monetary exactions.

Most recently, in *Koontz*, the Court again affirmed its exactions test, this time in the context of a demand for money and a permit denial. 570 U.S. at 619. The Court explained that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Id.*

In *Koontz*, a property owner sought a permit to develop his land. *Id*. at 601. In exchange, the government demanded that the property owner deed several acres of his property to the public or dedicate less acreage and pay to improve a large plot of government-owned land. *Id*. at 601-02. Because the landowner never submitted to the condition, the condition was never imposed. The question, then, was whether this could be a taking when nothing was "taken." The Supreme Court held, "The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so." *Id*. at 606 (emphasis in original). Furthermore, "[a] contrary rule would be especially untenable . . . because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval." *Id.*

The Court also dismissed the argument that an obligation to spend money is not a taking: this "argument rests on a mistaken premise." *Id*. at 613. "[T]he monetary obligation burdened petitioner's ownership of a specific parcel of land [and such a scenario] bears resemblance to our

cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property." *Id*. (citing *Armstrong*, 364 U.S. at 44-49; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-602 (1935); *United States v. Security Industrial Bank*, 459 U.S. 70, 77-78 (1982)). The Court explained further that this case was like *Nollan* and *Dolan* because it turned on "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Id*. at 614.

Therefore, under *Nollan*, *Dolan*, and *Koontz*, the burden is on the government to establish that a condition placed on the exercise of a right (1) serves an essential nexus to the public impact the government seeks to avoid, and (2) is roughly proportional to the public burden that will result from the land use, regardless of how that condition is imposed.

ARGUMENT

Metro does not dispute that it required Jim and Jason to agree to build sidewalks or pay in-lieu fees in exchange for permits to build on their properties. (SUMF ¶¶ 17, 25.) Metro also does not dispute that the conditions were imposed solely because Jim and Jason owned homes in the designated areas described in the sidewalk ordinance. (Id. ¶¶ 2-3.) Therefore, it is undisputed that Metro placed the conditions on Plaintiffs' building permits and that those conditions stemmed directly from the sidewalk ordinance.

However, Metro cannot justify these conditions on their face or as applied to Plaintiffs. The conditions imposed pursuant to the sidewalk ordinance lack an essential nexus to any potential impact of property owners' land use. Problems like traffic congestion and safety are not caused or

exacerbated by building a home under existing zoning, nor are they alleviated by denying a home building permit. The conditions also lack rough proportionality to any potential land use. Through the sidewalk ordinance, Metro sets a blanket mandate: property owners in designated areas must install sidewalks or pay an in-lieu fee, regardless of the nature of their property or proposed land use. Moreover, Metro calculates the in-lieu fee based on what it would cost the *city* to build a sidewalk, not what it would cost a property owner. Metro simply wants private property owners to carry the cost of remedying a decades-old public problem, but this remedy cannot come at the price of constitutional freedom.

Because Metro has wrongfully taken funds from Jason and enriched itself at his expense, it has been unjustly enriched as a matter of law. The Court should also grant summary judgment on Claim 2.

I. Metro cannot establish an essential nexus between the imposed conditions and any burdens imposed by Plaintiffs' proposed land use.

Metro's sidewalk ordinance is unconstitutional because there is no nexus between the alleged problem the imposed condition seeks to alleviate—a shortage of sidewalks—and the building of single-family homes. Supreme Court precedent requires a direct cause and effect link between an owner's use of property and the need for an exaction. Thus, the Court has held that if a property use does not cause the need for the condition, the government cannot impose it. *See Dolan*, 512 U.S. at 930-31; *Nollan*, 438 U.S. at 838. Additionally, the exaction must actually solve the social problem. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 395 (finding a government's belief that an exaction "could" remedy a problem is insufficient to satisfy its constitutional burden). In other words, the perceived public problem must be attributable to the individual property owner requesting a permit. *See Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1088-89

(N.D. Cal. 2014) (finding facially unconstitutional an ordinance that required landlords to pay a "tenant relocation" fee to displaced tenants in exchange for a permit to remove rent-controlled property from the rental market because "the explicit purpose of the statute is to approximate a rent differential sum that is neither caused by nor related to the impact of property owners' decisions to exercise the right to regain possession of their parcels").

In applying the nexus test, it is important to first identify the public problems the challenged exaction is intended to address. *Nollan*, 483 U.S. at 829-43. Here, the conditions imposed are intended to improve transportation and pedestrian safety, redress Nashville's perceived sidewalk shortage, reduce traffic congestion, and improve local health and "social connections." (SUMF ¶ 8.)

However, the problems Metro seeks to remedy have plagued the city for decades. Nashville itself admits that the sidewalk dilemma is attributable to poor planning that dates back as far as the 1950s. *See WalknBike* at 57; (*see also* Boucek Decl. ¶ 6, Ex. 3 at MG 000770); *cf. Levin*, 71 F. Supp. 3d at 1084 (finding that the issue the government sought to resolve—a lack of affordable rental housing—was a preexisting public problem, attributable to entrenched market forces and structural decisions made by the government's own land management plans and not to any individual landlord). The need for sidewalks long preexisted Plaintiffs' requests for building permits. *See WalknBike* at 57; (*see also* Boucek Decl. ¶ 6, Ex. 3 at MG 000770). It cannot be said that by building a home, Jason caused or contributes to a seventy-year-old infrastructure predicament. The same is true for Jim and any other similarly situated property owner.

Just as building a home would not cause a shortage of sidewalks, the alternative of *denying* a home building permit would not alleviate a sidewalk shortage. *See Nollan*, 483 U.S. at 837 ("In

short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.") (internal quotation and citation omitted); *see also Koontz*, 570 U.S. at 606. Metro attempts to point to the recitals clauses of the sidewalk ordinance to justify these conditions, (SUMF ¶ 8), but these purposes do not speak to any burden property owners like Plaintiffs place on the public, nor do they speak to the relief the public will have if permit requests are denied. In other words, Jim and Jason have done nothing to create or exacerbate *any* of the problems sidewalks are designed to remedy. Denying a home permit will not make transportation safer or more convenient; denying a home permit will not make the public less dependent on automobiles; and denying a home permit will not increase homeowner and community health. Metro's sidewalk law is a classic example of a public problem that requires a public solution—not a solution to be borne by just a few individuals.

Even if Plaintiffs somehow contributed to those problems, it cannot be said that requiring Plaintiffs to install sidewalks or pay an in-lieu fee in exchange for a building permit will improve Nashville's sidewalk dilemma. For example, "sidewalks to nowhere" and "zigzagging sidewalks" now famously exist throughout Nashville.[3] Although Jason elected to pay an in-lieu fee in exchange for his building permit, (SUMF ¶¶ 25-26), if he agreed to build a sidewalk on his

[3] Rebecca Cardenas, *City Ordinance Responsible for Sidewalks to Nowhere*, News4 Nashville (Mar. 4, 2019), https://www.wsmv.com/news/city-ordinance-responsible-for-sidewalks-to-nowhere/article_00835c22-3eed-11e9-a2a6-5fb78cc666c4.html. Dennis Ferrier, *Ferrier Files: Zigzagging Sidewalks More Common with Conflicting Metro Construction*, Fox17 WZTV Nashville (Aug. 1, 2019), https://fox17.com/news/ferrier-files/ferrier-files-zigzagging-sidewalks-more-common-with-conflicting-metro-construction.

property, it would have done nothing to improve pedestrian traffic, safety, or convenience because it would not have connected to anything and would not lead pedestrians anywhere. (See id. ¶ 24.) It would have been another sidewalk to nowhere. The same is true with Jim; if he had built a sidewalk, it would have connected to nothing. (Id. ¶ 16.) Thus, improving pedestrian safety on Jim's street is a moot point. In Jim's case, building a compliant sidewalk would *cause* public problems in the form of stormwater runoff issues (id. ¶ 18.); that is why Metro officials agreed to allow him to pay the in-lieu fee in the first place. (Id. ¶ 19.)

Moreover, Metro claims that the sidewalk ordinance will offset vehicular traffic and increased density due to the city's growing population. (Id. ¶ 8.) But Jim and Jason both seek to build single-family homes, which are already accounted for under the law and do not require a zoning upgrade. (Id. ¶¶ 15, 23.) Thus, Metro cannot claim that Jim and Jason contribute to density problems when they are otherwise able to build on their properties.

The real reason why Metro imposes these conditions on property owners like Plaintiffs is simple: Metro does not want to pay for sidewalks. Plaintiffs do not deny that Nashville has a "fragmented network" of accessible walking and biking paths "that will take decades to remedy." *WalkNBike* at 57. But the remedy cannot come at the price of constitutional freedom. Indeed, the Supreme Court has warned that applicants for land use permits are especially vulnerable "to extortionate demands for money." *Koontz*, 570 U.S. at 618. Plaintiffs also do not deny sidewalks are expensive and appreciate Metro's precarious finances. But by foisting the burden to finance public infrastructure on private property owners to bridge its fiscal gaps, Metro's sidewalk law implicates the "principal purpose of the Takings Clause." *See Dolan*, 512 U.S. at 384.

When it is not defending the sidewalk law in court, Metro acknowledges that the reason it is making Plaintiffs pay for sidewalks they did not remove or destroy is because Metro does not want to bear the burden of fixing the problem. In a presentation to the public about the sidewalk law, Metro listed the pros and cons of financing new sidewalks through a city capital project or by requiring private developers to fund them. Metro explained that if the city funded new sidewalks, it would be "more expensive" and "time-intensive." (SUMF ¶ 10.) But if private developers were required to install sidewalks on their "own property," it would no longer be the city's problem. And in 2020, as it considered repealing the in-lieu option altogether so as to give property owners no choice but to build sidewalks, Metro's sidewalk committee said, "[t]hese developers should be required to contribute to the betterment of their neighbors, who will be there long after the developer has sold their property." (Id. ¶ 12.) Metro cannot treat private property owners like ATMs to remedy its own fiscal woes.

Of course, it has become clear that private developers like Jim and Jason are not even installing sidewalks on their own properties, but instead they are required to fund sidewalks across town. As the Supreme Court made clear in *Nollan*, "The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." 483 U.S. at 837. For this reason, the sidewalk ordinance is unconstitutional.

II. The government-imposed conditions are not roughly proportional to any burdens caused by Plaintiffs' proposed land use.

Metro cannot establish that granting a home building permit will exacerbate its perceived sidewalk shortage, nor can it show that denying a home building permit will alleviate that shortage. But even if Jim, Jason, and other similarly situated property owners somehow contributed to Nashville's sidewalk problem, Metro still must show the cost of compliance with its sidewalk

condition is roughly proportional to the impact building a home will have on the community. It cannot meet this burden because it has not made an individualized assessment of any of the properties subject to the sidewalk ordinance. Instead, Metro imposes a blanket condition on every property located within the area designated by the sidewalk ordinance, and it requires individual property owners to bear an identical burden under the law, regardless of the nature of their individual land use.

The city must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Metro has not conducted *any* individualized assessment of the impact Plaintiffs' proposed land use will have on the public as required by *Dolan*. (SUMF ¶ 2.) Instead, Metro openly admits that it *only* relies on Sections A and B of the sidewalk ordinance to assess the impact of the land use, both as to Plaintiffs and everyone else. (Id. ("The criteria used to determine if the sidewalk law applies to a given permit applicant are fully and completely stated in the applicability provisions of the sidewalk law itself, namely Sections A and B of Metropolitan Code of Laws § 17.20.120.")) Sections A and B, in turn, focus *only* on the location of the property at issue to assess whether Metro will apply the sidewalk ordinance to a property owner, not on any impact created by the property. (Id.) The city also admits that it did not consider any other factors when determining whether Jim and Jason needed to build or fund sidewalks. (Id. ("No other characteristics of Plaintiffs' properties were considered in order for the ordinance to apply to them.")) Metro uses a one-size-fits-all solution for a problem that, under the Fifth Amendment, must be tailored to each individual property.

This is especially apparent in Plaintiffs' situations. It is not feasible for Jim to install a conforming sidewalk on his property because doing so would create stormwater runoff issues. (Id. ¶ 18.) While Metro offered to allow Jim to build a modified sidewalk to alleviate the stormwater runoff, this modification would still have forced Jim to remediate a problem that would not have existed at all but for Metro's demanding sidewalk ordinance. Likewise, Jason could install a sidewalk on his property, but it would be a "sidewalk to nowhere." (Id. ¶ 24.) The BZA simply denied Jason's appeal because it found "no unique hardship for the property," but it failed to explain how it came to that conclusion. (Id. ¶ 27.) Tellingly, while denying Jason's appeal, the BZA admitted that Jason's in-lieu fee "supplements Metro's annual sidewalk capital program by increasing sidewalk construction funds[.]" (Id.) Metro did not even use Jason's in-lieu contribution to fund sidewalk improvements on his street or block, but instead funded a sidewalk miles from his home. (Id. ¶ 29.)

Finally, the amount of the in-lieu fee fluctuates based on what it would cost Metro to build a sidewalk. Metro Code § 17.20.120(D). This has nothing to do with any harm that may arise from Plaintiffs or any other similarly situated property owners building a home. Metro fails to show that it has tailored its assessment of the sidewalk condition—whether through physical installation or payment of a fee—to individual properties. A sidewalk shortage may well be a public problem, but it is not for individual property owners to solve. The sidewalk ordinance cannot survive under *Nollan*, *Dolan*, and *Koontz*. The Court should enter summary judgment on Claim 1.

III. Metro has unjustly enriched itself by coercing Jason to pay an in-lieu fee.

Tennessee state and federal courts consistently recognize unjust enrichment claims against municipalities. *See Halpern 2012, LLC v. City of Ctr. Line*, 806 Fed. Appx. 390 (6th Cir. 2020);

Noel v. Metro. Gov't of Nashville & Davidson County, 2014 U.S. Dist. LEXIS 10252 (M.D. Tenn. January 28, 2014); *Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988); *Sircy v. Metro. Gov't of Nashville & Davidson County*, 182 S.W.3d 815 (Tenn. App. 2005). The elements of an unjust enrichment claim are: (1) plaintiff conferred a benefit on defendant; (2) defendant appreciated the benefit; and (3) it would be unjust for the defendant to retain the benefit. *See Noel*, 2014 U.S. Dist. LEXIS 10252 at *12. Jason conferred a benefit on Metro when he paid an in-lieu fee to the city in the amount of $8,883.21 in exchange for a permit to build a single-family home. (SUMF ¶¶ 25-26.) Metro spent the in-lieu contribution to install a sidewalk miles from Jason's home. (SUMF ¶ 29.) And, as described herein, it would be unjust for Metro to retain the cost of the in-lieu fee because the fee is an unconstitutional condition that required Jason to forego his Fifth Amendment right to just compensation in exchange for a building permit. Metro cannot continue with this extortion.

CONCLUSION

Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

Dated: August 30, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on the following persons by the following mean(s) on the following date:

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On this date: August 30, 2021.

s/ B. H. Boucek
BRADEN H. BOUCEK