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

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs submit this memorandum of law, along with a concurrently provided statement of undisputed material facts and exhibits in support of their Motion for Partial Summary Judgment.

INTRODUCTION

This case is about—and has always been about—exactions. Exactions "involve a special application" of the unconstitutional conditions doctrine "that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (citations and quotations omitted). This lawsuit challenges the constitutionality of Metro Nashville sidewalk ordinance BL2016-493 (sidewalk law, sidewalk ordinance, or sidewalk mandate), in

effect from April 2017 to July 2019, codified at Metro Code §§ 17.20.120, *et seq*. *See* Ex. 1. The ordinance mandated that a property owner build sidewalks or "contribute" an in-lieu fee to Metro's pedestrian benefit fund as a condition of receiving a permit to build a new single- or two-family home in large swathes of the city.

Metro is in the midst of a budget crisis. In 2018, Nashville was ranked one of the worst-run cities, largely because of its outstanding debt obligations. <https://www.tennessean.com/story/money/2018/07/10/tennessee-worst-run-cities-united-states-chattanooga/771325002/> (last visited Apr. 8, 2022), *See* Tenn. R. Evid. 902(6) (2020). These debt obligations included $1.7 billion in approved capital projects to include sidewalks that were otherwise unfinanced. <https://www.tennessean.com/story/news/2018/09/18/nashville-council-bonds-capitalprojects/1347458002/> (last visited Apr. 8, 2022).

However tempting it may be to use permits to patch up budget holes, doing so in this manner is unconstitutional. *See Koontz*, 570 U.S. at 619. Permit applicants are "especially vulnerable to . . . coercion . . . because the government often has broad discretion to deny a permit that is worth more than the property it would like to take." *Id.* at 604–05. Accordingly, the Supreme Court has been vigilant in identifying permit conditions—like those imposed by Metro's sidewalk mandate—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) (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

There is nothing wrong with permit conditions generally. Governments may certainly impose conditions requiring property owners to address any public harms that will result from their intended land-use. But they may not constitutionally impose permit conditions that serve other, wholly unrelated purposes, such as requiring property owners to fund quintessential public works like sidewalks. Those are the conditions that the Supreme Court has compared to "out-and-out . . . extortion." *See Koontz*, 570 U.S. at 606 (quotation omitted).

The sidewalk mandate's requirement to build or pay is extortionate, illegal, and unconstitutional. Metro never considered whether Plaintiffs' building new homes did anything to create or even exacerbate the pre-existing public problem of a lack of city sidewalks. Metro admits this, acknowledging that it conducted no individualized assessment of any of Plaintiffs' properties prior to conditioning their receipt of lawful building permits on compliance with the sidewalk law. Pls.' SUMF ¶¶ 63, 66. Metro cannot require individuals to bear the cost of addressing public infrastructure problems that they did not create. The sidewalk ordinance violates the unconstitutional conditions doctrine by burdening Plaintiffs' right to not have property taken without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 21 of the Tennessee Constitution.

SUMMARY JUDGMENT STANDARD

This Court's order dated February 17, 2022, calls for motions for partial summary judgment as to the correct legal standard to govern this case.[1] "Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties." *Byrd v. Hall*, 847 S.W. 2d 208, 214 (Tenn. 1993) (quoting William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 451 (1991)). The material facts here are not in dispute. The heart of the controversy is this: may Metro require property owners to furnish public infrastructure, either by building sidewalks or by paying into the pedestrian-benefit fund, as a condition of receiving an otherwise lawful building permit for a single-family home? To that end, Plaintiffs submit this Memorandum of Law showing that the test established in *Nollan* and *Dolan* provides the controlling legal test to decide the outcome.

When all the evidence points in one and only one direction, courts can and should enter summary judgment on the undisputed facts. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

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[1] The *Nollan/Dolan* test is not applicable to Plaintiff Old South's *ultra vires* claim. Because the order only calls for briefing on whether that test applies, Plaintiffs have not included the *ultra vires* claim in this motion. Out of an abundance of caution, Plaintiffs respectfully reserve the right to move for summary judgment on that claim at a later date.

fact and that the moving party is entitled to a judgment as a matter of law.'" *Rye v. Women's Care Ctr. of Memphis, MPLLC.*, 477 S.W.3d 235, 250 (Tenn. 2015) (quoting Tenn. R. Civ. P. 56.04). Tennessee's summary-judgment standard "fully embrace[s] the standards articulated in the [federal] *Celotex* trilogy." *Id.* at 264; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 321–25 (1986) (holding summary judgment proper when movant shows there is no evidence to support nonmovant's case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–51 (1986) (holding that "substantive law" governs "which facts are material" and that "genuine" disputes require "evidence" to support nonmovant's argument); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986) (requiring nonmovant to "do more than simply show that there is some metaphysical doubt as to the material facts").

The parties are in agreement as to the material facts, and when the material facts are not in doubt, the courts should apply the law. "Tennessee courts have 'always been empowered to decide legal questions upon agreed facts.'" *Rye*, 477 S.W.2d at 262 (quoting Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee after* Hannan v. Alltel Publishing Co., 77 Tenn. L. Rev. 305, 311–12 (2010)). This is especially true where, as here, the question to be decided is the proper legal standard to apply to Plaintiffs' claims.

ARGUMENT

I. The Essential-Nexus and Rough-Proportionality Test Established in *Nollan* and *Dolan* Controls the Analysis for Exaction Claims, Regardless of What Government Entity Imposes the Condition.

Through the sidewalk mandate, Metro coerces property owners into giving up their Fifth Amendment right to not have property taken without just compensation by holding their building permits hostage until they acquiesce to extortionate conditions. *See Koontz*, 570 U.S. at 605 (recognizing temptation to extort permit applicants based on their "especial[] vulnerab[ility]"). The test for lawful exactions established in *Nollan* and *Dolan* has two requirements. First, any condition must share an essential nexus with the impact of a proposed project. Second, any imposed condition be roughly proportional in nature and extent to the impact created by a proposed project. In its most recent decision on exactions, the United States Supreme Court held that the essential-nexus and rough-proportionality requirements apply even where the permitting authority denies the permit and even where the demand is for money rather than a possessory interest in land. Moreover, just last year, the Supreme Court emphatically clarified that the nature of the government action burdening a plaintiff's Fifth Amendment rights—*i.e.*, whether adjudicative or legislative—is irrelevant.

A. *Overview of Unconstitutional Conditions and Exactions.*

The Supreme Court has repeatedly ruled in a variety of constitutional contexts that "'the government may not deny a benefit to

a person because he exercises a constitutional right.'" *Koontz,* 570 U.S. at 604 (quoting *Regan v. Taxation without Representation of Wash.*, 461 U.S. 540, 545 (1983)). Indeed, "[e]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons on which the government may not rely. It 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." *Id*. Without this doctrine, governments could easily evade constitutional requirements by simply conditioning all government benefits on citizens foregoing their fundamental rights.

The unconstitutional conditions doctrine extends to the Fifth Amendment takings context. *See* Christina M. Martin, *Nollan, Dolan, and Koontz – Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 Willamette L. Rev. 39, 51 (2014). The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, promises "nor shall private property be taken for public use, without just compensation." U.S. Const. amend V; *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896) (incorporating the Fifth Amendment to apply to the states). The doctrine of unconditional conditions prohibits the government from conditioning the provision of a discretionary benefit—such as the issuance of a home

building permit—upon a requirement that the recipient waive or surrender a constitutional right. *See Perry*, 408 U.S. at 597; *Koontz*, 570 U.S. at 619.

In the land-use context, government actions that burden the right to not have property taken without just compensation are called *exactions*. The Supreme Court has repeatedly ruled—in a variety of contexts—that the government may not condition its land-use permits on property owners agreeing to give up their right to receive just compensation for a taking. *See Koontz*, 570 U.S. at 604 (2013) (quoting *Regan*, 461 U.S. at 545); *see also Dolan*, 512 U.S. at 384 ("One 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.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Supreme Court has also recently clarified that the relevant inquiry for a takings analysis is the effect of the governmental action, not which branch is doing the taking. *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063, 2072 (2021) ("The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else[.]")

The Supreme Court has outlined the contours of land-use exactions and the extent of government's permitting authority in a trio of cases, discussed more fully below.

B. *Essential Nexus:* Nollan *required exactions to be directly related to mitigating the impacts of permitted development.*

The Supreme Court first recognized the constitutional limits of land-use exactions in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). The Court determined that any demand attached to a permit must share an *essential nexus* with the intended land-use and any public problems or negative externalities that use might create. *Id.* at 837. Thus, under the Fifth Amendment, a government's condition must be directly related to mitigating the impacts caused by a proposed development.

The Nollans wanted to exercise an option to purchase their small beach bungalow, which required upgrading to a two-story home in keeping with the rest of the neighborhood. *Id.* at 828. When they applied for a permit, the California Coastal Commission conditioned its approval on the Nollans granting a public easement across their beachfront property. *Id.* The Commission applied the condition without an individual evaluation of the property or of the Nollans' plans for construction. *Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719, 724 (1986) ("[N]o findings were made, no evidence was in the record other than the application, submission and the executive director's statement of reasons and no hearing was held."). The statutorily required condition was standard under existing law and applied based on the plain language of the California Public Resources Code, *Nollan*, 483 U.S. at 828; *see* Cal. Pub. Res. Code Sec. 30212(a) (2013), and it was enforced uniformly when beachfront property owners applied for building permits. *Nollan*, 483

U.S. at 829 (The Commission "had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and [] of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property."). Unless the condition was satisfied, the Nollans would not, and did not, receive their permit.

When the Nollans challenged the condition as violative of the Fifth Amendment, the Commission attempted to muster evidence to support it. According to the Commission, the Nollans' land use would increase private use of the beach and erect a "psychological barrier" between the general public and the beach. *Id. at* 828. The Supreme Court ruled that there must be an "essential nexus" between the exaction and the impact of a proposed land-use. *Id.* at 837. The condition imposed by the Commission failed this test because allowing "people already on the public beaches [to] be able to walk across the Nollans' property" would not "lower[] any 'psychological barrier' to using the public beaches," "reduce[] any obstacles to viewing the beach created by the new house," or "remedy any additional congestion." *Id.* at 838–39. Indeed, the Commission's demanded condition was "an out-and-out plan of extortion" because the necessary connection between any burden created by the Nollans' land-use and the condition was so obviously lacking. *Id. at* 837. While "California [was] free to advance its comprehensive program, . . . by using its power of eminent domain for this public purpose[,] if it

want[ed] an easement across the Nollans' property, *it must pay for it*." *Id.* (emphasis added) (citations omitted).

C. *Proportionality:* Dolan *required that exactions must be roughly proportional to the impact created by a particular land-use.*

After *Nollan*, the Supreme Court next decided *Dolan v. City of Tigard*. 512 U.S. 374 (1994). In *Dolan*, the Court further developed the test for lawful exactions, finding that a condition must both share an essential nexus with, and be *roughly proportional* to, the impacts of a proposed project. *Id.* at 391.

There, Dolan applied for a permit from the City of Tigard to expand her hardware store and pave the surrounding gravel parking lot. Tigard would only approve the permit if she improved the storm drainage system and granted an easement along her property to be used as a public greenway and bike path. *Id.* at 380. The City attempted to justify its conditions by asserting that the paved parking lot would increase the impervious surface in the vicinity—thereby causing drainage issues—and that the bike trail would alleviate increased traffic and congestion created by the larger store. *Id.* at 381–82.

The state courts upheld Tigard's conditions, and all courts reviewing the issue agreed that the necessary nexus between the impact of the intended use and the condition was present. *Id.* at 387–88; *Dolan v. City of Tigard*, 832 P. 2d 853, 856 (Or. Ct. App. 1992). The Supreme Court, however, determined that the City had not justified the *extent* of its demanded conditions. *Id.* at 394–95. While it was appropriate for the

government to demand that property owners offset impacts on the community through various means, including "dedications for streets, sidewalks, and other public ways [which] are generally reasonable exactions to avoid excessive congestion from a proposed property use," development exactions can become extortionate—and therefore violate the Fifth Amendment—when not properly limited. *Id.* at 395. Specifically, the Supreme Court held that proper limitations include making 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 bears the burden of justifying the exaction. *Id.*

The Court found that Tigard had failed to carry that burden. *Id.* Requiring a greenway was related to the intended land-use because increasing impervious surface could cause problems with flooding that the greenway would ameliorate, but the City was unable to justify its demand for a *public* easement along Ms. Dolan's property. *Id.* at 394. "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.* (citation omitted). Similarly, while a larger store might increase traffic to Ms. Dolan's property, 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).

The takeaway from *Dolan* is that a government entity must produce *proof* that its permit condition was proportional to the problem that the plaintiff's use is alleged to create. And while no "precise mathematical calculation" is required, the government "must make some effort to quantify its findings in support of the dedication." *Id.* at 395–96. Thus, to satisfy the Fifth Amendment after *Dolan*, a permit condition must (1) share a direct nexus with a public impact arising from the property owners' exercise of their property rights and (2) be roughly proportional in both the nature and extent to the cost to the public impact arising from the property owners' exercise of their property rights.

D. Koontz *held that* Nollan *and* Dolan *apply to permit denials and to demands for money*

In *Koontz v. St. Johns River Water Management District*, the Supreme Court affirmed its exactions test, this time in the context of a demand for money and a permit denial. 570 U.S. 595 (2013). In that case, Koontz refused to accede to the St. Johns River Water Management District's demands that, in order to receive a permit to develop roughly 4 of his approximately 15 acres, he either deed 13.9 acres of his land outside Orlando to the District, or dedicate less acreage and pay to improve a large plot of District-owned land several miles away. *Id.* at 601–602. Instead of acquiescing, Koontz challenged both condition options as excessive relative to the projected impact of his land-use. *Id.* at 602.

Koontz presented a novel issue to the Court: because he never submitted to the demands, the conditions were never imposed. The question, then, was whether the District's demands could constitute a

taking when nothing was "taken." The Florida Supreme Court dismissed Koontz's claims, finding that his requested permit was denied rather than granted subject to conditions and noting that the district had offered him an option to pay a fee for improvements to the district's property elsewhere in lieu of the dedication. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011). The Florida Supreme Court also suggested that regulating would become prohibitively expensive for government agencies if permit denials and monetary fees in the land-use context were subject to the test laid out in *Nollan* and *Dolan*. *Id.* at 1231 ("Rather than risk the crushing costs of litigation," governments would "deny permits outright without discussion or negotiation.").

The Supreme Court disagreed. Because *Nollan* and *Dolan* represented a Fifth Amendment application of the unconstitutional conditions doctrine, "[t]he 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." *Koontz*, 570 U.S. 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 dismissed the argument that an obligation to spend money is not a taking out of hand, noting that "the 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. Sec. Indus. Bank*, 459 U.S. 70, 77–78 (1982)). The Court explained further that "the fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: 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.

Koontz thus established that *Nollan* and *Dolan* apply equally to Fifth Amendment exactions claims involving (1) a demand for money, like an in-lieu fee and (2) when the condition is never imposed because the property owner refuses to acquiesce to the demands.

E. *The Supreme Court recently clarified that a taking is a taking, regardless of which branch of government acts.*

Last year, the Supreme Court decided two Fifth Amendment takings cases, both on appeal from the Ninth Circuit. In *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063 (2021), the Supreme Court held that "[t]he essential question" when analyzing takings challenges "is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree).

It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." 141 S. Ct. at 2069. In that case, employers sued to challenge a California law permitting labor organizations to enter private property at specific and limited times to solicit employees. *Id.* at 2069–70. The Court considered the statutory origin of the taking, finding that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id.* at 2072. Thus, the Supreme Court roundly rejected as irrelevant the argument that the type of governmental action—legislative or adjudicative—affects whether a Fifth Amendment taking occurred.

Cedar Point was not an unconstitutional conditions case, but the Supreme Court indicated that its reasoning applied across its broader Fifth Amendment jurisprudence. For example, in its brief per curium opinion in *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021), the Court invited the Ninth Circuit to "give further consideration to" Pakdel's alternative claims "in light of our recent decision in *Cedar Point*." *Id.* at 2229 n.1. One of those claims was that the unconstitutional conditions doctrine applies to both legislative and adjudicative conditions. *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1162 n.4 (2020) (citing McClung and summarily rejecting the plaintiffs' exactions claim because it was a legislative exaction), *vacated*, 141 S. Ct. 2226.

In February 2022, the Ninth Circuit accepted the Supreme Court's invitation to revisit its caselaw on exactions. *See Ballinger v. City of Oakland*, ___ F.4th ___, No. 19-16550, 2022 U.S. App. LEXIS 2862 (9th Cir. Feb. 1, 2022). *Ballinger* involved a challenge to a city ordinance requiring landlords to pay vacating tenants a relocation fee when they wanted to reoccupy their homes. *Id.* at *3–5. In evaluating the landlords' exaction claim in light of the Supreme Court's decisions in *Cedar Point* and *Pakdel*, the Ninth Circuit rejected the distinction between legislative and adjudicative conditions, acknowledging that "the Supreme Court has suggested that any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Id.* at *20. Following *Cedar Point* and *Pakdel*, "[w]hat matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does[.]" *Id.* at *21 (emphasis in original). This analysis repudiated the Ninth Circuit's previous approach, exemplified by *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008), rejecting the application of the *Nollan*/*Dolan* test when conditions were legislatively imposed. *Id.* at *19.

The Ninth Circuit thus joins other courts in applying the essential-nexus and rough-proportionality requirements to permitting conditions imposed through legislation. *See, e.g.*, *Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, No. 20-61530-CIV-SMITH/VALLE, 2021 U.S. Dist. LEXIS 239647, at *16–19 (S.D. Fla. Dec. 15, 2021) (rejecting distinction between adjudicative and legislative

conditions under the *Nollan*/*Dolan* test), *Levin v. City & Cnty. of S.F.*, 71 F. Supp. 3d 1072, 1089 (N.D. Cal. 2014) (applying the *Nollan*/*Dolan* test to local ordinance), *Cheatham v. City of Hartselle*, No. CV-14-J-397-NE, 2015 U.S. Dist. LEXIS 25360, at *8–13 (N.D. Ala. Mar. 3, 2015) (finding state law failed to meet the rough proportionality requirement); *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 641 (Tex. 2004) (relying on *Nollan* and *Dolan* to strike down a town ordinance), *and Delchester Devs., L.P. v. Zoning Hearing Bd.*, 161 A.3d 1081, 1099 (Commw. Ct. Pa. 2017) (applying the *Nollan*/*Dolan* test to a local law).[2] Significantly, the *Ballinger* court recognized that the Ninth Circuit's prior distinction between legislative and adjudicative exactions could not be squared with recent Supreme Court precedent. *Ballinger*, 2022 U.S. App. LEXIS 2862, at *19–21.

F. *The essential-nexus and rough-proportionality requirements established in* Nollan, Dolan, *and* Koontz *is the proper legal standard to apply to Plaintiffs' claims.*

Metro's sidewalk ordinance fits neatly into the Supreme Court's

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[2] Last year, two courts upheld challenges to Metro's current sidewalk mandate. *See Knight v. Metro. Gov't of Nashville & Davidson Cnty.* No. 3:20-cv-00922, 2021 U.S. Dist. LEXIS 221927 (Nov. 16, 2021); *Elder v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 20-897-III (May 27, 2021). Although both cases joined other courts—expressly including citations to the Ninth Circuit and its district courts—in drawing a distinction between legislative and adjudicative exactions, neither addressed *Cedar Point*'s "essential question." Plaintiffs are unaware of any court that has maintained such a distinction after analyzing *Cedar Point*.

exactions analysis. Like the property owners in *Nollan*, *Dolan*, and *Koontz*, Plaintiffs wished to exercise their property rights; in this case, by building single or two-family homes. And like the government entities in those cases, Metro imposed conditions on Plaintiffs' exercise of those rights by requiring that they either build sidewalks or pay an in-lieu fee before granting them building permits. Metro burdened each Plaintiff's Fifth Amendment rights by imposing those conditions without providing just compensation.

Plaintiffs' situations and claims closely mirror the Nollans in at least two ways. First, they all applied for a permit to construct a single-family home on a property zoned for that use in a neighborhood full of similar homes. *Nollan*, 483 U.S. at 828; Pls.' SUMF ¶ 15. Second, the government in both cases uniformly applied the conditions to all applicants. *Nollan*, 483 U.S. at 829; Pls.' SUMF ¶¶ 7, 64.

Plaintiffs' circumstances, and what Metro attempts to exact from them, are also similar to those faced by Dolan. Just as Tigard required Dolan to provide a public right-of-way even though her property was not destroying, limiting, or encroaching on public spaces, *Dolan*, 512 U.S. at 394–95, Plaintiffs here had their projects held hostage until they agreed to create or fund public infrastructure even though their projects did not destroy, remove, or encroach on city sidewalks. Pls.' SUMF ¶¶ 13, 14, 17. And they faced a similar choice to that of Koontz, who was given an opportunity to avoid dedicating the requested property by funding improvements to property he did not own that was located miles away from his proposed development. *Koontz,* 570 U.S. at 601–02. Plaintiffs'

only option to avoid building public infrastructure was to instead fund the construction of public infrastructure elsewhere in the city by contributing to the pedestrian benefit fund. Pls.' SUMF ¶¶ 7, 13.

Just like the governmental entities in *Nollan*, *Dolan*, and *Koontz*, here Metro did not merely regulate in a way that restricts Plaintiffs' otherwise lawful use of their property. Instead, Metro conditioned receipt of a lawful building permit on Plaintiffs' acquiescence to its demand that they fund city sidewalks.

II. Whether the Essential-Nexus and Rough-Proportionality Test from *Nollan*, *Dolan*, and *Koontz* Applies is Likely to be Dispositive.

The Court's February 17, 2022, order notes that the "standard of review in this case is likely dispositive." This is true because the essential-nexus and rough-proportionality requirements are the correct constitutional standard to apply, and Metro simply cannot satisfy those requirements.[3] First, Metro cannot establish the required essential nexus. Specifically, Metro has acknowledged that it made "no individualized assessment" of any of Plaintiffs' properties prior to conditioning their receipt of a building permit on compliance with the sidewalk law. Pls.' SUMF ¶ 66. And Metro does not allege that Plaintiffs destroyed, removed, or encroached on existing sidewalks, necessitating an obligation to offset such destruction, removal, or encroachment. Instead, the sidewalk law was motivated by a desire for sidewalks and

[3] The burden is on Metro to illustrate that the sidewalk mandate is lawful. *Dolan*, 512 U.S. at 391.

an inability to pay for that public good. Metro merely determined that Plaintiffs' properties fell within the areas defined in Metro Code §§ 17.20.120 *et seq*., and required them to build or pay for sidewalks before obtaining lawful building permits for properties properly zoned for single-family homes. Pls.' SUMF ¶¶ 7, 9-10, 13-14, 64-65.

Second, Metro cannot carry its burden of establishing proportionality. At minimum, proportionality requires some sort of individualized determination that the harms are proportional to the imposed costs. *Dolan*, 512 U.S. at 391. Metro does not allege that Plaintiffs destroyed, removed, or encroached on existing sidewalks, necessitating an obligation to offset such destruction, removal, or encroachment. The sidewalk law imposes costs based on the simple act of building a home, not by quantifying public harms created by that activity. The only consideration in calculating the cost of an in-lieu fee is the linear-foot average of Metro's sidewalk construction and repair costs. Pls.' SUMF ¶ 8. The widely varying costs of compliance for Plaintiffs who built single-family homes illustrate the complete lack of proportionality.

A. ***Essential Nexus*: The sidewalk mandate bears no essential nexus to Plaintiffs' land-use.**

Metro cannot show that the need for city sidewalks bears any nexus—much less a close relationship—to construction of a new single- or two-family home on properties already zoned for that lawful use. Metro never considered *any* harms caused by a particular property's intended use that sidewalks would remediate. Pls.' SUMF ¶ 66. And the plain terms of the sidewalk ordinance contain no nexus between any harm

resulting from building new, single-family homes and a demand to build or pay for sidewalks. *See* Ex. 1.

Importantly, Metro never conducted the individualized assessments required by the Supreme Court. Pls.' SUMF ¶ 66. Metro admitted for each property in question that "Metropolitan Government has not assessed whether the permitted land use at this property, standing alone, caused a pre-existing lack of infrastructure, created a need for additional infrastructure, or increased pedestrian or community demand for sidewalks." *Id.* Instead, Metro justified the need for Plaintiffs to build or pay for sidewalks based on generalized factors that were inapplicable to Plaintiffs or beyond their control, including "the incredible growth of Nashville, the lack of previous infrastructure, growing pedestrian and community demand, . . . the safety of pedestrians[,] . . . [the] need to address traffic congestion," and the "Nashville Next Plan, which organizes growth around certain pike and city centers." Pls.' SUMF ¶ 62.

Although the problems Metro intended to address with sidewalks are valid reasons for the city to build sidewalks, they are not valid reasons to require that Plaintiffs bear the cost. That is particularly so when Metro acknowledges that it made no determination that any of Plaintiffs' properties share any relationship with those public problems. Pls.' SUMF ¶¶ 65, 66. Metro cannot point to a single moment that it even thought about a nexus between Plaintiffs and the sidewalk law. Instead, Metro determined that sidewalks were desirable, and that someone else needed to pay for them. The nexus requirement demands more.

B. ***Rough Proportionality: The requirement to build or fund city infrastructure in the form of sidewalks is not roughly proportional to any impact created by Plaintiffs' land-use.***

Metro also failed to articulate how the sidewalk mandate is roughly proportional in both nature and extent to any Plaintiff's intended land-use.[4] First, Metro cannot show that compliance with the sidewalk mandate is roughly proportional to building single- or two-family homes. Rather than determining whether the new home construction causes any harm, the amount of the in-lieu fee is calculated according to the average cost per linear foot to Metro for its sidewalk construction and repair projects. Pls.' SUMF ¶ 8.[5] Because the in-lieu fee relates to the cost of

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[4] The failure to show nexus is fatal to this second prong requiring proof of proportionality between impact and demand. It is impossible for Metro to show rough proportionality because it did not first consider and determine the impact of each property that created or exacerbated a need for sidewalks, illustrating the required essential nexus. Regardless, Plaintiffs analyze the second prong because a government defendant can still fail the rough-proportionality requirement even if it has shown an essential nexus. *Dolan*, 512 U.S. at 386.

[5] For example, April paid an in-lieu fee of $12,524.80 to receive a permit to build on the property at 6227 Robin Hill Road, Compl. ¶¶ 58, 60, the in-lieu fee for MRB Development to receive a permit to build at 5807 Morrow Road would have approximated $47,300, *id.* ¶¶ 112–114, and Old South paid an in-lieu fee of $31,920 in order to receive a building permit for the property at 4701 Dakota Avenue, *id.* ¶¶ 74, 77–78. If the cost to build or pay was meant to be proportional to an impact created by the land-use at a given property, the in-lieu fee would not vary so widely between the properties where single-family homes were built.

sidewalk construction, rather than any problems caused by new home construction, Metro fails the proportionality test.

Second, Metro cannot show that the sidewalk mandate is roughly proportional to any impact created by Plaintiffs' individual properties. The Supreme Court requires government entities make an "individualized determination" to show proportionality, *Dolan*, 512 U.S. at 391, and Metro explicitly acknowledged that it engaged in no such determination for Plaintiffs' properties prior to conditioning receipt of a building permit on compliance with the sidewalk law. Pls.' SUMF ¶¶ 63, 65, 66. This failure concedes the case. *Dolan*, 512 U.S. at 391 (cities must make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

While no "precise mathematical calculation" is required, "the city must make some effort to quantify its findings in support of the dedication." *Dolan* at 395–96. Here, the only quantifying was tallying the total of an in-lieu fee to be collected based on the average linear cost to Metro's Public Works Department if Metro built the sidewalk. Pls.' SUMF ¶¶ 8, 66; *see* Ex. 1 (Metro Code § 17.120.20(D)(1)(b)). That does not suffice to show proportionality.

CONCLUSION

The Court should find that the *Nollan/Dolan* test applies to Plaintiffs' claims and grant Plaintiffs' Motion for Partial Summary Judgment.

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Respectfully submitted,

s/ Jason I. Coleman

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CERTIFICATE OF SERVICE

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

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