

INFINIUM BUILDERS LLC and KE)
HOLDINGS LLC d/b/a ASCENT)
CONSTRUCTION, On Behalf of)
Themselves and All Others Similarly) **CLASS ACTION**
Situated,)

) **CASE NO.** _____
Plaintiffs,)

) **JUDGE** _____
v.)

) **JURY DEMAND**
METROPOLITAN GOVERNMENT OF)
NASHVILLE & DAVIDSON COUNTY,)

)
Defendant.)

I. INTRODUCTION

II. JURISDICTION AND VENUE

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3. This Court has subject matter jurisdiction over Plaintiffs' state law unjust enrichment claims pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d).

4. This Court also has supplemental jurisdiction over Plaintiffs' state law unjust enrichment claims pursuant to 28 U.S.C. § 1357 because the state law claims are so related to the claims under the U.S. Constitution and Section 1983 that they form part of the same case or controversy.

5. Venue for this action properly lies in the U.S. District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1391 because Defendant resides in this judicial district and because the claims arose in this judicial district.

III. PARTIES

A. Plaintiffs

6. Plaintiff Infinium Builders LLC is a Tennessee limited liability company with a principal place of business in Nashville, Tennessee.

7. Plaintiff KE Holdings LLC d/b/a Ascent Construction is a Mississippi limited liability company registered to do business in Tennessee. Its principal place of business is located in Nashville, Tennessee.

B. Defendant

8. Defendant Metropolitan Government of Nashville & Davidson County is a governmental entity located in the Nashville Division of the Middle District of Tennessee.

IV. FACTS

A. The Sidewalk Ordinance

9. On September 1, 2019, Defendant the Metropolitan Government of Nashville & Davidson County ("Defendant" or "Metro") enacted BL2019-1659, an ordinance requiring

applicants who meet certain requirements to build a sidewalk in order to receive a building permit (the “Sidewalk Ordinance” or the “Ordinance”). A copy of the Sidewalk Ordinance is attached as Exhibit A.

10. The Sidewalk Ordinance is codified at Metro Code § 17.20.120 *et seq.*

11. In describing its purpose, the Sidewalk Ordinance describes the need for sidewalks, which it says is based on Nashville’s population growth and need to reduce traffic congestion.

12. The Ordinance applies to construction or redevelopment of single-family residential, two-family residential, multi-family residential, and non-residential property within certain areas of Nashville designated by the Ordinance (collectively, “Covered Property”).

13. Under the Sidewalk Ordinance, applicants for building permits for Covered Property have three options: (1) build a sidewalk on the property; (2) contribute to the Fund; or (3) buy, and get approved for, a waiver.

14. If an applicant builds a sidewalk on their property or replaces an existing sidewalk in need of repair, the new sidewalk must cover all property frontage and must comply with standards established by Metro’s Department of Public Works.

15. In lieu of construction of a sidewalk, applicants may make a financial contribution to the fund for the pedestrian benefit zone (the “Fund”).

16. An applicant’s required Fund contribution is measured by the average linear foot sidewalk project cost, as determined by the Department of Public Works, with a maximum contribution of not more than three percent of the total construction value of the building permit.

17. Metro’s Planning Commission allocates Fund contributions to its strategic sidewalks and bikeways plan; if the contribution is not allocated within ten years for use in the same pedestrian benefit zone as the property, it will be refunded to the applicant.

18. Alternatively, in lieu of construction or the Fund Contribution, an applicant subject to the Sidewalk Ordinance may seek a waiver from Metro's Zoning Administrator.

19. The Zoning Administrator may only waive the Sidewalk Ordinance under certain circumstances outlined in the Ordinance, including, *inter alia*, steep topography, affordable housing, certain historic properties, or if the construction of the Covered Property is required due to a natural disaster.

20. Metro Code § 17.20.125 provides for a right to appeal or seek a variance from the Sidewalk Ordinance.

21. In order to appeal to Metro's Board of Zoning Appeals, an applicant must first obtain a determination about the application of the Ordinance from the Zoning Administrator.

22. Metro has continuously enforced the Sidewalk Ordinance since its promulgation in 2019.

23. In July 2020, the Sidewalk Ordinance was amended to add § 17.20.120.C.2.c, which requires applicants for building permits for certain multi-family and nonresidential Covered Properties to also add street trees in the grass strip/green zone on the property's frontage. The trees must come from Metro's Urban Forestry Recommended Tree List.

B. The *Knight* Case

24. In October 2020, two owners of Covered Property sued Metro in this Court, seeking declaratory and injunctive relief on the basis that the Sidewalk Ordinance is unconstitutional. *See* Complaint, *Knight v. The Metropolitan Government of Nashville and Davidson County*, No. 3:20-cv-00922 (M.D. Tenn. Oct. 27, 2020), ECF No. 1 (hereinafter, "*Knight v. Metro*").

25. In *Knight v. Metro*, the property owners alleged the Sidewalk Ordinance constitutes a taking in violation of the Fifth Amendment to the U.S. Constitution. Complaint, *Knight*, ECF

No. 1, at ¶ 134-149.

26. The *Knight* plaintiffs reasoned that the Supreme Court has held the government may not condition permits upon an owner's agreement to a taking without just compensation. Complaint, *Knight*, ECF No. 1, at ¶ 136.

27. The *Knight* plaintiffs asked this Court, among other things, to enjoin Metro from enforcing the Sidewalk Ordinance and for the return of their Fund contributions as restitution for the Fifth Amendment violation. Complaint, *Knight*, ECF No. 1, at ¶ 164-65.

28. In November 2021, this Court entered summary judgment in favor of Metro. *See* Mem. Op., *Knight*, ECF No. 40. The Court applied the *Penn Central* balancing test to determine whether the Sidewalk Ordinance constituted a taking and found that it did not. *Id.*

29. The *Knight* plaintiffs appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing the *Nollan-Dolan* unconstitutional-conditions test should be applied to the Sidewalk Ordinance instead of the test from *Penn Central*. *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, 67 F.4th 816, 827 (6th Cir. 2023).

30. In its May 10, 2023 opinion, the Sixth Circuit held that the *Nollan-Dolan* test applied to the constitutional analysis of the Sidewalk Ordinance. *Id.* at 828.

31. Applying the *Nollan-Dolan* test, the Sixth Circuit held the application of the Sidewalk Ordinance there was an unconstitutional taking because Metro had failed to show a “nexus” and “rough proportionality” between the conditions that it imposed on the *Knight* plaintiffs and the purported government purpose.

32. Having held that the *Knight* plaintiffs’ constitutional rights were violated, the Sixth Circuit remanded the case to this Court for a determination of the appropriate remedy.

C. The Named Plaintiffs

i. Ascent Construction

33. At the time of the actions that gave rise to this litigation, Plaintiff KE Holdings LLC d/b/a Ascent Construction (“Ascent”) owned properties in Davidson County at 1323 Harding Place, 1407 Harding Place, 3998 Harding Place, 4000 Harding Place, 796 Montrose Avenue, and 2509 Vaultx Lane (the “Ascent Lots”).

34. Ascent built new single and two-family homes on the Ascent Lots between 2022 and 2023.

35. As a condition of Ascent’s building permits at 1323 Harding Place, Metro required Ascent to pay \$31,620.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

36. As a condition of Ascent’s building permits at 1407 Harding Place, Metro required Ascent to pay \$22,450.91 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

37. As a condition of Ascent’s building permits at 3998 Harding Place, Metro required Ascent to pay \$2,913.09 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

38. As a condition of Ascent’s building permits at 4000 Harding Place, Metro required Ascent to pay \$13,857.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

39. As a condition of Ascent’s building permits at 796 Montrose Avenue, Metro required Ascent to pay \$14,200.27 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

40. As a condition of Ascent's building permits at 2509 Vaulx Lane, Metro required Ascent to pay \$14,230.70 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Ascent paid this amount to the Fund.

ii. Infinium Builders

41. At the time of the actions that gave rise to this litigation, Plaintiff Infinium Builders ("Infinium") submitted applications for building permits for properties in Davidson County at 600 A and B Freedom Court, 2421 14th Avenue North, 2423 14th Avenue North, 5298 Georgia Avenue, 5300 Georgia Avenue, 80 A and B Brookwood Terrace, 6216 A and B Henry Ford Drive, 1311 A and B Otay Street, 2928 Glenmeade Drive, 4017 A and B Indiana Avenue, 1603 A and B 22nd Avenue North, 2123 A and B Scott Avenue, and 1621 A and B Porter Avenue (the "Infinium Lots").

42. Infinium built new single and two-family homes on each of the Infinium Lots between 2022 and 2023.

43. As a condition of Infinium's building permits at 600 A and B Freedom Court, Metro required Infinium to pay \$8,500.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

44. As a condition of Infinium's building permits at 2421 and 2423 14th Avenue North, Metro required Infinium to pay \$11,271.60 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

45. As a condition of Infinium's building permits at 5298 and 5300 Georgia Avenue, Metro required Infinium to pay \$11,120.94 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

46. As a condition of Infinium's building permits at 80 A and B Brookwood Terrace,

Metro required Infinium to pay \$21,948.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

47. As a condition of Infinium's building permits at 6216 A and B Henry Ford Drive, Metro required Infinium to pay \$18,648.52 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

48. As a condition of Infinium's building permits at 1311 A and B Otay Street, Metro required Infinium to pay \$19,725.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

49. As a condition of Infinium's building permits at 2926 and 2928 Glenmeade Drive, Metro required Infinium to pay \$19,725.00 to the Fund in lieu of constructing a sidewalk, as required under Metro Code § 17.20.120. Infinium paid this amount to the Fund.

50. As a condition of Infinium's building permits at 4017 A and B Indiana Avenue, Metro required Infinium to destroy the existing sidewalk and reconstruct the sidewalk to Metro's sidewalk design standards, as required under Metro Code § 17.20.120. Infinium destroyed the existing sidewalk and reconstructed a new sidewalk in compliance with this requirement.

51. As a condition of Infinium's building permits at 1603 A and B 22nd Avenue North, Metro required Infinium to destroy the existing sidewalk and reconstruct the sidewalk to Metro's sidewalk design standards, as required under Metro Code § 17.20.120. Infinium destroyed the existing sidewalk and reconstructed a new sidewalk in compliance with this requirement.

52. As a condition of Infinium's building permits at 2123 A and B Scott Avenue, Metro required Infinium to construct new sidewalks to Metro's sidewalk design standards, as required under Metro Code § 17.20.120. At the time of construction there were no sidewalks on that side of the street. Infinium constructed new sidewalks in compliance with this requirement.

53. As a condition of Infinium's building permits at 1621 A and B Porter Avenue, Metro required Infinium to destroy the existing sidewalk and reconstruct the sidewalk to Metro's sidewalk design standards, as required under Metro Code § 17.20.120. Infinium destroyed the existing sidewalk and reconstructed a new sidewalk in compliance with this requirement.

V. CLASS ACTION ALLEGATIONS

54. Plaintiffs bring this class action on behalf of themselves and, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of the following class:

All individuals and entities who complied with the Sidewalk Ordinance by either building a sidewalk or paying a fee in lieu of a sidewalk.

(the "Rule 23 Class").

55. Plaintiffs are members of the class they seek to represent.

56. The Rule 23 Class is sufficiently numerous that joinder of all members is impractical, satisfying Federal Rule of Civil Procedure 23(a)(1). Upon information and belief, the Rule 23 Class consists of thousands of putative class members who have complied with the Sidewalk Ordinance.

57. All members of the Rule 23 Class share the same pivotal questions of law and fact, thereby satisfying Federal Rule of Civil Procedure 23(a)(2). For example, some common questions include: (a) whether the Sidewalk Ordinance violates the Takings Clause of the Fifth Amendment of the U.S. Constitution; (b) whether Defendant was unjustly enriched by the compliance of members of the Rule 23 Class with the Sidewalk Ordinance; and (c) whether and to what extent Defendant members of the Rule 23 Class have been damaged by the Sidewalk Ordinance.

58. The claims of Plaintiffs are typical of the claims of the Rule 23 Class, thus satisfying Federal Rule of Civil Procedure 23(a)(3). The Sidewalk Ordinance was applied in the same way to Plaintiffs and all members of the Rule 23 Class, who all either built a sidewalk or paid a fee in

lieu of building a sidewalk. In other words, the Named Plaintiffs claims do not arise out of any facts unique to them.

59. Plaintiffs will fairly and adequately represent and protect the interests of the Rule 23 Class. Further, Plaintiffs have retained competent counsel experienced in representing classes of individuals asserting complex legal claims, thus satisfying Federal Rule of Civil Procedure 23(a)(4) and (g).

60. By applying the Sidewalk Ordinance consistently as a condition on building permits sought by Plaintiffs and the Rule 23 Class, Defendant has acted on grounds that apply generally to all members of the Rule 23 Class, such that final injunctive relief and corresponding declaratory relief is appropriate respecting the class as a whole. Accordingly, Plaintiffs are entitled to pursue their claims as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2).

61. By applying the Sidewalk Ordinance consistently as a condition on building permits sought by Plaintiffs and the Rule 23 Class, Defendant has created a scenario where questions of law and fact common to Rule 23 Class Members predominate over any questions affecting only individual members. Thus, a class action is superior for adjudication of this matter to other available methods for fairly and efficiently adjudicating the controversy. Accordingly, Plaintiffs are entitled to pursue their claims as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(3).

VI. CAUSES OF ACTION

COUNT I

(Violation of the Fifth Amendment of the United States Constitution)

62. All previous paragraphs are incorporated as though fully set forth herein.

63. Plaintiffs assert this claim on behalf of themselves and the Rule 23 Class.

64. Defendant has conditioned the issuance of building permits to Plaintiffs and the

Rule 23 Class on compliance with the provisions of the Sidewalk Ordinance.

65. Plaintiffs and the Rule 23 Class have complied with the Sidewalk Ordinance by either building a sidewalk or paying fee in lieu of building a sidewalk.

66. Conditioning the issuance of building permits on building a sidewalk or paying a fee in lieu of building a sidewalk constitutes an unconstitutional taking in violation of the Fifth Amendment of the United States Constitution. *See generally Knight v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 67 F.4th 816 (6th Cir. 2023).

67. Pursuant to 42 U.S.C. § 1983, Defendant is liable to Plaintiffs and the Rule 23 Class for its violations of their Fifth Amendment rights for damages, restitution, and other legal and equitable relief.

COUNT II
(Unjust Enrichment)

68. All previous paragraphs are incorporated as though fully set forth herein.

69. Plaintiffs assert this claim on behalf of themselves and the Rule 23 Class.

70. Under Tennessee law, a claim for unjust enrichment has three required elements: “[1] A benefit conferred upon the defendant by the plaintiff, [2] appreciation by the defendant of such benefit, [3] and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.” *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966).

71. Plaintiffs and the Rule 23 Class have conferred benefits on Defendant, including, among other things, the payment of fees to Defendants and the construction of sidewalks at no cost to Defendant.

72. Defendant has appreciated these benefits.

73. Defendant received these benefits by imposing an unconstitutional and unjust

condition on the issuance of building permits that Plaintiffs and the Rule 23 Class provide these benefits to Defendant and give up their right to receive just compensation for the unconstitutional taking of their property.

74. These circumstances make it inequitable for Defendant to retain the benefits conferred on it by Plaintiffs and the Rule 23 Class without paying them the value of those benefits.

75. Thus, Defendant has been unjustly enriched, and Plaintiffs and the Rule 23 Class are entitled to all appropriate monetary and non-monetary relief.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief on behalf of themselves and the Rule 23 Class:

A. An order permitting this litigation to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. An order tolling the statute of limitations for the Rule 23 Class members' claims, allowing them to pursue such claim individually, should this Court deny their request for class certification in accordance with Rule 23;

C. A finding that Defendant has violated the Fifth Amendment rights of Plaintiffs and the Rule 23 Class;

D. A finding that Defendant has been unjustly enriched at the expense of Plaintiffs and the Rule 23 Class;

E. An award to Plaintiffs and the Rule 23 Class of all monetary relief under 42 U.S.C. § 1983 and the Tennessee common law of unjust enrichment, including, but not limited to, compensatory, consequential, incidental, and all other available economic damages; restitution; and pre- and post-judgment interest to the fullest extent permitted under the law and in equity;

F. Injunctive relief, including a permanent injunction, prohibiting Defendant from

enforcing the Sidewalk Ordinance;

G. Litigation costs, expenses, and Plaintiffs' attorneys' fees to the fullest extent permitted under 42 U.S.C. § 1988 and the Federal Rules of Civil Procedure; and,

H. Such other and further relief as this Court deems just and proper in law and equity.

VIII. JURY DEMAND

Plaintiffs demand a jury as to all claims so triable.

Dated: August 30, 2023

Respectfully submitted,

/s/ David W. Garrison

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