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Sixth Circuit Invalidates Application of Nashville's Sidewalk Ordinance Under The Takings Clause: Squire Patton Boggs

In *Knight v. Metro. Gov't of Nashville and Davidson County* (No. 21-6179), the Sixth Circuit decided a longstanding question about the standard that applies to conditions imposed by a legislature on those applying for building permits. The issue is common enough: a city wants more sidewalks to improve safety, health, and traffic. So the city requires landowners to add sidewalks to their properties as a condition of issuing building permits. Nashville's ordinance requires to grant an easement and build a sidewalk or to pay a fee to build sidewalks elsewhere in the city. The question in Knight was whether this permit condition should be judged under the unconstitutional conditions test in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) or the deferential balancing test used for zoning restrictions under *Penn Central Trans. v. NYC*, 438 U.S. 104 (1978). State courts have long been divided on whether *Nollan* is limited to the discretionary decisions of zoning administrators, or whether it also applies to municipal legislation like Nashville's rule.

Writing for the panel, Judge Murphy's opinion reviews the history of the Takings Clause and Supreme Court decisions on unconstitutional conditions, and concludes that *Nollan* applies and that Nashville's ordinance violates the Takings Clause by "forcing a few people to bear the full cost of public programs that the public as a whole should pay for." The ordinance lacks the "nexus" and "rough proportionality" between the imposed condition and the social costs of the new construction. Extending existing sidewalks would be permissible, the court explains, but Nashville cannot force landowners to build "sidewalks to nowhere" or "pay for sidewalks miles away" without compensation. After saying so, however, the court says it has not actually decided the issue because Nashville had waived all arguments regarding *Nollan* by focusing exclusively on the *Penn Central* test. Though the panel avoids declaring Nashville's ordinance unconstitutional, its opinion gives important guidance for cities imposing conditions on building permits across the Sixth Circuit—and for landowners that challenge those ordinances.

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