IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

RACHEL ANDERSON and P.J. ANDERSON,	)	
Plaintiffs/Appellees,	)	**Court of Appeals No. M2017-00190-COA-R3-CV**
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY,	)	**Circuit Court No. 15C3212**
Defendant/Appellant.	)	

REPLY BRIEF OF THE METROPOLITAN GOVERNMENT

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NASHVILLE AND DAVIDSON COUNTY
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REPLY

In Metro's Brief filed May 11, 2017, Metro presented this Court with two issues for review: (1) whether the STRP ordinances are unconstitutionally vague "as applied" to the Andersons, and (2) whether attorney fees and costs were appropriately awarded to the Andersons. Metro contends that the Trial Court erred in both respects. Plaintiffs present a third issue in their Brief filed June 8, 2017: whether the 3% cap on non-owner occupied STRPs creates an unconstitutional monopoly. It is Metro's position that the Trial Court was correct in finding that it does not.

I. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFFS' MONOPOLY CLAIM.

The Trial Court's October 28, 2016 Order correctly granted summary judgment in favor of Metro on Plaintiffs' monopoly claim. First, the Trial Court concluded "that a residential property owner's ability to operate a non-owner-occupied STRP was not a common right before the passage of the ordinance in question." Second, the Trial Court concluded "that, even if the three percent cap constitutes a monopoly, the monopoly created would be a permissible monopoly" because it "furthers the well-being of Metro citizens because it balances the interest between citizens who want to achieve benefits from renting their property on a short term basis against the interest of citizens who want to protect the residential character of their neighborhoods." Plaintiffs contend that both of the Trial Court's conclusions were in error.

A. The Trial Court properly determined that operating a non-owner occupied STRP in a residential neighborhood was not a "common right" prior to the enactment of the STRP ordinances.

In Tennessee, monopoly is defined as "an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly." *Trails End Campground, LLC v. Brimstone*

Recreation, LLC, 2015 WL 388313, *9 (Tenn. Ct. App. Jan. 29, 2015), *appeal denied* (Aug. 14, 2015) (citations omitted).

Because there was no "common right" to operate a non-owner occupied short-term rental in a residential district prior to the passage of the STRP ordinances, there can be no monopoly. This principle has been applied a number of times by Tennessee courts. *See James Cable Partners, L.P. v. City of Jamestown,* 818 S.W.2d 338, 345 (Tenn.Ct.App.1991) (no prior common right to use the city streets to operate a communications system); *City of Watauga v. City of Johnson City,* 589 S.W.2d 901, 904 (Tenn.1979) (annexation of territory is not a common right of municipalities); *City of Memphis v. Memphis Water Co.,* 52 Tenn. 495, 529-31 (1871); (no prior common right "to erect water works in Memphis, to take up pavements, occupy the streets and do such things as were necessary and proper, in completing their water works").

Plaintiffs assert that operating a non-owner occupied STRP is a "prior common right" because it was freely practiced without interference from Metro prior to the enactment of the STRP ordinances. In support of this contention, they point to comments made by various Metro officials around the time the ordinances were being debated by the Metro Council and Metro's discovery responses. But this evidence merely suggests that non-owner occupied STRPs were unregulated prior to the passage of the ordinances, not that they were a right available to the general public.

Metro has never agreed that operating a non-owner occupied STRP in a residential neighborhood was a property owner's legal right. Rather, Metro has argued that while there were no Zoning Code provisions that explicitly barred the operation of STRPs prior to the passage of the ordinances at issue, this does not mean that the use was legally permissible. Like many counties' zoning regulations, the Metro Zoning Code is "based upon certain uses being

permitted within certain districts. If a use is not listed as a permitted use, then that use is not permitted within that zoning district." *Wade v. Patterson,* 2009 WL 211878, *5 (Tenn. Ct. App. Jan. 29, 2009); Metro Code § 17.08.030 (T.R. 235-242).

Prior to the enactment of the STRP ordinances, the housing of transients was not explicitly barred in residential zones, but there were no land use categories that provided for such use (other than boarding house) in residential areas. Metro Code § 17.08.030 ("Residential uses" on the district land use tables now include single-family, two-family, multi-family, mobile home dwelling, accessory apartment, accessory dwelling (detached), boarding house, consignment sale, domesticated hens, garage sale, historic bed and breakfast homestay, historic home events, home occupation, rural bed and breakfast homestay, security residence and short term rental property (STRP).) (T.R. 235-242).

Therefore, outside of those operating a boarding house, the housing of transients was not a legal use in residential neighborhoods until the ordinances amended the district land use tables to include STRP as a permissible "residential use." *Id.* Similarly, the Metro Zoning Code does not contain a provision explicitly barring hotels in residential zones, but no one would argue that this means operating a hotel in a residential neighborhood is a permissible use. Hotel is listed under "commercial uses" in the district land use tables, and it is not listed as a permissible use in any of the residentially zoned districts. *Id.* The fact that a hotel is not listed in the district land use tables as a "residential use" means that it is not permitted in residential zones.

As for the Andersons specifically, their home is in an R6 district, which now includes the following permitted uses: single-family, two-family (with conditions), accessory apartment (accessory use), accessory dwelling, detached (with conditions), consignment sale (with conditions), domesticated hens (accessory use), garage sale (accessory use), historic bed and

breakfast homestay (overlay), historic home events (special exception), home occupation (accessory use) and STRP (accessory use). Metro Code § 17.08.030 (T.R. 235-242). Prior to the enactment of the STRP ordinances, the Andersons had no authorized right to house transients in their R6 district because no such land use category was available to them.

It was the Plaintiffs' burden to produce evidence that operating a non-owner occupied STRP in a residential district was a "common right," but the evidence they have pointed to only proves that they operated an STRP without interference from Metro Zoning officials, not that they (or anyone else) had the legal right to do so.

As explained above, an examination of the Zoning Code indicates that such use was not permissible in their R6 district prior to the adoption of the STRP despite the fact that it was not explicitly barred. After all, in Tennessee, there is no "common right" to run a commercial business in a residential zone. *See G & N Rest. Group v. City of Chattanooga*, 2014 WL 5035428, *10 (Tenn. Ct. App. Oct. 8, 2014) (holding that a permitted business use is a privilege rather than a right).

B. There is no monopoly in this case because operating a non-owner occupied STRP is not "an exclusive right granted to a few."

The Plaintiffs' monopoly claim also fails because the STRP ordinances do not grant a right to a few property owners while excluding all others. Plaintiffs attempt to limit the analysis to one census tract and claim they are entitled to a permit for this particular property. But there is no constitutional right to run a particular commercial business in every part of town. This is the essence of zoning – it limits certain uses, and often certain numbers of businesses, to certain parts of town. *Family Golf of Nashville, Inc. v. Metro. Gov't of Nashville*, 964 S.W.2d 254, 258 (Tenn. Ct. App. 1997) (defining zoning as "the territorial division of land into districts according

to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses.").

In support of their argument, Plaintiffs compare the 3% cap on non-owner occupied STRPs to a taxi cab regulation struck down by the Tennessee Supreme Court in *Checker Cab Co. v. City of Johnson City,* 216 S.W.2d 335, 337 (Tenn. 1948). In *Checker Cab,* Johnson City had passed a law that prohibited the issuance of a certificate of public convenience and necessity to a new taxi cab operator, even after a finding that additional service was needed, unless current taxi cab operators were given the opportunity to meet the need for additional service. *Checker Cab,* 216 S.W.2d at 336. Essentially, the city had given current taxi cab operators a right of first refusal in the event additional taxi cab service was needed. *Id.*

The Tennessee Supreme Court found that the operation of taxis materially concerns the safety and welfare of the people, so it may be regulated by municipalities. *Id.* at 336-337. The Court also noted the well-settled law that monopolies are constitutional if they have "a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Id.* at 337. However, the Court could not discern how the law being challenged (which gave current taxi cab operators the right of first refusal whenever additional taxi cab service was needed) would aid in the promotion of the health, safety, morals and well being of the people. *Id.*

In this case, there was no right of first refusal for current non-owner occupied STRP operators. The 3% cap was chosen in order to allow for enough permits so that all non-owner occupied STRPs that were operating prior to the enactment of the ordinances could continue operating and also provide some room for new operators. *See* Metro Responses to Plaintiffs' Discovery Requests, March 18, 2016, ¶ 16 ("The 3% figure was reached in the following way:

the Planning Staff provided the number of single and two family homes in place in the census districts with the highest concentration of STRPs. This was compared to the approximate number of STRPs shown on the two major web providers. Based on the most conservative assumption that all were non-owner occupied, this information showed that the densest was less than 2%. Three percent allowed those STRPs to stay and allowed some room to grow, so to speak. In addition, the City of Austin's ordinance used 3% and that number seemed to be working reasonably well.") (T.R. 910-911).

Under the STRP ordinances, every residential property owner, including the Andersons, had the ability to apply for a non-owner occupied STRP permit at the same time and in the same manner. Michael Decl., ¶ 4 (T.R. 1239). Instead, the Andersons chose to apply for an owner occupied STRP permit. Complaint, ¶ 67 (T.R. 16). This is quite the opposite from the regulatory scheme that was struck down by the Tennessee Supreme Court in *Checker Cab*.

Plaintiffs also rely on the early twentieth century Tennessee Supreme Court case of *Noe v. Town of Morristown,* 161 S.W. 485 (Tenn. 1913). In *Noe*, the effect of two of ordinances, when read together, was to limit the business of slaughtering animals to a single private company at a single location. In finding that the ordinances violated the anti-monopoly provision in the Tennessee Constitution, the Court focused on the fact that by limiting the slaughter of animals to one place in the hands of one company, the city had effectively prevented all other individuals and companies from engaging in this particular business at all.

Here, the STRP ordinances have not limited the business of operating a non-owner occupied STRP to a single person or company. There are hundreds of people operating STRPs in Davidson County. (T.R. 925-930).

Further, there are no restrictions on Plaintiffs' ability to research other areas of Nashville, where thousands of non-owner occupied permits are still available, and purchase property in those areas to rent through Airbnb. *See* Michael Decl., ¶ 3 (T.R. 1239). The STRP ordinances do not prevent the Plaintiffs (or anyone else for that matter) from participating in this particular business – they simply limit the total number of these businesses in each area of town. The mere limitation on the number of permits cannot create a monopoly. *See Ketner v. Clabo*, 189 Tenn. 260, 266 (1949) (holding that a municipality did not create a monopoly when everyone was able to apply for a beer permit even if only 5 permits were issued); Michael Decl. ¶ 4 (T.R. 1239).

There are only two cases where the Tennessee Supreme Court has struck down a regulation as creating an unconstitutional monopoly, *Noe* and *Checker Cab*. Neither is analogous to the regulation at issue in this case. Here, the 3% cap does not create an "exclusive right granted to a few" because all property owners were able to apply for a non-owner occupied permit and permits are still available in many of the census tracts in the county.

C. The Trial Court correctly applied the rational basis test in determining that the three-percent cap constituted an appropriate exercise of Metro's police power.

The Trial Court correctly determined that if a monopoly had been created by the 3% cap, the question of whether the Council has properly exercised its police power should be examined by applying the rational basis test. *Dial-A-Page, Inc. v. Bissell,* 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991); *see also, Esquinance v. Polk Cty. Educ. Ass'n,* 195 S.W.3d 35, 47 (Tenn. Ct. App. 2005).

Plaintiffs attempt to downplay this more contemporary Court of Appeals case law in favor of half-century and century old Tennessee Supreme Court decisions. However, it should be noted that Rule 11 applications were filed in both *Dial-A-Page* and *Esquinance*, but the Supreme Court elected to leave the Court of Appeals decisions applying the rational basis test

undisturbed. *Dial-A-Page,* 823 S.W.2d 202, *perm. app. denied,* Sept. 23, 1991; *Esquinance,* 195 S.W.3d 35, *perm. app. denied,* Jan. 30, 2006.

In the landmark zoning case, *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926), which dealt with a challenge to a zoning ordinance under the due process clause and the equal protection clause, the United States Supreme Court stated:

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."

Id. at 386.

Since that time courts have consistently upheld zoning laws that protect residential neighborhoods as a valid exercise of police power under rational basis review despite the fact that they often deprive a landowner "some freedom to use the land for all purposes." *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303, 308 (6th Cir. 1983); *see also, Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974) (upholding a zoning ordinance that limited the number of cohabiting, non-related individuals to two in an effort to create a "quiet place where yards are wide, people few, and motor vehicles restricted"); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977) (upholding the denial of a building permit for multi-family low income housing); *Memphis v. Green,* 451 U.S. 100 (1981) (upholding an ordinance that diverted the flow of commuter traffic from a residential neighborhood).

While the Tennessee Supreme Court has stated that "a monopoly cannot be validly created merely by connecting such creation with the exercise of a police power," the Trial Court did more than simply point to Metro's zoning power and end its analysis there. *Checker Cab*, 216 S.W.2d at 337. Rather, the Trial Court determined that the record supported a finding that the STRP ordinances had a "reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people."[1] *Id.* Despite Plaintiffs' insistence otherwise, the Trial Court performed the rational basis analysis correctly in this case. *See Dial-A-Page*, 823 S.W.2d at 206 ("If the legislature concludes that there is a reasonable basis for the regulatory statute and if there is some foundation in fact to justify the legislature's conclusion, then the court is powerless and may not substitute its judgment for that of the legislature.").

As noted by the Trial Court, the 3% cap "balances the interests of the citizens who want to achieve benefits from renting their property on a short term basis against the interest of citizens who want to protect the residential character of their neighborhoods." This rational basis for allowing some short term rentals but restricting the number that are not occupied by an owner is contained in the ordinances themselves:

> WHEREAS, short-term rental of homes can provide a flexible housing stock that allows travelers a safe accommodation while contributing to the local economy; and
>
> WHEREAS, short-term rental of homes can provide homeowners an opportunity to hold property in difficult economic circumstances or as an investment; and
>
> WHEREAS, hotel taxes from short term rental of homes can be used to promote travel and tourism and to support the local tourism industry; and

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[1] Plaintiffs assert that for the purpose of analyzing a monopoly under rational basis review, the regulation's purpose must advance "the moral or physical well being of the people," and therefore, preserving the residential character of neighborhoods is not a valid purpose in the context of the monopoly claim. But Plaintiffs' brief provides no citation to require this standard, and there is no support in Tennessee case law for this proposition.

WHEREAS, the needs of long-term residents should be balanced with the allowance of short-term rentals.

(T.R. 98, 103).

Simple common sense supports the Trial Court's findings – by definition, non-owner occupied STRPs have no long-term resident who could contribute to the neighborhood community. Metro Code § 6.28.030 (T.R. 103).

The record also demonstrated that while the bills were being debated, their sponsor, Councilwoman Burkley Allen, heard from many citizens of Nashville and Davidson County who shared the Metro Council's concerns related to preserving the residential character of Nashville neighborhoods:

- "As a homeowner and parent, I am strongly opposed to allowing short-term rentals in residential areas, especially those zoned RS40. The introduction of a transient population to a residential neighborhood could bring safety concerns as well as a decrease in property values and degradation of neighborhoods. My husband and I purchased our home because it was in an established neighborhood of homeowners." (Vicki Manning, Sept. 26, 2014)

- "I love my neighborhood, too, and if I got to vote, I would not want vacation rentals my neighborhood at all. The people using these houses are not my neighbors – they are just a constant stream of strangers. It seems to me that Metro has made many efforts lately to build communities. Neighbors knowing their neighbors is a huge part of this. But I don't know who is in my neighborhood these days." (Kim Sorenson, Oct. 18, 2014)

- "I am concerned that the proposed bill does not limit this activity to owner occupied dwellings. There needs to be someone present and responsible for occupants – to be certain the house is not turned into a party house which will spill over negatively into the surrounding neighborhood." (Jan Bushing, Oct. 15, 2014)

- "The removal of home ownership further opens the door to non-resident infiltration of neighborhoods. This is not pro-neighborhood. I realize Nashville is a popular place, but by enacting this bill, you have essentially transformed quiet, family friendly neighborhoods into tourist zones." (Chris Ferrara, Nov. 10, 2014)

- "Allowing a dwelling to be used for such purposes in effect changes its character from a residential to a commercial use. I do not believe this use of the single-family dwellings in my neighborhood or many other neighborhoods in Nashville would be a good fit or would be welcomed by current residents. While renting homes or portions of homes through websites such as airbnb or VRBO can make sense for beach communities, ski resorts or downtown areas of tourist-friendly cities like Nashville, it does not make sense in the quiet neighborhoods of Green Hills. When homes are occupied by homeowners or long-term renters, the occupants have an investment in the neighborhood and generally have more of an incentive to be good neighbors. Visitors renting a home while in Nashville for the CMA Festival, the Music City Bowl or a bachelor party don't have the same incentive." (Robert Horner, Nov. 13, 2014)

- "As amended, the legislation is fair and addresses almost all of the concerns that citizens have brought to Ms. Allen. Allowing unlimited owner occupied rentals and restricting those that are not owner occupied to 3% of single family homes in a census tract will not force any current hosts to stop opening their homes and will not turn neighborhoods into commercial hotel areas." (Luann Reid, Nov. 18, 2014)

- "The other problem is the transience that VRBO's and Airbnb's bring by the nature of what they are. These 'guests' are not my neighbors. They are just on vacation of a business trip to Nashville. This not good for my property value or the neighborhood as a whole. My main complaint is that I did not buy this home, which is a home for me and my two young children, to live in an atmosphere similar to a motel on Dickerson Rd." (Bobby Kent, Jan. 2, 2015)

- "Nashvillians bought their homes in residential areas to be free of business. This bill essential [sic] opens the door for future bills allowing additional types of home business and commercial activity within residential areas...And by allowing business owners who do not live in the home to operate this type of business, this bill essentially allows for mini-hotels to be sprinkled all throughout our neighborhoods." (Susan Floyd, Feb. 2, 2014)

Attachment to Allen Decl. (T.R. 1189-1238).

Metro also provided evidence that the concerns of the Metro Council and constituents related to non-owner occupied STRPs were not unfounded.[2] As described by Nashville residents

[2] Plaintiffs argue that non-owner occupied STRPs would not overtake residential neighborhoods without a cap on their number because the record showed that there were still permits available in other

Pippa Holloway and Christopher Wood, the concentration of non-owner occupied STRPs has had a negative effect on the residential character of their respective neighborhoods.

Ms. Holloway lives on Rudolph Avenue in East Nashville. Holloway Decl., ¶ 2 (T.R. 1184). By her count there are 24 houses that front onto this two-block street, and five of them are non-owner occupied short-term rentals. *Id.* High density of non-owner occupied STRPs has resulted in an increased number of transient strangers and a decreased sense of community. *Id.*, ¶ 4 (T.R. 1185). On a regular basis there are people she does not know or recognize entering properties around her home. *Id.*, ¶ 5. On her street there are three large houses that rent to groups of 10 people each, which are frequently rented to "bachelorette parties" on weekends that are often loud, inebriated, and disrespectful of the neighborhood. *Id.*, ¶ 6. There are less tangible losses as well to having fewer long-term neighbors – 20% of the properties on her street are not part of the close-knit neighborhood community. *Id.*, ¶ 7 (T.R. 1185-1186).

Mr. Wood is a resident of the Lockland Springs neighborhood in East Nashville. Wood Decl. ¶ 2 (T.R. 1187). His family purchased their home in this neighborhood in 2013 because they wanted to be part of a vibrant and diverse community that was welcoming to young families and in close proximity to parks, playgrounds and schools. *Id.* There are currently six single-family houses within 200 feet of Mr. Wood's home that have been granted STRP permits. *Id.*, ¶ 4 (T.R. 1187). None of these properties appear to be owner occupied. *Id.* Rather, they are

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parts of Nashville outside of the downtown core. However, the evidence actually supports the opposite conclusion.

There is no way to know definitively how many permits for non-owner occupied STRPs would have been issued without a cap, but the demand for permits in neighborhoods like the Andersons' was high. Permit applications were made available to all property owners on April 1, 2015, and only four months later, all 28 non-owner occupied permits in the Andersons' neighborhood were spoken for when the Andersons' applied to convert their permit on August 19, 2015. *See* Michael Decl., ¶ 3 (T.R. 1239); Complaint, ¶ 76-77 (T.R. 17). It seems unlikely that the Andersons are the only property owners who would like to take advantage of an unlimited number of non-owner occupied permits in desirable downtown neighborhoods.

occupied primarily during the weekends, often by individuals hosting parties, sometimes with up to a dozen guests. *Id.* While the owners of these properties are considerate and conscientious of their neighbors, replacing long-term residents with tourists has had a negative effect on the community. *Id.*, ¶ 5 (T.R. 1188). Without the 3% cap, Mr. Wood believes that numerous other properties in his neighborhood would have already been sold to individuals intending to utilize them as non-owner occupied STRPs. *Id.*, ¶ 7 (T.R. 1188). This would have a very detrimental effect on the cohesiveness and quality of life in this primarily residential community. *Id.*

Finally, even the Plaintiff Rachel Anderson's testimony indicates that she understands the rationale behind the 3% cap: "I agree that there should be some kind of guidelines or limitations. I don't want to be in a neighborhood that's all short-term rentals either...I just like the idea of knowing your neighbors. You know, if you need a loaf of bread or some milk, that you can go across the street. I mean, we don't have much – all our houses are relatively small, so we spend a lot of time outside in the summer. We all talk and things like that." Anderson Deposition, p. 18, l. 22-24, p. 20, l. 12-18. She also testified about how non-owner occupied STRPs in residential neighborhoods can make properties unaffordable for single families: "If an investor comes in and they see that – if they're able to get a non-owner occupied permit and they can make, you know, I don't know – $8 to $10,000 a month, they're willing to spend, you know, another $50 or $100,000 in the house, when a family that is going to live in that house would never pay a mortgage that would be, you know, $4 or $5,000 a month." *Id.* at p. 37, l. 15-22.

In sum, there is an abundance of evidence in the record supporting the Metro Council's rationale for exercising its police power through the passage of the STRP ordinances: (1) the sponsor of the legislation heard from numerous constituents who wanted to protect the residential character of their neighborhoods from commercial activity, (2) two individuals gave

detailed declarations about the negative impacts of high-density non-owner occupied STRPs in their neighborhoods, and (3) even the Plaintiff acknowledged the possible undesirable effects of not limiting non-owner occupied STRPs. Because there is an evidentiary foundation for the 3% cap on non-owner occupied STRPs, the Trial Court was correct to defer to the judgment of the Metro Council.[3]

II. THE TRIAL COURT ERRED IN ITS DETERMINATION THAT THE STRP ORDINANCES WERE VAGUE "AS-APPLIED" TO THE ANDERSONS' PROPERTY.

This case presents a perplexing situation for the Court. The Andersons voluntarily applied for an owner occupied STRP permit, presumably because they understood that the ordinances applied to the use of their property. Metro issued the permit because Metro interpreted the law to apply to the Andersons as well. No enforcement action related to the STRP ordinances has ever been taken against the Andersons, and the Andersons have never brought an administrative action before the Zoning Administrator or the BZA. And yet, the Trial Court determined that the STRP ordinances are vague as applied to the Andersons. It appears that the Trial Court performed its strict vagueness analysis without considering how the law has actually been applied to the Plaintiffs in this case – instead, focusing on speculation as to how other land use definitions might be applied.

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[3] Plaintiffs claim that the bills' sponsor "colluded with" the hospitality sector to purposefully handicap STRPs, but they produced no evidence to support their theory that the real purpose behind the 3% cap was economic protectionism. Rather, the record indicates that public input from all interested parties, including residents and STRP owners, was gathered and considered. *See* Metro Responses to Plaintiffs' Discovery Requests, March 18, 2016, ¶ 2 ("During the drafting process, Councilmember Allen met with representatives from the following departments: Police, Convention Bureau, Fire Marshall, Codes, and Planning. ... Airbnb lobbyists Colby Sledge and Alice Chapman participated in the process. During the drafting process, Councilmember Allen held several meetings with neighborhood associations and community meetings to discuss the proposed legislation. Before and after the passage of the legislation, Councilmember Allen fielded hundreds of questions and met with dozens of constituents to discuss the law.") (T.R. 908).

A. The Trial Court erred in failing to apply a more lenient standard because violations of Metro ordinances are civil, rather than criminal, in nature.

Plaintiffs continue to insist that the Trial Court was correct to hold the STRP ordinances to a stricter standard in analyzing their vagueness claim because they are criminal regulations. They appear to base this argument on the mere fact that the Metro Code labels violations of the Zoning Code as "misdemeanors." Metro Code § 17.40.620 (T.R. 435). But violations of Metro's STRP ordinances are not criminal. They are litigated in Metro's general sessions court designated for codes violations, known as "environmental court." (T.R. 909). Pursuant to Pub. Act 1993, Ch. 212 (copy attached) an environmental court judge has the authority to "order any defendant found guilty of violating any metropolitan ordinance relating to health, housing, fire, land subdivision, building or zoning to correct such violation at the defendant's own expense." The judge's remedies are limited to a mandatory injunction against the violation. Only if the injunction is violated may the court find contempt and order a fifty-dollar fine or jail time; fines and/or confinement may not be ordered as punishment for the underlying violation of the Metro Code. *Id.*

As Plaintiffs pointed out in their brief, a factor in determining whether a regulation involves a criminal or civil penalty is whether the sanction is "predominantly punitive or remedial in nature." *City of Chattanooga v. Davis,* 54 S.W.3d 248, 263 (Tenn. 2001). But *City of Chattanooga* also states: "[T]he law now appears settled that proceedings for a municipal ordinance violation are civil in nature." *Id.* at 259.

Violations of city ordinances have long been considered civil matters:

> It has long been settled, however, that a prosecution for an act violating a city ordinance is a civil, not a criminal, proceeding. This is true though such act be denounced by the ordinance as a 'misdemeanor,' and be also an offense against state law. Such a prosecution by a city, though often called quasi-criminal, is a civil action to recover a penalty for a violation of its law.

O'Dell v. City of Knoxville,[4] 379 S.W.2d 756, 757-58 (Tenn. 1964); *see also, City of Knoxville v. Brown*, 284 S.W.3d 330, 338 (Tenn. Ct. App. 2008) (holding that a ticket issued using a "red light camera," for violation of a municipal ordinance, was civil in nature; even though the fine at issue was not remedial, the fine was still considered civil.); *City of Murfreesboro v. Norton*, 2010 WL 1838068, at *4 & ftnt 4 (Tenn. Ct. App. May 6, 2010) (stating that "for 130 years proceedings to recover fines for the violation of municipal ordinances have been considered civil for the purposes of procedure and appeal, although the principles of double jeopardy have recently been determined to apply in such cases."); *City of Chattanooga v. Myers,* 787 S.W.2d 921, 928 (Tenn. 1990) (stating such proceedings are considered to be "a civil action brought by the municipality to recover a 'debt.'").

Here, violations of the Metro Code are punished by requiring offenders to correct the violation, a purely remedial penalty. Only contempt of the environmental court's order carries with it the possibility of more punitive measures. Under these circumstances, there is no reasonable argument to be made that this case involves a criminal regulation that would warrant the stricter test applied by the Trial Court.

B. The Trial Court should have applied the "substantially incomprehensible" vagueness test to this economic regulation.

If the Trial Court's analysis of the land use definitions it examined is applied to the rest of the Zoning Code, many land use categories would be vague simply because individuals may differ in their interpretations of each definition and how it might be applied to various properties. For example, is a college baseball field a "recreation center" or a "stadium"? Is a rescue mission

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[4] *O'Dell v. City of Knoxville* was overruled by *City of Chattanooga* only "to the extent that [it] would compel a contrary conclusion" regarding the jury requirement of the Tennessee Constitution. *Davis* at 250. Cited favorably by the *City of Chattanooga* court, the remainder of *O'Dell* is still good law, including the statement that "it has long been settled, however, that a prosecution for an act violating a city ordinance is a civil, not a criminal, proceeding." 214 Tenn. 237, 239 (Tenn. 1964).

a "church" or something else? These questions can, and have been, answered by resorting to the administrative process provided for in the Zoning Code itself. *See* Metro Code § 17.40.180(A) (T.R. 424); *Walker v. Metro. Bd. of Parks and Recreation,* 2009 WL 5178435, *14 (Tenn. Ct. App. Dec. 30, 2009); *Capps v. Metro. Gov't of Nashville and Davidson Cty.*, 2008 WL 5427972, *8 (Tenn. Ct. App. Dec. 31, 2008). Likewise, the Andersons could have used this administrative process to determine definitively whether their property is an STRP, hotel, bed and breakfast or boarding house.

The Supreme Court has been clear that economic regulations like the one at issue in this case are "subject to a less strict vagueness test" because a business "can be expected to consult relevant legislation in advance of action" and "may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The type of uncertainty allegedly experienced by the Andersons "is not enough for [the regulation] to be unconstitutionally vague; rather, it must be substantially incomprehensible." *Doe v. Staples,* 706 F.2d 985, 988 (6th Cir. 1983) (quoting *Exxon Corp. v. Busbee,* 644 F.2d 1030 (5th Cir. 1981)) (emphasis added).

In fact, the Andersons already had an answer from Metro as to how it classified their property even without resorting to an appeal to the BZA. The administrative action of issuing an STRP permit to the Andersons indicates that Metro determined their property qualified as an STRP, rather than a hotel, bed and breakfast or boarding house for land use purposes. Complaint, ¶ 67 (T.R. 16). After all, the ordinance specifically provides that if a property is an STRP, it cannot also be a hotel, bed and breakfast or boarding house. Metro Code §§ 6.28.030 (T.R. 115), 17.04.060 (T.R. 223).

Because "[t]he meaning of a zoning ordinance and its application are, in the first instance, questions for the local officials to decide," the Trial Court erred when it failed to attach any significance to Metro's application of the STRP ordinances to the Andersons' property. *Whittemore v. Brentwood Planning Comm'n, City of Brentwood,* 835 S.W.2d 11, 16 (Tenn. Ct. App. 1992) (internal citations omitted). Instead of analyzing Plaintiffs' vagueness claim based on how the STRP ordinances have actually been applied to the Andersons, the Trial Court relied on a hypothetical scenario invented by Plaintiffs where despite issuing the Andersons an STRP permit, the Metro Codes Department suddenly decides to cite them for operating an illegal hotel. But the Plaintiffs produced absolutely no evidence that the STRP ordinances have been enforced in the arbitrary manner imagined by Plaintiffs, an issue that should have been critical to the Court's analysis. *State v. Burkhart,* 58 S.W.3d 694, 700 (Tenn. 2001)

By requiring precise land use definitions with no possibility of ambiguity, the Trial Court has given the Zoning Code a patently unreasonable construction, the opposite of its charge pursuant to Tennessee case law. *See State v. Enoch,* 2003 WL 535914, *7 (Tenn. Ct. App. Feb. 26, 2003) ("[A] land use regulation that can be upheld by giving it a reasonable construction will not be declared void for uncertainty."); *State v. Lyons,* 802 S.W.2d 590, 592 (Tenn. 1990) ("It is the duty of this Court to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction."). If the STRP ordinances are read in their context in the Zoning Code as required by the rules of statutory interpretation, they easily withstand a vagueness challenge because the evidence indicated that the Andersons had notice that the ordinances applied to them, they have been applied in a reasonable manner by Metro officials, and the Andersons had the opportunity for further clarity by resorting to the administrative process provided in the Zoning Code.

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO THE ANDERSONS.

The Trial Court awarded a reduced fee to the Andersons based on their success with their vagueness claim. Order, Jan. 23, 2017 (T.R. 1680-1681). Plaintiffs argue that the Trial Court should have also awarded fees because they were the "prevailing party" in their request for a preliminary injunction despite the fact that it was dissolved and the underlying claims were dismissed. Agreed Order, Aug. 25, 2016 (T.R. 828-830).

A. The Trial Court correctly determined that Plaintiffs were not a "prevailing party" pursuant to the preliminary injunction.

Plaintiffs assert that the Trial Court should have also awarded fees related to the preliminary injunction issued on November 12, 2015, but Plaintiffs do not establish prevailing party status when a preliminary injunction is later "reversed, dissolved, or otherwise undone by the final decision in the same case," because § 1988 requires lasting relief, not the temporary, "fleeting success" that the injunction represented since it was later dissolved and the relevant claims dismissed by Order of the Court on August 26, 2016. *Sole v. Wyner,* 551 U.S. 74, 86 (2007).

Likewise, the Plaintiffs are not entitled to any award of fees related to the Metro Council's decision to amend the STRP ordinance to remove the signage ban and permit STRP permit holders to refuse inspection of their guest register. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to authorize an award of attorney's fees. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 604 (2001) (holding that the "catalyst theory" is not a permissible basis for the award of attorney's fees).

Although the possibility of fees based on a preliminary injunction that is later dissolved was left open by the Supreme Court in *Sole*, there is no case where an appellate court has permitted fees under those circumstances. And there is no basis in the law for granting fees based on a "catalyst theory" as the Plaintiffs are suggesting. Therefore, it was certainly not an abuse of the Trial Court's discretion to limit its finding that the Plaintiffs are "prevailing parties" to the vagueness claim.

B. Fees are not justified in this case because the Andersons cannot legally operate as an STRP without the benefit of the STRP ordinances, so they have achieved only a Pyrrhic victory.

Obviously, if the ordinances are not vague when the correct "substantially incomprehensible" test is applied, the Andersons are not entitled to any attorney fees or costs. But even if the Trial Court's ruling on vagueness is not reversed, fees are still not warranted in this case.

As explained more thoroughly in the monopoly section of this brief, the only land use category that allows transient occupancy in the Andersons' neighborhood is STRP. Metro Code § 17.40.030 (T.R. 235-242). In making its vagueness ruling, the Trial Court determined that this category no longer applies to the Andersons, which leaves them with no permissible land use categories to continue renting their home on a short-term basis. *See* Memorandum and Order, Dec. 16, 2016 (T.R. 1594). While the Trial Court's decision on their vagueness claim might be a technical victory, the legal relationship between Metro and the Andersons has changed to their detriment, not to their benefit as courts must require to justify an award of fees. *Farrar v. Hobby,* 506 U.S. 103, 111-112 (1992).

Because their success was ultimately no more than a Pyrrhic victory, the Trial Court abused its discretion when it failed to find that the "reasonable fee is zero" and deny Plaintiffs' motion for attorney fees. *Id.* at 117.

C. The Trial Court failed to explain its reasoning in awarding fees, so there is no way for this Court to adequately review the matter.

Contrary to Plaintiffs' contention, the Trial Court's reasoning for its award of attorney fees is not readily discernible. There is no way for this Court to determine what informed the Trial Court's decision to reduce the requested fee without resorting to speculation. While the Court noted the correct standard, it did not give any indication as to how it weighed the factors or what might have informed its reasoning. Order, Jan. 23, 2017 (T.R. 1680-1681).

Under these circumstances, there is no way for a reviewing court to determine whether the Trial Court abused its discretion in awarding attorney fees, and the only appropriate remedy is remand. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 439-440 (1983) ("We are unable to affirm the decisions below, however, because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award. The court's finding that 'the [significant] extent of the relief clearly justifies the award of a reasonable attorney's fee' does not answer the question of what is 'reasonable' in light of that level of success. We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole."); *Harthun v. Edens,* 2016 WL 1056960, *4-5 (Tenn. Ct. App. Mar. 17, 2016) ("The trial court's order does not contain any findings of fact whatsoever. If this Court were to review the trial court's determination not to award fees and to apportion costs, we would have to speculate as to what facts form the basis of the trial court's determination. It is this Court's purview to review, not assume or speculate. Without any facts

in the trial court's order, we are forced to guess at the rational the trial court used in arriving at its decision. This we cannot do. Accordingly, we conclude that the trial court did not comply with Tennessee Rule of Civil Procedure 52.01.").

CONCLUSION

For these reasons and the reasons articulated in Metro's Brief, Metro respectfully requests that the Trial Court's ruling that the STRP ordinances are vague as applied to the Andersons' property, as well as the award of attorney fees and discretionary costs, be reversed. Metro also requests that the Trial Court's ruling that the 3% cap do not create an unconstitutional monopoly be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, via United States mail postage prepaid to Braden H. Boucek, Beacon Center of Tennessee, [redacted]

Catherine J. Pham