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.	)	

THE METROPOLITAN GOVERNMENT'S BRIEF

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
Director of Law
Lora Barkenbus Fox #17243
Catherine J. Pham #28005
Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
Post Office Box 196300
Nashville, Tennessee 37219-6300
(615) 862-6375

ORAL ARGUMENT REQUESTED

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.	)	

THE METROPOLITAN GOVERNMENT'S BRIEF

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
Director of Law
Lora Barkenbus Fox #17243
Catherine J. Pham #28005
Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
Post Office Box 196300
Nashville, Tennessee 37219-6300
(615) 862-6375

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

ARGUMENT 5

I. STANDARD OF REVIEW 5

II. THE TRIAL COURT ERRED IN DETERMINING THAT THE STRP ORDINANCES ARE UNCONSTITUTIONALLY VAGUE "AS APPLIED" TO THE ANDERSONS 6

A. The Trial Court applied the incorrect standard in determining whether the STRP ordinances were unconstitutionally vague due to inadequate notice 6

B. The Trial Court erred in failing to consider the complete absence of any evidence of arbitrary enforcement or discrimination related to the STRP ordinances 9

C. The Trial Court erred when it did not give any deference to local zoning officials' interpretation of the STRP ordinances and found that land use definitions in the Zoning Code cannot overlap in their application 10

D. The Trial Court erred when it failed to attempt to give the STRP ordinances a reasonable construction prior to finding they are unconstitutionally vague 12

III. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO THE ANDERSONS 14

A. The Trial erred in awarding attorney fees because the Andersons do not meet the definition of prevailing parties under 42 U.S.C § 1988 15

B. Even if the Andersons are prevailing parties, they are not entitled to attorney fees because their success in this case was so limited 17

C. The Trial Court erred when it failed to adequately consider the relationship between the Appellee's extend of success and the amount of the fee awarded 19

CONCLUSION 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

CASES

Bean v. McWherter, 24 S.W.3d 325 (Tenn. Ct. App. 1999) 13

Blair v. W. Town Mall, 130 S.W.3d 761 (Tenn. 2004) 5

Boyd v. Comdata Network, Inc., 88 S.W.3d 203 (Tenn. Ct. App. 2002) 21

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001) 15

Clark v. Metro. Gov't. of Nashville and Davidson Cty., 827 S.W.2d 312 (Tenn. Ct. App. 1991) 7

Capps v. Metro. Gov't. of Nashville and Davidson Cty., 2008 WL 5427972 (Tenn. Ct. App. Dec. 31, 2008) 11

City of Chattanooga v. Davis, 54 S.W.3d 248 (Tenn. 2001) 7

City of Chattanooga v. Meyers, 787 S.W.2d (Tenn. 1990) 7

City of Knoxville v. Brown, 284 S.W.3d 330 (Tenn. Ct. App. 2008) 7

Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty., 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) 5

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 13

Doe v. Staples, 706 F.2d 985, 988 (6th Cir. 1983) 6

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) 5

Farrar v. Hobby, 506 U.S. 103 (1992) 15, 16, 17, 18

FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959) 14

Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) 20

Gratz v. Bollinger, 353 F.Supp. 929 (E.D. Mich. 2005) 17

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 13

Harthun v. Edens, 2016 WL 1056960 (Tenn. Ct. App. Mar. 17, 2016) 22

Hensley v. Eckerhart, 461 U.S. 424 (1983) 15, 17, 19, 20

Hewitt v. Helms, 482 U.S. 755 (1987) 15

Hill v. Colorado, 530 U.S. 703 (2000) 9

Hutsell v. Jefferson Cty. Bd. of Zoning Appeals, 2005 WL 954646 (Tenn. Ct. App. Apr. 26, 2005)..... 8, 12

Knop v. Johnson, 712 F.Supp. 571 (W.D. Mich. 1989) 19

Lee Medical, Inc. v. Beecher, 312 S.W.3d 515 (Tenn. 2010) 13, 14

McQueary v. Conway, 614 F.3d 591 (6th Cir. 2010) 16

PHN Motors, LLC v. Medina Tp., 498 Fed.Appx. 540 (6th Cir. 2012)..... 13

Smith v. Metro. Gov't of Nashville & Davidson Cty., 2015 WL 1756419 (Tenn. Ct. App. Apr. 13, 2015) 7

Smith County v. Enoch, 2003 WL 535914 (Tenn. Ct. App. Feb. 26, 2003)..... 12

Smith v. Goguen, 415 U.S. 566 (1974) 9

State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186 (Tenn. 2000)..... 5

State v. Burkhart, 58 S.W.3d 694 (Tenn. 2001) 8, 9

State v. Lyons, 802 S.W.2d 590 (Tenn. 1990)..... 12

State v. Silaski, 238 S.W.3d 338 (Tenn. Crim. App. 2007) 13

State v. Wilkins, 655 S.W.2d 914 (Tenn. 1983) 12

Rhodes v. Stewart, 488 U.S. 1 (1988) 15

Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782 (1989) 15, 16

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)..... 6, 11

Walker v. Metro. Bd. of Parks and Recreation, 2009 WL 5178435 (Tenn. Ct. App. Dec. 30, 2009) 11

Whittemore v. Brentwood Planning Com'n, City of Brentwood, 835 S.W.2d 11 (Tenn. Ct. App. 1992) 10, 11, 13

Wright ex rel. Wright v. Wright, 337 S.W.3d 166 (Tenn. 2011) 20

STATUTES

42 U.S.C. § 1983 14

42 U.S.C. § 1988 15

OTHER

Tenn. Op. Atty. Gen. No. 16-40, 2016 WL 6906610 (Nov. 16, 2016)..... 7

Tenn. Op. Atty. Gen. No. 15-78, 2015 WL 8538116 (Dec. 1, 2015) 10

STATEMENT OF THE ISSUES

In 2015, the Metro Council enacted two ordinances aimed at regulating the new phenomenon of short-term rentals through a permit-system. Appellees, Rachel and P.J. Anderson, applied for and were granted an owner occupied short-term rental (STRP) permit. But when the Andersons decided they wanted to move to Chicago and continue renting their home on a short-term basis, they were unable to obtain a non-owner occupied permit because the three-percent cap imposed by the Metro Council had already been reached in their neighborhood.

The Andersons filed suit, asking the Trial Court to declare the STRP ordinances unconstitutional on various grounds.

Did the Trial Court err in determining that the STRP ordinances were unconstitutionally vague as applied to the Andersons' property because there is some overlap in land use definitions related to short-term rental occupancy in the Metro Zoning Code? Also, did the Trial Court err in awarding attorney fees and costs to the Andersons based on its vagueness ruling?

STATEMENT OF THE CASE

On April 26, 2015, Rachel and P.J. Anderson filed suit against the Metropolitan Government challenging Metro ordinances related to short-term rentals, BL2014-909 and BL2014-951, on various grounds. (T.R. 1-29.)

The Andersons filed a Motion for Preliminary Injunction on September 17, 2015, and Metro filed a Motion to Dismiss on October 13, 2015. (T.R. 30, 75.) The motions were heard together on October 30, 2015. (T.R. 459, 462.) In two separate orders issued on November 12, 2015, the Trial Court dismissed Claim Five (substantive due process) and granted a preliminary injunction applying only to the Andersons on Claim Three (commercial speech) and Claim Seven (unreasonable search). (T.R. 459-464.)

Claim Three (commercial speech) and Claim Seven (unreasonable search) were dismissed by Agreed Order on August 25, 2016, and the preliminary injunction was dissolved. (T.R. 828-830.)

The parties filed cross summary judgment motions on the remaining claims: (1) the STRP ordinance does not apply to the Andersons because they qualify for an exemption (Claim One), (2) the STRP ordinance is unconstitutionally vague (Claim Two), (3) the STRP ordinance violates equal protection (Claim Four), and (4) the STRP ordinance creates an unlawful monopoly (Claim Six). (T.R. 831, 1157.) On October 28, 2016, the Trial Court issued its Order:

- denying both parties' motions as it relates to Claim One (declining to rule as to whether the STRP ordinance applies to the Andersons);
- granting the Andersons' motion for summary judgment and denying Metro's motion as to Claim Two (finding the ordinance was vague);
- granting Metro's motion for summary judgment and denying the Andersons' motion as to Claim Four (finding there was no violation of equal protection); and
- granting Metro's motion for summary judgment and denying the Andersons' motion as to Claim Six (finding the ordinance did not create a monopoly).

(T.R. 1350-1355.)

Metro filed a Motion to Alter or Amend, or, in the Alternative, for a Stay on November 4, 2016 prior to the October 28, 2016 Order becoming final. (T.R. 1366.) Metro requested that the Trial Court reconsider its ruling on vagueness, limit its ruling to the Andersons, or stay the application of its ruling while the Metro Council pursued a legislative fix. (T.R. 1366-1367.) The Andersons, in turn, filed a motion requesting that the Trial Court issue a permanent injunction barring Metro from using the STRP definition and from taking continued enforcement action based upon the definition. (T.R. 1356-1363.)

The Trial Court issued an Order on December 19, 2016 amending its October 28, 2016 Order to clarify that the STRP ordinance is only unconstitutionally vague "as applied" to the Andersons and denying their request for a permanent injunction. (T.R. 1582-1595.)

Both parties appealed the Trial Court's ruling on January 13, 2017. (T.R. 1670, 1676.)

On January 23, 2017, the Trial Court issued an Order awarding Appellees $103,300 in attorneys' fees and $1,304.36 in discretionary costs, for a total award of $104,604.36. (T.R. 1680-1682.)

STATEMENT OF THE FACTS

The Andersons brought this § 1983 lawsuit seeking to invalidate two Metro ordinances. (T.R. 1-29, 98-108.) The ordinances govern short-term rental properties (STRPs), such as rentals through *www.airbnb.com*. (T.R. 98-108.) However, the ordinances do not ban short-term rentals. *Id.* They allow short term rentals so long as two primary conditions are met: (1) the applicant obtains a permit, and (2) pays taxes. *Id.* The ordinances also describe the contours of what constitutes an STRP in that bed and breakfast establishments, boarding houses, hotels, and motels are not considered. *Id.*

The ordinances at issue are BL 2014-909 (allowing short term rental as an accessory use for property zoned residential) and BL 2014-951 (requiring a permit, putting a limit of the amount of permits issued, requiring proof of insurance, smoke detectors, and creating a process for revoking a permit due to complaints). *Id.*

BL 2014-909 was introduced and passed first reading before the Metro Council on October 7, 2014. (T.R. 98-101.) It was referred to the Planning Commission and the Planning & Zoning Committee of the Metro Council. *Id.* After a few deferrals and the introduction of a substitute ordinance, it passed second reading on February 3, 2015. *Id.* BL 2014-951 was introduced and passed first reading on November 8, 2014. (T.R. 102-108.) It was deferred and then amended on second reading on February 3, 2015. *Id.* Both bills passed third reading on

February 24, 2015. (T.R. 98-108.) They were signed by then-Mayor Karl Deal on February 26, 2015 and became effective on March 6, 2015. *Id.*

Pursuant to these ordinances, there are two kinds of STRP permits for single-family homes, based on whether the owner occupies the premises. The first permit type allows "owner occupied" units. (T.R. 115-118.) There is no limit on the number of "owner occupied" permits that can be issued. *Id.* The second permit type is available for property owners that do not live on the premises. These "non-owner occupied permits" are limited in number. No more than three-percent of the residences within each census tract may be issued non-owner occupied STRP permits. *Id.*

The Andersons own a three-bedroom home at th Avenue North, Nashville, Tennessee in an R6 zoned district. (T.R. 7, 9.) They began using their home as a STRP in November 2013. (T.R. 8; Anderson Depo., p. 10, l. 13-18.) They obtained a permit in 2015, after the Metro permitting process went into effect. (T.R. 16; Anderson Depo., p. 13, l. 20 through p. 14, l. 4.) Their permit was for an owner occupied STRP. *Id.* Both owner occupied and non-owner occupied STRP permits were available beginning on July 1, 2015. (T.R. 1239.) Any property owner wishing to apply for either permit was able to at that time. *Id.*

In August 2015, the Andersons applied to convert their permit to a non-owner occupied permit. (T.R. 17; Anderson Depo., p. 15, l. 13-21.) Their request for a non-owner occupied permit was not granted because the three-percent cap had already been reached for their census tract. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

Metro appeal from the Trial Court's decision granting summary judgment to the Andersons based on vagueness. The granting or denying of summary judgment is a question of law, subject to *de novo* review. *Blair v. W. Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004).

Metro also has appealed the Trial Court's order awarding fees to the Andersons. "A trial court's decision to grant or deny fees is reviewed for abuse of discretion. That discretion is limited, however, by the requirement that only a prevailing party may qualify for a fee award. Additionally, if it is determined that a party meets the prevailing party requirement, fees should be awarded 'unless special circumstances would render such an award unjust.'" *Consolidated Waste Systems, LLC v. Metro. Gov't of Nashville and Davidson Cty.*, 2005 WL 1541860, *45 (Tenn. Ct. App. June 30, 2005) (internal citations omitted).

In *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn. 2001), the Tennessee Supreme Court provided the following guidance regarding the abuse of discretion standard:

> Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." *State v. Scott,* 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland,* 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley,* 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 927 (Tenn. 1998).

"An abuse of discretion exists when the reviewing court is firmly convinced that the lower court has made a mistake in that it affirmatively appears that the lower court's decision has no basis in law or in fact and is therefore arbitrary, illogical, or unconscionable." *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186, 191 (Tenn. 2000).

II. THE TRIAL COURT ERRED IN DETERMINING THAT THE STRP ORDINANCES ARE UNCONSTITUTIONALLY VAGUE "AS APPLIED" TO THE ANDERSONS.

A. The Trial Court applied the incorrect standard in determining whether the STRP ordinances were unconstitutionally vague due to inadequate notice.

The Trial Court stated that "there are two grounds on which a law may be found to be unconstitutionally vague: (1) if the law requires or forbids ' the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,' or (2) if the law 'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'"

The Trial Court specifically framed the question in this lawsuit as "whether these definitions [of STRP, hotel, bed and breakfast and boarding house] are reconcilable in such a way that a person of "ordinary," "common," or "average" intelligence has sufficient notice of whether they are an STRP or exempted as one of the other categories to the degree of certainty necessary to satisfy due process." But in reviewing the STRP ordinances to determine if the Andersons received adequate notice for due process concerns, the Trial Court failed to distinguish between the stricter analysis applied to statutes that are concerned with criminal conduct or first amendment freedoms and the more lenient analysis applied by courts when reviewing economic regulations.

"When a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim for vagueness." *Doe v. Staples,* 706 F.2d 985, 988 (6th Cir. 1983).

> [T]o constitute a deprivation of due process, it must be "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.,* 267 U.S. [233] at 239, 45 S.Ct. [295] at 297 [69 L.Ed. 589] (1925). To paraphrase, uncertainty in this

> statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible."

Id. (quoting *Exxon Corp. v. Busbee,* 644 F.2d 1030 (5th Cir. 1981)). The Trial Court should only have determined that the STRP ordinances are vague if they are "substantially incomprehensible," because the regulations at issue are civil[1] in nature and do not involve any First Amendment interests. Mere uncertainty as to their application is not enough.

"The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demand to plan behavior accordingly, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982).

Here, the Andersons are running a part-time business out of their home and are subject to the economic regulations contained in the STRP ordinances. The Andersons were aware of the

---

[1] A citation issued for the violation of a Metro ordinance is civil, not criminal, in nature. *See Clark v. Metro. Gov't of Nashville & Davidson Cty.,* 827 S.W.2d 312, 315 (Tenn. Ct. App. 1991); *Smith v. Metro. Gov't of Nashville & Davidson Cty.,* 2015 WL 1756419, *3 and ftnt 5 (Tenn. Ct. App. Apr. 13, 2015). The Tennessee Supreme Court has held several times that violations of city ordinances are civil matters. *See City of Chattanooga v. Davis,* 54 S.W.3d 248, 259-260 (Tenn. 2001) ("Since our decision in *City of Chattanooga v. Myers,* the law now appears settled that proceedings for a municipal ordinance violation are civil in nature, at least in terms of technical application of procedure and for pursuing avenues of appeal."); *City of Chattanooga v. Myers,* 787 S.W.2d 921, 928 (Tenn. 1990) ("For 130 years proceedings to recover fines for the violation of municipal ordinances have been considered civil for the purposes of procedure and appeal."); *see also, City of Knoxville v. Brown,* 284 S.W.3d 330, 338 (Tenn. Ct. App. 2008). Likewise, the Tennessee Attorney General has recently agreed that violations of municipal ordinances are civil in nature. Tenn. Op. Atty. Gen. No. 16-40, 2016 WL 6906610, *7 (Nov. 16, 2016) ("Violations of ordinances are local civil actions, not state criminal prosecutions.").

legislation when it was enacted and consulted with the Metro Codes Department in applying for their owner occupied permit and again in attempting to procure a non-owner occupied permit. They had the time and the opportunity to clear up any confusion they may have had about how the STRP ordinances apply to their property with Metro officials prior to filing their lawsuit.

Even if the Andersons were uncertain and chose not to obtain an STRP permit, they could not complain of inadequate notice due to vagueness – because they were aware that the ordinances might apply to their home. *See* Transcript of October 30, 2016 Hearing, p. 86, l. 18-22 ("Finally, Your Honor, they [the Andersons] may not have been confused. I don't think most short-term rentals in Nashville thought they were operating a hotel…"). Even in a criminal law context, "[a] person who is aware of a possible application of the statute and nevertheless proceeds cannot complain of inadequate notice when arrested. Indeed, an uncertain meaning should lead to citizens 'steer[ing] far wider of the unlawful zone' than if the statute were more precise in the use of its language." *State v. Burkhart,* 58 S.W.3d 694, 698 (Tenn. 2001).

Surely, if a person cannot claim a criminal statute is vague when he is aware of its possible application, then the Andersons should not be permitted to challenge economic regulations, such as the STRP ordinances, as unconstitutionally vague based on inadequate notice. Here, where the Andersons clearly understood that the STRP ordinances applied to their property (or at least thought they might and actually applied for a permit), it was improper for the Trial Court to determine that the laws are unconstitutionally vague as applied to their property due to inadequate notice. *See Hutsell v. Jefferson Cty. Bd. of Zoning Appeals,* 2005 WL 954646, *3 (Tenn. Ct. App. Apr. 26, 2005) ("Plaintiff's own testimony suggests that he understood the meaning and intent of the ordinances, and we conclude that this [vagueness] issue is without merit.").

B. The Trial Court erred in failing to consider the complete absence of any evidence of arbitrary enforcement or discrimination related to the STRP ordinances.

The Trial Court's orders have never addressed the question of arbitrary enforcement or discrimination. But this gap in its analysis is especially important because "the requirement that a legislature establish minimal guidelines to govern law enforcement" is the more important aspect of the vagueness doctrine. *Smith v. Goguen,* 415 U.S. 566, 574 (1974).

The Andersons repeatedly alluded to the potential for arbitrary enforcement by Metro Zoning officials – arguing that Metro could cite the Andersons for failure to procure an STRP permit one day and then for operating an illegal hotel the next. But what should have been critical to the Trial Court's vagueness analysis is the fact that "no evidence in the record suggests that the [ordinances] have actually been enforced in an arbitrary or discriminatory manner." *State v. Burkhart,* 58 S.W.3d at 700 (citing *Village v. Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982)). Speculation about possible vagueness in hypothetical situations not supported by the facts of the case is not sufficient to support a determination that the STRP ordinances are constitutionally vague. *Hill v. Colorado,* 530 U.S. 703, 732 (2000).

There is nothing in the record that indicates that Metro Zoning officials enforced the STRP ordinances in the arbitrary and discriminatory manner that the Andersons have speculated might occur. Instead, the record indicates that Metro Codes officials agreed with the Andersons that their property qualified as an STRP – when they applied, they were granted an owner occupied STRP permit. Likewise, the Andersons produced no evidence that Metro Codes officials attempted to enforce hotel, bed and breakfast or boarding house regulations against them.[2]

---

[2] The Andersons have continually insisted that the STRP ordinances have been arbitrarily enforced because they have been asked to pay hotel occupancy taxes. But this has nothing to do with the enforcement of the STRP ordinances. The letter sent by the Metro Finance Department informing the

C. The Trial Court erred when it did not give any deference to local zoning officials' interpretation of the STRP ordinances and found that land use definitions in the Zoning Code cannot overlap in their application.

"The meaning of a zoning ordinance and its application are, in the first instance, questions for the local officials to decide. Thus, the courts attach great significance to the local officials' prior interpretations of an ordinance..." *Whittemore v. Brentwood Planning Com'n, City of Brentwood,* 835 S.W.2d 11, 16 (Tenn. Ct. App. 1992) (internal citations omitted). In this case, when the Andersons were given an owner occupied permit, Metro officials determined that the Andersons' home fit the definition of an STRP, rather than into other land use definitions, such as hotel, bed and breakfast or boarding house.

Ordinarily, a property owner who is aggrieved by the denial of an STRP permit would appeal to the Metro Board of Zoning Appeals pursuant to Metro Code 17.40.180(A). Here, the Andersons did not appeal the denial of their permit. Rather, they challenged the entire regulatory scheme on constitutional grounds. But this deprived the Trial Court of a record on the issue of how the Board of Zoning Appeals might interpret and apply the STRP ordinances and the land use definitions in the Zoning Code to the Andersons' property – something the Board of Zoning Appeals is designed to do.[3]

The Trial Court was left to interpret the ordinances without assistance from an administrative record. While this is permissible, it does not mean that the local government

---

Andersons that they were liable for hotel occupancy taxes was sent in November 2014, prior to the passage of the STRP ordinances. How can an attempt to enforce an entirely different Metro Code provision and state statute be evidence of arbitrary enforcement of an ordinance that had not even been enacted yet? It cannot. Even if the STRP ordinances were struck down in their entirety, the Andersons will continue to be liable for hotel occupancy taxes as long as they rent their home through Airbnb. Tenn. Op. Atty. Gen. No. 15-78, 2015 WL 8538116, *3-4 (Dec. 1, 2015).

[3] As mentioned in the first section of this argument, the Supreme Court has indicated that when "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process" the courts should have a greater tolerance for vagueness. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982).

officials' interpretation is irrelevant. The courts "ultimately take responsibility for construing statutes and ordinances. While they may defer to fairly debatable interpretations, they will not hesitate to set an interpretation aside if it is arbitrary and capricious, if it is contrary to the drafter's intent, or if it undermines the statute's or ordinance's validity. *Whittemore,* 835 S.W.2d at 16 (internal citations omitted).

But in this case, the Trial Court did not give any deference to local zoning officials' interpretation of the STRP ordinances, or the Andersons' own acknowledgement that they were an STRP. It also did not determine that Metro's interpretation was arbitrary or contrary to the intent of the Metro Council. Instead, the Trial Court determined there must be a crystal clear delineation between each land use category in order to escape a vagueness challenge. But courts have never required that level of scientific precision in zoning cases – in fact, numerous Tennessee court decisions revolve around choosing between two "fairly debatable" land use classifications. *See, e.g., Walker v. Metro. Bd. of Parks and Recreation,* 2009 WL 5178435, *14 (Tenn. Ct. App. Dec. 30, 2009) (finding that the BZA's decision as to whether a proposed baseball field at Belmont University should be classified as a "recreation center" or a "stadium" for land use purposes should be upheld where the interpretation of an ordinance is "fairly debatable"); *Capps v. Metro. Gov't. of Nashville and Davidson Cty.,* 2008 WL 5427972, *8 (Tenn. Ct. App. Dec. 31, 2008) (finding that the BZA's determination that the Nashville Union Rescue Mission fits the definition of a "church" for land use purposes where its decision is supported by material evidence).

In finding that any overlap in the application of land use definitions in the Zoning Code is unconstitutionally vague, even when a property owner has the opportunity to appeal to the Board of Zoning Appeals to flesh out or dispute the proper classification for their property, the Trial

Court held Metro to a standard that is not the rule in Tennessee and failed to give any deference to the judgment of Metro land use officials as to how to apply the definitions at issue.

D. The Trial Court erred when it failed to attempt to give the STRP ordinances a reasonable construction prior to finding they are unconstitutionally vague.

Rather than striking the ordinances down "on vagueness grounds merely because they could have been drafted with greater readability," the Trial Court had the responsibility to give them a reasonable construction. *Hutsell,* 2005 WL 954646 at *3 (citing *State v. Wilkins,* 655 S.W.2d 914, 915 (Tenn. 1983)). This is especially true when, as is the case here, the "evil sought to be prevented is apparent ... [and] uncertainty can ... be removed by resort to the context, instead of attempting to construe the words themselves." *Id.* (quoting *State v. Sanner Contracting Co.,* 514 P.2d 443, 445-446 (Ariz. 1973)). Rather than find such an ordinance vague, "[i]t is the duty of this Court to adopt a construction which will sustain [the ordinances] and avoid constitutional conflict if [their] recitation permits such a construction." *State v. Lyons,* 802 S.W.2d 590, 592 (Tenn. 1990).

After all, the constitutional prohibition on vagueness does not invalidate every potentially confusing phrase:

> [Vagueness] does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness for [i]n most English words and phrases there lurk uncertainties... Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what statutes may compel or forbid.

State v. Wilkins, 655 S.W.2d 914, 915 (Tenn. 1983) (quoting *Rose v. Locke,* 423 U.S. 48, 50 (1975)). "[A] land use regulation that can be upheld by giving it a reasonable construction will not be declared void for vagueness." *Smith County v. Enoch,* 2003 WL 535914, *7 (Tenn. Ct. App. Feb. 26, 2003). "[T]he less-than-perfect wording of [a land use regulation] presents a

problem more of statutory ambiguity than a case of unconstitutional vagueness." *Id.; see also, Bean v. McWherter,* 24 S.W.3d 325, 333 (Tenn. Ct. App. 1999) ("That is not uncertain or vague which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.").

The Trial Court's inquiry should have begun "with the premise that local zoning regulations are presumed valid." *PHN Motors, LLC v. Medina Tp.,* 498 Fed.Appx. 540, 546 (6th Cir. 2012) (citing *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303, 308 (6th Cir. 1983)). "Courts must indulge ever presumption in favor of validity and resolve any doubt in favor of the constitutionality of the statute." *State v. Silaski,* 238 S.W.3d 338, 363 (Tenn. Crim. App. 2007).

In attempting to give an imprecise ordinance a reasonable construction that would save it from a vagueness challenge, "[c]ourts should construe ordinances using the same principles used to construe statutes. ... If ... the ordinance lacks precision, the courts should call upon their arsenal of interpretational rules, presumptions, and aids to arrive at the ordinance's meaning and intent." *Whittemore,* 835 S.W.2d at 15. "When courts are called upon to construe a statute, their goal is to give full effect to the [legislature's] purpose, stopping just short of exceeding its intended scope." *Lee Medical, Inc. v. Beecher,* 312 S.W.3d 515, 526 (Tenn. 2010). And "[b]ecause the legislative purpose is reflected in the statute's language, the court must always begin with the words the [legislature] has chosen." *Id.*

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). This Court should interpret the Zoning Code "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.,* 513 U.S.

561, 569 (1995), and "fit, if possible, all parts into an harmonious whole." *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959); *see also, Lee Medical,* 312 S.W.3d at 526-527 ("[B]ecause these words are known by the company they keep, courts must also construe these words in the context in which they appear in the statute and in light of the statute's general purpose. ... Conflicting provisions in a statute may create ambiguity. In this circumstance, the courts should endeavor to give effect to the entire statute by harmonizing the conflicting provisions ... and by construing each provision consistently and reasonably.").

Rather than use the rules of statutory construction to interpret the meaning of the STRP ordinances as applied to the Andersons' property, the Trial Court should have given the ordinances a reasonable construction prior to finding them void for vagueness. For these reasons, Metro asks that the Trial Court's finding be reversed.

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

The Trial Court determined that the Andersons were "the prevailing party within the meaning of 42 U.S.C. § 1983 because the Court granted summary judgment on their Fourth Amendment 'vagueness' claim." If this Court determines that the Trial Court erred in granting summary judgment to the Andersons on their vagueness claim, then the attorney fees award must be vacated. However, in the event this Court finds otherwise, Metro still contends that the Trial Court erred in finding that the Andersons were prevailing parties under 42 U.S.C. § 1988(b) for purposes of awarding attorney's fees. Additionally, even if the Andersons are prevailing parties, the Trial Court nevertheless erred in awarding it attorney's fees and costs because their success was so limited.

A. The Trial Court erred in awarding attorney fees because the Andersons do not meet the definition of prevailing parties under 42 U.S.C. § 1988.

"[P]revailing party" is a "legal term of art." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 603 (2001). "A typical formulation is that 'plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278 (1st Cir. 1978)).

Since *Hensley,* the Supreme Court has continued to elaborate on the definition of prevailing party. In *Hewitt v. Helms,* 482 U.S. 755 (1987), the Supreme Court required "a plaintiff [to] receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760. Specifically, the plaintiff must prove "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Id.* at 761 (emphasis in original).

One year later, in *Rhodes v. Stewart,* 488 U.S. 1 (1988), the Court "reversed an award of attorney's fees premised solely on a declaratory judgment that prison officials had violated the plaintiffs First and Fourteenth Amendment rights." *Farrar v. Hobby,* 506 U.S. 103, 110 (1992) (citing *Rhodes,* 488 U.S. at 4). The Court explained its ruling stating that "nothing in [*Hewitt*] suggested that the entry of [a declaratory] judgment in a party's favor automatically renders that party prevailing under § 1988." *Rhodes,* 488 U.S. at 3. Rather, "a judgment – declaratory or otherwise – 'will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Farrar,* 506 U.S. at 110 (citing *Rhodes,* 488 U.S. at 4).

In *Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782 (1989), the Court held, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. The Court reemphasized that

"[t]he touchstone of the prevailing party must be the material alteration of the legal relationship of the parties." *Id.* at 792-793.

Finally, in *Farrar v. Hobby,* 506 U.S. 103 (1992), the Court summarized its prior rulings on the meaning of prevailing party, holding that "[i]n short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-112 (emphasis added). "Absent a direct benefit, the plaintiff achieves only a symbolic victory, which § 1988(b) does not compensate." *McQueary v. Conway,* 614 F.3d 591, 598 (6th Cir. 2010).

Here, the Andersons succeeded in securing a declaratory judgment that the current STRP ordinances are unconstitutionally vague as applied to the Andersons' use of their property and are, therefore, unenforceable against them. The Andersons were not successful in their request for a permanent injunction, and the Trial Court limited the effect of its ruling to the Andersons, so the STRP ordinances remain enforceable against all other properties in Davidson County. The Andersons were also not successful in obtaining a judgment in their favor on any of the other six claims they presented in this lawsuit. Therefore, the only claim upon which their prevailing party status can be premised is their "as-applied" vagueness claim.

In its December 16, 2016 Order, the Trial Court concluded that the Andersons' property "fit into both the definition of STRP and the definitions of the properties explicitly and specifically exempted from the definition of STRP," referring to the land use categories for hotel, bed and breakfast inn and boarding house. Essentially, the Trial Court adopted the Andersons' interpretation of the Metro Code, in which the their short-term rental qualifies as a hotel, bed and breakfast inn, boarding house and an STRP for land use purposes.

Because STRPs are the only short-term rental uses permitted in their R6 district, if the STRP ordinances are unconstitutional, then any short-term rental occupancy of the Andersons' home would still be illegal. The legal relationship of the parties has not changed to benefit the Andersons: prior to the passage of the STRP ordinances, the Andersons (and all residential property owners in Davidson County) could not legally operate a short-term rental in a residential neighborhood, and now, after the Trial Court's ruling, the Andersons still cannot legally operate a short-term rental.

Given that the entire purpose behind the Andersons' lawsuit was to allow them to operate a non-owner occupied STRP and the opposite outcome has materialized, even if the Trial Court's ruling is affirmed, it has not changed the legal relationship between the parties in a way that directly benefits the Andersons, and they have achieved, at best, a "symbolic victory" for which attorney's fees are not warranted under § 1988.

B. Even if the Andersons are prevailing parties, they are not entitled to attorney fees because their success in this case was so limited.

"Section 1988 only allows a prevailing party to recover its 'reasonable' attorneys' fees." *Gratz v. Bollinger,* 353 F.Supp. 929 (E.D. Mich. 2005). "Once civil rights litigation materially alters the legal relationship between the parties, 'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award." *Farrar,* 506 U.S. at 114 (quoting *Garland,* 489 U.S. at 793). In fact, "the most critical factor" in determining a reasonable fee award "is the degree of success obtained." *Hensley,* 461 U.S. at 436.

In *Farrar,* the Supreme Court upheld the reversal of a § 1988 award of $280,000 in attorney's fees to the plaintiffs, who recovered only nominal damages of $1 after seeking damages of $17 million. *Id.* at 115-116. In doing so, the Court recognized that "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no

attorney's fees at all." *Farrar,* 506 U.S. at 115. "When the plaintiff's success is purely technical or *de minimus,* no fees can be awarded. Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Id.* at 117.

In the present case, the Andersons' success is technical or *de minimus*, and therefore, no fees are justified. The purpose of the Andersons' lawsuit is described in Paragraph 1 of their Complaint:

> This civil rights lawsuit seeks to vindicate the rights of Rachel and Paul John ("P.J.") Anderson ("the Andersons") to list their home on Airbnb.com free from vague, arbitrary and irrational government regulation. The Andersons want to continue to provide a unique, affordable and safe way for people to enjoy Nashville by staying in the Andersons' home. The Andersons are alleviating the problem of a lack of bed space in the downtown area that has been used to justify millions of taxpayer dollars in recent years to attract hotels. Standing in their way is an arbitrary cap on the number of permits to operate short-term rental properties ("STRPs") in their neighborhood that is part of Metropolitan Nashville's ("Metro") new law regulating STRPs.

The Andersons' primary focus was clearly to invalidate the three-percent cap on non-owner occupied STRPs and to rent their home through Airbnb.com without residing in the property. There is no question they did not succeed in this regard.

In its October 28, 2016 Order, the Trial Court ruled in Metro's favor in determining that the three-percent cap does not violate Equal Protection or the anti-monopoly clause in the Tennessee Constitution and upheld the Council's right to regulate and limit STRPs within Davidson County. As clarified in its December 16, 2016 Order, the Trial Court determined that the definition of STRP is unconstitutionally vague as applied to the Andersons' short-term rental use of their home because it concluded that the Andersons' home fits within the definitions of STRP, hotel, bed and breakfast and boarding house. But the Court limited its ruling on the vagueness issue to the Andersons, finding that the they "have simply not met their burden of

proving that the STRP ordinance is 'impermissibly vague in all of its applications,' and that 'no standard of conduct is specified at all.'" (T.R. 1584-1589) (internal citations omitted).

The Andersons have never provided any evidence of actual harm due to their alleged confusion related to whether the STRP ordinances applied to their property or not, and the Trial Court made no specific findings as to how the vagueness of the STRP definition harmed the Andersons. Like the plaintiff in *Farrar,* the Andersons may only be satisfied with a "moral victory" that their constitutional rights have been violated in some ambiguous way. This is especially true because there has been no constitutional injury due to the application of the STRP ordinances to the Andersons' home. Prior to the enactment of the ordinances, the short-term rental of their residence was not a permitted use, and with the Trial Court's ruling declaring the STRP ordinances unenforceable against the Andersons, they still may not undertake such use because all the other short-term rental uses (i.e., hotel, bed and breakfast inn and boarding house) are not permitted in the Andersons' neighborhood.

C. The Trial Court erred when it failed to adequately consider the relationship between the Appellee's extent of success and the amount of the fee awarded.

The Supreme Court has "held that a party's fee award must be reduced where the party prevailed on some but not all of the claims presented." *Knop v. Johnson,* 712 F.Supp. 571, 574 (W.D. Mich. 1989) (citing *Hensley,* 461 U.S. at 435). "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants ... counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Hensley,* 461 U.S. at 435 (quoting *Davis v. Cty. of Los Angeles,* 1974 WL 180, *3 (C.D. Cal. Jun. 5, 1974)). However, where the plaintiff's claims "involve a common

core of facts" or are "based on related legal theories" such that the "lawsuit cannot be viewed as a series of discrete claims," the Court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley,* 461 U.S. at 435.

In cases where "a plaintiff has achieved only partial or limited success," a party's fee award should be reduced accordingly. *Id.* at 436. "This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." *Id.* The Supreme Court has given the trial court the discretion to "attempt to identify specific hours that should be eliminated" or to "simply reduce the award to account for the limited success." *Id.* at 436-437. But ultimately, "[t]he result is what matters." *Id.* at 435; *see also Granzeier v. Middleton,* 173 F.3d 568, 578 (6th Cir. 1999) (citing *Phelan v. Bell,* 8 F.3d 369 (6th Cir. 1993) ("[A]ttorney's fee awards are to be proportional to the prevailing party's degree of success.").

In *Hensley,* Plaintiffs brought a lawsuit on behalf of all persons involuntarily confined at a forensic unit of a state hospital, challenging the constitutionality of treatment and conditions at the hospital. *Id.* at 426. After a trial, the District Court found constitutional violations in five of the six general areas of treatment and awarded an attorney's fee of $133,332.25. *Id.* at 427-428. The Supreme Court vacated the lower court's decision and remanded the matter to the District Court because it "did not properly consider the relationship between the extent of success and the amount of the fee award."

Generally, a trial court's determination of attorney fees should be upheld by an appellate court unless the trial court has abused its discretion. *Wright ex rel. Wright v. Wright,* 337 S.W.3d 166, 176 (Tenn. 2011). "While the 'abuse of discretion' standard limits the scope of our review of discretionary decisions, it does not immunize these decisions completely from appellate

review. Even though it prevents us from second-guessing the trial court, or from substituting our discretion for the trial court's discretion, it does not prevent us from examining the trial court's decision to determine whether it has taken the applicable law and the relevant facts into account. We will not hesitate to conclude that a trial court 'abused its discretion' when the court has applied an incorrect legal standard, has reached a decision that is illogical, has based its decision on a clearly erroneous assessment of the evidence, or has employed reasoning that causes an injustice to the complaining party." *Boyd v. Comdata Network, Inc.,* 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002) (internal citations omitted).

Here, the Andersons requested $144,620 in attorney fees and $1,645.86 in discretionary costs, but the Trial Court awarded a lesser amount: $103,300 in attorney fees and $1,304.36 in discretionary costs. The Trial Court stated that it considered a number of factors in awarding attorney fees and costs: "the time devoted to performing the legal service; the time limitations imposed by the circumstances; the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly; the fee customarily charged in this locality for similar legal services; the amount involved; the results obtained; and the experience, reputation, abilities of the attorney performing the legal service." Notably, the Trial Court's order contains no analysis of these factors, and the order does not state that the Trial Court even considered the relationship between the extent of success and the amount of the fee award as required by *Hensley*. Therefore, this Court can only speculate as to why the Trial Court reduced the award in this manner.

As in *Hensley,* this Court should vacate the Trial Court's award of attorney fees because the Trial Court apparently did not consider the relationship between the extent of success and the amount of the fee award as mandated by the Supreme Court. Further, Tennessee courts should

vacate attorney fee awards where the trial court's order fails to make findings of fact and conclusions of law as required by Tenn. R. Civ. P. 52.01. *See Harthun v. Edens,* 2016 WL 1056960, *4-5 (Tenn. Ct. App. Mar. 17, 2016).

CONCLUSION

The Trial Court's finding that the STRP ordinances are vague as applied to the Andersons' property is premised on the idea that there must be a clear demarcation between each land use classification – hotel, bed and breakfast, boarding house, and STRP. This is a standard that has never been applied by Tennessee courts to zoning laws, and therefore, it should not have been applied to the STRP ordinances, especially when property owners have the opportunity for review by the Board of Zoning Appeals. Further, the Trial Court failed to take into consideration the lesser degree of precision required for economic regulations and the total lack of evidence of arbitrary or discriminatory enforcement of these ordinances. The issue before the Trial Court should have been viewed as one of statutory ambiguity that could be solved by giving the ordinances a reasonable construction rather than declaring them to be unconstitutionally vague.

If this Court affirms the ruling on the merits, the Trial Court's award of attorney fees should be vacated on the grounds that the Andersons are not prevailing parties, their success was merely *de minimus* in nature, and the Trial Court failed to support its decision by analyzing the relationship between the extent of success and the amount of the fee awarded.

For these reasons, Metro 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.

Respectfully submitted,

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #023571
Director of Law

Lora Barkenbus Fox, #17243
Catherine J. Pham, #28005
Metropolitan Attorneys
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219-6300
(615) 862-6341

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, P.O. Box 198646, Nashville, TN 37219 on May 11, 2017.

Catherine J. Pham