SUMMARY

Should this Court grant certiorari to settle important questions of law and public interest, specifically, whether a zoning code must contain crystal clear delineation between land use categories in order to escape a vagueness challenge; and to decide whether a preliminary injunction that was later dissolved due to a change in the challenged law should be the basis for an attorney fee award?

In 2015, the Metropolitan Council enacted two ordinances aimed at regulating the new phenomenon of short-term rentals through a permit-system. Rachel and P.J. Anderson applied for and were granted an owner occupied short-term rental (STRP) permit. When the Andersons decided to move to Chicago and wanted to 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 Metropolitan Council had already been reached in their neighborhood.

The Andersons filed suit, asking the Trial Court[1] to declare the STRP ordinances unconstitutional on various grounds. On cross-summary judgment motions, the Trial Court dismissed the Andersons' equal protection and monopoly claims but determined that the STRP ordinances were unconstitutionally vague as applied to the Andersons' property because there was some overlap in the land use definitions related to short-term rental occupancy in the Metropolitan Zoning Code. Further, the Trial Court awarded $104,604.36 in attorney fees and costs to the Andersons based on its vagueness ruling.

On appeal, the Court of Appeals declined to reach the merits of the vagueness issue because it determined that the issue had become moot on appeal due to the passage of a new STRP ordinance. The Court also vacated the Trial Court's attorney fee award due to the

[1] The Honorable Kelvin D. Jones, Judge, Eighth Circuit Court, Davidson County, Tennessee shall be referred to as "the Trial Court." The technical record shall be cited to as "T.R. ___."

insufficiency of its findings and remanded the matter for reconsideration. However, in doing so, the Court specifically found that the Andersons were prevailing parties not only as to the vagueness question but also pursuant to a preliminary injunction that had been dismissed.

Because the Court of Appeals did not reach the merits of the vagueness claim, the Trial Court's ruling, which is based on a misunderstanding of the applicable standard for vagueness, has created confusing precedent for property owners and city officials in Nashville. Further, the Court of Appeals' decision to find that the Andersons are prevailing parties based on their success with a preliminary injunction is contrary to United States Court of Appeals for the Sixth Circuit law on that very issue.

DATE OF JUDGMENT

The Court of Appeals issued its decision on January 23, 2018. A copy of the decision is attached. On February 2, 2018, Metro filed a petition for rehearing. On February 6, 2018, the Court of Appeals issued its Order denying Metro's petition. The Metropolitan Government timely requests permission to appeal pursuant to Tenn. R. App. P. 11.

QUESTIONS PRESENTED

1. Whether a zoning code may contain land use categories that overlap in their definitions without creating a constitutional vagueness problem?

2. Whether a preliminary injunction that has been dissolved due to a change in the challenged law can be the basis for an attorney fee award?

FACTS RELEVANT TO THE QUESTIONS PRESENTED

I. THE METRO ORDINANCES AT ISSUE

The Andersons brought this 42 U.S.C. § 1983 lawsuit seeking to invalidate two Metropolitan ordinances. (T.R. 1-29, 98-108.) The ordinances governed short-term rental

properties (STRPs), colloquially known as "Airbnbs." (T.R. 98-108.) The ordinances do not ban short-term rentals. *Id.* The Metropolitan Council authorized 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 described the contours of what constitutes an STRP in that bed and breakfast establishments, boarding houses, hotels, and motels are not regulated as STRPs. *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 Metropolitan Council on October 7, 2014. (T.R. 98-101.) It was referred to the Planning Commission and the Planning & Zoning Committee of the Metropolitan 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 were two kinds of STRP permits for single-family homes, based on whether the owner occupies the premises. The first permit type allowed "owner occupied" units. (T.R. 115-118.) There was no limit on the number of "owner occupied" permits that can be issued. *Id*. The second permit type was available for property owners that do not live on the premises. These "non-owner occupied permits" were limited in

number. No more than three-percent of the residences within each census tract could be issued non-owner occupied STRP permits. *Id*.

II. THE LAND USE CATEGORIES AT ISSUE

At that time, "Short Term Rental Property (STRP)" was defined in the Metropolitan Zoning Code as:

> A residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised for rent for transient occupancy by guests as those terms are defined in Section 5.12.010 of the metropolitan code. Dwelling units rented to the same occupant for more than 30 continuous days, Bed and Breakfast establishments, boarding houses, hotels, and motels shall not be considered Short Term Rental Property.

Metropolitan Code § 17.04.060 (T.R. 223).

The Zoning Code also contained definitions for "bed and breakfast inn" and "boarding house":

> Bed and breakfast inn – Four through ten furnished guest rooms for pay. Meals may be provided to overnight guests. The maximum stay for any guest shall be fourteen consecutive days.
>
> Boarding house – A residential facility or a portion of a dwelling unit for the temporary accommodation of persons or families in a rooming unit, whether for compensation or not, who are in need of lodging, personal services, supervision, or rehabilitative services.

Metropolitan Code § 17.04.060 (T.R. 209).

Hotel and motel were not defined terms in the Metropolitan Zoning Code, and therefore, the Zoning Code directs that "the definition found in the most current edition of Webster's Unabridged Dictionary shall be used." Metropolitan Code § 17.04.060(A) (T.R. 207).

Pursuant to the Zoning Code's District Land Use Table, STRPs were permitted as an accessory use in all but a few select zoning districts. Metropolitan Code § 17.08.030 (T.R. 236). Hotels, motels, and bed and breakfasts, on the other hand, were only permitted in commercial zoning districts, and while boarding houses were permitted in some multi-family

residential districts, they were not permitted in single-family/two-family districts. Metropolitan Code § 17.08.030 (T.R. 236, 238).

III. THE ANDERSONS

The Andersons own a three-bedroom home at 1623 5th Avenue North, Nashville, Tennessee in an R6 zoned district. (T.R. 7, 9.) They began renting out their home on a short-term basis in November 2013. (T.R. 8; Anderson Depo., p. 10, l. 13-18.) They applied for a permit in 2015, after the permitting process went into effect, and based on their application, the Metropolitan Codes Department issued them an owner occupied STRP permit. (T.R. 16; Anderson Depo., p. 13, l. 20 through p. 14, l. 4.)

In August 2015, the Andersons applied to convert their permit to a non-owner occupied STRP 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.*

IV. THE TRIAL COURT FOUND THAT THE DEFINITION OF STRP WAS UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE ANDERSONS' PROPERTY.

The Trial Court determined that the STRP ordinance at issue was unconstitutionally vague because "The definitions of STRP, bed and breakfast, boarding house, and hotel overlap, such that a single property could fall into one, several, or all of the aforementioned property classifications." (T.R. 1352). 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." (T.R. 1592).

The evidence presented to the Trial Court indicated that the Andersons voluntarily applied for an owner occupied STRP permit, acknowledging that they understood the ordinances applied to the use of their property. (T.R. 16; Anderson Depo., p. 13, l. 20 through p. 14, l. 4.) Consistent with the intent of the ordinances and the Metropolitan Government's understanding of the ordinances, the Codes Department issued the permit to the Andersons. *Id.* Further, hotels, bed and breakfasts and boarding houses are not permitted uses in the Andersons' R6 zoning district, while STRPs are allowed if the property owner is issued a permit. Metropolitan Code § 17.08.030 (T.R. 236, 238). 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 Board of Zoning Appeals.

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 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.

V. THE TRIAL COURT AWARDED ATTORNEY FEES TO THE ANDERSONS.

The Andersons requested attorney fees based on their assertion that they were "prevailing parties" related to their vagueness claim and also two claims that prevailed in a preliminary injunction but were later dismissed as moot. (T.R. 1467). However, 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." (T.R. 1680). The Trial Court did not explain why it did not find the Andersons to be prevailing based on the preliminary injunction. *Id.*

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. (T.R. 1667). 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." (T.R. 1680). Notably, the Trial Court's order contains no analysis of these factors. *Id.*

VI. THE COURT OF APPEALS DECLINED TO REACH THE MERITS OF THE VAGUENESS ISSUE BECAUSE THE STRP ORDINANCES WERE AMENDED WHILE THE APPEAL WAS PENDING.

The Court of Appeals surmised that because the Andersons' vagueness claim was related to a definition that was amended by the Metropolitan Council while the case was pending on appeal, the issue was moot:

> Here, the record reflects that Metro passed a new ordinance to deal with the STRP definition after the trial court declared the prior ordinance unconstitutional. Specifically, subsequent to the filing of notices of appeal in this case, Metro approved Substitute Ordinance No. BL2016-492.
>
> In pertinent part, the new ordinance deletes the previous definition of "Short Term Rental Property" and replaces it with a new one. Under the new ordinance, a STRP "means a residential dwelling unit containing not more than four sleeping rooms that is used and/or advertised only through an online marketplace for rent for transient occupancy by guests." Notably, unlike the old definition, the new definition does not pose the issue complained about by the Andersons. That is, it does not state that bed and breakfast establishments, boarding houses, hotels, and motels shall not be considered "Short Term Rental Property." In any event, the new ordinance also provides new definitions for "Hotel," "Bed and breakfast inn," and "Boarding house."
>
> Because the Andersons' constitutional "vagueness" claim relates to a definition that is no longer in place, our inquiry into the matter would not be an inquiry into

> a "legal controversy." The issue is a moot one. As such, we decline to address the matter.

(Ct. App. Op., p. 8).

Neither the Andersons nor the Metropolitan Government briefed the Court of Appeals on whether the case remained justiciable despite the change in the law. In this case, declining to reach the merits creates negative consequences for the Metropolitan Government and the general public – the Metropolitan Government remains on hook for over a hundred thousand dollars of attorney fees and the Trial Court's ruling now has the potential to affect how local officials and Nashville citizens interpret other overlapping land use categories, a common occurrence in the Zoning Code.

VII. THE COURT OF APPEALS VACATED THE TRIAL COURT'S AWARD OF ATTORNEY FEES AND REMANDED THE ISSUE FOR RECONSIDERATION AND FURTHER FINDINGS.

The Court of Appeals determined that the Trial Court's order awarding attorney fees to the Andersons was not sufficiently clear to allow for intelligent appellate review:

> With that said, it is somewhat unclear why the Andersons were awarded the amount of fees ordered by the trial court. We might surmise that the trial court gave an amount less than had been requested because it considered the Andersons to have prevailed on some claim(s), i.e., the vagueness claim, but not others. After all, the order does specifically mention that the Andersons "are the prevailing party … because the Court granted summary judgment on their Fourteenth Amendment 'vagueness' claim." However, on the whole, were are of the opinion that the order does not provide a sufficient account for our appellate review.
> …
>
> Because we would largely be forced to speculate how the trial court considered the relevant factors incident to its § 1988 award, we must vacate the trial court's award on attorney's fees and remand for reconsideration and further findings.

(Ct. App. Op., p. 17-18).

Despite finding that the Trial Court had not adequately explained its reasoning in determining the amount of the fee award, the Court of Appeals went on to disagree with the

"implication from the order" that the Trial Court did not consider the Andersons to be prevailing parties on their free speech and seizure claims. This was based on their success in obtaining a preliminary injunction, despite the fact that it was later dissolved when the laws were amended. (Ct. App. Op., p. 18).

The Court of Appeals acknowledged that "it does not appear that the federal courts have uniformly employed the same analysis governing when a preliminary injunction might confer prevailing party status." (Ct. App. Op., p. 18-19). However, the Court determined, based on the federal cases that it found in its research, that the Andersons were prevailing parties. *Id.*

DISCUSSION

I. STANDARD OF REVIEW.

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).

"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), this 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. REASONS SUPPORTING REVIEW BY THE SUPREME COURT.

Rule 11 of the Rules of Appellate Procedure states:

> In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

The Metropolitan Government requests permission to appeal to this Court regarding two issues that meet all four criteria, specifically:

- **May a Trial Court determine that a land use definition in a Zoning Code is unconstitutionally vague as applied to a plaintiff's property solely based on the fact that the definition overlaps in some ways with other land use categories, when the evidence indicates that the plaintiff had sufficient notice that the provision applied to their property and no enforcement action has ever been taken against the plaintiff?**

- **May an appellate court make the contextual and case specific determination that a plaintiff is a "prevailing party" for purposes of 42 U.S.C. § 1988 in the first instance when the Trial Court's decision related to the fee award does not contain sufficient findings for appellate review?**

Vagueness

A. The Court of Appeals decision declining to reach the merits of the vagueness claim leaves in place a Trial Court ruling that radically alters the requirements for land use law, and therefore, it presents an exception to the mootness doctrine.

The definitions at issue in this case were changed by the Metropolitan Council while this appeal was pending, and while generally the Court should be reluctant to address moot claims, Tennessee appellate courts "may exercise their judgment and discretion to address issues of great importance to the public and the administration of justice." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cty.*, 301 S.W.3d 196, 210 (Tenn. 2009). "To guide their discretion, the courts should first address the following threshold considerations: (1) the public interest exception should not be invoked in cases affecting only private rights and claims personal to the parties; (2) the public interest exception should be invoked only with regard to 'issues of great importance to the public and the administration of justice'; (3) the public interest exception should not be invoked if the issue is unlikely to arise in the future; and (4) the public interest exception should not be invoked if the record is inadequate or if the issue has not been effectively addressed in earlier proceedings." *Id.*, 210-211.

Here, the Andersons' lawsuit sought to declare void and unenforceable the entire STRP ordinance. While ultimately the Andersons only succeeded in a declaration that the ordinance is unenforceable as applied to their property, the Trial Court's ruling has far-reaching implications for the rights of all property owners in Davidson County.

Essentially, the Trial Court took issue with the overlap in the definitions of STRP, hotel, bed and breakfast and boarding house, but such overlap in land use categories is commonplace in the Metropolitan Zoning Code. "The decision as to whether to retain a moot case in order to pass on a question of public interest lies in the discretion of the court and generally a court will

determine a moot question of public importance if it feels that the value of its determination as a precedent is sufficient to overcome the rule against considering moot questions." *Dockery v. Dockery,* 559 S.W.2d 952, 954 (Tenn. Ct. App. 1977). Here, the precedent set by the Trial Court's ruling has the potential to affect how local officials and Nashville citizens interpret other overlapping land use categories and whether those definitions may also be found unconstitutionally vague.

There is good reason to believe this issue will arise again in the future. 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 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, but the Trial Court's ruling calls this process into question. *See* Metropolitan 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) (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). Finally, the record is more than adequate to address the merits of the vagueness claim and both parties have briefed the issue multiple times.

Because the threshold considerations meet the public interest exception to the mootness doctrine, the next step is to "balance the interests of the parties, the public, and the courts to determine whether the issues in the case are exceptional enough to address. In making this determination, the courts may consider, among other factors, the following: (1) the assistance that a decision on the merits will provide to public officials in the exercise of their duties, (2) the likelihood that the issue will recur under similar conditions regardless of whether the same parties are involved, (3) the degree of urgency in resolving the issue, (4) the costs and difficulties in litigating the issue again, and (5) whether the issue is one of law, a mixed question of law and fact, or heavily fact-dependent." *Norma Faye Pyles Lynch Family Purpose LLC*, 301 S.W.3d at 211.

In this case, these factors weigh in favor of reaching the merits of the vagueness question through application of the public interest exception. Under the Zoning Code, the Zoning Administrator and the Board of Zoning Appeals are responsible for determining which land use category is appropriate when there is a debate related to how a property is being used, but the Trial Court's determination that overlap in land use definitions causes the Zoning Code to be vague conflicts with this practice. Further, as stated above, this issue has arisen before and is likely to recur in the future. Zoning decisions are made on a daily basis, and it could be very expensive to litigate a similar issue in the future given the possibility of attorney fees. Finally, although a decision on the merits of the vagueness claim is fact-dependent, the material facts in this case are undisputed.

The Supreme Court's review is therefore warranted in order to settle an important question of law and public interest. Further, the Trial Court's ruling is contrary to previous decisions of the Court of Appeals, which endorse the Zoning Codes process for choosing

between land use categories, and therefore, this Court's review is necessary to secure uniformity of decision. The Metropolitan Government respectfully requests that this Court accept the petition and allow the parties to brief the issue of vagueness on the merits and present oral argument, or, in the alternative, issue an order remanding the issue of vagueness to the Court of Appeals for a decision on the merits, pursuant to the public interest exception.

B. The Trial Court's ruling fundamentally misunderstands the standard for vagueness claims related to economic regulations.

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.'" (T.R. 1590-1591).

While the Trial Court correctly stated the general standard for vagueness, it failed to acknowledge the lower standard for economic regulations. 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).

Here, the Andersons are running a business out of their home and are subject to the economic regulations contained in the STRP ordinances. The Andersons were aware of the legislation when it was enacted and consulted with the Metropolitan Codes Department in applying for their owner occupied permit and again in attempting to procure a non-owner occupied permit. (T.R. 8, 17; Anderson Depo., p. 10, l. 13-18, p. 15, l. 13-21.) 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 local officials prior to filing their lawsuit.

In fact, the Andersons already had an answer from the Metropolitan Government as to how it classified their property even without resorting to an appeal to the Board of Zoning Appeals. 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. Metropolitan Code §§ 6.28.030 (T.R. 115), 17.04.060 (T.R. 223).

Because 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.").

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 Metropolitan Government'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 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 Metropolitan Government officials, and the Andersons had the opportunity for further clarity by resorting to the administrative process provided in the Zoning Code.

Attorney Fees

The Court of Appeals ignored a United States Court of Appeals for the Sixth Circuit case involving similar circumstances to this case, which indicates that the question should have been remanded to the Trial Court, was not addressed in the opinion. Further, the Court of Appeals did not analyze how the Trial Court had abused its discretion in determining that the Andersons were not "prevailing parties" based on the preliminary injunction.

In *McQueary v. Conway,* 614 F.3d 591 (6th Cir. 2010), the plaintiff challenged the constitutionality of a Kentucky law placing limits on protests at military funeral on free speech grounds. *Id.* at 594. The district court issued a preliminary injunction preventing enforcement of the law, but soon after the Kentucky legislature repealed the relevant provisions of the statute mooting the lawsuit. *Id.* The Sixth Circuit rejected the district court's reasoning for denying the plaintiff's fee application, but in doing so, it clarified its position on granting fees for preliminary injunctions:

> All of this leaves us with a contextual and case-specific inquiry, one that does not permit us to say that preliminary-injunction winners always are, or never are, "prevailing parties." In the aftermath of *Buckhannon* and *Sole,* however, we can say that the "preliminary" nature of the relief—together with the requirement that a prevailing-party victory must create a lasting change in the legal relationship between the parties and not merely "catalyze" the defendant to voluntary action – will generally counsel against fees in the context of preliminary injunctions.

Id. at 601.

The Court also emphasized that it was remanding the matter to the district court, to make the determination of whether fees were warranted, in light of their ruling:

> So far, we have explained why the district court's explanations for denying fees in this difficult case do not hold up. Yet we have not explained whether McQueary should collect fees—and with good reason. <u>That question initially is for the district court, which had a ring-side view of the underlying proceedings, which is in the best position to make an initial cut at whether McQueary deserves</u>

> fees for this preliminary injunction and which is given considerable deference over most aspects of the fees inquiry. *Buckhannon, Sole* and *Dubuc* make clear, we think, that, when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988. What remains unclear is when the occasional exceptions to that rule should apply, a contextual and case-specific inquiry that we ask the district court to undertake in the first instance.

Id. at 604 (emphasis added).

The *McQueary* Court suggests that the decision of whether fees are warranted for a preliminary injunction that is dissolved due to a change in the law is a "contextual and case-specific inquiry," but that generally fee awards under these circumstances are not appropriate. Further, the Court acknowledged that the Trial Court should make the determination in the first instance.

Tennessee law also indicates that the Court of Appeals erred in making a determination as to whether the Andersons were entitled to a fee award related to the preliminary injunction. The Court did not explain how the Trial Court's decision not to award fees based on the preliminary injunction was an "abuse of discretion," which is the standard for appellate review under Tennessee law. *See Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002) (""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.").

Rather, the Court determined that the Trial Court's order was not "sufficiently clear to allow for intelligent appellate review." (Ct. App. Op., p. 18). Under these circumstances, Tennessee appellate courts should vacate attorney fee awards and remand the issue to the Trial Court, rather than make a determination in the first instance. *See Harthun v. Edens*, 2016 WL 1056960, *4-5 (Tenn. Ct. App. Mar. 17, 2016).

Here, the Court of Appeals should have allowed the Trial Court, which had a "ring-side view" of the proceedings to make the initial determination as to whether the Andersons are entitled to a fee award related to their preliminary injunction. This is especially the case given the similarities in the procedural posture of this lawsuit and *McQueary* – both cases involved initial success with a preliminary injunction, a voluntary change to the relevant law which rendered the claim moot, and no permanent judicially-sanctioned relief.

To the extent that the Court of Appeals could appropriately reach the merits of the attorney fee award question, its decision to award fees related to the preliminary injunction is contrary to the Sixth Circuit precedent established by *McQueary.* On remand, the district court determined that a fee award related to the preliminary injunction was not appropriate, and the Sixth Circuit upheld that decision:

> The court appreciated that attorney's fees may be awarded in some settings to preliminary-injunction winners, but it found that this was not an appropriate occasion for doing so. After examining the context of this case in light of our instructions in *McQueary I,* the district court concluded that the circumstances did not justify a fee award. As the court recognized, there is no "catalyst" theory for granting fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The court thus reasoned that the state legislature's "voluntary conduct" – its repeal of the funeral-protest statute – does not by itself "serve as the basis for an award of attorney's fees." R.71 at 3.
>
> Nor, the court added, did McQueary's claim "become moot because the preliminary injunction granted him all the relief he sought." R.71 at 3. McQueary wanted to "permanently enjoin the state from enforcing the challenged provisions." *Id.* The nature of the relief McQueary sought in other words was

> permanent; the relief he received from the court was temporary. To illustrate the point, the court distinguished *Young v. City of Chicago*, 2002 F.3d 1000 (7th Cir. 2000), in which the plaintiff wanted to protest during a single, specific event—the 1996 Democratic National Convention. Young received that relief from the court through a preliminary injunction, and the case became moot when the convention ended. *Id.* at 1000. Unlike the injunction in *Young*, the district court explained, McQueary's preliminary injunction itself did not ultimately provide him with the permanent relief he requested.
>
> As we explained in *McQueary I*, Supreme Court precedent counsels that, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." 614 F.3d at 604. The district court's task was to make a "contextual and case-specific inquiry" to determine if McQueary's preliminary injunction fit within an exception to that general rule. *Id.* The district court did not clearly err in concluding that it did not.

McQueary v. Conway, 508 Fed. Appx. 522, 524 (6th Cir. Dec. 18, 2012) (emphasis added).

Because the Sixth Circuit precedent governing the federal law at issue is contrary to the actions of the Court of Appeals in this case, the Metropolitan Government respectfully requests that this Court exercise its supervisory authority to settle an important question of law and to secure uniformity of decision between the federal and state courts on this issue of federal law. Specifically, the Metropolitan Government requests that this Court accept this petition and allow the parties to brief the issue and present oral argument, or, in the alternative, issue an order vacating the Court of Appeals' finding that the Andersons are "prevailing parties" based on the preliminary injunction and remanding that issue to the Trial Court to undertake in the first instance.

CONCLUSION

For all these reasons, the Court should grant the Metropolitan Government's Application for Permission to Appeal.

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