IN THE EIGHTH CIRCUIT COURT OF
DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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D.C.

RACHEL AND P.J. ANDERSON,	)	
	)	
Plaintiffs,	)	
	)	
	)	
v.	)	Case No. 15c3212
	)	Hon. Judge Kelvin Jones
THE METROPOLITAN	)	
GOVERNMENT OF	)	
NASHVILLE AND	)	
DAVIDSON COUNTY,	)	
	)	
Defendant.	)	

REPLY TO METRO'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Metro's response ignores enough significant portions of the Andersons argument such that they have not carried their burden. *See Rye v. Women's Care Ctr. Of Memphis, MPLLC,* 477 S.W.3d 235, 262 (Tenn. 2015) (if nonmoving party fails to respond to properly supported motion, summary judgment "shall be entered against the adverse party") (quoting Tenn. R. Civ. P. 56.06). Even when Metro does address the Andersons arguments, it makes substantial errors, as pointed out below. This Court should enter summary judgment in the Andersons' favor on each of the remaining issues.

I. This Court can enter summary judgment on the vagueness issue.

Metro responds that because this case does not involve criminal penalties, the Andersons are limited to lodging an as-applied challenge that would lose, because only STRPs were permitted where the Andersons were zoned, so there is no way they could have had a hotel or a boarding house. Def.'s Resp. 1-3. Metro continues to ignore the opinions of the Attorney General of Tennessee, current Metro legal director, and the bill's sponsor, all of who believed that STRPs could also meet the definition of hotels or boarding houses regardless of where they were zoned. Again, if hotels could not be in a residential zone, then Metro should not have told the Andersons to pay a hotel tax. The letter demanding the taxes even observed that "your *residential property*" was obligated to remit "*hotel* occupancy taxes." Ex. C.2.E. Metro also ignores the argument that the definition of the terms, "transient" and "occupancy" used in the STRP definition requires that they be a hotel. With Metro failing on its face to carry its burden, this Court may grant summary judgment.

In arguing that only STRPs are allowed where the Andersons live, Def's Resp. 3, Metro continues to conflate the definitions with the land use. While an STRP must be a residence, the definitions of hotels and boarding houses nowhere exclude residences. A hotel or a boarding house could be in R6 zone. It would just be impermissible. Otherwise there would be no such thing as a zoning infraction. Indeed, this is the essence of the Andersons'

argument. They do not know if the city will arbitrarily classify their home to be a hotel as it did once before and shut them down entirely. As the terms are defined, they are susceptible to such an arbitrary enforcement action.

Metro's response confuses several aspects of the vagueness doctrine. Any vagueness challenge may proceed facially or as-applied, not just criminal ones. A facial challenge means that under no circumstances could the law be valid, *see Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993), not that the plaintiff may offer hypothetical facts. Criminal statutes do get more exacting scrutiny, *Leech v. American Booksellers Asso.*, 582 S.W.2d 738, 746 (Tenn. 1979), but they are not susceptible to hypothetical facts. *See State v. Siliski*, 238 S.W.3d 338, 363 (Tenn. Crim. App. 2007). A plaintiff may propound hypothetical facts in a First Amendment case. *See Davis-Kidd Booksellers,* 866 S.W.2d at 531. Metro's confusion is not material. Because the Andersons' home could be considered an STRP or a hotel/boarding house/bed and breakfast regardless of whether it was a permissible use, the law is vague under the facts at hand. Also, this case does involve criminal penalties.

A violation of the zoning title is a misdemeanor. *See* Metro. Code § 17.40.610 ("Any violation of this title shall be a misdemeanor offense punishable by law."). That means that Metro could conceivably jail the Andersons for up to one year, *see* Tenn. Code Ann. § 40-35-111(e) (LexisNexis 2016), if it decided once again to consider their home a hotel. Metro's makes

this an easy issue by implying that the law would be vague if this case involved criminal penalties because it does.

Metro argues that the Andersons incorrectly rely on the definition of "hotel" found in Title 6, instead of Title 17 where zoning is found. Def.'s Resp. 2-3, n.1. Acknowledging that the zoning title leaves hotels undefined, Metro turns to the dictionary definition: "an establishment that provides lodging, meals, entertainment and various personal services for the public." *Id.* Metro's argument stops short of explaining why the Andersons' STRP would fail to meet this definition as well. Their home is an establishment that provides lodging and services. The same problem of vagueness abounds under either definition.

Nor is it important that the Andersons sought an STRP permit. Metro takes this to mean they knew they were an STRP. *Id.* at 3. But the issue is not whether the Andersons fit the definition of STRP. The issue is whether they are *also* a hotel or a boarding house because the STRP law says it is one or the other. Furthermore, it really does not matter what the Andersons believed. The vagueness standard is an objective one. *See Leech*, 582 S.W.2d at 746 (statute is vague when persons "of common intelligence must necessarily guess at its meaning"). If it matters, the Andersons might not have been confused until Metro told them they had a hotel. Besides, the Andersons, like many, navigate a thicket of bewildering, often contradictory

regulations. It does not make the ordinance any less vague that they wisely erred on the safe side.

II. This Court can enter summary judgment on the anti-monopolies claim.

Metro's response mostly disputes that it has created a monopoly, Def.'s Resp. 2-3, devoting precious little attention to how the cap would satisfy the limited justifications of health, safety, morals, and well being.

Metro takes no issue with the description of how they have tilted the playing field in favor of traditional hotels. It should be taken as conceded that the STRP law has warped the competitive landscape, perversely putting STRPs in the position of funding their competitors with tax dollars ostensibly used to address a hotel shortage that STRPs would address. This troubling concession is extremely compelling evidence of the law's true purpose: protectionism.

On the question of whether it was a common right to operate an STRP, Metro disputes that Councilmember Allen's repeated assurances or the zoning administrator's memorandum that STRPs were unregulated means that they were a common right. Def.'s Resp. 3. Metro cannot escape the explicit statement of the zoning administrator that STRPs were "an incidental subordinate use to a principal residential use," based on the "property owner's *right* to the free use of his or her property." Ex. C.2.B (emphasis added). Metro argues that the question of whether STRPs were a

common right is a legal question for the Court, Def.'s Resp. 3, but that question is determined by the fact that they were allowed.

Metro's effort to draw a distinction between STRPs being unregulated—which Metro apparently concedes—and a common right is unsuccessful. The Court has written that it is not a monopoly "if the subject had not the common right or liberty before, to do the act." *Memphis v. Memphis Water Co.* 52 Tenn. 495, 529 (1871). Metro admits that Nashvillians previously were free to operate an STRPs. That means Metro created a monopoly when it deprived them of that liberty.

Metro then denies that they have created a monopoly because permits are available in other census tracts. Def.'s Resp. 4. But the very case Metro relies on, *id.* (quoting *Trails End Campground, LLC v. Brimstone Rec., LLC,* 2015 Tenn. App. LEXIS 39 (Tenn. Ct. App. Jan. 29, 2015) (copy of opinion previously provided)), plainly defines a monopoly as existing within a "community or district," not city. There is no authority that indicates a city may create a monopoly within some its territories and have it not be deemed a monopoly. The relevant community or district is defined by the governmental action itself. Metro chose to make the cap apply by census tract. It cannot then argue that census tract lines are not the relevant community or district.

The absence of proof that permit holders were acting in concert to inflate prices does not matter. Def's Resp. 5. The Court found that Johnson

City's method of regulating taxicabs was "just about as exclusive and complete as may be conceived," and thus an illegal monopoly. *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 336 (Tenn. 1948). It was exclusivity, not coordination, which made it a monopoly. Also, it was the grant of monopolies by English monarchs to a favored few that ultimately made monopolies illegal, not that the few acted in concert. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585, 600, 602-604 (2009). The coordination of competitors is certainly one form of a monopoly, but hardly the only one. Making a common right exclusive is another.

Metro only briefly argues that the cap would satisfy the legitimate relations test, once again employing the slight of hand it used in its motion where it substitutes the rational basis test used under the Fourteenth Amendment for the anti-monopolies test under the Tennessee Constitution. Def's Resp. 5. But as Metro has frequently pointed out, under the Fourteenth Amendment, the onus is upon the Andersons to negate every conceivable justification for the law, even ones that were not actual ones. Under the anti-monopolies test, the burden is on Metro to show the monopoly has a legitimate tendency to further one of only four (4) goals: health, safety, morals or well being. *See Checker Cab,* 216 S.W.2d 335. The sorts of measures that would pass this test are laws restricting the sale of

unwholesome food, adulterated liquors, or poisonous drugs without a label, *see Leeper v. State*, 52 S.W. 962, 964 (Tenn. 1899), not ones that, at most, protect aesthetics.

Metro's reliance on cases upholding zoning laws under the Fourteenth Amendment is misguided. Def's Resp. 5-6. The Fourteenth Amendment requires a different test, and the cap is not zoning. As pointed out in the Andersons' original response, neighborhood aesthetics are a matter of taste, quite unlike adulterated liquors or poison. Zoning to protect neighborhoods may satisfy the Fourteenth Amendment (though the *Bell* case cited by Metro in their motion was fairly qualified), but Metro has never been able to articulate how this is a question of physical or moral well being. It is not. The Arkansas Supreme Court has even held that although zoning is a valid exercise of a city's police powers, a refusal to rezone property for business use when other properties are already zoned for such purposes violated the Arkansas anti-monopolies clause. *See Blytheville v. Thompson*, 491 S.W.2d 769, 773 (Ark. 1973). By failing to even articulate a legitimate justification for the creation of a monopoly, Metro has facially failed to rebut a critical step in the analysis. This Court can grant summary judgment.

III. **This Court may grant summary judgment on the equal protection issue.**

Metro fails to respond to critical parts of the Andersons' equal protection argument:

- Metro never addresses the argument that a cap is an unconstitutional method violating equal protection under *Consumer Gasoline.*
- Metro never addresses the evidence presented by the Andersons that the zoning administrator admitted that STRPs were not a reported problem in need of regulation in the first place. Ex. E.1, 5:19.
- Metro never addresses the evidence that the fear of non-owner occupied STRPs overtaking neighborhoods is now demonstrably unfounded. Ex. D.1; Ex. G.3.
- Metro never addresses the argument that divvying up the city by census tract is an irrational approach because some neighborhoods (like the Andersons) are not so residential that STRPs are disruptive, Ex. G.1; G.2, and some are absurdly small. Ex. C.2.D, at 122; Ex. D.1, 6.
- Metro never addresses the argument that the stated concerns of Nashvillians were over STRPs generally, not non-owner occupied STRPs.
- Metro never addresses the argument that the three percent (3%) number, swiped from Austin and then tinkered with, was as arbitrary as the distance requirements for landfills in *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, 2005 Tenn. App. LEXIS 382, at *118 (Tenn. Ct. App. 2005) (copy of opinion previously provided).
- Metro never addresses the argument that it is irrational to limit STRPs if the lack of bed space is such an acute problem that tax dollars are thrown at it, or require STRPs to effectively fund hotels.

Because these points are never addressed, they should be viewed as conceded. This means that the Andersons should prevail as a matter of law because Metro has not carried its burden to respond. *See Rye*, 477 S.W.3d at 262.

Metro tries to distinguish *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), by relying on another, unpublished case. Def's Resp. 6-7 (citing *Bah v. Attorney General*, 2015 U.S. App. LEXIS 7882 (6th Cir. 2015) (unpublished) (copy of opinion attached)). Based on *Bah*, Metro contends that *Craigmiles* was really a due process case, not an equal protection case, and that because this Court has dismissed the Andersons' due process claim, *Craigmiles* was not on point. *Id. Craigmiles* was clearly an equal protection case, however. 312 F.3d at 224 (6th Cir. 2002) ("While feared by many, morticians and casket retailers have not achieved the protected status that requires a higher level of scrutiny under our Equal Protection jurisprudence."); *see also Craigmiles v. Giles*, 110 F. Supp. 2d 658, 665, 667 (E.D. Tenn. 2000) (violates equal protection and due process). This is how other courts have viewed *Craigmiles* in *published* and unpublished cases alike, including one involving Metro. *See, e.g., St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012) (recognizing that *Craigmiles* struck down law "as a denial of due process and equal protection"); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 n. 8 (E.D. Ky. 2014) (although equal protection and due process protect different interests, they "will be analyzed together because they present the

same issue"); *Bohkari v. Metro Gov't of Nashville & Davidson County*, 2012 U.S. Dist. LEXIS 6054 (M.D. Tenn. Jan. 19, 2012) (copy of opinion attached). More to the point, the Andersons have completed the first step in equal protection analysis and shown that non-owner occupied STRPs are similarly situated, contrary to Metro's contention. Def's Resp. 7. There is no natural and reasonable relation, *see State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 775 (Tenn. 19190), between protecting neighborhoods and capping non-owner occupied STRPs while leaving owner-occupied STRPs or long-term rentals uncapped.

The Andersons have produced evidence that all of these classes that bring renters in a neighborhood are similarly situated for purposes of causing the same harm, contrary to Metro's argument. Def's Resp. 7. It takes the form of the emails and statements of the people at council meetings who pushed for the law in the first place, to include the declarations submitted by Metro. Overwhelmingly, these individuals voice concern over STRPs generally. The Andersons also propounded hard numbers showing that non-owner occupied STRPs are no more likely to overtake a neighborhood than owner occupied STRPs are. Ex. D.1, G.3. The evidence shows that that the few neighborhoods that have hit the cap are in areas like downtown or 12 South that are already heavily commercial. Ex. G.3. Indeed, all the evidence worthy of the name tends to show that there is no substantial basis to treat non-owner occupied STRPs so harshly.

It is Metro, rather, who offers no evidence-based reason to single out non-owner occupied STRPs, submitting instead that "[c]ommon sense dictates that a full-time commercial property with no long-term resident is very different. ..." Def's Resp. 7. But under that logic a renter of thirty-one (31) days would take an even greater toll on a neighborhood. Yet it is not disputed long-term renters are allowed to go wholly unregulated altogether, even as Councilmember Allen recognized how much worse her own long-term neighbor was than her short term rental neighbor. Ex. C.2.D, 96, 109. "Common sense" does not rebut actual, objective evidence.

Evincing its real purpose, the cap on only one type of STRPs is the most suspicious circuitous and ineffectual route to protecting neighborhoods imaginable. *See Craigmiles*, 312 F.3d at 227 (observing legislature's indirect route of achieving stated goals as indicative of protectionism). If Metro's concern were neighborhoods, it would have placed limits on all types of STRPs, or limited them in heavily residential zones, instead of allowing them with tight limits even in downtown areas with no residential feel but where the only alternative is a hotel. Metro targeted the group that was competing directly with hotels and bed and breakfasts, leaving those which spoke to the neighborhood groups to go without number. "[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008).

The classification was made based on animus towards a politically vulnerable minority, not any valid concern about protecting neighborhoods.

Metro is correct that Councilmember Allen's communications with hotels and other constituencies are not, standing alone, evidence of protectionism. Def's Resp. 9. What makes her communications with hotels and bed and breakfasts significant is that they were the only ones concerned with making sure the STRP law was anti-competitive, Ex. C.2.D, 8, 9, and it is the anti-competitive cap that is at issue. "Leveling the playing field," is the dark euphemism found throughout her communications with hotels and bed and breakfasts, *id.* at 3, 5, 12, 15, 20- 22, 44, 60, 61, but not with homeowners who could have cared less about the hotels' bottom-line. Councilmember Allen even stated that was why she got involved. *Id.* at 3, 22. The proof shows that the intent of the law was to hamstring only the STRPs that compete with hotels.

The lingering question asks what harm do non-owner occupied STRPs do in the Andersons' neighborhood that has not already been done by industrial riverfront, Ex. G.1, 6-8, fish marts, *id.* at 17, vacant lots, *id.* at 2, or abandoned buildings? *Id.* at 1, 3, 5, 9. Metro has *never* answered. The cap is perfectly suited for protecting hotels and bed and breakfasts from a disruptive form of competition and continuing to ensure that wealthy hoteliers can beg for scarce tax dollars to address the very problem the cap creates. This Court should grant summary judgment.

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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, by the following means:

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Unpublished Authority

Pursuant to LCv R. 26.04(b), counsel attaches the following unreported decisions.

- *Bah v. Attorney General*, 2015 U.S. App. LEXIS 7882 (6th Cir. May 8, 2015).
- *Bohkari v. Metro Gov't of Nashville & Davidson County*, 2012 U.S. Dist. LEXIS 6054 (M.D. Tenn. Jan. 19, 2012).