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

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

RESPONSE IN OPPOSITION TO METRO'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Rachel and P.J. Anderson, the plaintiffs in this case ("the Andersons"), to respectfully respond to Metro's motion for summary judgment. Metro's motion is not just mistaken. It demonstrates that this Court can rule as a matter of law that the STRP law is invalid on vagueness, anti-monopolies and equal protection grounds. At the least, disputes of fact exist as to whether the cap is rationally related to Metro's stated goal of protecting neighborhoods (equal protection), or has any rational tendency to advance health, safety, morals, or well being (anti-monopolies).

I. The applicability of the ordinance definitions to the Andersons' property in particular and STRPs generally renders the statute unconstitutionally vague.

The Andersons have pointed out the substantial overlap in the definitions found in the zoning definitions found at Metro Code §§ 5.12.010 and 17.04.060(B), which makes it impossible to know how the STRP law could apply without exempting them. The Andersons have merely asked for Metro to articulate a standard that is not so arbitrary that an enforcement authority could selectively employ definitions, as they have done already.

Every standard propounded by Metro is unconstitutionally vague. Metro argues that only STRPs are permitted where the Andersons' are zoned so they must have an STRP.[1] Def.'s Mem. Supp. Summ. J. 5. This is nonsense. The *use* is different from the *definition*. *Compare* Metro. Code § 17.04.060(B) *with* Metro. Code § 17.08.030. One must know the definition in the first place to know what is an acceptable use. A hotel impermissibly operating in a residential zone is still a hotel.

Metro's explanation is essentially tautological; something is permissible in a zone if it is in the zone. But Metro obviously considers there to be such a thing as an impermissible land use. *See* Metro. Code § 17.40.610 (penalizing a violation of the zoning title as a misdemeanor). To illustrate,

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[1] Metro admits boarding houses may be in a residential zone but maintains the Andersons could not fit this definition because they do not perform a service or supervise their guests. Def's Mem. Supp. Summ. J. 5. A boardinghouse needs to provide accommodation to those in need of "*lodging*, personal services, supervision, *or* rehabilitative services." Metro. Code § 17.04.060(B) (emphasis added). This list is in the disjunctive. They need to only meet one thing on the list. They do provide lodging. Metro succeeds only in proving the Andersons' point. They have a boarding house as much as they have an STRP.

helistops and zoos are not permitted in R6 zoning either. *See* Metro. Code § 17.08.030.[2] If there were a place with many kinds of animals on display with a big area in the middle where helicopters land, it would still be a zoo with a helipad in it, even if it was in R6. It would just be a zoo with a helipad located in the wrong zone. *Where* it is is not the same as *what* it is. Metro has never articulated a standard that would not lead to arbitrary enforcement.

Besides, it is not as if the land use table clarifies things any. STRPs are permitted as accessory to principal use for all residences across virtually all zones, residential, commercial, mixed use, etc. *See* Metro. Code § 17.08.030. Single-family residences are a permitted use across virtually all zones as well. *Id.* Bed and breakfasts are permitted in overlays or outright within virtually every zone allows single-family residences. *Id.* Boarding houses are permitted in half of the residential zoning categories, all of the mixed use and downtown categories, and some of the commercial categories. *Id.* Hotels are allowed in all mixed use and downtown categories, most commercial and, some office categories. *Id.* So even within the use category, there is substantial overlap between terms. Even if this Court were to accept Metro's standard and look to what is and is not an acceptable land use, it no more clarifies things because the uses overlap much like the definitions.

At its core, the problem with the STRP law is that it was constructed under the assumption that a property is either an STRP or a hotel, etc., but

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[2] A helistop is defined as a "helicopter landing area for boarding and discharging the occupants of the craft." Metro. Code § 17.04.060(B). A zoo is not explicitly defined so it has the dictionary definition. Metro. Code § 17.04.060(A).

not both. The reality is that the definitions are practically synonymous. Metro could cite someone for not having an STRP permit but once he or she obtained a permit, Metro could cite that same property owner for operating a hotel in a residential zone. Tennesseans may not be subjected to such capricious enforcement.

This is no hypothetical. Metro has selectively employed the overlapping definitions in the past. It demanded hotel taxes from the Andersons even though it never occurred to them that their STRP could be considered a hotel. Def.'s Resp. to Pl.'s Interrog. No. 4, Ex. C.2.E; Rachel Anderson Dep. Ex. J, at 21: 10-20, 22: 5-8. This act, perpetuated citywide, demonstrates the potential for abuse posed by the overlapping definitions. Metro will arbitrarily enforce its vague definitions because it already has.

In claiming that there "is no ambiguity" if the "use qualifies as any of the other terms listed in the statute," Def.'s Mem. Supp. Summ. J. 6, Metro also ignores the abundant evidence that its own officials certainly thought STRPs were also hotels and boarding houses. Again, Metro tried to tax STRPs *because* they were hotels. Def.'s Resp. to Pls.' Interrog. No. 4, Ex. C.2.E. Councilmember Allen acknowledged that STRPs would be defined "in the same way the hotel regulations do." Ex. C.2.D at 034. The Tennessee Attorney General defined the STRPs and hotels essentially synonymously, never incorporating land use restrictions. *See* Tenn. Att'y Gen. Op. No. 15-78 (Dec. 1, 2015). Then-council attorney Jon Cooper understood STRPs to be

boarding houses in some cases. Ex. H at 59:51-1:00:35; Ex. H.1. Councilmember Allen agreed that they were boarding houses too. Ex. C.2.D, at 051-52, 123. Metro contradicts each of these individuals and itself in trying to differentiate hotels and boarding houses from STRPs.

Along these lines, Metro argues that STRPs could not be any of these other things because "the ordinance, on its face, makes it clear that these terms do not overlap." Def.'s Mem. Supp. Summ. J. 6. This is more circular logic. Metro argues that an STRP is not a hotel because the law says so. This takes us no closer to understanding when an STRP is an STRP and not a hotel. It just tells us they cannot be both at the same time. Indeed, this is the problem in the first place because, per the definitions, they can be both, even though the law prohibits it. Saying they are different does not mean they are.

Finally, Metro entirely fails to respond to the argument that the definition of STRPs includes terms that require the property to fall within the definition of a "hotel." It is an element of the definition. Metro. Code § 6.28.030(A) (defining transient occupancy as defined for hotels, which require only when "in a hotel.") Therefore, even if Metro's response made sense and hotels were never STRPs, no STRP would ever qualify as an STRP because it has to be a hotel to be an STRP as an element. Admittedly this is nonsense, but this is the ordinance Metro drafted, and it has made no effort to explain this away.

This Court has no obligation to save Metro's ordinance. The importance of property rights in Tennessee requires this Court to accord "deference toward a property owner's right to the free use of his or her property," *Lion's Head Ass'n v. Metro Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn. Ct. App. 1997), and "not hesitate" to set Metro's arbitrary and capricious explanations aside. *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 16 (Tenn. Ct. App. 1992). Metro's position is itself concrete evidence that enforcement is sure to be arbitrary.

In the end, the definitions mean what they say and the STRP law makes no sense. The Andersons are as much exempted from the STRP law as they are governed by it, or there are no definitions. The Andersons must win on either Claim One because they are exempt, or Claim Two, because the law is unconstitutionally vague. This is a pure issue of law that this Court may determine in the summary judgment stage.

II. The ordinance violates equal protection because Metro has not demonstrated that capping non-owner occupied STRPs at three percent (3%) by census tract is a rational means of achieving its goal of protecting residential neighborhoods or a good and valid reason for classification.

In moving for summary judgment on the theory that protecting residential neighborhoods is a rational goal and that zoning is a well-recognized component of a state's police power, Def.'s Mem. Supp. Summ. J. 7-11, Metro misses the point. The legitimacy of this goal is not at issue.[3] The

[3] The legitimacy of that goal for anti-monopolies purposes is at issue.

challenge is to the rationality of Metro's chosen means: the three percent (3%) cap by census tract. As a matter of law, the *Consumers Gasoline* case holds that a statute violates equal protection when it allows some individuals, but not others, to operate. *Consumers Gasoline Stations v. Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956). Because it is not a uniform use of land within zones, Metro cannot rest on its zoning authority. Its chosen method is irrational.

Moreover, Metro's Motion fails to demonstrate an absence of a dispute in fact over the rationality of: 1) fearing that one type of STRPs would have overtaken the city; 2) dividing the city by census tract; 3) capping one type of STRPs; or, 4) placing the number at exactly three percent (3%). The question of whether a law satisfies rational basis under equal protection may properly be submitted to a finder of fact. *See, e.g., Loesel v. City of Frankenmuth*, 692 F.3d 452, 465 (6th Cir. 2012) (finding a genuine dispute of material fact as to the validity of a zoning question in an equal protection challenge). The cap was perfectly suited to its real purpose: illegitimate protectionism.

A. *A cap that selectively prohibits some residents from operating in a neighborhood where others are allowed violates the Tennessee Constitution under* Consumers Gasoline.

Metro has failed to demonstrate that its means for protecting neighborhood appeal are rational. Metro incorrectly argues, "upon acknowledgment of the legitimate purpose of the statute, the Court should make no further review." Def.'s Mem. Supp. Summ. J. 16. But "the mere assertion of a legitimate government interest has never been enough to

validate a law." *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002). The challenged law must utilize a means that are rationally related to whatever the legitimate goal is. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014). Metro omits half of the inquiry.

Its means are not rational. Metro may not allow some operators, but not ninety-seven percent (97%) of people, to operate without violating the Tennessee Constitution. Metro has never addressed the controlling case of *Consumers Gasoline*, where the Court struck on equal protection grounds a law that allowed some existing operators, but not others, to operate gas stations because, although the city might regulate the businesses, "it does not have the right to exclude certain persons from engaging in the business while allowing others to do so." 292 S.W.2d at 737. This case is controlling, and stands for the proposition that the exclusionary nature of the cap is unconstitutional as a matter of law. It remains entirely unrebutted.

Metro's chosen method in this instance—an arbitrary cap—is a fundamentally irrational response. Metro already has provisions in place to deal with excess traffic, or noise. Beyond question, there are disruptive STRPs. Bad neighbors are a risk for all homeowners. Yet Metro does not cap by census tract the number of SEC fans who can have tailgates just because a few get rowdy, or limit the number of Cub Scouts selling popcorn door-to-door even if some parents do park on the street. Similarly, Metro could have

disallowed all STRPs, but did not. Once Metro elected to allow some STRPs in a census tract, it could not cap their number without violating the Tennessee Constitution.

B. *Because it limits the number of non-owner occupied STRPs while allowing them everywhere, the cap is not a zoning law and Metro therefore has no authority for what it has done.*

Metro mischaracterizes this ordinance as a zoning law, failing to appreciate how different the cap is from anything resembling zoning. Def.'s Mem. Supp. Summ. J. 10-11.[4] While in many instances, "[t]he precise contours of determining when an ordinance is a zoning ordinance . . . are difficult to draw or define," *SNPCO, Inc. v. City of Jefferson City,* 363 S.W.3d 467, 477 (Tenn. 2012) (citation and internal quotation marks omitted), this is not one of them. A zoning ordinance "involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses." *Family Golf v. Metropolitan Gov't of Nashville,* 964 S.W.2d 254, 258 (Tenn. Ct. App. 1997). This is not what the cap does. It allows non-owner occupied STRPs in all zones, but limits them to three percent (3%) per census tract.

The cap is really the opposite of zoning. A zoning scheme would *limit* the zones where non-owner occupied STRPs may operate but *allow* them to all, whereas this cap *allows* them in all zones, but *limits* them to some. A

[4] The Andersons further observe that if the cap was a change in zoning, then as existing operators of STRPs, they should have been grandfathered in. *See* Tenn. Code Ann. § 13-7-208(b)(1) (grandfathering in as an exception to any change in zoning any existing establishment).

zoning law would have allowed STRPs to operate in particular zones, but not allowed an arbitrary number within those zones. There is demonstrably not "uniformity of these uses," even within zones; nor are STRPS suitable for particular use in particular zones under Metro's scheme. STRPs are suitable in all residential zones, but only in a non-uniform fashion. This is flatly foreign to zoning concepts. What Metro has done is anathema to zoning laws.

The portion of the STRP law that caps non-owner occupied STRPs was not even designed to be a zoning measure under "the municipality's comprehensive zoning plan." *SNPCO, Inc.*, 363 S.W.3d at 478. What is now referred to as the STRP law began life as two bills: BL2014-909 and BL2014-951 (copy of bills attached). BL2014-951 contained the cap and amended the subsection relating to the regulation of businesses. It was BL2014-909 that "amend[s] Title 17 of Metropolitan Code, Zoning Regulations." Nothing within 909 is remotely at issue. The cap never had anything to do with zoning. It remains a part of Title 6, not Title 17, where zoning is. The cap flatly does not "depend upon [Metro's] zoning plan." *SPNCO, Inc.* 363 S.W.3d at 478. The zoning plan could be ripped from the Code altogether, and the cap would still exist. Calling the cap a zoning measure fundamentally mischaracterizes it on multiple levels.

Because the cap is not a zoning law, Metro's contention that the cap satisfies the rational basis test because zoning schemes protecting residential areas are rational is beside the point. Def.'s Mem. Supp. Summ. J. 10. Metro

fails to produce any authority tending to authorize the cap as a rational method.

C. *Dividing the city by census tract and then limiting the cap to exactly three percent (3%) is irrational.*

Metro's motion also fails because it has not shown that dividing the city up by census tract is a rational way to advance the goal of protecting neighborhoods. Laws that attempt to address its goals that are "at once too narrow and too broad," *Romer v. Evans*, 517 U.S. 620, 633 (1996), fail the rational basis test. This perfectly describes the manner in which the cap operates. It is too narrow because it permits unlimited numbers of STRPs. And it is too broad because it includes neighborhoods like where the Andersons live. What violence do non-owner occupied STRPs do to the sanctity of the neighborhood that is not done by owner occupied STRPs, abandoned buildings and hair salons? This question remains unanswered.

The concerns of Ms. Hollowell and Ms. Wood, however valid they may be where they live, are not valid where the Andersons live. It is simply irrational to make them beholden to the same concerns when Germantown needs and wants reinvestment, not residential feel. Metro has not carried its burden of showing a dispute of material fact on this issue.

Metro also fails to create genuine dispute of fact as to whether the number of exactly three percent (3%) rationally advances Metro's stated goals or whether it is arbitrary. A city may not exercise its regulatory powers arbitrarily without violating the rational basis test. *See Neece v. Johnson*

City, 767 S.W.2d 638, 639 (Tenn. 1989). An arbitrary example was previously provided by Metro in *Consolidated Waste Systems, LLC v. Metro Government of Nashville*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005) (copy of opinion previously provided). The Court struck a requirement that one specific type of landfill needed a buffer of exactly two (2) miles because "there is no planning policy basis for choosing two miles as opposed to any other particular distance; there is no proof that a two-mile buffer meets the stated goals (protecting parks and schools from effects such as dust, noise, and truck traffic) and another distance would not." 2005 Tenn. App. LEXIS 382, at *118.

The same could be said of the three percent (3%) number. Metro claims to be protecting neighborhoods. Protecting neighborhoods may be generally rationally related but what is different here is that Metro has already opened up all neighborhoods to STRPs, but excluded an arbitrary number of non-owner occupied STRPs. Offering no rational reason why any number other than three percent (3%) would ruin every neighborhood n Nashville, Metro fails to show an absence of material fact.

The number was pulled out of a hat. Metro just cribbed it from Austin, only Austin's number was two percent (2%). Def.'s Resp. to Pls.' Interrog. No. 16, Ex. C.2. Metro decided they wanted "some room to grow" so they added one percent (1%), a strange choice if non-owner occupied STRPs were such a threat. Metro has never explained why the city of Austin was a model, or why

three percent (3%) as opposed to four percent (4%) would not better advance the goals of protecting neighborhoods while allowing "room to grow." Metro does not appear to have considered any of it very much; it just "seemed to be working reasonably well." Def.'s Resp. to Pls.' Interrog. No. 16 Ex. C.2. This is something that creates a genuine issue of material fact as to whether the precise percentage is rationally related to Metro's goals.

D. *Metro has failed to show that the fears of non-owner occupied STRPs taking over were or continue to be rationally based.*

Metro's motion fails to address the question of whether the fear of non-owner occupied STRPs has ever been rational. The Andersons have shown "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This analysis should be guided by the case of *Consolidated Waste,* because "the ordinances as drafted did not further the stated purposes and there was no rational justification for the harsher treatment." *Id.* at *110.

There is at least a disputed issue of fact as to whether it was rational to treat non-owner occupied STRPs more harshly. The Andersons' proof consists of a recording of the zoning administrator that he had very few complaints, and none of the ones he described appeared to be specific to non-owner occupied STRPs. Ex. E.1 at 4:28-5:30. As of March, most census tracts had not hit the cap. *See* Ex. G.3. Many, in fact, had no permits. Ex. D.1. Even the famous case of *United States v. Carolene Prods. Co.,* 304 U.S. 144, 153 (1938), recognized that a once-constitutional statute might become

unconstitutional when the facts supporting it change. Metro's homeowners may have had an understandable, if misguided, fear of a new industry. Now we have actual evidence indicating those fears to be overstated. Numbers, not inchoate fears, should now guide the conversation.

On the other side, Metro offers the unverified, hearsay complaints found in various emails to Councilmember Allen, as well as two declarations, the overwhelming majority of which do not bear on the question of capping *non-owner occupied* STRPs only. Def.'s Mem. Supp. Summ. J. 12-14. Overwhelmingly, the emails are complaints fretting over the number of STRPs generally that do not articulate a substantial basis for distinguishing between owner and non-owner occupied. Allen Decl. Metro Ex. 4, at 17-21. One of the emails in question, drafted in October of 2014, long before the law became effective, was concerned about non-owner occupied STRPs because "[t]here needs to be someone present and responsible for occupants." *Id.* at 19. This is specific to non-owner occupied STRPs. But the final version of the law requires a person responsible for the STRP remain local and be available to answer calls "twenty-four hours a day, seven days a week." Metro. Code § 6.28.030(D)(1), (M). This, and the STRP law's requirement that nuisance regulations be obeyed, *see* Metro. Code § 6.28.030(F), addressed the concern so the cap no longer is not justifiable. Imposing upon non-owner occupied STRPs such a severe limitation was unnatural, given even Metro's flimsy and now dated evidence. Certainly there is a dispute of fact.

To justify its concern Metro labors to rely on Ms. Anderson's deposition when she stated that she did not want to live in a neighborhood of all short-term rentals. Def.'s Mem. Supp. Summ. J. 15-16. Metro misunderstands the nature of the equal protection challenge. The Andersons do not challenge the goal. They question Metro's need to protect neighborhoods with something like the cap on one type of STRPs. Ms. Anderson, like nearly all of the concerned citizens produced by Metro, was concerned about the prevalence of all types of STRPs. She did not "want to be in a neighborhood that's all *short-term rentals* either." Ex. J, at 18:23-24. She was clear, however, that "what [she] had a problem with," *id.* at ¶ 25, was the cap that prevented a responsible and reputable operator like her from continuing to do so. *Id.* at 18:25-19:11. She also called into question the rationality of the fear that neighborhoods actually would get overrun. *Id.* at 30:4-17.

Metro also argues that non-owner occupied STRPs drive up home prices, again citing to Ms. Anderson's deposition. Def.'s Mem. Supp. Summ. J. 16. First, Metro misunderstands her testimony; again, she was alluding to the effect the cap had on prices. Ex. J at p. 29:7-25, 37:11-22. Second, Metro may not take the rather alarming position that it is legitimate for the city to artificially devalue the home prices of its citizens. Price-fixing was not a goal that Metro has ever identified, and runs directly counter to Metro's stated goal of providing homeowners with an investment opportunity. Third, the Supreme Court has recognized that the Fifth and Fourteenth Amendments

protect property owners' right to seek the highest prices on their property. *See Old Dearborn Distrib. Co. v. Segram-Distillers, Corp.*, 299 U.S. 183, 192 (1936). Fourth, the effect of STRPs on home prices is hotly debated, and having an STRP provides an income stream with which to address higher costs. Ms. Anderson, as a lay witness, would not be in a position to provide an opinion. In any event, she ultimately disavowed knowing how the cap affected prices. Ex. J, at 37:23-38:23.

E. *No valid reason exists to treat non-owner occupied STRPs differently from owner occupied or long-term renters.*

Even if one were to lend full credence to the expressed concerns of homeowners, Metro has failed to demonstrate a good and valid reason to subject only non-owner occupied STRPs to the burden of the cap. *See Sutton v. State*, 36 S.W. 697, 700 (Tenn. 1896) (quotation marks omitted). Until the enactment of the ordinance, STRPs were allowed to go without number. Almost entirely Metro proffers evidence that there was antipathy towards STRPs generally, but that is not what the law addresses. Furthermore, Metro places no restrictions whatsoever on a rental of thirty-one (31) days. If the concern is the absence of a homeowner, then that concern weighs even more heavily with long-term renters, practically by definition. As even Councilmember Allen recognized, in her experience long-term renters can be as much or more of a nuisance, and they do not leave in a few days. Ex. C.2.D, at 096, 109. The most favorable view of the evidence is that Metro has yet to identify the "substantial distinctions that make one class really

different from another." *State v. Nashville, C. & S. L. R. Co.*, 135 S.W. 773, 776 (Tenn. 1910) (citation and quotation omitted).

F. *The involvement of business competitors and the circuitous route in which Metro has chosen to try to protect neighborhoods indicate that this law was illegitimate protectionism.*

Along with *Consumers Gasoline*, Metro also avoids the case of *Craigmiles v. Giles*, which held that doling out favors to interested business competitors does not constitute a legitimate governmental interest. 312 F.3d at 224. The Sixth Circuit warned of the need for closer judicial vigilance when, as in this case, lawmakers choose a circuitous route to a legitimate end, despite the availability of a direct path. *Id.* at 227.

Unaddressed by Metro, this case demonstrates why its motion must fail. A direct path to protecting neighborhoods would have been to zone STRPs out of heavy residential areas, but allow them in mixed ones like Germantown. A direct path would have been a cap on the number of permits an individual could have. A direct path would have been a cap on the number of STRPs overall. The ordinance at issue warrants this Court's suspicion, especially given, unlike in *Craigmiles,* the direct evidence that business competitors labored to organize and pass this law as a way of "leveling the playing field." A genuine issue of fact exists as to whether the actual function of the law was protectionism.

III. The ordinance creates an unconstitutional monopoly in violation of the Tennessee Constitution.

Metro's argument for summary judgment rests on erroneous legal premises and factual ones that are, to say the least, sufficient to create a reasonable dispute of fact. No reasonable dispute of fact exists that STRPs were a common right. Legally, this Court can also reject the argument that the cap does not create a monopoly because the Andersons can just move. Also as a matter of law, this Court can rule that the stated goal of protecting neighborhood aesthetics is not a legitimate goal for the creation of a monopoly. Finally, there is at the least a reasonable dispute of fact as to whether the cap, placed only on one type of STRP while allowing unlimited numbers of the other type, is legitimately related to that goal, or whether the law was intended as protectionism.

A. *The record overwhelmingly shows that STRPs were a common right.*

Denying that it was a common right, Metro maintains that "nothing in the record" indicates that STRPs could operate in residential zones. Overwhelming and incontrovertible evidence demonstrates, however, that they were permitted. Metro admitted that operating an STRP was not previously a Codes violation. Def.'s Resp. to Pl.'s Interrog. No. 26, Ex. C.2. Metro produced a memorandum from the zoning administrator that they were permissible "anywhere a residential use is allowed." Ex. C.2.B. Councilmember Allen publicly stated on the record that they "seem to be fine,

[be]cause it doesn't say [in the Code] they are not fine."[5] Ex. I at 1:47:38; Ex. I.1. Her emails repeat this time and again, as cited in the Andersons' motion. Also on the record, the council attorney stated that rental of the home was then unregulated. Ex. H at 59:51-1:00:35; Ex. H.1. Frankly, all the evidence in the record runs counter: STRPs were a common right.

Metro mistakenly relies on *Ketner v. Clabo*, 225 S.W.2d 54 (Tenn. 1949) and *G&N Rest. Group, Inc. v. City of Chattanooga*, No. E2013-02617-COA-R3-CV, 2014 Tenn. App. LEXIS 634 (Tenn. Ct. App. Oct. 8, 2014) (copy of opinion attached), for the proposition that the cap did not create a monopoly because they were not a common right and anyone could apply for a limited number of permits. Def.'s Mem. Supp. Summ. J. 17. Factually, this is wrong. STRPs did operate as a common right, as shown above. Nor is it correct that the Andersons could have applied. All of the permits were gone before the Andersons even planned on moving. P.J. Anderson Decl. Ex. A. ¶¶ 15-19; Ex. B ¶¶ 6, 16-19. They are not alone. Persons whose life situations change, people who move to Nashville, people not yet born will never be able to count on a permit becoming available because they can be held in perpetuity.

Legally speaking, both *Ketner* and *G&N Restaurant Group* are inapposite. Both cases involved beer permits, a very different right from home ownership and entrepreneurship. Selling beer "is not a natural and

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[5] Also available here: *2/03/15 Metro Council Meeting*, Youtube, https://www.youtube.com/watch?v=fH6nagMVZFg&index=38&list=PLAAE32390485B37DB.

inherent or statute [sic] given right but a permissive right." *McHugh v. Morristown*, 208 S.W.2d 1021, 1023 (Tenn. 1948). It only exists by privilege, a privilege that was once taken by the government altogether but then reinstated with the Twenty-First Amendment, which "gave back to the states the power to regulate" alcohol. *Dixon v. Lawrenceburg Beer Bd.*, No. 01-A-9809-CH-00484, 1999 Tenn. App. LEXIS 465, at *2 (Tenn. Ct. App. July 16, 1999) (copy of opinion attached). As such, the beer business "is subject to unlimited restrictions." *Ketner*, 225 S.W.2d at 56.

Such limitless restrictions, however, are inapplicable to the home or the ability to pursue opportunity. Both are well recognized by courts as essential property and liberty interests. *See, e.g,, Truax v. Raich*, 239 U.S. 33 (1915); *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899); *Lion's Head Ass'n* 968 S.W.2d at 301. *Ketner's* reach is limited to instances where the government seeks to burden a privilege, not a right. Making full use of ones' home in pursuit of opportunity is a right that the government has only an exceedingly narrow ability to regulate, let alone prohibit them outright once a census tract reaches an arbitrary number.

B. *The ability to move does not make the cap any less monopolistic.*

Metro's next legal mistake is to reason with no supporting authority that the cap is not a monopoly because the Andersons can simply move. Def.'s Mem. Supp. Summ. J. 18. Metro' assumes that this is simply an outgrowth of zoning. It also misperceives what constitutes a monopoly. A monopoly is:

> when all, or so nearly all, of an article of trade or commerce *within a community or district*, is brought within the hands of one person or set of persons, as practically to bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein.

Trails End Campground, LLC v. Brimstone Rec., LLC, 2015 Tenn. App. LEXIS 39, at *23-24 (Tenn. Ct. App. Jan. 29, 2015) (emphasis added) (quoting *Black's Law Dictionary* (9th ed. 2009)) (copy of opinion previously provided). Within the Andersons' "community or district"—in this case, census tracts—all of an article of commerce has been brought with the hands of one set of persons. Metro chose to limit the number of permits by census tract. That is the applicable standard. Metro's understanding has no nexus in the case law, and would effectively write out the anti-monopolies clause because people could always move. The framers of the Tennessee Constitution placed no such boundaries on the anti-monopolies clause.

C. *The cap fails to advance any of the four (4) legitimate governmental interests.*

Metro's next argues that the cap aids in the promotion of health, safety, morals, and well being of the citizenry because it protects neighborhood aesthetics. Def.'s Mem. Supp. Summ. J. 18. It needs to be emphasized that the anti-monopolies test is different from the rational basis test in the equal protection argument. Whereas under rational basis, the onus is upon the Andersons to demonstrate the absence of any legitimate justification, under the anti-monopolies test, the onus is upon Metro to demonstrate that its monopoly has a legitimate tendency to advance one of a

finite set of goals: "health, safety, morals, or well being." *See Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 337-38 (Tenn. 1948).

1. *Metro has never even articulated a legitimate goal. Aesthetics do not justify a monopoly.*

Metro does so by relying on *Town of Smyrna v. Bell*, No. M2010-01519-COA-R3-CV, 2011 Tenn. App. LEXIS 592, at *4 (Tenn. Ct. App. Oct. 31, 2011) (copy of opinion attached), and its observation that zoning ordinances are "enacted for the purpose of promoting the health, safety, morals or general welfare of the community, and are promulgated in accordance with governmental police powers." Def.'s Mem. Supp. Summ. J. 19. But the Tennessee Supreme Court has firmly held that "a monopoly cannot be validly created merely by connecting such creation with the exercise of police powers." *See Checker Cab Co.*, 216 S.W.2d at 337. What Metro has done with the cap is not zoning, and a city's police powers can never authorize the creation of monopolies. *Bell* neither considered the anti-monopolies clause nor purported to hold that neighborhood aesthetics or welfare were legitimate justifications. Metro's authority under its police powers extends to regulation and zoning, but not monopolizing. *Bell* does not help Metro.

In quoting *Bell*, Metro attempts to smuggle in a new justification that is *not* part of the anti-monopolies test: community welfare. To satisfy the Tennessee Constitution, the monopoly must protect health, safety, morals, or well being. *See Checker Cab, 216 S.W.2d at* 337-38. Welfare is not on that list. Whereas aesthetics may serve the expansive notion of public *welfare*, it

does not serve the more limited goals of public health, safety, morals, or well being, nor does Metro try to explain how it would. "Residential feel" is an issue of personal taste, not actual physical (or moral) harm, however unsightly non-owner occupied STRPs might be. Notably, the Court has invalidated a city-sponsored monopoly of slaughterhouses in *Noe v. Morristown,* 161 S.W. 485 (Tenn. 1913), which present far more of an aesthetic menace. If aesthetics were enough, then Morristown could have certainly limited slaughterhouses. "Welfare" will not justify a monopoly.

The Andersons further note that the legitimacy of neighborhood aesthetics as a goal was carefully qualified, even in the *Bell* case. 2011 Tenn. App. LEXIS 592, at *17 n.3 (noting past conflicting decisions and finding that aesthetics were a legitimate goal "*depending upon the facts and circumstances*") (emphasis added) (citation and internal quotation marks omitted). In short, Metro's sole justification for the creation of a monopoly relies on an off-point case that equivocated about whether aesthetics were even within a government's police powers,

Relying on welfare is fatal for Metro because it means it has not so much as pled a necessary step for satisfying the legitimate relation test. This missing step renders Metro's argument legally deficient. The power to *regulate* does not carry with it the power to *monopolize. Checker Cab Co.,* 216 S.W.2d at 337. All Metro's pleadings merely establish is the power to regulate

without proffering a legitimate justification. This Court can rule as a matter of law.

2. *A genuine dispute of fact exists as to whether the cap on non-owner occupied STRPs has a reasonable tendency to protect neighborhood aesthetics.*

A genuine dispute of fact exists as to whether the stated fear of non-owner occupied STRPs taking over the city was evidence-based, either then or now, and as to whether the cap legitimately furthers that goal. This point too is unaddressed. As explained above, the negative answer is practically self-evident. Metro's evidence is concerned, almost exclusively, with STRPs overall. So either the fears of unchecked STRPS are unwarranted, or the cap is unnecessary. In either case, Metro loses. At the very least, the map demonstrating that non-owner occupied STRPs have not hit the cap in most areas of Nashville presents an evidentiary dispute that must be resolved by a trier of fact. Ex. G.3

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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:

Counsel	Counsel for	Via
Catherine J. Pham Metro Attorney Metro Courthouse [redacted] [redacted]300 [redacted]	Defendant	☐United States mail, postage prepaid ☑Hand delivery ☐Fax ☑Email ☐Fed Ex ☐CM/ECF

On this date, October 14, 2016.

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