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

RACHEL AND P.J. ANDERSON,	)	
Plaintiffs,	)	
v.	)	**Case No: 15C3212**
METROPOLITAN GOVERNMENT OF	)	
NASHVILLE & DAVIDSON COUNTY,	)	
Defendant.	)	

METRO'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Metropolitan Government submits this Response in opposition to Plaintiffs' Motion for Summary Judgment.

I. Because the STRP ordinances are not vague as applied to the facts of this case, Plaintiffs' vagueness challenge fails as a matter of law.

"Courts employ various levels of strictness in analyzing vagueness challenges, depending on the type of conduct regulated and the potential consequences of violations." *Carter v. Welles-Bowen Realty, Inc.,* 719 F.Supp.2d 846, 852 (N.D. Ohio 2010) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982)). Courts exercise closer scrutiny when laws reach conduct protected by the First Amendment or when they impose criminal penalties. *Belle Maer Harbor v. Charter Tp. of Harrison,* 170 F.3d 553, 557 (6th Cir. 1999) ("[V]agueness claims not involving First Amendment freedoms must be examined in light of the facts of the particular case at hand and not as to the statute's facial validity … [and] even in cases not involving First Amendment rights, we have recognized that courts may engage in a facial analysis where the enactment imposes criminal sanctions."). In all other cases, the plaintiff "bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation." *U.S. v. Krumrei,* 258 F.3d 535, 537 (6th Cir. 2001).

Here, neither First Amendment rights nor criminal penalties are involved. Therefore, Plaintiffs cannot make a facial challenge to the short-term rental ordinances. *See Columbia Natural Resources, Inc. v. Tatum,* 58 F.3d 1101, 1109 n.6 (6th Cir. 1995); *Springfield Armory, Inc. v. City of Columbus,* 29 F.3d 250, 252–254 (6th Cir. 1994). Instead, the Court should perform an "as applied" analysis and review Plaintiffs' vagueness challenge only in light of the facts of this particular case.

A short term rental property is defined in the Metro 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. Residential dwelling units rented to the same occupant for more than thirty continuous days, bed and breakfast establishments, boarding houses, hotels, and motels shall not be considered short term rental property." The Anderson's home is located in a residential zoning district (R6) and has three bedrooms. Further, they acknowledge that they began renting out their home through Airbnb in November 2013. As such, their home fits squarely within the definition of a short-term rental property.

Even so, Plaintiffs allege the ordinance is vague because they believe that their home could also be classified as a bed and breakfast, boarding house or hotel.[1] But as explained in

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[1] Plaintiffs argue that the broad definition of a "hotel" in the Metro Code could fit the Anderson's home. But Plaintiffs are confusing the definition of "hotel" for taxation purposes with the definition of "hotel" for zoning purposes.

Metro Code § 5.12.010 contains definitions of various terms for the purpose of collecting the hotel occupancy privilege tax. It defines "hotel" as "any structure, or any portion of any structure, which is occupied or intended or designed for occupancy by transients for dwelling, lodging or sleeping purposes within the area of the jurisdiction of the metropolitan government, and includes any hotel, inn, tourist court, tourist camp, tourist cabin, motel or any place in which rooms, lodgings or accommodations are furnished to transients for a consideration." It also limits applicability of this definition to the Chapter of the Metro Code in which it is located. Metro Code § 5.12.010 ("As used in this chapter, unless a different meaning clearly appears from the context, the following definitions shall apply…") (emphasis added).

Metro's memorandum in support of its motion for summary judgment, bed and breakfasts, boarding houses and hotels are not permitted in R6 zoning districts. If there had been an overlap between the definitions, the Andersons would not have the standing to challenge it because they could not legally operate their home as a bed and breakfast, boarding house or hotel. *See Parker v. Levy,* 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

The facts of this case also belie Plaintiffs' assertion that the ordinance is vague as applied to the Anderson's home. The Andersons clearly understand that the ordinance applies to their home because they applied for an owner occupied permit and later attempted to obtain a non-owner occupied permit to operate a short-term rental property. In fact, the gravamen of Plaintiffs' Complaint is not whether the STRP ordinances apply to them, but how they apply to them, in that they are unable to obtain a non-owner occupied permit.

II. The 3% cap on non-owner occupied STRPs does not create an unconstitutional monopoly.

Plaintiffs argue that it is undisputed that operating a non-owner occupied STRP is a "prior common right." In support of this contention, they point to comments made by the Zoning Administrator and the bills' sponsor. But these comments merely suggest that non-owner occupied STRPs were unregulated prior to the passage of the ordinances, not that they were a right available to the general public. After all, the question of whether operating a non-owner occupied STRP in a residentially zoned district is a "prior common right" is a legal question for this Court to answer, not a question of fact as Plaintiffs contend.

On the other hand, the Metro Zoning Code contains no specific definition for the term "hotel." *See* Metro Code § 17.04.060(B). Instead, for zoning purposes, "[w]here words have not been defined, the definition found in the most current edition of Webster's Unabridged Dictionary shall be used." Metro Code § 17.04.060(A). Webster's defines "hotel" as "an establishment that provides lodging and usually meals, entertainment, and various personal services for the public."

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

Here, the STRP ordinances have not limited the business of operating a non-owner occupied STRP to a single person or company, and Plaintiffs are not precluded from engaging in this business because there are numerous permits available in other census tracts. The STRP ordinances do not prevent the Plaintiffs (or anyone else for that matter) from participating in this particular business – they simply limit the total number of these businesses in each area of town.

The most recent case examining the anti-monopoly provision in the Tennessee Constitution in the context of the twenty-first century provides a more complete definition of a monopoly:

> A modern definition of the concept of "monopoly" is found in Black's Law Dictionary (9th ed. 2009), quoting 54A Am.Jur.2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 781, at 107 (1996), as follows:
>
> In the modern sense, a monopoly exists 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. A monopoly is created when, as the result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power, for all practical purposes, to control the prices of a commodity and thus to suppress competition. In brief, a monopoly is the practical suppression of effective business competition which thereby creates a power to control prices to the public harm.

Trails End Campground, LLC v. Brimstone Recreation, LLC, No. E2014–00336–COA–R3–CV, 2015 WL 388313, *9 (Tenn. Ct. App. Jan. 29, 2016) (emphasis added). If the STRP ordinances are examined through the lens of this modern definition, there is no question that they do not create a monopoly. There is no allegation that the current non-owner occupied STRP permit holders are acting in concert with each other or controlling rental rates for the rest of the community. The 3% cap does not concentrate the business of operating a non-owner occupied STRP in the hands of one person or even a few people acting together. It does not even prevent new competitors (like the Andersons) from entering the marketplace. They may enter the marketplace by purchasing property where permits are available.

If a monopoly had been created by the 3% cap, the question of whether the Council has correctly exercised its police power would be examined by applying the rational basis test. *Dial-A-Page, Inc. v. Bissell,* 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991). In the landmark zoning case, *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926), which dealt with a challenge to a zoning ordinance under the due process clause and the equal protection clause, the United States Supreme Court stated:

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

Id. at 386.

Since that time courts have consistently upheld zoning laws that protect residential neighborhoods as a valid exercise of police power under rational basis review despite the fact that

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

III. The 3% cap on non-owner occupied STRP permits does not violate equal protection.

Plaintiffs assert that *Craigmiles v. Giles,* 312 F.3d 220 (6th Cir. 2002) is binding precedent that supports their equal protection claim. But in *Craigmiles* "the casket makers alleged that they were *different* from funeral directors and that the Tennessee law treating them the *same* was an unconstitutional barrier to their chosen profession that lacked any rational basis." *Bah v. Attorney General of Tennessee,* 610 Fed.Appx 547, 555 (citing *Craigmiles,* 312 F.3d at 225). "Equal protection claims are generally stated just the opposite – that the plaintiff is similarly situated to another individual but the defendant treated the plaintiff disparately with no rational basis for doing so." *Id.* "In other words, although the casket sellers brought claims under both the Due Process and Equal Protection Clauses, and the Sixth Circuit affirmed on both grounds, their argument was not that they were being treated differently in violation of the Equal Protection Clause, but that they were suffering an unconstitutional barrier to practice their profession – a due process claim." *Id.* (quoting *Merrifield v. Lockyer,* 547 F.3d 978, 985 (9th Cir. 2008) (emphasis added).

Plaintiffs' substantive due process claim has already been rejected by the Court, so *Craigmiles* provides little guidance in this case. Although *Craigmiles* may stand for the proposition that economic protectionism is not a legitimate governmental purpose for rational basis review, it does not negate the first step in an analysis under the Equal Protection Clause – an examination of whether the Plaintiffs were treated differently from other similarly situated individuals.

Plaintiffs' Complaint does not identify what individuals are similarly situated to them but treated differently. It appears that Plaintiffs are arguing that as a non-owner occupied STRP permit applicant, they are treated differently from owner-occupied STRP permit applicants because as part of the former category, they are subject to the 3% cap. Importantly, Plaintiffs have not produced any evidence that these two groups are "similarly situated" in all material respects. Common sense dictates that a full-time commercial property with no long-term resident is very different from a home occupied by a long-term resident that is sometimes rented out on a short-term basis. This was acknowledged by Plaintiff Mrs. Anderson in her deposition ("I agree that there should be some kind of guidelines or limitations. I don't want to be in a neighborhood that's all short-term rentals either…I just like the idea of knowing your neighbors. You know, if you need a loaf of bread of some milk, that you can go across the street. I mean, we don't have much – all our houses are relatively small, so we spend a lot of time outside in the summer. We all talk and things like that.") Anderson Deposition, p. 18, l. 22-24, p. 20, l. 12-18. In addition, the declarations of Christopher Wood and Pippa Holloway also demonstrate that these two groups are perceived differently in Nashville neighborhoods. Wood Decl., ¶ 4-7; Holloway Decl., ¶ 4-7.

Plaintiffs argue that the 3% cap cannot withstand rational basis review. But pointing to a lack of "objective, scientific evidence" underlying the Council's decision or asserting that the 3%

cap does not protect neighborhoods as it was designed to do or even suggesting a different method for capping STRPs would be more rational is simply not enough to overcome the "strong presumption of validity" for the ordinances under rational basis review. *See Walker v. Bain,* 257 F.3d 660, 668 (6th Cir. 2001).

This is because a court's "standards for accepting a justification for the regulatory scheme are far from daunting. A proffered explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's 'rational speculation' linking the regulation to a legitimate purpose, even 'unsupported by evidence or empirical data.'" *Craigmiles,* 312 F.3d at 224 (emphasis added).

"Rational basis review does not empower … courts to 'subject' legislative line-drawing to 'courtroom' factfinding designed to show that legislatures have done too much or too little. *DeBoer v. Snyder,* 772 F.3d 388, 404–405 (6th Cir. 2014)). "[T]here may be no actual proof supporting [the legislature's] decision (in fact, there could even be proof demonstrating that the policy does not, in fact, achieve the desired result)." *Wagner v. Haslam,* 112 F.Supp.3d 673, 692–93 (M.D. Tenn. 2015) (emphasis added).

> In sum, where rational basis review applies … the U.S. Constitution allows … legislators and policymakers to make both excellent decisions and terrible decisions, provided that the decisions are based on some conceivable modicum of rationality at the time of their passage or application in practice. The U.S. Constitution does not permit a … court to evaluate or rule upon the wisdom of these decisions, even where the policy may be unfair, misguided, or counter-productive. Thus, when a … court finds that a policy is "rationally related to a legitimate government objective," the court is not endorsing the policy, finding that it is empirically supported, or concluding that it is a wise idea. The court is merely ruling that the U.S. Constitution does not forbid a state or locality from adopting or applying that policy.

Id. at 693 (emphasis added).

IV. Economic protectionism was not the goal of the 3% cap on non-owner occupied STRPs.

For both the monopoly claim and the Equal Protection claim, Plaintiffs claim that the Council's real reason for the 3% cap was economic protectionism – specifically protecting the hotel industry from competition. But speculating that Metro's justifications for the 3% cap are pretextual does not make it so. Plaintiffs' only proof for their claim is that the bills' sponsor, Councilmember Burkley Allen, reached out to the more traditional hospitality sector in the process of drafting the STRP legislation.

But this ignores the comparatively abundant evidence in the record that the 3% cap was inserted into the law for the purpose of protecting the residential character of Nashville neighborhoods, by limiting the number of properties that were not lived in by owners and only operated as short term rentals. Councilmember Allen communicated with numerous constituents unrelated to the hotel industry who were justifiably concerned about commercial activity, like non-owner occupied STRPs, in their neighborhoods. Attachment to Allen Decl. She also consulted with Airbnb lobbyists and multiple Metro departments prior to the passage of the ordinances. Metro's Response to Plaintiff's Interrogatories, Feb. 26, 2016, No. 2. Discussing legislation with individuals from varying viewpoints does not demonstrate an improper motive – instead, it demonstrates that Councilmember Allen was extremely conscientious in trying to locate a middle ground to balance the needs of as many citizens as possible.

Further, the Metro Council speaks and acts as a body, not individually, so Councilmember Allen's statements do not necessarily reflect the intent of all members of the Metro Council or even the Council as a whole. *See B & B Enterprises of Wilson Co., LLC v. City of Lebanon,* No. M2003-00267-COA-R3CV, 2004 WL 2916141, at *3 (Tenn. Ct. App. Dec. 16, 2004) ("The official record of a governmental board's or commission's actions is customarily its minutes. The

courts have repeatedly observed that boards and commissions, like the planning commission in this case, speak or act officially only through their minutes and records made at duly called meetings.").

CONCLUSION

The Metropolitan Government asks that the Court grant its summary judgment in favor of Metro and deny Plaintiffs' motion for summary judgment based on the grounds presented in its summary judgment motion and based on this response, as follows:

- The STRP ordinances apply to the Plaintiffs' property because they are the only type of short term rental use permitted on Plaintiffs' R6 zoned property. Bed and breakfasts, boarding houses and hotels are not permitted in R6 zoning districts.

- The STRP ordinances are not unconstitionally vague. The definitions are clear on their face and the zoning categories (here, R6) add context to the definitions. The Plaintiffs have always understood that their use fell under the STRP ordinances since they applied for an owner occupied permit and later attempted to obtain a non-owner occupied permit to operate a short-term rental property.

- The STRP ordinances do not create an illegal monopoly. Prior to this ordinance being adopted in 2015, there was no legal "right" to operate an unlimited number of non-owner occupied mini-hotels in residentially-zoned Nashville neighborhoods. The ordinances reasonably limited the number of non-owner occupied permits to meet a rational, legitimate governmental purpose. The dangers of monopoly (concentrating the business of operating a non-owner occupied STRP in the hands of one person or even a few people acting together, preventing new competitors from entering the marketplace) are not evident or even possible, where the permits were issued to the public on a first-come, first-served basis and where there are still many permits available in Davidson County.

- The STRP ordinances do not violate equal protection, because owner occupied STRPs and non-owner occupied STRPS are not similarly situated. Common sense, the testimony of the Plaintiff, the affidavits of Holloway and Wood, and the constituent input received by Councilperson Allen all show that a full-time commercial property with no long-term resident is very different from a home occupied by a long-term resident that is sometimes rented out on a short-term basis. They are not only different in nature; they have different effects on their neighborhood. Balancing the different purposes, needs, and effects by limiting the number of non-owner occupied mini-hotels operating in residential neighborhoods is a rational, legitimate governmental purpose.

For these reasons, Metro respectfully requests that its summary judgment motion be granted and Plaintiffs' motion be denied.

Respectfully submitted,
THE DEPARTMENT OF LAW OF THE
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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 email by agreement to Braden H. Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219 on October 14, 2016.

Catherine J. Pham