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

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

MEMORANDUM OF LAW IN SUPPORT OF METRO'S MOTION FOR SUMMARY JUDGMENT

The Metropolitan Government respectfully submits this Memorandum of Law in support of its Motion for Summary Judgment, on the following grounds:

- The STRP ordinances apply to Plaintiffs' property;
- The ordinances are not unconstitutionally vague in violation of the Tennessee Constitution and the Fourteenth Amendment of the U.S. Constitution;
- The ordinances do not violate the Equal Protection clause of the Tennessee Constitution or the Fourteenth Amendment of the U.S. Constitution because they serve a rational, legitimate government interest;
- The ordinances do not create a monopoly in violation of the Tennessee Constitution.

FACTUAL BACKGROUND

Plaintiffs bring this § 1983 lawsuit seeking to invalidate two Metro ordinances. The ordinances govern short-term rental properties (STRPs), such as rentals through *www.airbnb.com.* However, the ordinances do not ban short-term rentals. They allow short term rentals so long as two primary conditions are met: (1) the applicant obtains a permit, and (2) pays taxes. The ordinances also describe the contours of what constitutes an STRP in that bed and breakfast establishments, boarding houses, hotels, and motels are not considered. M.C.L. § 6.28.030(A).

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).

BL 2014-909 and BL 2014-951 were sponsored by Councilwoman Burkley Allen. Allen Decl., ¶ 3. BL 2014-909 was introduced and passed first reading before the Metro Council on October 7, 2014. Metro. Govt. Ordinance BL 2014-909. It was referred to the Planning Commission and the Planning & Zoning Committee of the Metro Council. *Id.* After a few deferrals and the introduction of a substitute ordinance, it passed second reading on February 3, 2015. *Id.* BL 2014-951 was introduced and passed first reading on November 8, 2014. Metro. Govt. Ordinance BL 2014-951. It was deferred and then amended on second reading on February 3, 2015. *Id.* Both bills passed third reading on February 24, 2015. *Id.* They were signed by Mayor Karl Deal on February 26, 2015 and became effective on March 6, 2015. *Id.*

Pursuant to these ordinances, there are two kinds of STRP permits for single-family homes, based on whether the owner occupies the premises. The first permit type allows "owner occupied" permits. M.C.L. § 6.28.030(Q). There is no limit on the number of "owner occupied" permits that can be issued. *Id.* The second permit type is available for property owners that do not live on the premises. These "non-owner occupied permits" are limited in number. No more than 3% of the residences within each census tract may be issued non-owner occupied STRP permits. *Id.*

The Plaintiffs own a three-bedroom home at 1623 5th Avenue North, Nashville, Tennessee in an R6 zoned district. Complaint, ¶ 31-32, 41. The Plaintiffs began using their home as a STRP in November of 2013. Complaint, ¶ 34; Anderson Depo., p. 10, l. 13-18. They obtained a permit

in 2015, after the Metro permitting process went into effect. Complaint, ¶ 67; Anderson Depo., p. 13, l. 20 through p. 14, l. 4.. Their permit was for an *owner occupied* STRP. *Id.* Both owner occupied and non-owner occupied STRP permits were available beginning on X. Any property owner wishing to apply for either permit was able to at that time.

In August of 2015, the Plaintiffs asked Metro to convert their permit to a non-owner occupied permit. Complaint, ¶ 77; Anderson Depo., p. 15, l. 13-21. Their request for a non-owner occupied permit was not granted because the 3% cap had already been reached for their census tract. *Id.*

PROCEDURAL HISTORY

On August 26, 2015, Plaintiffs Rachel and P.J. Anderson, filed suit against the Metropolitan Government of Nashville and Davidson County.

Claim Five (substantive due process) of Plaintiffs' Complaint was dismissed by the Court on November 12, 2015. Claim Three (commercial speech) and Claim Seven (unreasonable search) were dismissed by Agreed Order on August 25, 2016. Plaintiffs' remaining claims are: (1) the STRP ordinance does not apply to Plaintiffs because they qualify for an exemption, (2) the STRP ordinance is unconstitutionally vague, (3) the STRP ordinance violates equal protection, and (4) the STRP ordinance creates an unlawful monopoly.

STANDARD OF REVIEW

Tenn. Code Ann. § 20–16–101 applies to summary judgment motions. The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> > (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or

(2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20–16–101.

The Tennessee Court of Appeals has noted that this statute "return[s] the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan*, reinstating the 'put up or shut up' standard." *Coleman v. S. Tennessee Oil, Inc.*, 2012 WL 2628617 (Tenn. Ct. App. July 5, 2012).

If the moving party makes a properly supported motion, the non-moving party must then establish the existence of the essential elements of the claim. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). The nonmoving party's evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party. *Id.*

Additionally, "[s]ummary judgment may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Arnold ex rel. Arnold v. Kennedy*, 2013 WL 2423901, *10-11 (Tenn. Ct. App. May 31, 2013) (citations omitted).

LEGAL ANALYSIS

I. THE STRP ORDINANCES APPLY TO PLAINTIFFS' PROPERTY.

Plaintiffs allege that their property qualifies as a hotel, bed and breakfast or boardinghouse, which are specifically exempted from the definition of a "short-term rental property." Plaintiffs claim that they "both fall under the ordinance and are exempted out of the ordinance." Complaint, ¶ 93-97.

The Plaintiff's property is located in a district zoned as R6. Complaint, ¶ 41. Hotels, bed and breakfast inns and boarding houses are both classified as commercial uses according to the District Land Use Table in the Metro Zoning Code. M.C.L § 17.08.030. As such, they are not permitted in districts zoned R6, such as the Plaintiffs' property.

"Boarding house" is defined in the Metro Zoning Code as "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." M.C.L § 17.04.060(B). Plaintiffs have never alleged that they performed any services or supervised their guests as part of their Airbnb business. *See* Complaint, ¶ 36. While a boarding houses is classified as residential use, it is not permitted in districts zoned R6. M.C.L § 17.08.030.

Under the uses defined in the Metro Zoning Code, Plaintiffs' property is not a boarding house, and it would not be permitted at all if it was a hotel, a bed and breakfast or a boarding house. Plaintiffs' property does, however, fit the definition of a "short-term rental property," 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." M.C.L § 17.04.060(B); *see also,* Complaint, ¶ 32-36. Therefore, the STRP ordinances apply to the Plaintiffs' property.

II. THE STRP ORDINANCES ARE NOT UNCONSTITUTIONALLY VAGUE IN VIOLATION OF ARTICLE I, SECTION 8 OF THE TENNESSEE CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

Plaintiffs allege that the STRP ordinances are unconstitutionally vague because "no ordinary person could know if the law covers their activity or if they are exempt." Complaint, ¶ 100. Again, the Plaintiffs point to the terms "hotel," "bed and breakfast" and "boardinghouse," and they claim that their home could qualify as both an STRP and one of those terms. *Id.*, ¶ 95-

97. But this is not possible, because the ordinance, on its face, makes it clear that these terms do not overlap with the definition of an STRP[1] – "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." M.C.L § 6.28.030(A).

"The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words." *State v. Lyons,* 802 S.W.2d 590, 592 (Tenn. 1990). In the absence of a definition, the Court should construe a term in accordance with its ordinary and natural meaning. *F.D.I.C. v. Meyer,* 510 U.S. 471, 476 (1994). Further, it is the Court's duty to adopt a construction of the ordinance that will sustain the enactment and avoid constitutional conflict if possible. *Id.; Marion County Board of Commissioners v. Marion County Election Commission,* 594 S.W.2d 681, 685 (Tenn. 1980); *see also, State v. Hudson,* 562 S.W.2d 416, 418-19 (Tenn. 1978).

The words "shall not be" do not provide any ambiguity that could serve as the grounds for a claim of vagueness. If a property's use qualifies as any of the other terms listed in the statute, it cannot also be an STRP. Because there is no ambiguity in the definition of an STRP as it applies to Plaintiffs' property, the STRP ordinances are not unconstitutionally vague.

III. THE ORDINANCES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE TENNESSEE CONSTITUTION OR THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

Plaintiffs allege that the 3% cap on non-owner occupied STRP permits violates the Equal Protection clause of the Tennessee Constitution and the 14th Amendment of the U.S. Constitution.

[1] Also, as explained in the previous section, the Plaintiffs' home could not legally be used as a hotel or bed and breakfast in the R6 zoning district in which it is located, and it does not meet the definition in the Metro Zoning Code of a "boarding house."

The Tennessee Constitution's equal protection provisions confer "essentially the same protection" as the Equal Protection clause of the United States Constitution. *Riggs v. Burson,* 941 S.W.2d 44, 52 (Tenn. 1997); *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993). "Both guarantee that all persons who are similarly situated will be treated alike by the government and by the law." *Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville and Davidson County, 2005* WL 1541860, *7 (Tenn. Ct. App. June 30, 2005) (citing *Tennessee Small Schools,* 951 S.W.2d at 153.

Here, the STRP ordinances contain two classes of permits, owner occupied and non-owner occupied, which are treated differently in that non-owner occupied permits are subject to a 3% cap while owner occupied permits are not.

A. OWNER OCCUPIED STRPS AND NON-OWNER OCCUPIED STRPS ARE NOT SIMILARLY SITUATED.

"It is well settled that the equal protection clause does not require absolute equality from the State and its political subdivisions." *Posey v. City of Memphis,* 164 S.W.3d 575, 578–79 (Tenn. Ct. App. 2004) (citing *Gray's Disposal Co. v. Metro. Gov't of Nashville,* 122 S.W.3d 148, 162–63 (Tenn. Ct. App. 2002)). As a threshold determination, the Court must first consider whether classes are "similarly situated so as to warrant application of the protection of the equal protection clause." *Id.* at 579.

"In determining whether individuals are 'similarly situated,' a court should 'not demand exact correlation, but should instead seek relevant similarity.'" *Bench Billboard v. City of Cincinnati,* 675 F.3d 974, 987 (6th Cir. 2012) (quoting *Perry v. McGinnis,* 209 F.3d 597, 601 (6th Cir. 2000) (citation omitted)). "[M]ateriality cannot be evaluated in a vacuum." *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty., Ohio,* 430 F.3d 783, 790 (6th Cir. 2005). "Inevitably, the degree to which others are viewed as similarly situated depends substantially on the facts and context of

the case." *Loesel v. City of Frankenmuth,* 692 F.3d 452, 463 (6th Cir. 2012) (quoting *Jennings v. City of Stillwater,* 383 F.3d 1199, 1214 (10th Cir. 2004)). "Whether ... differences are material depends on whether disparate treatment would be justified based on these attributes—i.e., would the city have a rational reason" for treating non-owner occupied STRPs and owner occupied STRPs differently. *EJS Properties, LLC v. City of Toledo,* 698 F.3d 854, 865 (6th Cir. 2012) (citing *TriHealth, Inc. v. Bd. of Com'rs, Hamilton Cty., Ohio,* 430 3d 783, 790 (6th Cir. 2005).

An "owner occupied" STRP is defined as "owner of the property permanently resides in the STRP or in the principal residential unit with which the STRP is associated on the same lot." Owner occupied STRPs house long-term residents, similar to the majority of properties in a residential neighborhood.

Non-owner occupied STRPs, on the other hand, house only transient strangers, operating more like a commercial property or hotel. *See* Holloway Decl., ¶ 4; Wood Decl., ¶ 4. STRPs that house long-term residents are part of a neighborhood's community, while non-owner occupied STRPs are "occupied primarily during the weekends, often by individuals hosting parties, sometimes with dozens of guests." Wood Decl., ¶ 4; Holloway Decl., ¶ 7; *see also, PHN Motors, LLC v. Medina Tp.,* 2012 WL 3834778, *9 (6th Cir. Sept. 4, 2012) (finding that property in residential districts is not similarly situated to property in commercial districts because "residential districts, by definition, usually draw significantly less traffic...are often primarily used by those who live in them and are not often a destination for large numbers of people from outside the residential area."); *City of Ladue v. Gilleo,* 512 U.S. 43, 58 (1994) (recognizing that "individual residents themselves have strong incentives to keep their own property values up" while commercial property owners do not share those same incentives).

On the facts and context of this case, an owner occupied STRP and a non-owner occupied STRP are not "similarly situated" for the purpose of an Equal Protection analysis.

B. THE DIFFERENT TREATMENT OF OWNER OCCUPIED STRPS AND NON-OWNER OCCUPIED STRPS SERVES A RATIONAL, LEGITIMATE GOVERNMENTAL PURPOSE.

"Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., alienage or race). *State v. Tester,* 879 S.W.2d 823, 828 (Tenn. 1994); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973). In this case, there is no fundamental right at stake or protected class at issue. The classification made by the ordinances (owner occupied vs. non-owner occupied) does not interfere with the exercise of a fundamental right, and therefore the Court must apply the rational basis test in analyzing the Plaintiffs' claim. *See Gallaher v. Elam,* 104 S.W.3d 455, 461 (Tenn. 2003); *G & N Rest. Grp., Inc. v. City of Chattanooga*, E2013-02617-COA-R3CV, 2014 WL 5035428, at *9-10 (Tenn. Ct. App. Oct. 8, 2014), *appeal denied, not for citation* (Mar. 11, 2015) (beer permit is a privilege rather than a fundamental right).

Under rational basis review, "the burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable, the statute must be upheld." *Beaman Bottling Co. v. Huddleston,* 01-A-01-9512-CH00567, 1996 WL 417100, at *4 (Tenn. Ct. App. 1996) (quoting *Harrison v. Schrader,* 569 S.W.2d 822, 826 (Tenn.1978)). "On rational-basis review, a classification in a statute ... comes to [the Court] bearing a strong presumption of validity...and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,'...Moreover, because we never require a legislature to articulate its reasons for

enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Nor can the Council's classification be deemed to lack rational justification simply because it "is not made with mathematical nicety or because in practice it results some inequality." *Id.* at 316 n. 7 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)). An equal protection violation will be made out only if the Council's action is shown to be "irrational." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 710 (6th Cir. 2005).

In the specific context of a zoning ordinance, the Tennessee Supreme Court has held that zoning ordinances are legislative acts and are valid if they have a rational or justifiable basis:

> When a municipal governing body acts under its delegated police powers either to adopt or amend a zoning ordinance, it acts in a legislative capacity and the scope of judicial review of such action is quite restricted. *Davidson County v. Rogers*, 184 Tenn. 327, 198 S.W.2d 812 (1947); *Mobile Home City of Chattanooga v. Hamilton County, supra; Barret v. Shelby County*, Tenn. App., 619 S.W.2d 390 (1981).
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> **"Legislative classification in a zoning law, ordinance or resolution is valid if any possible reason can be conceived to justify it."** *State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg*, Tenn., 636 S.W.2d 430, 437 (1982).
>
> The restricted role of the courts in reviewing the validity of a zoning ordinance or regulation has been aptly stated as follows:
>
> "Zoning is a legislative matter, and, as a general proposition, the exercise of the zoning power should not be subjected to judicial interference unless clearly necessary. **In enacting or amending zoning legislation, the local authorities are vested with broad discretion and, in cases where the validity of a zoning ordinance is fairly debatable, the court cannot substitute its judgment for that of the legislative authority.** If there is a rational or justifiable basis for the enactment and it does not violate any state statute or positive constitutional guaranty, the wisdom of the zoning regulation is a matter exclusively for legislative determination.

Fallin v. Knox Cnty. Bd. of Comm'rs, 656 S.W.2d 338, 342-43 (Tenn. 1983) (emphasis added).

1. The 3% cap was instituted by the Metro Council in order to protect the residential character of Nashville's neighborhoods.

In this case, both Ordinance BL2014-909 and BL2014-951 include the following rational and justifiable reasons for allowing some short term rentals but restricting the number that are not occupied by an owner:

> WHEREAS, short-term rental of homes can provide a flexible housing stock that allows travelers a safe accommodation while contributing to the local economy; and
>
> WHEREAS, short-term rental of homes can provide homeowners an opportunity to hold property in difficult economic circumstances or as an investment; and
>
> WHEREAS, hotel taxes from short term rental of homes can be used to promote travel and tourism and to support the local tourism industry; and
>
> WHEREAS, the needs of long-term residents should be balanced with the allowance of short-term rentals.

Metro Council's concern about having some residential neighborhoods overtaken by properties that are not lived in by owners and only operate as rentals is a valid one and constitutes a rational basis for Council's enactments.

For the purposes of rational basis review, protecting the residential character of neighborhoods is reasonable basis for differentiating between owner occupied and non-owner occupied STRPs. The Sixth Circuit has held that the "desire to preserve the residential and quiet nature of the neighborhood" is a permissible motive for zoning decisions. *Hartman & Tyner, Inc. v. Charter Twp. of W. Bloomfield,* 985 F.2d 560 (6th Cir. 1993); *see also, Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992) (concerns about the deterioration of the neighborhood are rationally related to the goals of zoning). After all, "[a]ll zoning plans have inherent within them a discrimination between the various land uses permitted thereunder. Consequently, the classification to which plaintiffs have been subjected is that which permeates

all zoning, and does not amount to a denial of equal protection." *Studen v. Beebe,* 588 F.2d 560, 565 (6th Cir. 1978).

2. **Many citizens of Nashville were concerned about commercial activity, like non-owner occupied STRPs, in their neighborhoods.**

While the bills were being debated, their sponsor, Councilwoman Burkley Allen, heard from many citizens of Nashville and Davidson County who shared the Metro Council's concerns related to preserving the residential character of Nashville neighborhoods:

- "[A]s a property owner, I do worry about how having these sorts of short term rental places operating in neighboring houses will affect things like: parking, traffic, trash, etc." (Omid Yamini, Sept. 8, 2014)

- "...I would like to go on record as being against allowing this in a single family area. I have one of these a couple houses away. I bought by house so I would not be around a business. I don't care how you slice this it is a business! Different people come and go all hours of the day and night. Normally you get to know yours [sic] neighbor and you know who should be there and who should not be so when strangers are around a neighbors [sic] house you may call the police to check if they belong. I believe this should be banned in Brentwood." (Glen Allen, Sept. 21, 2014)

- "As a homeowner and parent, I am strongly opposed to allowing short-term rentals in residential areas, especially those zoned RS40. The introduction of a transient population to a residential neighborhood could bring safety concerns as well as a decrease in property values and degradation of neighborhoods. My husband and I purchased our home because it was in an established neighborhood of homeowners." (Vicki Manning, Sept. 26, 2014)

- "The overwhelming opinion of folks in my neighborhood is a resounding no. Folks feel very uncomfortable with 'unknowns' in the 'hood." (Bell Lowe Newton, Oct. 12, 2014)

- "We are totally opposed to short term rentals in our neighborhood. The practice could bring undesirable, improperly vetted strangers into an otherwise stable neighborhood." (Esther Cohn, Oct. 13, 2014)

- "I love my neighborhood, too, and if I got to vote, I would not want vacation rentals my neighborhood at all. The people using these houses are not my neighbors – they are just a constant stream of strangers. It seems to me that Metro has made many efforts lately to build communities. Neighbors knowing their neighbors is a huge part of this. But I don't know who is in my neighborhood these days." (Kim Sorenson, Oct. 18, 2014)

- "I am concerned that the proposed bill does not limit this activity to owner occupied dwellings. There needs to be someone present and responsible for occupants – to be certain the house is not turned into a party house which will spill over negatively into the surrounding neighborhood." (Jan Bushing, Oct. 15, 2014)

- "The removal of home ownership further opens the door to non-resident infiltration of neighborhoods. This is not pro-neighborhood. I realize Nashville is a popular place, but by enacting this bill, you have essentially transformed quiet, family friendly neighborhoods into tourist zones." (Chris Ferrara, Nov. 10, 2014)

- "I am strongly opposed to this legislation that would allow for short term rentals of properties in my neighborhood. To me this violates the whole point of zoning laws, not to mention hotel and tourism taxes and regulations. In no way would I think it is in the interest of the neighborhoods of Nashville to allow such rentals. In my opinion it would significantly reduce the home values and quality of life we should be protecting." (Clay Beach, Nov. 12, 2016)

- "I think that eliminating the pure hotel-free neighborhoods in our city is very short sighted and will serve to benefit all surrounding counties much more than Nashville. It certainly reduces all residential real estate values in our neighborhood. If all of Nashville becomes for-profit commercial property no families will choose to live here. It reminds me of Pottersville in It's a Wonderful Life – Mr. Potter also equated progress with profit." (Mary Ferrara, Nov. 16, 2014)

- "Allowing a dwelling to be used for such purposes in effect changes its character from a residential to a commercial use. I do not believe this use of the single-family dwellings in my neighborhood or many other neighborhoods in Nashville would be a good fit or would be welcomed by current residents. While renting homes or portions of homes through websites such as airbnb or VRBO can make sense for beach communities, ski resorts or downtown areas of tourist-friendly cities like Nashville, it does not make sense in the quiet neighborhoods of Green Hills. When homes are occupied by homeowners or long-term renters, the occupants have an investment in the neighborhood and generally have more of an incentive to be good neighbors. Visitors renting a home while in Nashville for the CMA Festival, the Music City Bowl or a bachelor party don't have the same incentive." (Robert Horner, Nov. 13, 2014)

- "As amended, the legislation is fair and addresses almost all of the concerns that citizens have brought to Ms. Allen. Allowing unlimited owner occupied rentals and restricting those that are not owner occupied to 3% of single family homes in a census tract will not force any current hosts to stop opening their homes and will not turn neighborhoods into commercial hotel areas." (Luann Reid, Nov. 18, 2014)

- "These STRP bills are nothing more than providing an exception for a specific type of home business. If approved, in addition to giving neighborhoods a more commercial feel, I am concerned it will open the door for other specific types of home businesses

in residential neighborhoods...Residential neighborhoods need to remain residential – at least an appearance of residential...Better management of Metro tax dollars would prevent this invasion of residential neighborhoods for the sake of increasing the Metro coffers. Please do not legalize home businesses." (Charlotte Cooper, Nov. 30, 2014)

- "We do not feel that these two bills, BL2014-909 and BL2014-951 will completely solve the problems of Short Term Rental Properties, but may jeopardize Residential neighborhoods, and cause them to lose their coverage of Residential versus turning them into Commercial, which may be unintended, but actually may cause that problem with these two bills coming through on Second Reading." (Wallace Lampley, Dec. 1, 2014)

- "The other problem is the transience that VRBO's and Airbnb's bring by the nature of what they are. These 'guests' are not my neighbors. They are just on vacation of a business trip to Nashville. This not good for my property value or the neighborhood as a whole. My main complaint is that I did not buy this home, which is a home for me and my two young children, to live in an atmosphere similar to a motel on Dickerson Rd." (Bobby Kent, Jan. 2, 2015)

- "Nashvillians bought their homes in residential areas to be free of business. This bill essential [sic] opens the door for future bills allowing additional types of home business and commercial activity within residential areas...And by allowing business owners who do not live in the home to operate this type of business, this bill essentially allows for mini-hotels to be sprinkled all throughout our neighborhoods." (Susan Floyd, Feb. 2, 2014)

Attachment to Allen Decl.

3. The concentration of non-owner occupied STRPs has already negatively impacted some Nashville neighborhoods.

The concerns of the Metro Council and constituents related to non-owner occupied STRPs were not unfounded. As described by Nashville residents Pippa Holloway and Christopher Wood, the concentration of non-owner occupied STRPs has had a negative effect on the residential character of their respective neighborhoods.

Ms. Holloway lives on Rudolph Avenue in East Nashville. Holloway Decl., ¶ 2. By her count there are 24 houses that front onto this two-block street, and five of them are non-owner occupied short-term rentals. *Id.* High density of non-owner occupied STRPs has resulted in an increased number of transient strangers and a decreased sense of community. *Id.*, ¶ 4. On a

regular basis there are people she does not know or recognize entering properties around her home. *Id.*. ¶ 5. On her street there are three large houses that rent to groups of 10 people each, which are frequently rented to "bachelorette parties" on weekends that are often loud, inebriated, and disrespectful of the neighborhood. *Id.*. ¶ 6. There are less tangible losses as well to having fewer long-term neighbors – 20% of the properties on her street are not part of the close-knit neighborhood community. *Id.*. ¶ 7.

Mr. Wood is a resident of the Lockland Springs neighborhood in East Nashville. Wood Decl. ¶ 2. His family purchased their home in this neighborhood in 2013 because they wanted to be part of a vibrant and diverse community that was welcoming to young families and in close proximity to parks, playgrounds and schools. *Id.* There are currently six single-family houses within 200 feet of Mr. Wood's home that have been granted STRP permits. *Id.*, ¶ 4. None of these properties appear to be owner occupied. *Id.* Rather, they are occupied primarily during the weekends, often by individuals hosting parties, sometimes with up to a dozen guests. *Id.* While the owners of these properties are considerate and conscientious of their neighbors, replacing long-term residents with tourists has had a negative effect on the community. *Id.*, ¶ 5. Without the 3% cap, Mr. Wood believes that numerous other properties in his neighborhood would have already been sold to individuals intending to utilize them as non-owner occupied STRPs. *Id.*, ¶ 7. This would have a very detrimental effect on the cohesiveness and quality of life in this primarily residential community. *Id.*

4. Even Plaintiff Rachel Anderson believes that STRPs should be limited in some manner in residential areas.

Plaintiff Rachel Anderson's testimony indicates that she understands the rationale behind the 3% cap: "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 or 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. She also testified about how non-owner occupied STRPs in residential neighborhoods can make properties unaffordable for single families: "If an investor comes in and they see that – if they're able to get a non-owner occupied permit and they can make, you know, I don't know – $8 to $10,000 a month, they're willing to spend, you know, another $50 or $100,000 in the house, when a family that is going to live in that house would never pay a mortgage that would be, you know, $4 or $5,000 a month." *Id.* at p. 37, l. 15-22.

Ms. Anderson acknowledges the purpose of the statute but disagrees with the fact that she is not able to get a permit for her property upon demand. She notes other methods of permitting that she would support, presumably because she would get a permit, but upon acknowledgment of the legitimate purpose of the statute, the Court should make no further review. Because protecting residential neighborhoods is a rational, legitimate government purpose for the 3% cap on non-owner occupied STRPs, the ordinances do not violate the Equal Protection clause.

IV. THE STRP ORDINANCES DO NOT CREATE AN ILLEGAL MONOPOLY IN VIOLATION OF THE TENNESSEE CONSTITUTION.

The Plaintiffs' claim that the STRP ordinances create an illegal monopoly by putting a cap on the number of non-owner occupied permits that are issued by the Metro Government.

A. THERE WAS NO PREVIOUS COMMON RIGHT TO AN STRP IN A RESIDENTIAL DISTRICT.

In Tennessee, monopoly is defined as "an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly." *Trails End Campground, LLC v. Brimstone*

Recreation, LLC, 2015 WL 388313, *9 (Tenn. Ct. App. Jan. 29, 2015), *appeal denied* (Aug. 14, 2015) (citations omitted).

Because there was no "common right" to operate a non-owner occupied short-term rental in a residential district prior to the passage of the STRP ordinances, there can be no monopoly. This principle has been applied a number of times by Tennessee courts. *See James Cable Partners, L.P. v. City of Jamestown,* 818 S.W.2d 338, 345 (Tenn.Ct.App.1991) (no prior common right to use the city streets to operate a communications system); *City of Watauga v. City of Johnson City,* 589 S.W.2d 901, 904 (Tenn.1979) (annexation of territory is not a common right of municipalities); *City of Memphis v. Memphis Water Co.,* 52 Tenn. 495, 529-31 (1871); (no prior common right "to erect water works in Memphis, to take up pavements, occupy the streets and do such things as were necessary and proper, in completing their water works").

There is nothing in the record to indicate that the Plaintiffs (or anyone else) had the right to operate a non-owner occupied STRP in a residential district prior to the adoption of these ordinances. After all, in Tennessee, there is no "common right" to run a commercial business in a residential zone. *See G & N Rest. Group v. City of Chattanooga*, No. E2013–02617–COA–R3–CV, 2014 WL 5035428, *10 (Tenn. Ct. App. Oct. 8, 2014) (holding that a permitted business use is a privilege rather than a right). Further, because every residential property owner had the ability to apply for a permit to operate a non-owner occupied STRP, the mere limitation on the number of permits cannot create a monopoly. *See Ketner v. Clabo*, 189 Tenn. 260, 266 (1949) (holding that a municipality did not create a monopoly when everyone was able to apply for a beer permit even if only 5 permits were issued); Michael Decl., ¶ 4.

B. PLAINTIFFS ARE NOT PROHIBITED FROM OPERATING A NON-OWNER OCCUPIED STRP IN OTHER AREAS OF THE COUNTY.

The Plaintiffs' claim also fails because they attempt to limit the analysis to one census tract and claim they are entitled to a permit in a particular neighborhood. But there is no constitutional right to run a particular commercial business in every part of town. This is the essence of zoning – it limits certain uses, and often certain numbers of businesses, to certain parts of town. *Family Golf of Nashville, Inc. v. Metro. Gov't of Nashville*, 964 S.W.2d 254, 258 (Tenn. Ct. App. 1997) (defining zoning as "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."). There are no restrictions on Plaintiffs' ability to research areas of Nashville, where non-owner occupied permits are still available, and purchase property in those areas to lease through Airbnb. *See* Michael Decl., ¶ 3.

C. THE 3% CAP AIDS IN THE PROMOTION OF THE HEALTH, SAFETY, MORALS AND WELL-BEING OF THE CITIZENS OF NASHVILLE AND DAVIDSON COUNTY.

Even if the STRP ordinances were construed to create a monopoly in particular census tracts where no more non-owner occupied permits are available, "[it is settled law that the antimonopoly clause of our constitution does not prohibit the legislature from granting a monopoly, in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co. v. City of Johnson City,* 216 S.W.2d 335, 337 (Tenn. 1948).

"The test for determining whether the legislature has correctly exercised its police power in regulating an activity is the rational basis test. If the legislature concludes that there is a reasonable basis for the regulatory statute and if there is some foundation in fact to justify the

legislature's conclusion, then the court is powerless and may not substitute its judgment for that of the legislature." *Dial-A-Page, Inc. v. Bissell,* 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991).

"Zoning statutes, ordinances and regulations 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." *Town of Smyrna v. Bell,* No. M2010–01519–COA–R3–CV, 2011 WL 5184117, *4 (Tenn. Ct. App. Oct. 31, 2011) (citing *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 387 (1926); *Family Golf of Nashville, Inc. v. Metro. Gov't,* 964 S.W.2d 254, 258 (Tenn.Ct.App.1997)).

The previous section of this Memorandum described the abundance of evidence in the record supporting the Metro Council's rationale for exercising its police power through the passage of the STRP ordinances: (1) the sponsor of the legislation heard from numerous constituents who wanted to protect the residential character of their neighborhoods from commercial activity, (2) two individuals gave detailed declarations about the negative impacts of high-density non-owner occupied STRPs in their neighborhoods, and (3) even the Plaintiff acknowledged the possible undesirable effects of not limiting non-owner occupied STRPs. Because there is an evidentiary foundation for the 3% cap on non-owner occupied STRPs, the Court should not step in and override the judgment of the Metro Council.

Because there is no "common right" to operate an STRP on a residential property, the Plaintiff is not forbidden from operating a non-owner occupied STRP in census tracts where permits are available, and the 3% cap has a reasonable tendency to aid in the promotion of the health, safety, morals and well-being of the people, the STRP ordinances do not violate the anti-monopoly clause of the Tennessee Constitution.

CONCLUSION

This case challenges the Metropolitan Council's ability to distinguish between different land uses throughout Davidson County. If Plaintiffs' assertions are accepted, the Council has no ability to limit the number of non-owner occupied "party houses" that are essentially acting as hotels directly next to single family residences. The Council has attempted to reasonably allow some of these non-owner houses. But there is no law that requires Metro to allow all commercial businesses in residential neighborhoods.

Because the Council has reasonably attempted to balance the interests of homeowners who seek additional income with homeowners who want to maintain their residential neighborhood, the rational basis test has been met and the Metropolitan Government requests that summary judgment be granted.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

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[redacted]

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, via United States mail postage prepaid to Braden H. Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219 on September 14, 2016.

Catherine J. Pham