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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs argue in their response to Metro's motion for summary judgment that there are disputes of fact that would prevent this Court from ruling in favor of Metro at the summary judgment stage. But there are no disputes of material fact remaining.[1]

Where the parties disagree is related the legal effect of those facts. Whether the facts demonstrate that the STRP ordinances are vague as applied to the Anderson's home, whether they are rationally related to a legitimate governmental purpose, whether the operation of a non-owner occupied STRP is a prior common right, etc. – these are all questions of law for this Court to determine. *See, e.g., Bruner v. Zawacki,* 997 F.Supp.2d 691, 696 (E.D. Ky. 2014) ("Whether a rational basis exists for a government regulation is a question of law. … The rationality of a governmental policy is 'a question of law for the judge—not the jury—to determine.'") (internal citations omitted).

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[1] Metro did not dispute the vast majority of the seventy-eight facts recited in Plaintiffs' Statement of Undisputed Material Fact. The facts that were disputed are not material to the legal analysis of the claims. Plaintiffs did not respond to Metro's Statement of Undisputed Material Facts, the Court must treat them as undisputed. *Bovat v. Nissan N. Am.*, No. M2013-00592-COA-R3CV, 2013 WL 6021458, at *3 (Tenn. Ct. App. Nov. 8, 2013).

I. Read in context with the entire Metro Zoning Code, the STRP ordinances are not unconstitutionally vague.

In analyzing the various types of uses in the Metro Zoning Code, Plaintiffs argue that the Court should not look at what uses are permissible in determining what use is occurring. Instead, Plaintiffs contend that the Court should examine only the definitions of hotel, boarding house, bed and breakfast and STRP. But in determining whether the STRP ordinances are vague, the Court must look at these terms in their context within the Metro Zoning Code. *See House v. U.S., I.R.S.,* 593 F.Supp. 139, 142 (W.D. Mich. 1984), *aff'd, House v. U.S.,* 1986 WL 16612 (6th Cir. Mar. 10, 1986) ("No word has an intrinsic content. It gets meaning and contour from its context, from its association, and from its commonly understood usage.") (quoting *McAlpine v. Reese,* 309 F.Supp. 136, 138–139 (E.D. Mich. 1970)).

Plaintiffs assert that "this Court has no obligation to save Metro's ordinance," in the context of a vagueness challenge, but "[i]t is the duty of this Court to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction." *State v. Lyons,* 802 S.W.2d 590, 592 (Tenn. 1990). Further, it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). The Court should interpret the Zoning Code "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959).

Plaintiffs invent confusion where there is none in the STRP ordinances, but even so, "mere uncertainty is not sufficient" to warrant finding a statute unconstitutionally vague. *In re Long,* 261 B.R. 205, 208 (Bkrtcy. S.D. Ohio 2000) (citing *Doe v. Staples,* 706 F.2d 985, 988 (6th

Cir.1983)). In fact, as described by the Sixth Circuit, the standard of vagueness in statutes not involving criminal conduct or first amendment freedoms is fairly lenient:

> [T]o constitute a deprivation of due process, it must be "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. [v. American Sugar Refining Co.],* 267 U.S. [233] at 239, 45 S.Ct. [295] at 297 [69 L.Ed. 589] (1925). To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible.

Doe v. Staples, 706 F.2d at 988 (quoting *Exxon Corp. v. Busbee,* 644 F.2d 1030, 1033 (5th Cir.).

When the Andersons rent their three-bedroom home located in an R6 district through Airbnb.com, their use of the property undoubtedly qualifies it as an owner occupied STRP. They, of course, knew this because they applied for an STRP permit.

The property also is clearly not a hotel, boarding house or bed and breakfast because those uses are not permitted in an R6 district at all. As applied to the facts of this case, the ordinances are not "substantially incomprehensible," and therefore, they are not unconstitutionally vague.

II. The 3% cap is rationally related to the legitimate governmental purpose of protecting residential neighborhoods from being overtaken by non-owner occupied STRPs.

Plaintiffs assert that the 3% cap on non-owner occupied STRPs is not a zoning measure because it does not uniformly permit non-owner occupied STRPs in particular zones.[2] In reality, the 3% cap is best characterized as a form of "inverse zoning." *American Mini Theatres, Inc. v. Gribbs,* 518 F.2d 1014, 1015 (6th Cir. 1975) ("Whereas the purpose of most zoning ordinances is to establish separate zones for various uses and to confine such uses to those zones, thus segregating specified uses of land from each other and concentrating each use or class of uses into defined zones, Detroit adopted the theory of 'inverse zoning' by which certain land uses were

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[2] Ultimately, this argument constitutes a distinction without a difference. Whether the ordinances are zoning or regulatory ordinances, they "enjoy[] the same scope of review." *Curto v. City of Harper Woods,* 954 F.2d 1237, 1242 (6th Cir. 1992).

prohibited from concentrating and were required to maintain minimum distances from each other.")

The Detroit ordinance at issue in *American Mini Theatres, Inc.* prohibited the operating of certain "adult" businesses within 1,000 feet of each other or within 500 feet of a residential area. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52-53 (1976). In finding that the ordinance did not violate Equal Protection under intermediate scrutiny, the Supreme Court concluded "that the city's interest in the present and future character of its neighborhoods adequately supports its classification." *Id.* at 72. The Court noted:

> It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 71. The Court also emphasized that "zoning has become an accepted necessity in our increasingly urbanized society, and the types of zoning restrictions have taken on forms far more complex and innovative than the ordinance involved in *Euclid [v. Amber Realty Co.*, 272 U.S. 365 (1926)]." *Id.* at 74. Importantly, "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Id.* at 80 (quoting *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

Plaintiffs assert that while it is undisputed that the purpose of the 3% cap is legitimate, they dispute that the cap is rationally related to Metro's goal. Despite Plaintiffs' argument otherwise "under the rational basis test, specific evidence is not necessary to show the relationship

between the statute and its purpose. Rather, this Court asks only whether the law is reasonably related to proper legislative interests." *Riggs v. Burson,* 941 S.W. 2d 44, 52 (Tenn. 1997).

If the Metro Council's aim was to prevent short-term rental properties with no long-term residents from overtaking residential neighborhoods, what could be more rational than capping these types of STRPs? Like Detroit's distance requirements for "adult" businesses, the Metro Council has chosen to prevent the concentration of purely commercial businesses in residential neighborhoods by placing a 3% cap on non-owner occupied STRPs in each census tract.[3] But unlike Detroit's classification, which was subject to intermediate scrutiny because it restrains conduct protected by the First Amendment, the STRP ordinances at issue in this case are only subject to rational basis review.

Debating the specific number chosen by the Metro Council is likewise unavailing. First, Metro's discovery responses indicate that the 3% cap was not "pulled out of a hat" as Plaintiffs assert. Metro Responses to Plaintiffs' Interrogatories, March 18, 2016, ¶ 16 ("The 3% figure was reached in the following way: the Planning Staff provided the number of single and two family homes in place in the census districts with the highest concentration of STRPs. This was compared to the approximate number of STRPs shown on the two major web providers. Based on the most conservative assumption that all were non-owner occupied, this information showed that the densest was less than 2%. Three percent allowed those STRPs to stay and allowed some room to grow, so to speak. In addition, the City of Austin's ordinance used 3% and that number seemed to be working reasonably well.")

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[3] The fact that all the census tracts located in and around the downtown core have no available non-owner occupied permits indicates that the Metro Council was correct in its assumption that without a cap these businesses could easily overtake popular urban residential areas like Germantown where the Plaintiffs' home is located.

Courts have sanctioned relying on the experiences of other cities in enacting zoning ordinances, so using Austin's ordinance as a starting place is not unreasonable. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 52 (1986) (finding that the City of Renton "was entitled to rely on the experiences of ... other cities ... in enacting its adult theater zoning ordinance"). Further, in reviewing the constitutionality of zoning ordinances, courts have not required cities to "offer an exact justification for the particular number that [they] chose." *Hucul Advertising, LLC v. Charter Tp. of Gaines,* 748 F.3d 273, 279 (6th Cir. 2014); *see also, Village of Belle Terre v. Boraas,* 416 U.S. at 18 ("It is said, however, that if two unmarried people can constitute a 'family,' there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.")

Finally, Plaintiffs' emphasis on *Consumers Gasoline Stations v. City of Pulaski,* 4 McCanless 480 (Tenn. 1956) is misplaced. In *Consumers Gasoline,* the effect of the ordinance at issue was to completely prohibit the construction of any additional gas stations within the municipality. Further, the stations that were in existence at the time the ordinance was enacted were exempt from the challenged regulation. Here, the STRP ordinances do not prevent new non-owner occupied STRPs from entering the marketplace – in fact, there were 4,212 permits available as of the filing of Metro's motion. Michael Decl, ¶ 3. And the STRP ordinances do not exempt pre-existing STRPs from regulation – everyone had the same opportunity and obligation to apply for the necessary permits beginning on April 1, 2015. *Id.,* ¶ 4.

III. If the 3% cap creates a monopoly, it is constitutional because it has a reasonable tendency to aid in the promotion of the health, safety, morals and well-being of the people.

"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). Despite Plaintiffs' insistence otherwise, "[i]f 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).

In reasoning that Metro "has not pled a necessary step for satisfying the legitimate relation test," Plaintiffs mischaracterize Metro's argument. Metro has not argued that the 3% cap aids in the promotion of the health, safety, morals and well-being of the people because it protects "neighborhood aesthetics." Instead, Metro has maintained that the purpose of the cap was to prevent residential neighborhoods from being overtaken by non-owner occupied STRPs. And Metro has been consistent in its position that there is a foundation of evidence in the record that supports a finding that the 3% cap furthers the "health, safety, morals and well being of the people."[4]

For these reasons and the reasons articulated in Metro's Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment, Metro respectfully requests that its summary judgment motion be granted and Plaintiffs' motion be denied.

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[4] It is unclear what Plaintiffs are attempting to argue in claiming that Metro's justification for the ordinances is not a legitimate governmental goal for the purpose of the anti-monopoly rational basis test. After all, even if Metro's justification is "community welfare" as characterized by the Plaintiffs, welfare and well-being are synonymous terms.

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 email by agreement to Braden H. Boucek, Beacon Center of Tennessee, P.O. Box 198646, Nashville, TN 37219 on October 19, 2016.

Catherine J. Pham