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

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

MOTION AND MEMORANDUM
FOR PRELIMINARY INJUNCTION

I.
Introduction

COMES NOW Rachel and P.J. Anderson, the plaintiffs in this case, to respectfully request pursuant to Tenn. R. Civ. P. 65.01, 65.04, this Honorable Court to issue a preliminary injunction barring enforcement of the recently enacted ordinance regulating short-term rental properties ("STRPs") found at Metro. Code § 6.28.030. The Andersons recently filed a civil complaint that made seven (7) distinct claims. This preliminary injunction only seeks relief on the basis of the three (3) claims that most cause the Andersons immediate and irreparable harm: 1) the STRP ordinance does not apply to them (Claim

One); 2) the total ban on signage (Claim Three); and, 3) the records requirements (Claim Seven).

There is a high degree of probability that the Andersons will prevail on these claims. The STRP ordinance was drafted in such a way that it either does not apply to them or it has exempted them. Moreover, a total signage ban constitutes a clear cut case of content-based discrimination, thus violating the Andersons' constitutionally guaranteed right to engage in commercial, free expression. Finally, the requirement that the Andersons keep records on their guests and surrender them to the police at any time is so invalid, both facially and as-applied, that the Andersons should not have to live one more day with the prospect of an unreasonable search and seizure. The balance of hardships overwhelmingly tips in favor of an injunction because Metro will lose no interest it cannot ultimately reclaim.

II.
Exhibits

Exhibit 1: Declaration of Rachel Anderson.

Exhibit 2: Declaration of P.J. Anderson.

Exhibit 3: Metro STRP map of Germantown, August 19, 2015.

Exhibit 4: Email from Metro Zoning Examiner denying permit, August 19, 2015.

Exhibit 5: Airbnb reviews for the Andersons.

Exhibit 6: Email from Metro Zoning Examiner regarding signage, August 18, 2015.

III.
Background

The background of this case is contained in the previously filed complaint. This complaint is supplemented with attached declarations, and exhibits. To summarize, the Andersons are a young Nashville couple. They frequently list their home on Airbnb.com, a website that allows people to host tourists in their residence. In a short period of time, Airbnb has materially altered the Andersons' financial portrait, and they have come to count on it as an important supplement to their income.

Until very recently Metro did not have a regulation regarding STRPs. They operated, essentially ungoverned, without much attention. Those drawn to a unique tourist experience enjoyed Nashville's robust STRP market. STRPs also provided an affordable alternative to Nashville's exorbitant downtown hotel rates. That changed.

On or about February 26, 2015, Ordinance No. BL2014-951 pertaining to STRPs was signed into effect. Enforcement of the law began on July 1, 2015. The law required STRP users to obtain a permit, comply with a number of legitimate health and safety regulations, and collect taxes.

The law differentiates between owner occupied and non-owner occupied scenarios. Only three percent (3%) of the residences within a particular census tract may obtain a permit when the home in question is *not* being used as the homeowner's primary residence. Metro. Code § 6.28.030(Q).

When the law became effective, the Andersons lived in their home and had no plans to move. The house is in the Germantown neighborhood, a neighborhood highly sought after by Airbnb users. The Andersons obtained a lawful permit after the enactment of the STRP ordinance. Because they lived in the home, they were not subject to the cap. The Andersons were later presented with an employment opportunity. For them to capitalize on it, they would have to move to Chicago. Mrs. Anderson also recently learned she was pregnant with their third child.

On August 19, 2015, Mr. Anderson sought to convert their permit to a non-owner occupied permit so that they could continue to own their home and rent it part-time on Airbnb. He was denied solely because the cap in their neighborhood had been reached. Highlighting the arbitrariness of the law, the cap had actually exceeded. Even though at that time two (2) parties obtained non-owner occupied permits in excess of the cap, *see* Exhibit 2, 3, the Andersons were denied.

Germane to the instant motion are the exceptions built into the STRP ordinance. Hotels, motels, bed and breakfast establishments, and boarding houses are not considered STRPs and, thus, are not implicated by the ordinance.

Also at issue is the total ban on signage for operators of an STRP. Metro. Code § 6.28.030(E). And, in a separate ordinance that would encompass STRP operators, Metro requires keeping records on guests and

surrendering them to the police upon written request. Metro. Code § 6.28.010(A).

The Andersons seek a preliminary injunction barring enforcement of specifically these claims pending the outcome of this litigation. Absent a preliminary injunction, they will undergo irreparable harm to their constitutional rights and ability to make important family decisions.

III.
Legal Standard

Tenn. R. Civ. P. 65.01 provides trial courts with authorization to provide injunctive relief by issuing a preliminary, temporary injunction. A trial court should issue an injunction when:

> it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Gentry v. McCain, 329 S.W.3d 786, 792-93 (Tenn. Ct. App. 2010) (quoting *S. Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 (Tenn. Ct. App. 2000) and Tenn. R. Civ. P. 65.04(2)).

The standard for issuance of the injunction is guided by a familiar, four (4) part test:

> The most common description of the standard for preliminary injunction in federal and state courts is a four-factor test: (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury granting the injunction would inflict on the defendant; (3) the

probability that plaintiff will succeed on the merits; and (4) the public interest.

Id. at 793 (quotations omitted). As observed by the Sixth Circuit when considering injunctive relief: "These factors are not prerequisites which must be met, but are interrelated considerations that must be balanced together." *Northeast Ohio Coalition for Homeless and Service Employees v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) (quotation omitted) (dismissed on other grounds in part in *Northeast Ohio Coalition for Homeless and Service Employees v. Blackwell*, 652 F. Supp. 2d 871 (S.D. Ohio 2009)). The Court need not consider each of these factors if fewer factors are "dispositive." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003) (citations omitted).

IV.
Argument

These factors heavily weigh in favor of issuing the injunction. The claims raised in the instant motion are all substantially likely to prevail. Absent injunctive relief, the Andersons' constitutional rights will be immediately damaged. Additionally, their ability to consider important family matters will be hampered. Metro will undergo no harm if the injunction was granted. Any interest Metro has in enforcement of the STRP ordinance would be reclaimed in full once a judgment was entered.

A. Success on the merits

The Andersons are highly likely to prevail in each of their individual claims. **First**, under Metro's code, either the Andersons are exempt from the

STRP law or the STRP law does not apply to them. **Second**, a total ban on signage that would otherwise be permitted in the Andersons' neighborhood is unjustifiable under well-established First Amendment law as overly burdensome and impermissible viewpoint discrimination. **Third**, a nearly identical records requirement was recently rejected by the U.S. Supreme Court as a violation of the Fourth Amendment, which is even *less* restrictive than Tennessee's constitutional counterpart.

1) *The law is inapplicable to the Andersons.*

According to the definition in the ordinance, an STRP is a residential dwelling unit containing not more than four (4) sleeping rooms that is used and advertised for rent for transient occupancy by guests as those terms are defined in the Hotel Occupancy Tax ordinance (Section 5.12.010). Metro. Code § 6.28.030(A). The STRP ordinance goes on to provide that rentals exceeding thirty (30) days in length, bed and breakfast establishments, boarding houses, hotels, and motels shall not be considered short-term rental property. *Id.*

In order to determine who qualifies for the exception, these terms must be defined. The STRP ordinance contains no definitions for the terms, "hotel," "transient," or "occupancy," instead referring to the Hotel Occupancy Tax ordinance for definitions. *See* Metro. Code § 6.28.030(A). Taking this terms one at a time, according to the Hotel Tax ordinance, a "hotel" is:

> 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.

Metro Code. § 5.12.10.

The Andersons fit the legal definition of a hotel. They furnish accommodations to transients for a consideration. Their home is occupied and intended for occupancy by transients for dwelling, lodging or sleeping purposes. While they Andersons appear to fit the definition of an STRP and thus come under the STRP ordinance, they *also* meet the definition of a hotel. Because this definition sweeps the Andersons into it, they are exempt from the ordinance.

Assuming, somehow, that their home would not meet the definition of a hotel, then the Andersons could also not meet the definition of an STRP. The ordinance requires the facility to be a hotel before it can be considered an STRP. As quoted above, the STRP ordinance uses the term "transient," and "occupancy," and then references the Hotel Occupancy Tax ordinance to define those terms. Metro Code. § 5.12.10. The legal definitions of those terms specify that they apply *only* to hotels. For instance, "'occupancy' means the use or possession or the right to the use or possession of any room, lodgings or accommodations *in a hotel.* ..." Metro Code § 5.12.010 (emphasis added). Likewise, "'transient' means any person who exercises occupancy or is entitled to occupancy for any rooms, lodgings or accommodations *in a hotel.*

...." *Id.* (emphasis added). These terms incorporate the term, "hotel," as part of the definition.

So, in effect, the STRP ordinance only applies to structures occupied or intended for occupancy "*in a hotel*," of transients "*in a hotel.*" Take away the hotel setting, and, per the STRP ordinance, the Andersons would not have structure occupied or intended for occupancy of transients. In other words, for the ordinance to apply to the Andersons, they must meet the definition of a hotel, but if they run a hotel, then they are exempt from the STRP ordinance altogether. The ordinance is at war with itself. *Either* the Andersons are not providing occupancy to transients and not subject to the STRP ordinance, *or* they are an exempt hotel. Under either scenario the STRP ordinance would not apply to them.

The other exceptions set out in the ordinance fare no better. Bed and Breakfasts, motels and boardinghouses are also exempted. Those terms are no less inclusive of the Andersons' home than is the term, "hotel." They are not defined in the STRP ordinance. Definitions do exist in the zoning regulation.[1]

A "boardinghouse" is defined in the zoning title as a residential facility or a portion of a dwelling unit for the temporary accommodation of persons in a rooming unit, whether for compensation or not, who are in need of lodging.

[1] "Motel" is never defined anywhere in the Code. However, the definition of "hotels" in the Occupancy Tax specifies that includes "motels." Metro Code. § 5.12.10. Those definitions only apply to "this title" (the zoning title), calling into question if those terms are ever defined.

Metro Code. § 17.04.060. The Andersons' home may also be considered a boardinghouse.

A "bed and breakfast" is a place with four (4) to ten (10) furnished guest rooms for pay where meals may, but are not required to be, served. *Id.* The Andersons' home may qualify as a bed and breakfast as well depending on what qualifies as a "furnished guest room." They have three (3) bedrooms in their home, as well as a common living room that could be used for lodging guests. The Andersons could fall under this exception as well.

Any way that the STRP ordinance is sliced, the Andersons simply do not fall under it. This claim is easily determined by consideration of the simple and unmistakable language of Metro's Code, however inartfully drafted it may be. Because the Andersons are sure to prevail on this claim, this most important factor weighs in favor of issuing the injunction.

2) *The signage ban violates the Andersons' right to engage in commercial, free speech.*

The STRP ordinance's total ban on any STRP signage offends free speech because it is a textbook example of a content-based burden on speech. The signage ban fails strict scrutiny analysis. The ordinance's prohibition serves no interest, let alone a compelling one. Furthermore, a total ban of STRP signage is not tailored in any way, let alone narrowly.

Free speech is among the most protected of constitutional rights. Those protections are not forfeited in a commercial setting, like advertising. *See Va. Bd. of Pharmacy v. Va. Citizen's Consumer Council*, 425 U.S. 748, 765 (1976)

("the free flow of commercial information is indispensible to the public."); *H&L Messengers, Inc. v. Brentwood*, 577 S.W.2d 444, 451-52 (Tenn. 1979). The parameters of commercial, free speech rights have historically been less than fully defined, *see* Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 Harv. J.L. & Pub. Pol'y 663, 676 (Spr. 2008), but as a general rule, the Court has been more permissive of restrictions on advertising than other forms of speech. *See generally Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (articulating a four (4) part, intermediate scrutiny test to restrictions on commercial speech).[2] That being said, restrictions that are based on the *content* of speech, even advertising, require the highest justification. *See H & L Messengers,* 577 S.W.2d at 451 ("[Above] all else, the First Amendment means that government has no power to restrict expression because *of its message, its ideas, its subject matter, or its content.*") (bracket and emphasis added in original) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

When a municipality enacts an ordinance that targets speech based on content, the ordinance is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Gilbert*, -- U.S. --, 135 S. Ct. 2218, 2226 (2015) (citing cases). It does not matter if a content-based law was

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[2] *Va. Bd. of Pharmacy* and *Central Hudson* distinguished between commercial and regular speech, affording the former lesser protection. Plaintiffs wish to preserve their argument that *Va. Bd. of Pharmacy* and *Central Hudson* were wrongly decided and should be overruled.

motivated by legitimate concerns like nuisance regulations. *See H & L Messengers,* 577 S.W.2d at 453 (commercial speech "[r]estrictions, regulations, and exemptions so based are constitutionally offensive whether they be evil or benign."). A content-based regulation is not hard to identify following the Supreme Court's recent unanimous decision in *Reed*: "Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. If a law applies because of the topic, then it is content-based.

The ordinance in question is content-based. It only applies to one topic: STRPs. The ordinance is explicit in this regard. Metro. Code § 6.28.030(E) states: "Signs, advertising, or any other display on the property indicating that the dwelling unit is being utilized, in whole or in part, *as a STRP* is prohibited." (emphasis added). The STRP law embodies a classic case of a content-based restriction.

So when Mrs. Anderson requested permission to put up temporary, small advertisements, she was categorically forbidden. She wanted to erect a sign that truthfully advertised that the property was available on Airbnb, and a sticker to put up in her window that truthfully notified guests that they had arrived at the correct location. *See* Exhibit 1, 4. Both would have only been up for a few days. Her simple request was denied. *Id.*

The denial was based on Metro's content-based, categorical ban on STRP signs. If the signs had not mentioned short-term rentals, then Mrs. Anderson's request would not have implicated the law. Laws that come into play based on the message were described by the Court in *Reed* as "obvious, defining regulated speech by particular subject matter. ..." 135 S. Ct. at 2227.

So while the Andersons may not, under any circumstances, put up a temporary sign advertising their home's availability on Airbnb, their neighbors may put up temporary signs advertising: 1) that their home is available for rent (just not on a short-term basis), *see* Metro. Code § 17.32.060(C)(2)(a); 2) a fair, sporting event, or flea market, *see* Metro. Code § 17.32.060(C)(4); 3) a yard sale, *see* Metro. Code § 17.32.040(R); 4) the construction firm working on a house, *see* Metro. Code § 17.32.040(S); 5) a restaurant menu board, *see* Metro. Code § 17.32.040(X); or, 6) an auction. *See* Metro. Code § 17.32.040(AA). But under no circumstances, including the extremely narrow ones that Mrs. Anderson inquired about, may the Andersons mention an STRP in a sign. *See* Exhibit 4. "This is a paradigmatic example of content-based discrimination." *Reed*, 135 S. Ct. at 2231. As such, the ordinance must surmount strict scrutiny. *Id.* at 2226.

Under strict scrutiny, Metro must show that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231 (quotation and citation omitted). "Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (citation

omitted). The burden is upon Metro to demonstrate the ordinance passes strict scrutiny. *See Reed*, 135 S. Ct. at 2230. Metro must show "that the Code's differentiation between [STRP signs] and other types of signs ... furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 135 S. Ct. at 2231. The Andersons "must be deemed likely to prevail," *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004), unless Metro can show that there are no less restrictive means.

This Court cannot defer to Metro's assessment of harms and remedies. In trying to ban advertising of STRPs, Metro cannot meet its burden "by mere speculation or conjecture." *Endenfield v. Fane*, 507 U.S. 761, 771 (1993) (using intermediate scrutiny). The harms the ordinance is designed to address must be "real," not speculative, and the Court must also scrutinize whether the ordinance actually works, meaning "its restriction will in fact alleviate them [the harm] to a material degree." *Endenfield,* U.S. at 770-71. The signage restriction must serve the stated interest "in a direct and material manner." *Id.* at 773. This Court is authorized to actively scrutinize both Metro's stated goals and the efficacy of the challenged measure.

Such a sweeping ordinance as the STRP ordinance cannot satisfy strict scrutiny. There is no interest, let alone a compelling one, in totally banning STRP signs, or restricting it more tightly than other, similar signs. *See Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 111 (1990) ("State may not ... completely ban statements that are not actually or

inherently misleading.") (cited with approval in *Douglas v. State*, 921 S.W.2d 180, 184 (Tenn. 1996)). Any interest Metro could possibly articulate will surely be "hopelessly underinclusive." *See Reed*, 135 S. Ct. at 2231. A temporary sign that reads, for instance, "For rent," is no different from a sign that reads "For rent *on Airbnb*." Yet the first sign is perfectly acceptable while the second is completely banned. *Compare* Metro. Code § 17.32.060(C)(2)(a) *with* Metro. Code § 6.28.030(E). What could possibly be compelling about outright *prohibiting* under *all* circumstances, a sign that merely adds two truthful words providing helpful information to tourists about how to go about renting the Andersons' home? There is no compelling interest.

On the contrary, even though Mrs. Anderson's forbidden speech did include a commercial component it would have "serve[d] individual and societal interests in assuring informed and reliable decisionmaking." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (citations omitted); *see Virginia Bd. of Pharmacy.*, 425 U.S. at 763 (a "particular consumer's interest in the free flow of commercial information may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). Informed and reliable decision making is hampered by Metro's refusal to let Mrs. Anderson place a sticker in her window to assure her guests they are at the correct address. It is not difficult to imagine how confusion over the correct address could harm the neighborhood and the guests. It could even

potentially lead to tragedy, as guests could be mistaken for home burglars. The sign also had social value. Festivalgoers enjoying Germantown during Oktoberfest may have no other way of knowing that they can stay in a neighborhood residence. *See Bates,* 433 U.S. at 364(1977) ("[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an *indispensable role in the allocation of resources in a free enterprise system.*"). Far from an interest in restricting Mrs. Anderson's speech, the public interest lay with encouraging it. The ordinance fails the first prong of strict scrutiny.

The ordinance's underinclusivity is equally fatal to the tailoring question. *See Reed,* 135 S. Ct. at 2232 ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation and citations omitted). The ordinance fails the second prong of strict scrutiny. Metro cannot demonstrate that this content-based law can survive strict scrutiny.

Once this Court determines that the law does likely violate the First Amendment, it virtually answers all the other questions in determining whether to issue an injunction. "[W]hen a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor." *Planet Aid v. City of St. Johns,* 782 F.3d 318, 331 (6th Cir. 2015) (quoting

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1988)). A loss of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Moreover, the loss of such a sacred right, even briefly, means that the public interest lies in favor of granting the injunction because "it is always in the public to prevent the violation of a party's constitutional rights." *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (citations and quotations omitted). Thus, this Court should find that the likelihood of succeeding on the First Amendment claim also satisfies the other factors to weigh and directly proceed to granting the preliminary injunction.

Because the ban on STRP signs is a content-based ban, there is a substantial likelihood that the plaintiffs will prevail on the merits of this argument.

3) *The records requirement is an unreasonable search and seizure.*

A requirement that persons housing guests keep records and surrender them to the police is, absent judicial supervision or opportunity for preclearance of any kind, an unreasonable search. Furthermore, operators of STRPs are unlike those who operate a large, multi-room commercial establishment in important respects such that they should not qualify for the administrative search exception to the warrant requirement in the first place.

Metro. Code § 6.28.010(A) mandates that every person operating a hotel or "engaged in the business of lodging transients" to keep a book of information on all of their guests. The ordinance further mandates the surrender of this information to the police upon a written request. Metro. Code § 6.28.010(C). Ostensibly absent is any requirement that the police obtain a warrant, subpoena or be subject to judicial oversight of any kind.

The U.S. Supreme Court recently examined a very similar ordinance in *City of Los Angeles v. Patel*, -- U.S. --, 135 S. Ct. 2443 (2015). Like Nashville, Los Angeles required hotels to keep specific records on their guests and make them "available to any officer of the Los Angeles Department for inspection." *Id.* 135 S. Ct. at 2447. The Court held that the requirement to surrender the records was facially unconstitutional because it lacked any opportunity for precompliance review, thus violating the Fourth Amendment. *Id.* While the Court "assume[d]" that the law qualified as administrative search, it ultimately determined that it could not fall under the administrative search exception to the warrant requirement because it lacked even the "minimal requirement" of some sort of opportunity for precompliance review from the judiciary. *Id.* at 2452-53, 2456.

This case governs. The Andersons must keep records on their guests and provide them to the police pursuant to Metro. Code § 6.28.010. The police need only ask in writing. Metro's ordinance dictates that the Andersons surrender their records with no opportunity to question the reasonableness of

the request before refusing to comply. *See* Metro. Code § 6.28.010. This oversteps the clear rule set forth in *Patel.* There is a substantial probability that this Court will rule this unconstitutional as well.

In fact, unlike *Patel,* which addressed conventional, large, multi-room commercial establishments, STRPs are homes. They should not even qualify for an administrative search in the first place. There are three (3) reasons why. **First**, STRPs like the Andersons' home deserve the most stringent of protections from unreasonable searches and seizures precisely because they are homes, not some large, multi-room purely commercial establishment. Above all else, the Fourth Amendment protects the sanctity of the home. *See Steagald v. United States*, 451 U.S. 204, 212 (1981) ("the Fourth Amendment has drawn a firm line at the entrance to the house."). The Anderson's home is no less sacrosanct because they let others stay there for a small time period.

Second, the Andersons' home also deserves enhanced protection because it is subject to the greater constitutional protections by virtue of Article I, Section 7 of the Tennessee Constitution. [3] The Tennessee Constitution is more somewhat more protective of private property rights than the U.S. Constitution. *State v. Doelman*, 620 S.W.2d 96, 99 (Tenn. Crim. App. 1981). Unlike the U.S. Constitution, Tennessee also protects "possessions" from unreasonable searches and seizures, along with persons,

[3] The original complaint mistakenly referred to Article I, Section 2 in the heading of Claim Seven. Complaint, p. 25. The body correctly refers to Article I, Section 7. Plaintiffs request leave to correct that reference with this footnote, and incorporate that into the complaint here by reference.

houses, and papers. *Id.* (citing *Welch v. State*, 289 S.W. 510 (Tenn. 1926)); *see also Cravens v. State*, 148 Tenn. 517, 520, 256 S.W. 431 (Tenn. 1923) ("this court should set itself unfalteringly against any disturbance of the security of the people in 'their persons, houses, papers and possessions' by unreasonable searches and seizures."). The boundaries of Tennessee's enhanced search and seizure protections are somewhat murky, but it is certainly true that Tennessee's protections are *at least* as protective as the Fourth Amendment and, historically, have gone further. *See generally* Brent A. Heilig, *State v. Randolph: The Tennessee Supreme Court Sheds New Light on Seizures Under Article I, Section 7 of the Tennessee Constitution*, 33 U. Mem. L. Rev. 727 (Spr. 2003) (for a protracted analysis comparing Tennessee and U.S. Supreme Court decisions). As the Los Angeles ordinance failed to clear even the Fourth Amendment in *Patel*, Metro's ordinance cannot overcome the dual hurdles of the protections in the U.S. and Tennessee Constitutions.

Third, STRPs, unlike a large building with many rooms housing guests purely for commercial reasons, should not qualify for the "special needs" exception to the warrant requirement in the first place. The Court in *Patel* "assume[d]" that hotel records searches qualified as an administrative search because they ensured compliance with proper records keeping requirements, "which in turn deters criminals from operating on the hotels' premises." 135 S. Ct. at 2452. Because "'the primary purpose' of the search is '[d]istinguishable from the general interest in crime control'" the Court then

turned to the question of whether the obligation to surrender records to the police was reasonable, before concluding that it was not. *Id.* (citations and quotations omitted)

With STRPs, the question never gets to that point. STRPs are homes. Homeowners have every incentive be vigilant for crime taking root under their own roof. The properties are in residential neighborhoods so they also operate under the watchful eye of concerned neighbors. With no need to "deter[] criminals from operating" in an STRP, unlike on the premises of large, multi-room buildings, *id.*, Metro may not assume that there is a primary purpose other than the general interest in crime control. An STRP does not have the same "special need." *See Patel*, 135 S. Ct. at 2452. It should not qualify for an administrative search in the first place.

The Andersons live in their three (3) bedroom home with their children. They have another baby on the way. Safety is a serious matter. They rent the bedrooms out for a matter of days and then return. For the Andersons to allow crime to sprout behind the same four walls where their children sleep would be quite inconceivable. This Court should not even entertain the assumption that the Andersons' home could fall under the administrative search exception as the Supreme Court did in *Patel*.

There is a substantial likelihood that the Andersons will prevail on this claim as well. A substantively identical ordinance was recently struck

down by the highest court in the land. Metro's records keeping ordinance only has more problems.

B. Irreparable Injury

The Andersons will undergo immediate, irreparable harm absent an injunction—both harm-in-fact and harm-in-law. The harm-in-law takes the form of a deprivation of the Andersons' constitutional rights. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (when constitutional rights are at issue "the likelihood of success on the merits is often the determinative factor."). The Andersons are suffering a diminution of several important constitutional rights. The loss of First Amendment rights, however temporary, causes irreparable harm. *See Husted*, 751 F.3d at 412 (citations omitted). The loss of Fourth Amendment rights also rises to the level of irreparable harm. *See Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (cited with approval in *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002)).

The harm-in-fact is the impact that being forced to undergo a heavy handed and ill-thought out regulatory regime takes on the Andersons' ability to make decisions as a family. Future has been placed on hold for this family because of this ordinance. Can they keep the house if Mrs. Anderson accepts a job out of town? Is it worth it to move at all if they want to come back? Can they get maximum value from a buyer who will find that, just like the Andersons, he or she may not obtain a permit to use the home on Airbnb?

Furthermore, the sign restriction keeps the Andersons from taking advantage of the unique, once-in-a-year opportunity presented by Oktoberfest, an annual festival that takes place in their neighborhood that attracts many tourists. These are the unsettling questions with which they must wrestle if this ordinance were to remain. *See* Exhibits 1, 2.

Career, sale of a home, moving a family, the future, value in the house—these are among the most important decisions with which any young, family must wrestle. The importance of the freedom to move to pursue a job has been eloquently recognized by the Court in other contests. Observing that travel can be "necessary for a livelihood," the Court described its importance: "[i]t may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (citation omitted); *but, c.f. Regan v. Wald*, 468 U.S. 222, 242 (1984) (distinguishing other travel restriction). The Andersons are facing a private, family matter. Metro Nashville does not belong in the discussion. Leaving the ordinance in place, even temporarily, infects this family's decisionmaking process with a dreadful dilemma: pass on the job or lose the house. Now is the time when the Andersons need to plan. This law interrupts their present and future. It should be enjoined immediately.

Because the Andersons will undergo great actual harm to their family, as well as ongoing harm to their constitutionally guaranteed rights absent immediate, injunctive relief, this factor too tips in their favor.

C. Public Interest

As argued above, the remaining questions are largely moot because of the substantial likelihood that the Andersons will prevail on their constitutional claims. The public interest is served by the granting of the injunction because the public "as a whole has a significant interest in ... protection of First Amendment liberties." *Husted*, 751 F.3d at 412 (quoting *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995)). This rule only applies with more force here given the other constitutional rights that are implicated.

The public interest is also served because this is a new ordinance that affects a great number of people. As argued above, substantial uncertainty surrounds who is even covered by it in the first place. The public interest will be served by this Court providing clarity on an issue that directly affects the finances and homes of thousands of Nashville property owners.

D. Balancing

Granting the injunction would cause no harm to Metro. True, the Andersons would be free to operate on Airbnb absent the regulation. But they did that already at no detriment to the public interest. At worst, the

injunction would effectively send the city back to June, 2014, hardly a time when the city was being harmed beyond repair.

Guests will be safe if this Court issues the injunction. The Andersons have already complied with all the health and safety requirements. *See* Exhibits 1, 2. They have no intentions of removing any of their fire alarms or lowering their insurance coverage. The safety of their guests should be beyond questioning.

The neighborhood will not suffer either. The Andersons have a proven track record of operating on Airbnb with no regulation from Metro. Their neighborhood was the same before and after the regulation's enactment. The Andersons were reviewed by Airbnb guests prior to and after the regulation took effect. Their rating is perfect. *See* Exhibit 5. They have every reason to want to keep their five (5) star rating. Finally, the Andersons remain subject to Metro's nuisance ordinances that are not challenged by this ordinance.

If Metro prevailed on the claim, it would be perfectly free to resume regulation of the Andersons. This is not an instance where the ordinance prevents some great harm that can never be undone once it comes to pass. Nor is it a situation where Metro would lose some economic opportunity forevermore. Metro will have lost nothing if this Court issues an injunction.

In contrast, the regulation takes a great toll on the Andersons, a toll that, for the reasons outlined above, cannot be ameliorated by a future

judgment in their favor. The balance of hardships tilts overwhelmingly in the Andersons' favor.

V.
This Court should not order a bond

Under Tenn. R. Civ. P. 65.05, the applicant for an injunction must provide a bond for the payment of costs and damages as may be incurred or suffered by any person who would have been wrongfully enjoined. The bond is an issue for the court to determine. *See Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (courts "possess discretion over whether to require the posting of security.").

A bond is unnecessary and, in fact, does not make sense. The bond is to be set in the amount of "costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Tenn. R. Civ. P. 65.05(1). There are no costs and damages that could result. The parties are not suing each other over money. Indeed, even the Andersons are not asking for any compensatory damages. This case only seeks declaratory and injunctive relief so there will be no financial loss to Metro if this Court enters a preliminary injunction, let alone one that could not ultimately be reclaimed.

VI.
Conclusion

The Andersons respectfully request this Court to rule on this matter or, in the alternative, to set the matter for a hearing at the earliest possible date so they need not suffer any further erosion of their constitutional rights. All of the factors in determining whether to issue an injunction weigh heavily in the Andersons' favor. This Court should not hesitate to issue a preliminary injunction finding that the Andersons have a high likelihood of prevailing in their claim that the STRP ordinance does not apply to them and enjoining Metro from enforcing the STRP ordinance against the Andersons while this case remains pending.

Dated: September 17, 2015

Respectfully submitted,

BRADEN H. BOUCEK
B.P.R. No. 021399
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219
Tel.: 615.383.6431
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braden@beacontn.org

Counsel for plaintiffs

EXHIBIT 1
Declaration of Rachel Anderson

IN THE 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

DECLARATION OF RACHEL ANDERSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Rachel Anderson, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of Tennessee, and over 18 years old. I make this Declaration in support of Plaintiffs' Motion for Preliminary Injunction. I am fully competent to make this Declaration, which I make based on my personal knowledge.

2. I live at **** 5th Avenue N., in Nashville, TN with my husband, P.J. Anderson, and two (2) children. When we are not at home, we often host on Airbnb.

3. I have a job in graphic design with a company based out of Chicago. My husband is a musician.

4. We started hosting prior to on or about February 26, 2015, when Metro passed the new Airbnb law.

5. At that time, Metro had no regulations that pertained to short-term rentals.

6. We frequently hosted people in our home. Before the ordinance passed, we never received any formal complaints from Metro officials. We were rated highly on Airbnb.com. The comments of our guests were extremely favorable.

7. Airbnb uses a peer review format. That is, customers and hosts share their experiences with others on the website. It's a way of ensuring that consumers receive the most informative and timely information before they make a transaction. Airbnb lets guests rank their hosts and leave comments.

8. I have personally inspected Exhibit 5. Those are our Airbnb customer ratings showing that we have five (5) stars, the highest possible rating. Exhibit 5 is a true, accurate, complete, authentic and actual copy of that email exchange.

9. On or about February 26, 2015, the new Airbnb law was signed into effect. Enforcement of the law began on July 1, 2015.

10. The law places a cap on the number of non-owner occupied permits available in a particular census tract. There is not a cap of any kind

on the number of owner occupied permits. There is not a cap on the overall number of STRPs.

11. The map on Metro's website (http://maps.nashville.gov/strp/) said that there are 942 units that could be used as STRPs in our census tract and twenty-eight (28) permits available for non-owner occupied usage.[1]

12. At the time the ordinance took effect, we had no plans to move. My husband was able to obtain an owner-occupied permit. We continued to host on Airbnb.

13. Shortly afterwards, I met with my boss in Chicago to discuss my future with the company. I have worked with the same company since I was twenty-two (22). I have reached a stage where I am evaluating my career options. Based on my conversation with my boss, I learned that I may soon get promoted to an executive level position with the company.

14. This promotion would mean a move to Chicago.

15. This promotion would be a huge step in my career. It would mean valuable executive level experience. It would mean an increase in pay. It would also mean health benefits.

16. Also, after we obtained our first permit, I learned that I was expecting our third child.

17. Health benefits are important to us. Neither my husband nor I have employer provided health insurance so we have to self-insure. For a

[1] On September 14, 2015, the map relates that there are 936 units and twenty-nine (29) existing permits with -1 available.

family of five (5), insurance would cost us approximately $1,000 a month. It's especially a concern of ours with a third child on the way.

18. On August 17, 2015, I emailed Metro zoning examiner Clint Harper to ask if I could temporarily place a sign no larger than 18x12 inches in my yard that advertised that the home was available for rent on Airbnb, along with a website link to the listing. I wanted to know if I could have the sign up for three (3) days during Germantown's annual Oktoberfest event (October 9-11).

19. I also asked in the same email if I would be permitted to place a small, 4x4 inch Airbnb sticker in the front door window to notify upcoming guests that they had arrived at the right home. The sticker would only be placed in the window on the date of the guest's arrival.

20. I was told I could not have a sign of any kind.

21. The sign and sticker conveyed truthful information. We had a lawful permit. We were able to host guests.

22. The sign and sticker contained useful information that we intended to convey to the consumer public. Our house is available for rent on Airbnb. Many of the people who come to enjoy our neighborhood for Oktoberfest may find staying in a residence enjoyable. Likewise, the sticker lets our guests know they have arrived at the right house. This is important because it helps to avoid any potential mishaps that could come if they went to the wrong house.

23. I recognize the copy of the email dated August 17, 2015 with Metro zoning examiner Clint Harper. It is marked as Exhibit 6. It is a true, accurate, complete, authentic and actual copy of that email exchange.

24. As a family, we sincerely believe that Nashville is where our heart lies. So, if we moved to Chicago, we hope to return. My husband and I envision sending our three children to some of the great Nashville area Catholic high schools. We even imagine ourselves retiring in the home where we currently live.

25. So we could pursue this opportunity and keep our home, Mr. Anderson and I decided to convert our permit to a non-owner occupied permit. On August 19, 2015, he applied for one. He was unable to obtain a permit.

26. So if we move, we cannot continue to host on Airbnb. If we cannot rent the house on Airbnb when we move we would have to sell it. We cannot afford two (2) mortgages.

27. We cannot have a long-term renter. My husband is a musician. He will continue to return to Nashville. He needs a place to stay. I don't want to have to pay expensive hotel fees when he does.

28. Also, a long-term renter would make us landlords and we do not want to do that. A long-term renter would create more wear and tear on our home that we currently experience with short-term renters. A long-term

rental arrangement would also prevent us from using the house when we return to visit Nashville.

29. If we could obtain a non-owner occupied permit, we would continue to list our home on Airbnb. Our house would pay for itself. We would have the flexibility to schedule guests so that we could continue to use it when we returned. We would not have to be a landlord. The house would not need as much upkeep without a full-time resident.

30. We also worry that we would not get full value from the house if we sold it, because a buyer's options to also use it as an STRP are as limited as ours are.

31. When we got our original permit, we satisfied all the insurance and safety requirements. We have smoke detectors in our bedrooms. We believe our house meets all the state and local fire and safety building codes.

32. Our house was safe to begin with. It is modern, well-constructed, the wiring is new, and the house has smoke detectors. We have two (2) little children and need to keep the house especially safe. We would keep all of those measures in place.

33. Airbnb also provides supplemental insurance coverage. We exclusively list our home for short-term rental on Airbnb.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on 9/16, 2015

Rachel A. Anderson
RACHEL ANDERSON

EXHIBIT 2
Declaration of P.J. Anderson

IN THE 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

DECLARATION OF PAUL JOHN ("P.J.") ANDERSON IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Paul John (P.J.) Anderson, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the State of Tennessee, and over 18 years old. I make this Declaration in support of Plaintiffs' Motion for Preliminary Injunction. I am fully competent to make this Declaration, which I make based on my personal knowledge.

2. I live at **** 5th Avenue N., in Nashville, TN with my wife, Rachel, and two (2) children. When we are not at home, we often host on Airbnb.

3. We started hosting prior to on or about February 26, 2015, when Metro passed the new Airbnb law.

4. At that time, Metro had no regulations that pertained to short-term rentals.

5. We frequently hosted people in our home. Before the ordinance passed, we never received any formal complaints from Metro officials. We were rated highly on Airbnb.com. The comments of our guests were extremely favorable.

6. At the time the ordinance took effect, we had no plans to move. I was able to obtain an owner-occupied permit for use of our home on Airbnb.

7. My wife, Rachel Anderson, has a job in graphic design. The company she works for is based out of Chicago.

8. After I got our permit for owner-occupied short-term rental, my wife and her boss openly discussed her future with the company. In that conversation, my wife learned that she may soon get promoted to the executive level.

9. This promotion would entail a move to Chicago.

10. This is a job opportunity that we are very serious about pursuing. Getting executive experience would be a critical step in Mrs. Anderson's career.

11. This opportunity is important to our family. The promotion would come with a salary increase. It also means benefits.

12. Benefits, especially health benefits, are important to us. As an independent musician, I do not get benefits. Our family has to pay for our own insurance. This is expensive. Furthermore, we are expecting a third child. We estimate that health insurance for a family of five will cost us approximately $1,000 a month.

13. If we moved to Chicago, we would hope it would only be for a few years. We would like to return once Mrs. Anderson has an executive resume. We envision sending our children to some of the Nashville area Catholic high schools. When we return, we want to return to live in our current house.

14. Also, as a musician I plan on frequenting Nashville anyway. I will need to come back to record, perform, do songwriting sessions, and workshops. We want to keep the house as a place I can stay when I return. I don't want to have to pay expensive hotel fees when I have a home in the city.

15. Because we want to be free to pursue this opportunity and keep our home, I attempted to get our permit converted to a non-owner occupied permit on August 19, 2015.

16. After waiting, I was admitted to see Metro zoning examiner Clint Harper. When I told him my address, he replied "not going to happen," or words to that effect.

17. He told me that the reason was because the three percent (3%) cap on non-owner occupied permits had been reached in my census tract.

18. On that day, Metro's map showed that there were thirty (30) existing permits in our census tract with negative two (-2) available. I have examined Exhibit 3. It is a screenshot of the map on August 19, 2015. Exhibit 3 is a true, accurate, complete, authentic and actual copy the website as it looked on that day.

19. I asked Mr. Harper for an email memorializing the denial of my request for a permit. He did so, stating: "At the given address all non-owner occupied units are taken leaving no availability at this time. 8-19-15 @ 10:21 am."

20. I recognize the copy of the email dated August 19, 2015 from Metro zoning examiner Clint Harper. It is marked as Exhibit 4. It is a true, accurate, complete, authentic and actual copy of that email.

21. When we got our original permit, we satisfied all the insurance and safety requirements. We have smoke detectors in our bedrooms. We believe our house meets all the state and local fire and safety building codes.

22. Our house was safe to begin with. It is modern, well-constructed, the wiring is new, and the house has smoke detectors. We have two (2) little children and need to keep the house especially safe. We would keep all of those measures in place.

23. Airbnb also provides supplemental insurance coverage. We exclusively list our home for short-term rental on Airbnb.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on 9-16, 2015

PJ ANDERSON

EXHIBIT 3
Metro STRP map of Germantown, August 19, 2015

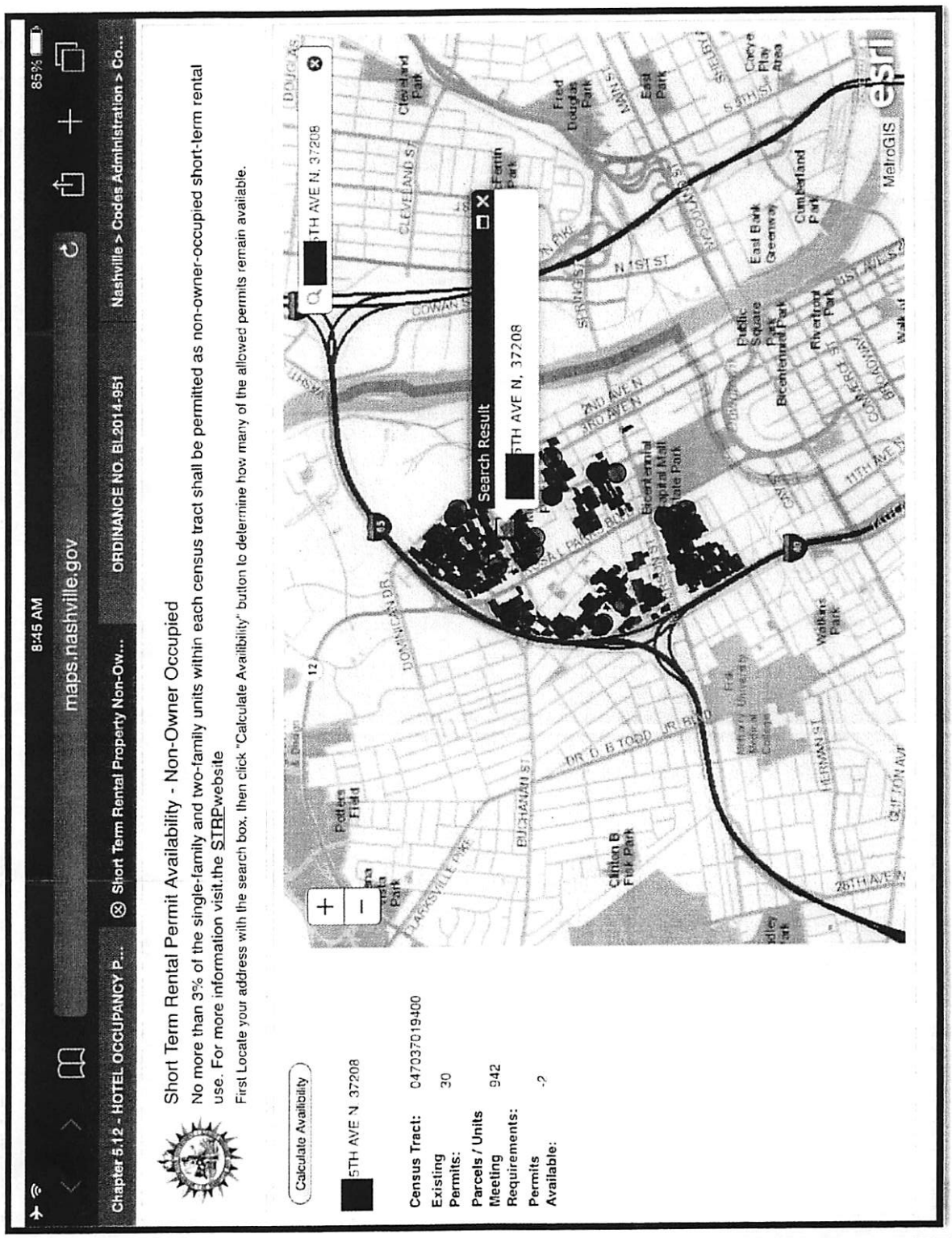

EXHIBIT 4
Email from Metro Zoning Examiner denying permit, August 19, 2015

Monday, September 14, 2015 at 4:14:03 PM Central Daylight Time

[redacted]

From: "Harper, Clint (Codes)" <[redacted]>
Date: August 19, 2015 at 10:21:13 AM CDT
To: "[redacted]>
Subject: [redacted] **5th ave n**

At the given address all non-owner occupied units are taken leaving no availability at this time.
8-19-15 @ 10:21am

Clint Harper
Zoning Examiner
[redacted]6621

Page 1 of 1

EXHIBIT 5
Airbnb reviews for the Andersons

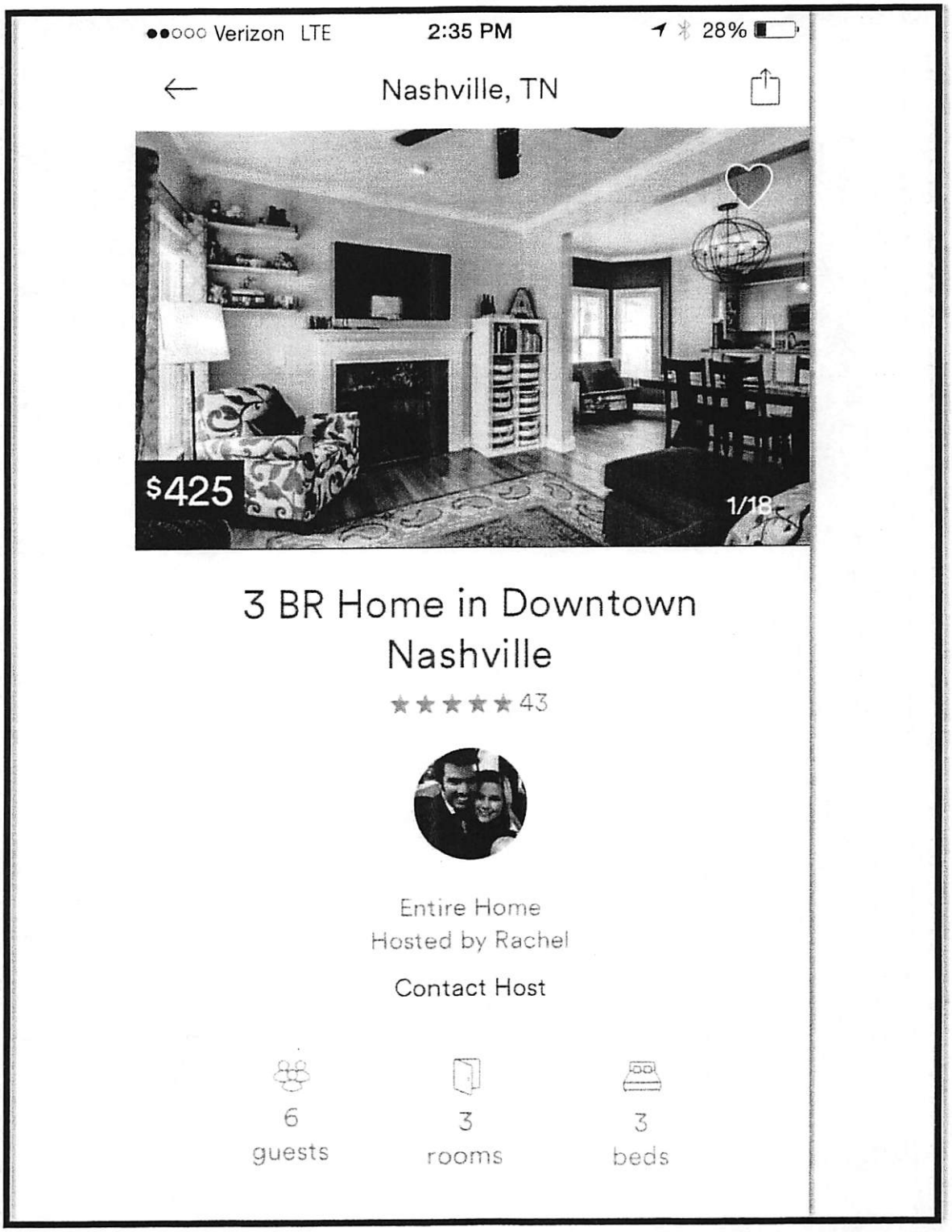

EXHIBIT 6
Email from Metro Zoning Examiner regarding signage, August 18, 2015

Monday, September 14, 2015 at 4:12:27 PM Central Daylight Time

[redacted]

[redacted]

From: "Harper, Clint (Codes)" [redacted]>
Date: August 18, 2015 at 7:39:34 AM CDT
To: 'Rachel Austen' <[redacted]>
Subject: **RE: Airbnb Question**

No signage is allowed.

Clint Harper
Zoning Examiner
[redacted]-6621

From: Rachel Austen [redacted]
Sent: Monday, August 17, 2015 5:54 PM
To: Harper, Clint (Codes)
Subject: Airbnb Question

Dear Mr. Harper,

I am writing to inquire about placing a small sign in my yard to advertise our home on Airbnb. We have a lawful permit. The sign would be no larger than 18x12 inches (smaller than the size of a traditional "FOR SALE" sign), and it would note that our home is available for rent on Airbnb along with a website link to the listing. Would we be permitted by Metro to place this sign in our front yard for the duration of Oktoberfest, which runs from October 9-11?

Second, would we be allowed to place a small Airbnb sticker in our front door window to notify our upcoming guests that they have arrived at the right home. The logo sticker will be approximately 4x4 inches and would only be placed in our window on the date that new guests arrive.

Can you please advise as to whether either is permissible under the new STRP ordinance?

Thanks,
Rachel Anderson, Graphic Designer
[redacted].2854

Page 1 of 1

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
Lora Fox Metro Attorney Metro Courthouse Ste. 108 P.O. Box 196300 Nashville, TN 37219-6300 615.862.6341 lora.fox@nashville.gov	Defendant	☐United States mail, postage prepaid ☑Hand delivery ☐Fax ☑Email ☐Fed Ex ☐CM/ECF

On this date, September 17, 2015.

BRADEN H. BOUCEK

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
Lora Fox Metro Attorney Metro Courthouse Ste. 108 P.O. Box 196300 Nashville, TN 37219-6300 615.862.6341 lora.fox@nashville.gov	Defendant	☐United States mail, postage prepaid ☑Hand delivery ☐Fax ☑Email ☐Fed Ex ☐CM/ECF

On this date, September 17, 2015.

BRADEN H. BOUCEK