IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	)	
Appellant / Plaintiff,	)	
v.	)	**No. M2020-00635-COA-R3-CV**
KALLIE KAY DREHER,	)	**Davidson Cnty. Circuit Court Case No. 19C815**
Appellee / Defendant.	)	

ON APPEAL FROM THE EIGHTH CIRCUIT COURT FOR THE TWENTIETH JUDICIAL DISTRICT, AT NASHVILLE, IN DAVIDSON COUNTY, TENNESSEE

RESPONSE BRIEF OF THE APPELLEE, KALLIE KAY DREHER

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ORAL ARGUMENT REQUESTED

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I. Introduction

Comes now the Appellee / Defendant, Kallie Kay Dreher, by and through counsel of record, Seth N. Cline, and hereby respectfully submits this Reply Brief in response to the Appellant's Brief filed with this court on the 9th day of October, 2020. The Appellee / Defendant will be referred to as "Ms. Dreher," the "Appellee," or the "Defendant." The Appellant / Plaintiff will be referred to as "Metro," "Metro Codes," the "Appellant," or the "Plaintiff." The Right Circuit Court for the Twentieth Judicial District, at Nashville, in Davidson County, Tennessee, the Honorable Judge Kelvin Jones presiding, will be referred to as the "Trial Court." Citations to the Technical Record, Transcript of Evidence, and Trial Exhibits will be designated as T.R. ____., Tr. ____., and T.E. ____., respectively.

II. Nature of Case, Course of Proceedings, and Disposition in Court Below

This matter came before the Environmental Court of the General Sessions Court for Davidson County, Tennessee, when the Appellant, Metro Codes, filed a Civil Warrant against the Appellee on January 10, 2019. T.R. 3. In the Civil Warrant, Metro alleged that, on July 13, 2018, the Appellee violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP[1] without a non-owner occupied permit at 1810 Fatherland Street, Nashville, [Davidson County, Tennessee] 37206" (the "Property"). *Id.* Metro sought an "Order to remedy violations." *Id*. The Civil Warrant summoned the Defendant to appear in Environmental Court on February 27, 2019. *Id*. On January 29, 2019, the Civil Warrant was served *via* the Tennessee Secretary of State. *Id.* On February 25, 2019, the Appellee requested that the matter be reset to March 6, 2019. T.R. 5. On March

[1] STRP is the abbreviation for Short Term Rental Property.

6, 2019, the Environmental Court held a hearing on the merits where witnesses were sworn; testimony was heard; evidence was tendered by counsel and published as exhibits; and, opening and closing arguments were made by the respective parties. T.R. 3. Upon the closing evidence, Referee Raymond Hirsch considered the merits of the matter and determined that the Appellee violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP without a non-owner occupied permit at the Property." *Id*. The referee entered a judgment for Metro Codes against the Defendant; fined the Defendant Fifty Dollars ($50.00) for the single violation; and imposed a three (3) year injunction, banning the use of the Property as a Short Term Rental Property ("STRP"). *Id*.

On March 11, 2019, the Appellee filed a Request for Rehearing to have the matter reheard before Judge Allegra Walker of the General Sessions Court, and the hearing was set for March 19, 2019. T.R. 6.[2] On March 19th, Judge Walker presided over the rehearing where opening and closing arguments where heard; witnesses were sworn and testimony was given; and, exhibits were tendered and published to the record. T.R. 2. Upon the conclusion of the evidence, Judge Walker considered the merits of the trial and (1) ruled that "the city [had] not put on adequate proof to prove that [the Appellee] doesn't live there. . ."; (2) found that Metro failed to prove Ms. Dreher violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner

[2] Despite filing the Request for Rehearing, on March 13, 2019, Counsel for Metro Codes Referee Hirsch entered the Final Order and Injunction thereby ordering the payment of the Fifty Dollar ($50.00) fine and the three (3) year enjoinment from operating the Property as an STRP. T.R. 7 – 8. It should also be noted that although counsel for the Appellant was aware that Ms. Dreher had retained Collins Legal, PLC as counsel, Notice of the Final Order and Injunction was sent directly to Ms. Dreher on March 15, 2019, and not to Collins Legal.

occupied STRP without a non-owner occupied permit at the Property"; and (3) entered an Order[3] that dismissed the allegations against the Appellee. T.R. 2, 160.

On April 1, 2019, some thirteen (13) days after the March 19th Order was entered by Judge Walker, the Appellant filed a Notice of Appeal thereby requesting to "appeal to Circuit Court the General Sessions' decision rendered on the Original Claim." T.R. 9. On April 4, 2019, the Appellee filed a Motion to Dismiss for Imperfection of Appeal Due to Untimeliness, pursuant to Tennessee Code Annotated § 27-5-108. T.R. 10. On May 2, 2019, Metro filed a Motion to Set Trial before the Eighth Circuit Court for Davidson County, Tennessee at Nashville. T.R. 113. On June 10, 2019, an Order Granting Plaintiff's Motion to Set Trial was entered by Judge Kelvin Judge Jones of the Eighth Circuit Court. T.R. 114. On July 17, 2019, Judge Jones entered an Order Denying the Defendant's Motion to Dismiss for Imperfection of Appeal Due to Untimeliness. T.R. 116. On July 30, 2019, Metro filed a Motion to Amend Civil Warrant with the Filing of an Amended Complaint (the "Motion to Amend"). T.R. 118 – 126. On August 20, 2019, the Appellee filed a response to Metro's Motion to Amend and asked the Court to deny Metro's Motion to Amend and to limit the standard of review; or, in the alternative, for an Order of Dismissal due to a *de novo* appeal being in violation of United States and Tennessee state constitutions. T.R. 130, 149. Because Local Rule 26.04(e) required a response be filed on August 19, 2019, and upon Metro's request for an extension of time to respond, the hearing was continued to September 20, 2020.

On September 20, 2019, a hearing on Metro's Motion to Amend was held before the Eighth Circuit Court where, after hearing arguments and reviewing the

[3] The Order reflects that it was entered on March 20, 2019; however, this was an inadvertent typographical error and the Order was rightfully entered on March 19, 2019. *See* T.R. 17.

evidence presented, Judge Jones denied[4] the Motion to Amend and held that "this particular case with the facts and the hearings that have already been – the adjudication has already taken place. . . – that's not what the legislature meant when [Rule 15.01] was passed." T.R. 171. On December 16, 2019, the Appellee filed a Motion to Limit the Standard of Review. T.R. 175. On January 21, 2020, Judge Jones, "after considering the pleadings and hearing oral arguments, found the Appellee's Motion to be well taken; granted the Motion limiting the standard of review to an abuse of discretion standard; and, denied the Appellant the right to a *de novo* trial. . ." (the "January 21st Order") T.R. 230. On February 21, 2020, Metro filed a Motion to Alter or Amend Judgment Pursuant to Tenn. R. Civ. P. 54.02. (the "Motion to Alter or Amend") T.R. 233. On March 2, 2020, the Appellee filed its Response to Metro's Motion to Alter or Amend. T.R. 245. On March 27, 2020, Judge Jones entered an Order setting aside the January 21st Order limiting the standard of review; dismissed the Appellant's appeal; and, held "the Eighth Circuit Court lacks jurisdiction to hear an appeal from General Sessions Court at any standard other than a trial de novo." T.R. 283 – 284. The Eight Circuit Court made a determination that (1) the above-referenced action is quasi-criminal in nature; (2) the fine required by the Metropolitan Code of Law is punitive in nature; and (3), jeopardy attached in the General Sessions Court upon the entry of judgment in favor of the Appellee by Judge Allegra Walker. *Id*. On April 24, 2020, the Appellant filed an appeal to challenge Judge Jones' dismissal of the appeal. T.R. 286.

[4] An Order Denying the Plaintiff's Motion to Amend was entered on October 11, 2019, by the Honorable Judge Kelvin Jones. T.R. 152.

STATEMENT OF THE FACTS

Prior to moving to Nashville, Tennessee in 2014, the Appellee resided with her husband, Lucas Dreher, on a row crop farm, in Mississippi. T.R. 92, 93. During that time while living in Mississippi, although a singer/songwriter by trade, the Appellee contributed to a personal photography blog, Kallie Dreher Photography. T.R. 87, 89.[5] Sometime in 2014, the Appellee moved to Nashville after receiving a record deal, to pursue a musical career with her band *Muddy Magnolias*. T.R. 75, 93-94. The Appellee resided in two different apartments, in Nashville, between 2014 and 2017. T.R. 75. On March 31, 2016, the Appellee was featured in the Clarion Ledger highlighting her success in the music industry. T.R. 41. As a result of said success, sometime on or around January 13, 2017, the Appellee and her husband sold their residence in Mississippi and relocated to Nashville. T.R. 82.

On or about January 19, 2017, the Appellee and her husband purchased and obtained a Deed of Trust on real property commonly known as 1810 Fatherland Street, Nashville, Davidson County, Tennessee 37206 (the "Property"). T.R. 75, T.E. 1. At all times thereafter, the Property was the Appellee's permanent residence where she kept her belongings including her clothing; received mail; paid taxes; and, sleeps when she is not away from home. T.R. 76, 78, 83. On or about June 29, 2017, the Appellee and Mr. Dreher executed a Modification of Deed of Trust that lists the Appellee's address as 1810 Fatherland Street, Nashville, Tennessee 37206. T.R. 51, 76. After owning and permanently residing at the Property for over a year, on or about April 12, 2018, the Appellee provided copies of her driver's license, voter registration card, and bank statements – all of which reflected the Appellee's address

[5] T.R. 87 (It is to be noted, the Record reflects that at some time nearly a decade ago, Ms. Dreher did receive compensation for taking picture for "a friend, maybe for a Christmas card, but not a company.").

as 1810 Fatherland Street – applied for, and was issued a STRP for the Property. T.R. 40.

Sometime on or about July, 2018, Robert Osborne, a Metro Employee, received a complaint[6] on the Property and engaged in an investigation as to whether the Appellee permanently resided at the Property. T.R. 58, 61. During his investigation, Mr. Osborne collected information which included an Airbnb advertisement and the aforementioned Kallie Dreher Photography Website and Clarion Ledger Article from 2016. T.R. 25, 34, 35. The Deed of Trust and Modification of Deed of Trust were first introduced to Mr. Osborne at the March 19, 2019 hearing and were not reviewed in Mr. Osborne's initial investigation and determination on whether to file a warrant against the Appellee. T.R. 44-45, 5. Mr. Osborne never visited the Property to personally observe whether the Appellee permanently resided at the Property. T.R. 63. Further, Mr. Osborne never made an attempt to verify the driver's license, voter registration card, and bank statements provided by the Appellee in the initial STRP application process. T.R. 71. Despite the clear and obvious lack of due diligence on behalf of Metro in its' investigation of the alleged complaint, a Civil Warrant was issued on January 10, 2019, and served on the Appellee on January 29, 2019.[7]

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[6] The record is unclear as to the source of the complaint.

[7] The Original Civil Warrant in the matter was filed against Lucas Dreher on July 18, 2018. T.R. 1. The Warrant was returned unserved. T.R.42. The January 10, 2019, Civil Warrant filed against the Appellee lists her address as 506 East Preston Street, Benoit, MS 38725. T.R. 3. The Appellee was served never physically served with the Civil Warrant; however, because the local postal worker in Benoit, MS – a town of approximately 200 people – saw the Appellee's name on a piece of mail addressed to a previous residence; took the mail to Mr. Lucas while he was at his P.O. Box; allowed him to sign on behalf of the Appellee; and, returned the Certified Mail Return Receipt to the Tennessee Secretary of State. T.R. 87.

SUMMARY OF THE ARGUMENT

The Eighth Circuit Court correctly held that the double jeopardy clauses of the United States and Tennessee constitutions both deny Metro the right to a *de novo* appeal after a hearing on the merits was held and the Defendant was acquitted in general sessions court. In the Civil Warrant filed against the Appellee on January 10, 2019, the Appellant alleged that, on July 13, 2018, the Appellee violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP without a non-owner occupied permit at 1810 Fatherland Street, Nashville, [Davidson County, Tennessee] 37206" (the "Property").[8] Metro sought an "Order to remedy violations."[9]

Metro Code Section 17.16.070 expressly provides and mandates the relief that must be sought when a determination that a violation of Metro Code Section 17.16.070.U.1.a has occurred. Specifically, the current version[10] of Metro Code Section 17.16.070.U.4.l.vi holds

> [t]he penalty for operating a short term rental property without a permit *shall* be: (1) A fifty dollar fine as imposed by a court of competent jurisdiction. Each day of operation without a permit *shall* constitute a separate offense.
> . . .
> (3) Upon a finding of a court of competent jurisdiction that a short term rental property has operated without a permit, in addition to any other relief granted, there *shall* be a waiting period of three years from the date of such finding for the property to become eligible for a STRP Permit.[11]

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[8] T.R. 4.

[9] T.R. 4.

[10] At the time the STRP Permit in question was issued, the Metro Code did not include a section for "Short term rental property (STRP) – Not / Non-Owner Occupied."

[11] *See* Metro Code Section 17.16.070.U.4.l.vi.

The aforementioned fifty dollar fine mandated by the Metro Code is punitive in nature and not remedial because the fine fails to accomplish any truly remedial measure, examples of which "include those that (1) compensate for loss; (2) reimburse for expenses; (3) disgorge "ill-gotten" gains; (4) provide restitution for harm; and (5) ensure compliance with an order or directive."[12] When the predominant purposes served by the penalty are to provide general and specific deterrence and to ensure overall future compliance with the law – like the current situation at hand – then the monetary penalty should be deemed as serving punitive purposes.[13]

Given that the Metropolitan Code mandates a fifty dollar fine that is punitive in nature, double jeopardy bars the Eighth Circuit Court from reviewing the acquittal of the Appellee from the General Sessions Court *de novo*. The Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Tennessee Constitution protect an individual not only from a second punishment for the same offense but also from a second trail for the same offense.[14]

In *Metropolitan Government of Nashville and Davidson County v. Miles*, 524 S.W. 2d 656 (Tenn. 1975), the Tennessee Supreme Court held "that a proceeding in a municipal court for the imposition of a fine upon a person for allegedly violating a city ordinance is criminal rather than civil in substance, in that, it seeks punishment to vindicate public justice, and, therefore, constitutes jeopardy."[15] The *Miles* court then affirmed the action of the trial court in holding that neither the Metropolitan Charter nor the Tennessee Code authorized the Metropolitan Government to appeal

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[12] *City of Chattanooga v. Davis*, 54 S.W.3d 248, 270 (Tenn. 2001).
[13] *Davis*, 54 S.W.3d at 265.
[14] *Metropolitan Government of Nashville and Davidson County v. Miles*, 524 S.W. 2d 657, 660 (Tenn. 1975).
[15] *Miles*, 524 S.W. 2d at 660.

and have another trial *de novo* in the Circuit Court for the same offense."[16] *Miles* was reaffirmed in *City of Chattanooga v. Davis*, 54 S.W.3d 248 (Tenn. 2001) where the Tennessee Supreme Court opined with regard to "the specific context of a civil proceeding for a municipal ordinance, this Court has held that the imposition of a pecuniary sanction triggers the protections of double jeopardy to prevent a second punishment in the state courts for the same offense."[17]

In sum, the Metropolitan Code commands that a fifty dollar fine shall be imposed for a violation of Metro Code Section 17.16.070.U.1.a. The Tennessee Supreme Court has held and reaffirmed that the imposition of a fine is punishment; therefore, Metro cannot proceed with a *de novo* appeal in the Circuit Court without violating the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Tennessee Constitution. As such, this Honorable Court should affirm the Order entered by the Eighth Circuit dismissing Metro's appeal.

[16] *Miles*, 524 S.W. 2d at 660.

[17] *Davis*, 54 S.W.3d 248, 261; *See Miles*, 524 S.W.2d at 660 ("We hold that the imposition of a *fine* is punishment." (emphasis in original)).

STANDARD OF REVIEW

A determination on the issue of whether the double jeopardy clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 10 of the Tennessee Constitution applies to the above-styled matter is a question of law. Given that the determination on the issue is primarily concerned with the Metropolitan Code and the application of the law to the facts, "it is well settled that we review such questions of law *de novo* with no presumption of correctness given the lower courts' judgments."[18] Any questions of fact are reviewed "*de novo* upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise."[19]

[18] *Nelson v. Wal-Mart Stores, Inc*., 8 S.W.3d 625, 628 (Tenn. 1999).
[19] *Nelson*, 8 S.W.3d at 628-629.

ARGUMENT

I. The Metropolitan Code of Laws expressly mandates that the penalty for violations of § 17.16.070.U. shall be both a fifty dollar ($50.00) fine and a three (3) year injunction; therefore, *Metro. Gov't of Nashville & Davidson Cnty. v. Miles* applies, and the double jeopardy clauses of the United States and Tennessee constitutions are applicable to the current proceeding.

A determination by the court that an individual operated a non-owner occupied short term rental property without a non-owner occupied short term rental permit requires a judgment be entered against the Defendant and shall include a mandatory fifty dollar ($50.00) fine for each day of operation and a three (3) year injunction from the date of the finding.[20] Pursuant to M.C.L. § 17.04.050 which provides the rules for construction of language for Title 17 of the Metropolitan Code, "The word "shall" is always mandatory and not discretionary."[21] It therefore follows that the language of M.C.L. § 17.16.070.U.l.4.vi which states in part "[t]he ***penalty*** for operating a short term rental property without a permit ***shall*** be: (1) A fifty dollar fine. . . [and] there ***shall*** be a waiting period of three years from the date of such finding for the property to become eligible for a STRP Permit"[22] is mandatory and not discretionary. The mandatory imposition of both a punitive measure and a remedial measure makes the matter quasi-criminal; within the purview of *Metro. Gov't of Nashville & Davidson Cnty. v. Miles*, 524 S.W.2d 656, 660 (Tenn. 1975);

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[20] M.C.L. § 17.16.070.U.4.l.vi.

[21] M.C.L. § 17.04.050.J. *See also Black's Law Dictionary* 1000, 1407 (Bryan A. Garner, ed., 11th ed.2019 (The first definition cited for "shall" reads: "1. Has a duty to; more broadly, is required to <the requester shall notice> <notice shall be sent>. This is the mandatory sense that drafters typically intend and that courts typically uphold." Conversely, Black's Law Dictionary defines "may" as: "1. To be permitted to <the Plaintiff may close>. 2. To be a possibility <we may win on appeal>."

[22] M.C.L. § 17.16.070.U.4.l.vi. (emphasis added).

and, therefore, the double jeopardy clauses of both the United States and Tennessee state constitutions bar the Appellant from bringing a *de novo* appeal in the circuit court.

a. The circuit court correctly applied M.C.L. § 17.16.070.U.l.4.vi as the specific authority to provide the penalty for operating a non-owner occupied STRP without a permit which expressly mandates that the remedy for violations of § 17.16.070.U. shall be both a fine and an injunction.

The Metropolitan Code is explicit in that the penalty for operating a non-owner occupied STRP without a non-owner occupied STRP permit in violation of M.C.L. § 17.16.070.U. ***shall*** be a fifty dollar ($50.00) fine and a three year injunction if the finding is made by a court of competent jurisdiction. [23] It is well-settled that the guiding principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.[24] The current version[25] of M.C.L. § 17.16.070.U.4.l.vi outlines the penalty for operating a STRP without a permit. Specifically,

> [t]he penalty for operating a short term rental property without a permit *shall* be:
>
> (1) A fifty dollar fine as imposed by a court of competent jurisdiction. Each day of operation without a permit *shall* constitute a separate offense.
> . . .
> (3) Upon a finding of a court of competent jurisdiction that a short term rental property has operated without a permit, in addition to any other relief granted, there *shall* be a waiting period of three years from the

[23] M.C.L. § 17.16.070.U.4.l.vi.

[24] *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994) (quoting *State v. Sliger,* 846 S.W.2d 262, 263 (Tenn. 1993)).

[25] At the time the STRP Permit in question was issued, the Metro Code did not include a section for "Not / Non-Owner Occupied."

> date of such finding for the property to become eligible for a STRP Permit.[26]

"Another rule of statutory interpretation is that a special statute or a special provision of a particular statute controls a general provision in another statute or a general provision in the same statute."[27] Stated differently, "A special provision in a statute will control a general provisions which would otherwise include that mentioned in the particular provisions."[28] "The rule is founded upon or expressed by the maxim, *generalia specialbus non derogant,* and is also known as the rule of implied exception."[29]

> "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."[30]

Nevertheless, it should be noted that Article XIII speaks to the general enforcement of Title 17.[31] Within Article XIII, M.C.L. § 17.40.610 speaks directly to violations of Title 17 and holds that "[a]ny violation of this title shall be a misdemeanor offense punishable by law. Each day of a violation shall constitute a separate offense."[32] Further, M.C.L. § 17.40.620 outlines that "[a]ny violation of this

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[26] *See* Metro Code Section 17.16.070.U.4.l.vi. (emphasis added).
[27] *Woodroof v. Nashville*, 183 Tenn. 483, 488, 192 S.W.2d 1013, 1015 (1946).
[28] *State v. Safley*, 172 Tenn. 385, 391, 112 S.W.2d 831, 833 (1937).
[29] *Burnett v. Maloney*, 97 Tenn. 697, 706, 37 S.W. 689, 691 (1896).
[30] *Safley*, 172 Tenn. 385 at 389-90.
[31] *See* M.C.L. § 17.40.590, *et al.*
[32] M.C.L. § 17.40.610.

title shall be assessed a civil penalty at the rate of five hundred dollars per day." Nowhere else in Title 17 does the Metropolitan Code speak to the penalty for operating an STRP without a permit nor the penalty for violating Title 17 in general. It is important to note that M.C.L. § 17.16.070.U.4.l.vi.3. leaves open the possibility for the court to also assess the general penalties in Title 17, Article XIII, under M.C.L. § 17.40.610 and M.C.L. § 17.40.620, thereby resulting in the possibility that a violation of M.C.L. § 17.16.070.U. may or otherwise could be a misdemeanor offense punishable by law, including incarceration up to eleven (11) months and twenty-nine (29) days, and the assessment of a civil penalty at the rate of five hundred dollars per day ($500.00).

In the Civil Warrant filed against the Appellee on January 10, 2019, the Appellant alleged that, on July 13, 2018, the Appellee violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP without a non-owner occupied permit at 1810 Fatherland Street, Nashville, [Davidson County, Tennessee] 37206" (the "Property")" and sought an "Order to remedy violations."[33] The principles of statutory construction and interpretation would necessitate that the penalty for the alleged violation would come from Title 17. Again, keeping in mind said principles, after reviewing the general and specific provisions related to enforcement, violations, and operating an STRP without a permit, the remedy sought by Metro must be derived from M.C.L. § 17.16.070.U.4.l.vi which outlines the specific penalty for operating an STRP without a permit.

The language in M.C.L. § 17.16.070.U.4.l.vi is specific, explicit, and unambiguous in mandating that upon a finding of a violation of M.C.L. § 17.16.070.U.1.a., the penalty ***shall*** be a fifty dollar ($50.00) fine and, *in addition to any other relief granted*, there ***shall*** be a waiting period of three (3) years from the

[33] T.R. 4.

date of such finding by a court of competent jurisdiction before the property will again become eligible for an STRP permit.[34] The Metropolitan Code, in its current form, fails to provide the Appellant with the right or ability to pick or otherwise choose the remedy for an alleged violation of M.C.L. § 17.16.070.U.1.a. Given these facts and the above-quoted law, a fifty dollar ($50.00) fine must be assessed, a three (3) year injunction must be assessed, a five hundred dollar ($500.00) penalty per day may be assessed, and a misdemeanor could be charged thereby potentially resulting in prison time of up to eleven (11) months and twenty-nine (29) days; therefore, the matter is at least quasi-criminal, not remedial in nature, and, thus, because a fine must be imposed or otherwise sought, *Metropolitan Government of Nashville v. Miles* applies.

b. *Miles* applies and prevents a *de novo* appeal from the acquittal of the Defendant in the General Sessions Court.

M.C.L. § 17.16.070.U.l.4.vi mandates a fine be assessed for operating a non-owner occupied STRP without a permit; therefore, the current action is quasi-criminal and falls under the purview of *Miles* to protect the Appellee not only from a second punishment for the same offense but also from a second trial for the same offense - both of which are violations of Article 1, Section 10 of the Constitution of the State of Tennessee and the Fifth and Fourteenth Amendments to the Constitution of the United States.[35] In *Metropolitan Government of Nashville and Davidson County v. Miles*, the Tennessee Supreme Court dismissed the theory that the *de novo* nature of an appeal "which is sought in the Circuit Court prevents the application of the double jeopardy clause because the judgment of the General Sessions Court is

[34] *See* M.C.L. § 17.16.070.U.4.l.vi. (emphasis added).

[35] *Miles*, 524 S.W.2d at 657, 660. *See also* S*tate v. Jackson*, 503 S.W.2d 185 (Tenn. 1973); *United States of America v. Dickinson* 168 F.Supp. 899 (D.C. 1958).

'wiped clean' and cannot, therefore be considered a former jeopardy."[36] The Court in *Miles* held "that a proceeding in a municipal court for the imposition of a fine upon a person for allegedly violating a city ordinance is criminal rather than civil in substance, in that, it seeks punishment to vindicate public justice and, therefore, constitutes jeopardy."[37] The *Miles* court then affirmed the action of the trial court in holding that neither the Metropolitan Government Charter nor the Tennessee Code authorized the Metropolitan Government to appeal and have another trial *de novo* in the Circuit Court for the same offense."

Miles was revisited in *Metropolitan Government of Nashville and Davidson County v. Allen* where the Tennessee Supreme Court reaffirmed "the thrust of our principal holding in *Miles*, which we reiterate. . . [t]hese cases [*O'Haver* and *O'Dell*] are not authority for the proposition that an appeal may follow an acquittal, after a trial on the merits in a case involving violation of a city ordinance."[38] *Miles* was again revisited in *City of Chattanooga v. Davis*, where the Tennessee Court of Appeals referenced *Miles* when it reached the same conclusion and held that while the general rule is that an appeal for the violation of a municipal ordinance is a civil action triable *de novo* in the circuit court and includes a right to a jury trial, "*the rules of double jeopardy apply to preclude an appeal from a judgment of acquittal*."[39]

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[36] *Miles*, 524 S.W.2d at 660.

[37] *Miles*, 524 S.W.2d at 656; *See also Ex parte Lange*, 85 U.S. 163, 168-169 (1873) (internal citations omitted)).

[38] *Metro. Gov't of Nashville & Davidson Cnty. v. Allen*, 529 S.W.2d 699 (Tenn. 1975).

[39] *Allen*, 529 S.W.2d at 707 (Tenn. 1975); *City of Chattanooga v. Davis, No. E2000-00664-COA-R3-CV, 2000 Tenn. App. LEXIS 722, at *19 (Ct. App. Oct. 31, 2000); see also Waller v. Florida*, 397 U.S. 387 (1970)).

The ruling in *Davis* was appealed to the Tennessee Supreme Court. In dicta, the Court explicitly overruled *O'Dell v. City of Knoxville*, 214 Tenn. 237 (1964) "to the extent that *O'Dell* compels the conclusion that proceedings involving municipal ordinance violations are outside the scope of Article VI, section 14, it is expressly overruled."[40]

> Although the intended character of the proceeding may be relevant to the nature of a sanction imposed in that proceeding, the *O'Dell* Court was plainly misguided to the extent that it believed a court could not impose a punitive sanction in a "civil action." As the United States Supreme Court has acknowledged, "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties."[41]

In making that finding, the Tennessee Supreme Court reaffirmed *Miles*: "Indeed, in the specific context of a civil proceeding for a municipal ordinance, this Court has held that the imposition of a pecuniary sanction triggers the protections of double jeopardy to prevent a second punishment in the state courts for the same offense."[42]

If a fine or punishment occurs, the double jeopardy clause applies thereby prohibiting not only a second trial for the same offense, but also prohibiting an attempt at a second time to punish a defendant for the same offense. Stated differently, *Miles* holds that courts are not to allow a second punitive action against a defendant for the same offense. The basis for the holding in *Miles* is that civil actions that sought fines or punishments were truly more criminal than civil "in substance" because those actions sought punishment to vindicate public justice.

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[40] *Davis*, 54 S.W.3d at 261.

[41] *Davis*, 54 S.W.3d at 261 (internal citations omitted).

[42] *Davis*, 54 S.W.3d at 261.

Miles does not extend to matters that are purely civil and remedial in nature. In other words, if there is no penalty or fine that is intended to punish a previous bad act, the matter is not criminal or quasi-criminal and is not subject to the protections of the federal and state double jeopardy clause.

The Appellant argues that the issue of what constitutes a remedial or punitive action is a case of first impressions; however, this argument is misplaced. *Miles* specifically speaks to what defines a purely civil and remedial matter and one that is punitive in nature. Proceedings are purely civil and remedial in nature when there is the absence of the possibility that a fine or imprisonment *may* result from a finding that an alleged violation of an ordinance has occurred. This is in contravention of the Metro Code which explicitly states, "The penalty for operating a short term property without a permit ***shall*** be: (1) A Fifty dollar fine. . . [and] there ***shall*** be a waiting period of three years from the date of such finding for the property to become eligible for a STRP." Therefore, it is clear that the instant matter falls squarely within the purview of *Miles*.

The Appellant seems to imply that simply bootstrapping a three (3) year injunction on a mandatory, punitive penalty somehow diminishes or otherwise removes the protections afforded by the federal and state double jeopardy clauses. This concept, again, flies in the face of *Miles* and the extension granted to those matters which are quasi-criminal in nature. If the Appellant desires the ability to be able to demand purely civil and remedial relief under M.C.L. § 17.16.070.U.l.4.vi, Metro should consult with city legislatures to amend the ordinance. It is not the duty of the court to alter or amend a statute, question a statute's reasonableness, or substitute the court's policy judgments for those of the legislature.[43]

[43] *Griffin v. Shelter Mut. Ins. Co.*, 18 S.W.3d 195, 201 (Tenn. 2000).

In short, *Allen* and *Davis* reaffirm both *Miles* and the Appellee's position that the *de novo* appeal sought by Metro cannot be granted. When a civil case ends with a "judgment of no liability against the defendant after a trial on the merits, such a judgment is almost always deemed final and favorable to the defendant. . ."[44] Any ruling that in substance amounts to an acquittal or dismissal triggers the protections against double jeopardy and bars retrial.[45] This seemingly incongruous result is mandated by the holding of the Supreme Court of the United States in *Waller v. Florida*, 397 U.S. 387 (1970) and is supported by other cases cited in *Miles*.[46]

c. The facts and circumstances in *Miles* do not differ substantially for the instant issue.

Metro's argument that *Miles* and the instant issue are substantially different are without merit or otherwise have no material impact on the comparison of the relevant case law and authority derived from *Miles*. In *Miles*, the Defendant was cited for both a criminal citation and a violation of a civil ordinance.[47] As the Appellant correctly identified, the remedy in *Miles* was to punish previous misconduct.

In the instant case, the Appellant asserts that the civil warrant issued in this matter was to ensure future compliance with the zoning code. Nonetheless, and contrary to the Appellant's mischaracterization of the original claim in the current matter, Metro's civil action was initiated on January 10, 2019, for an alleged, previous violation that occurred on July 13, 2018. Stated differently, the civil

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[44] *Meeks v. Gasaway*, No. M2012-02083-COA-R3-CV, 2013 Tenn. App. LEXIS 843, at *13 (Ct. App. Dec. 30, 2013); *See also Christian v. Lapidus*, 833 S.W.2d 71 (Tenn. 1992).

[45] *See Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1977).

[46] *Allen*, 529 S.W.2d at 707); *Davis*, No. E2000-00664-COA-R3-CV at *19.

[47] *See generally Miles*, 524 S.W.2d at 656.

warrant in the instant matter was filed to remedy an alleged violation that occurred *nearly five (5) months prior* to the issuance of the civil warrant.

The Appellant errantly predicates their entire argument on the falsity that a fine must not be assessed. As a result, the Appellant's analysis fails to identify that the mandate of a fifty dollar ($50.00) fine is punishment, punishment for a previous, single act, on a specific date. The punitive fine is not forward-looking. It is not intended to ensure or coerce future compliance. The Appellant fails to paint the entire picture. A holistic analysis of the language in M.C.L. § 17.16.070.U.4.l.vi reveals that the Metro Code encompasses both the focus on addressing a previous, single bad act as well as being forward-looking to ensure future compliance by requiring a three year injunction enjoining the use of the property as an STRP. If there is any difference in the material substance of *Miles* and the current case, it is that the ordinance in question not only punishes past behavior and vindicates a public justice but also seeks to ensure future compliance. The Appellee would assert that any argument to the contrary would be an undue restriction of the ordinance's coverage.

II. The Circuit Court did not err when it declined Metro the right to a *de novo* appeal of the Davidson County General Sessions Court's dismissal of Metro's claim that Ms. Dreher violated Metro Code of Laws § 17.16.070.

a. The current action cannot be legitimately viewed as purely civil and remedial in nature; therefore, *Chattanooga v. Davis* is not controlling on the instant issue.

The Appellant mischaracterizes this action as one that is purely civil and remedial in nature. This mischaracterization results in the Appellant's failure to establish that *Miles* extends double jeopardy protections to the current issue at hand. Nonetheless, the Appellant urges this Court to consider *Chattanooga v. Davis* in its'

analysis of whether the penalty imposed by M.C.L. § 17.16.070.U.l.4.vi is punitive or purely civil and remedial in nature.

In *Davis*, the court considered whether monetary sanctions, in excess of fifty dollars ($50.00), ordered against a Defendant who had been found guilty of violating various municipal ordinances were fines as contemplated by Article VI, section 14 and unconstitutional when imposed as a punitive measure.[48] The *Davis* Court held that a monetary sanction was a fine and within the scope of Article VI, section 14 when the legislative body creates a sanction primarily intended to punish the offender or the "clearest proof" shows the monetary sanction to be so punitive it cannot be legitimately viewed as remedial in nature.[49]

The Appellant argues, without citing any relevant authority or case law, that Tennessee courts must undergo a comparable analysis when applying the protections of the double jeopardy clauses for alleged municipal ordinance violations; and, any action to halt or correct *ongoing violations* should be considered remedial. This argument is unfounded.

In the instant matter, the singular alleged violation occurred on July 13, 2020.[50] The Civil Warrant fails to outline or notate any other violation or that the July 13th violation was ongoing. Why? The alleged violation was not ongoing; it was a singular event in the past; and, the July 13th violation is distinguishable from sanctions that seek to "correct or to halt a then-existing violation of the Code."[51] If the July 13th violation was "ongoing" and M.C.L. § 17.16.070.U.l.4.vi provides that each day of operation without a permit shall constitute a separate offense thereby mandating a fifty dollar ($50.00) fine for each day, under the Appellant's logic, the

[48] *Davis*, 54 S.W.3d at 251.
[49] *Davis*, 54 S.W.3d at 264.
[50] T.R. 4.
[51] *Davis*, 54 S.W.3d at 269.

violation had been ongoing for nearly six (6) months and the Appellee should have been fined an estimated nine thousand dollars ($9,000). Nonetheless, in contravention of its' own 'on-going violation' argument, in the Appellant's unsuccessful Motion to Amend it Pleadings, the Appellant attempted to amend or otherwise modify its prayer of relief from the original "order to remedy violations" to a request for relief which included a fifty dollar ($50.00) fine and a three (3) year injunction. In short, this request for relief implies that the alleged violation by the Appellee was a singular instance and not an ongoing violation under M.C.L. § 17.16.070.U. Even if, the Court applied the *Davis* test, both the legislative intent and the "clearest proof" test would establish that the totality of the circumstances demonstrates that the ordinance contains a pecuniary sanction to remedy or correct the violation.

b. Even if the Circuit Court applied the "punitive or remedial test" suggested by the Appellant, the action by Metro would still be quasi-criminal and punitive in nature.

Miles outlines that when a fine or imprisonment *may* result from a finding that an alleged violation has occurred, the matter is punitive and not purely civil; therefore, unless this Honorable Court deems *Miles* is no longer controlling and wishes to abrogate or otherwise overturn the opinion in *Miles*, the Appellant's request for this court to adopt a new test to review civil zoning actions should be denied. Nonetheless, for the sake of argument, even if the Circuit Court had applied the test proposed by Metro, the factors would show that the instant action is punitive in nature and, therefore, quasi-criminal. The modified-*Davis* test the Appellant encourages this Honorable Court to adopt contains three prongs: (1) whether the municipality initiating the civil action intended to punish the Appellee; (2) whether the prescribed remedies available through the civil action are aimed at punishing past acts or are coercive and forward-looking; and, (3) whether the act alleged to

have been violated in the civil action is an act for which is subject to criminal prosecution under the current criminal code or common law.[52]

Applying the proposed test to the current facts reasonably results in a conclusion that (1) the legislative body created the sanction primarily to punish an individual who violates M.C.L. § 17.16.070.U.; (2) the remedy available through the civil action is two-fold and punishes the single, past, bad act and coerces future compliance with the Metro code; and (3), the act alleged to have been violated in the civil action is subject to criminal prosecution under the current code. For these reasons, this Honorable Court should uphold the finding of the Circuit Court that the matter is quasi-criminal and punitive in nature.

i. The legislative body created the sanction to punish the Appellee.

The legislative body sought to punish the Appellee with the sanctions created under M.C.L. § 17.16.070.U.4.l.vi. The punishment for violating M.C.L. § 17.16.070.U. is two-fold and includes a fifty dollar ($50.00) punitive fine, per violation, with each day constituting a separate offense. Stated differently, the legislation specifically instructed that, "[t]he ***penalty*** for operating a short term rental property without a permit ***shall*** be. . . [a] fifty dollar fine. . ." [53] *in addition to* a three year injunction imposed by a court of competent jurisdiction after a determination that an individual has operated without a permit. "The intended purpose of this provision, plain on its face through the language used, is clearly to punish the offender for the violation of an ordinance. Although a "monetary penalty" can be imposed for remedial purposes in some circumstances, [there is] no such apparent purpose or intent present in this section."[54] Nonetheless, in asserting that this

[52] Appellant's Brief, p. 19.
[53] *See* M.C.L. § 17.16.070.U.4.l.vi.
[54] *Davis,* 54 S.W.3d at 267.

Honorable Court should adopt a modified version of the *Davis* test, the Appellant argues that relevant facts under the first prong should be

> 1) whether the alleged violation is an act ongoing or then-existing violation, 2) whether the alleged violation is[sic] involves an activity for which a permit is ordinarily required and whether defendant has said permit, and 3) whether the expressed purpose of the statutory scheme from which the alleged violation derives appears to be remedial or punitive.[55]

Although the Appellee rejects any notion that *Davis* applies or any modified version of *Davis* should be applied, for the sake of argument, the Appellee asserts that the fifty dollar ($50.00) fine is punitive in nature and not remedial because the fine fails to accomplish any truly remedial measure.

1. The alleged, single violation of the permitted use was not an on-going act and has a penalty that is punitive in nature.

The action asserted by the Appellant is an alleged past offensive act completed by the Appellee and could not be undone as it had previously occurred. The instant facts reveal that the alleged violation was not an ongoing act; is an activity that requires a permit; and has a statutory penalty for operating without a permit that is punitive in nature. In its' brief, the Appellant distinguishes between civil and criminal contempt as a way to illustrate the difference between a then-existing violation and an on-going violation.[56] The Appellant correctly identifies that "[c]ivil contempt, which is generally viewed as remedial in nature, seeks remedies to force compliance against future action," whereas criminal contempt is "purely punitive

[55] Appellant's Brief, p. 19-20.

[56] Appellant's Brief, p. 20.

and serves to vindicate the court's authority" where "an offensive act has been completed and cannot be undone."[57]

In the instant case, the Metro filed a Civil Warrant against the Appellee on January 10, 2019, where Metro alleged that, on July 13, 2018, the Appellee violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP without a non-owner occupied permit at 1810 Fatherland Street, Nashville, [Davidson County, Tennessee] 37206."[58] Nothing in the record indicates that the single instance of violation – alleged some six months later – was on-going. The essence of the claim is that on a specific date in the past, the Appellee operated a STRP without a permit. Stated differently, someone other than the Appellee occupied the Property on the day in question.

The alleged offensive act is distinguishable from the failure to comply with a previously issued stop-work order as outlined in *Davis*. There was no prior order or notice to comply issued to the Appellee that was subsequently violated. This offensive act alleged by the Appellant had already been completed, and, therefore, follows that the alleged offensive act cannot be undone. This is not a remedial action where the contemnor "has the keys to the jail in his pocket" [59] and can purge himself of the contempt. If the violation were on-going, it would be unnecessary for the legislation to include "[e]ach day of operation shall constitute a separate offense."[60] In sum, the legislative body sought to punish the Appellee for the alleged single, past, willful violation cited in the original Civil Warrant.

2. The Appellee possessed the necessary and proper permitting to operate a short term rental property at her primary residence.

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[57] *See Black v. Blount* 938 S.W.2d 394, 398 (Tenn. 1996); *Storey v. Storey*, 835 S.W.2d 593, 600 (Tenn. App. 1992).

[58] T.R. 3.

[59] *See International Union v. Bagwell*, 512 U.S. 821 (Tenn. 1994).

[60] *See* M.C.L. § 17.16.070.U.4.vi.1.

The record on appeal reflects that the Appellee obtained and possessed a valid permit to utilize her property as a short term rental. Any questions of fact are reviewed "*de novo* upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise."[61] It is undisputed that a permit is required for all STRP use. The Appellant failed to prove by a preponderance of the evidence that the Appellee did not occupy 1810 Fatherland Street as her primary residence and failed to obtain the proper permitting. At the original trial on the merits and upon the conclusion of the evidence, Judge Walker of the Davidson County General Sessions Court (1) ruled that "the city [had] not put on adequate proof to prove that [the Appellee] doesn't live there. . ."; (2) found that Metro failed to prove Ms. Dreher violated "Metro Code Section 17.16.070.U.1.a by operating a non-owner occupied STRP without a non-owner occupied permit at the Property"; and (3) entered an Order that dismissed the allegations against the Appellee.[62] Given the ruling of the Davidson County General Sessions Court, the lack of any additional contradicting proof in the record, and the standard of review imposed on this honorable court when determining questions of fact, the preponderance of the evidence holds that the Appellee possessed the necessary permit to operate a STRP.

3. The expressed purpose of the statutory scheme for which the alleged violation derives is punitive in nature.

The punishment prescribed for operating a short term rental without a permit is punitive in nature. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law. It is commonly understood that civil proceedings may advance punitive as well as remedial goals,

[61] *Nelson*, 8 S.W.3d at 628.
[62] T.R. 2, 160.

and, conversely, that both punitive and remedial goals may be served by criminal penalties.[63] Despite the Appellant's likening to civil and criminal contempt, the proper inquiry for determining whether a fine is civil or criminal in nature is if the purpose or effect of the monetary assessment is to further the goals of punishment.[64] The character of the proceedings is largely irrelevant to the substantive analysis of whether a legislative body intended the sanction to serve a punitive or remedial purpose.[65] This concept is further outlined in the discussion of *City of Chattanooga v. Davis*, 54 S.W.3d 248, 261 (2001), below.

In, *Davis*, the Tennessee Supreme Court held that non-punitive remedies "include those that (1) compensate for loss; (2) reimburse for expenses; (3) disgorge "ill-gotten" gains; (4) provide restitution for harm; and (5) ensure compliance with an order or directive."[66] There, the Tennessee Supreme Court discussed the above-mentioned Fifty-Dollar Fine Clause which "is concerned with the punitive purposes or effect of the sanctions imposed."[67] In discussing whether a monetary sanction imposed for a municipal ordinance is civil or criminal in nature, the Tennessee Supreme Court considered whether "(1) the legislative body creating the sanction primarily intended that the sanction punish the offender for the violation of an ordinance; or (2) despite the evidence of remedial intent, the monetary sanction is shown by the clearest proof to be so punitive in its actual purpose or effect that it cannot legitimately be viewed as remedial in nature."[68] The Tennessee Supreme Court notated that the focus of the Fifty-Dollar Clause was solely on the actual

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[63] *Austin v. United States*, 509 U.S. 602, 610 (1993) (internal citations omitted).
[64] *Austin*, 509 U.S. at 610.
[65] *Miles*, 524 S.W.2d at 659.
[66] *Davis*, 54 S.W.3d at 248.
[67] *Davis*, 54 S.W.3d at 261.
[68] *Davis*, 54 S.W.3d at 264.

purpose or effect of the sanction; therefore, the court went on to provide guidance for incorporating the personal impact on the punishment to the Defendant.[69] "In those cases in which a pecuniary sanction was originally intended to be remedial, courts should further examine the actual purpose or effect of the sanction within the context of its entire statutory scheme to determine whether the sanction truly functions as a remedial measure."[70] "[W]hen the *predominant* purposes served by the penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes. . ."[71]

In *Barret v. Metropolitan Government*[72], Metro served five civil warrants on the defendant alleging various violations of Title 16 of the Metropolitan Code.[73] Specifically, Barret was alleged to have failed on three separate occasions to obtain necessary building permits.[74] "The general sessions court found by clear and convincing evidence that the defendant was guilty of the charges set out, and imposed a fine of five hundred dollars, plus court costs, for the violation of each warrant."[75] On appeal, the Davidson County Circuit Court held that the "general sessions court exceeded its jurisdiction by imposing fines in excess of fifty dollars."[76] Metro appealed the circuit court ruling, and the Tennessee Court of Appeals reversed the circuit court and concluded that "the label attached to the

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[69] *Davis*, 54 S.W.3d at 265.
[70] *Davis*, 54 S.W.3d at 265.
[71] *Davis*, 54 S.W.3d at 271.
[72] *See generally Davis*, 54 S.W.3d at 248 (*Barret v. Metropolitan Government* was consolidated into *City of Chattanooga v. Davis*, 54 S.W.3d 248 (2001)).
[73] *Davis*, 54 S.W.3d at 255.
[74] *Davis*, 54 S.W.3d at 255.
[75] *Davis*, 54 S.W.3d at 255 (internal citations omitted).
[76] *Davis*, 54 S.W.3d at 255.

assessment was immaterial. . . [and] that because proceedings to recover fines for the violation of a municipal ordinance have been largely considered to be in the nature of civil debt, no assessment arising out of these proceedings could be subject to the limitations of the Fifty-Dollar Clause."[77]

The Tennessee Supreme Court "granted Barrett's application for permission to appeal on the sole issue of whether assessments by the Davidson County General Sessions Court were fines within the meaning of Article VI, section 14."[78] The Tennessee Supreme Court held that proceedings involving a municipal ordinance may be subject to the limitations of Article VI, section 14 when either the intended purpose or the actual purpose or effect of the monetary assessment is to serve a punitive measure.[79] It further held that the fines assessed against Barrett for failing to obtain the proper permits were sanctions imposed to punish Barrett for violating the Metro Code.[80] The Court reasoned that "a monetary penalty often stands in sharp contrast to other remedial measures because a monetary penalty can serve but a few truly remedial purposes."[81]

In turning their "attention to the penalties imposed for Barrett's failure to secure a building permit," the court made the following findings:

- "Title 16 of the Metropolitan Code of Laws does not appear to impose monetary penalties for the purpose of rectifying or otherwise correcting violations of its provisions. Rather, Title 16 imposes monetary penalties for past, completed violations of the Code of Laws without regard to correcting or rectifying them."[82]

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[77] *Davis*, 54 S.W.3d at 256.
[78] *Davis*, 54 S.W.3d at 256.
[79] *Davis*, 54 S.W.3d at 256.
[80] *Davis*, 54 S.W.3d at 256.
[81] *Davis*, 54 S.W.3d at 270.
[82] *Davis*, 54 S.W.3d at 270.

- The Code of Laws "does not impose monetary penalties for the purpose of compensating the Metropolitan Government or any private party for any loss that has resulted from a failure to comply with its provisions."
- The Code of Laws "does not impose monetary penalties to reimburse the Metropolitan Government, or any private party, for expense incurred in inspecting sites, in ensuring compliance with its provisions, or in administering any court proceedings."[83]
- The Code of Laws "does not impose monetary penalties to disgorge defendants of any underserved profits, nor does it impose monetary penalties to reimburse the Metropolitan Government, or any private party for fixing the damage caused by the defendant's noncompliance."[84]
- "The fine in this case did not have the actual effect of correcting or remedying any of Barrett's violations."[85]

The Tennessee Supreme Court held that despite whatever harm was caused by Barrett's failure to obtain the necessary permits, the fines cannot now be said to have alleviated, or rectified that harm; and, "[c]onsequently, we must conclude, that unlike other sanctions available in Title 16, the fines imposed in this case do not have the actual effect of correcting or remedying any problem associated with Barrett's violations of the Code."[86] To the extent that the deterrence associated with a fine appears to be its only or its predominant "remedial" aim, the fine is more properly characterized as being punitive in its **actual** purpose or effect."[87]

In the instant matter before this Honorable Court, the fine that would have been assessed had there been a finding that the Appellee operated a non-owner occupied STRP without a non-owner occupied STRP Permit is akin to the fine in *Barrett*; therefore, this Court should reaffirm its previous finding that the fine is

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[83] *See generally Davis,* 54 S.W.3d at 248.
[84] *Davis*, 54 S.W.3d at 271.
[85] *Davis*, 54 S.W.3d at 271.
[86] *Davis*, 54 S.W.3d at 271.
[87] *Davis*, 54 S.W.3d at 271 (emphasis added).

punitive in nature. Like in *Barrett*, any fine assessed for the operating of an STRP without an STRP Permit would not have compensated the Appellant or any private party for any loss that has resulted from the failure to comply. Further, the fine would not have reimbursed the Appellant, or any private party, for expenses incurred in inspecting sites, in ensuring compliance with its provisions, or in administering the court proceedings. The codes inspector is not reimbursed for his time inspecting the property prior to taking out a warrant; and, if the fine were to reimburse the Appellant for the administering of court proceedings, then the Appellant would need not ask on a regular basis to have matters in general sessions court be "dismissed with fines and court costs." The fine does not reimburse the Appellant, or any private party, for damages caused by a party's non-compliance, and the fine fails to have an actual effect of correcting or remedying any alleged violation. In short, had the Appellee not been acquitted and Ms. Dreher had been assessed a fine for lacking the proper permitting like the facts in *Barrett*, the fine would be more properly characterized as being punitive *based on its actual purpose or effect*.

In sum, the Appellee would again assert that the imposition of an injunction – *in addition to the fifty dollar ($50.00) fine* – does not strip away or otherwise nullify the punitive nature of the penalty for operating a short term rental property without a permit. Further, as the Appellant postulates, the remedy provided for under M.C.L. § 17.16.070.U.4.l.vi.1 is "almost directly in line with vindicating public justice," punishes past misconduct, and is a fine that is punitive in nature.

ii. The remedy specified for violations of M.C.L. § 17.16.070.U. punishes the offensive act that cannot be undone *as well as* coerces future compliance with the Metro code.

Despite Metro's contention that the punitive fine assessed as the penalty for operating a STRP without a permit is coercive, forward looking, and not aimed at punishing a past bad act, the failure to acknowledge that the Metro Code mandates

a punitive fine *in addition to* a mandatory injunction is unsound. The Metropolitan Code is explicit in that the penalty for operating a non-owner occupied STRP without a non-owner occupied STRP permit in violation of M.C.L. § 17.16.070.U. ***shall*** be a fifty dollar ($50.00) fine **and** a three year injunction if the finding is made by a court of competent jurisdiction.[88]

The Appellant makes the argument that "a savvy defendant would envision that Metro's *only* redress was a mere $50 fine and build that profit margin into her business model."[89] This argument, while artful and abstract, is thwarted by the three (3) year injunction that is also required, in addition to the punitive fifty dollar ($50.00) fine upon a finding of operation by an individual without an STRP permit. It is especially important to note that M.C.L. § 17.16.070.U.4.l.vi.3. leaves open the possibility for the court to also assess the general penalties in Title 17, Article XIII, under M.C.L. § 17.40.610 and M.C.L. § 17.40.620, thereby resulting in the possibility that a violation of M.C.L. § 17.16.070.U. may or otherwise could be a misdemeanor offense punishable by law, including incarceration up to eleven (11) months and twenty-nine (29) days, and the assessment of a civil penalty at the rate of five hundred dollars per day ($500.00). This combination of remedies mandated by the Metro Code for general violations of Title 17 of the Metro Code and specific violations of M.C.L. § 17.16.070.U. results in the matter being punitive in nature and at least quasi-criminal.

[88] M.C.L. § 17.16.070.U.4.l.vi.

[89] Appellant's Brief, p. 27.

iii. The alleged violation found in the original civil warrant is subject to criminal prosecution under the Metro code.

The Appellee was subject to criminal prosecution had she been found to have violated M.C.L. § 17.16.070.U. Under both the specific[90] and general remedies[91] of Title 17, a determination by a court of competent jurisdiction that a violation of M.C.L. § 17.16.070.U. has occurred is subject to criminal prosecution. Nowhere else in Title 17 does the Metropolitan Code speak to the penalty for operating an STRP without a permit nor the penalty for violating Title 17 in general. In short, Title 17 provides that the penalty for operating a STRP without a permit is as follows: a fifty dollar ($50.00) fine must be assessed, a three (3) year injunction must be assessed, a five hundred dollar ($500.00) penalty per day may be assessed, and a misdemeanor could be charged thereby potentially resulting in incarceration of up to eleven (11) months and twenty-nine (29) days; therefore, the matter is at least quasi-criminal, not purely remedial in nature.

The principles of statutory construction and interpretation would necessitate that the penalty for the alleged violation found in the original Civil Warrant must come from Title 17. Title 17 includes criminal penalties, some of which are mandatory under the Title 17 rules for construction of language.[92] The Metropolitan Code, in its current form, fails to provide the Appellant with the right or ability to pick or otherwise choose the remedy for alleged violations of M.C.L. § 17.16.070.U.1.a.

c. The Circuit Court did not convert a constitutional protection into an obstacle to undermine the enactment of honestly-motivated remedial legislation.

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[90] *See* M.C.L. § 17.16.070.U.4.l.vi.

[91] *See* M.C.L. § 17.40.610 and M.C.L. § 17.40.620.

[92] *See* M.C.L. § 17.04.050.

The Double Jeopardy Clause is not just an "obstacle" as the Appellant has described it; but, rather, it is the very safeguard put into place to prevent the Appellant from both a second trial and a second attempt to punish the Appellee for the same violations alleged and tried in the General Sessions Court. The Appellee was acquitted in the General Sessions Court for an alleged violation of the Metro Code of Law, which has a specific, punitive, quasi-criminal remedy if the alleged violation is found to be true; therefore, the Circuit Court was not required or otherwise mandated to conduct the *Davis* analysis given that the double jeopardy clause applies.

Metro makes the argument that to require strict compliance to a plain reading of the Metropolitan Code would hamstring the Appellant and its' ability to regulate other business operations and activities. Specifically, the Appellant alleges that "[a] ruling of this magnitude puts a severe restriction on the types of enforcement options available to municipalities by such an unworkable rule."[93] The Appellant, again, misstates and misses the mark of the Circuit Court's ruling which is specific to the penalty for operating a non-owner occupied STRP without a non-owner occupied STRP permit pursuant to M.C.L. § 17.16.070.U.l.4.vi.3. The Circuit Court did not hold that Metro was incapable of bringing remedial measures. The Circuit Court held that upon a finding that an owner has violated M.C.L. § 17.16.070.U. and operated a non-owner occupied STRP without a non-owner occupied STRP permit, both a fifty dollar ($50.00) fine and a three (3) year injunction must be ordered.

In effect, as the legislature likely intended, the prior bad act, which cannot be undone, is punished by fine and future compliance is encouraged by the three year prohibition on operating a STRP on the property. Metro's authority to regulate and "combat unlicensed strip clubs, unsanitary food establishments, unpermitted beer

[93] Appellant's Brief, p. 19.

sales, or unsafe buildings occupied without use and occupancy permits" remains wholly unaffected by the Circuit Court's ruling in the instant matter. This specific remedy for violations of M.C.L. § 17.16.070.U. would have no bearing on strip clubs, food establishments, beer sales, or use and occupancy permits as these entities are specifically regulated by other sections of the Metropolitan Code. Furthermore, this unaffected authority to regulate is further outlined in the Appellant's brief where the Appellant cites the zoning administrator's general authority to, "in addition to other remedies, institute injunctions, mandamus or other appropriate action to correct or abate a violation of this title."[94]

In sum, the Appellant's attempt to dastardly mischaracterize the double jeopardy clause as an obstacle that has been expanded so far as to prevent the enactment of "honestly-motivated remedial legislation" is misplaced and without merit. If honest, remedial legislation is the Appellant's desire, Metro should seek action from its elected city councilwomen and councilman rather than ask this Honorable Court to grossly misinterpret the plain reading of the current law and carve away the protections afforded by the double jeopardy clause.

III. The Appellee timely objected to the *de novo* review in the Circuit Court as required by *Metropolitan Government v. Miles*.

The Appellee timely objected to a second trial on the merits. The constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived."[95] Stated differently, double jeopardy must be plead after the conclusion of the first trial and at or before the second trial on the matter; otherwise, it is waived.[96] This concept is illustrated in *Clark v. State*, where, in that case, the Defendant

[94] *See* M.C.L. § 17.40.630.
[95] *United States v. Scott*, 464 F.2d 832, 833 (1972) (internal citations omitted).
[96] *Barker v. Ohio*, 328 F.2d 582, 584 (6th Cir. 1964) (internal citations omiited).

asserted that the jury had in fact reached a verdict of not guilty as to him although not as to other defendants tried at the same time.[97] The Tennessee Supreme Court held that the Defendant was not entitled to raise the contention that a second trial would amount to double jeopardy at that time and *such contention could not be raised until such time as defendant was actually placed on trial a second time*.[98]

In this case, on August 20, 2019, the Appellee filed a Response and asked the Court to deny Metro's Motion to Amend; or, in the alternative, for an Order of Dismissal due to a *de novo* appeal being in violation of United States and Tennessee state constitutions.[99] The instant facts do not indicate that the Appellee failed to timely object to the *de novo* appeal or waived his right to a claim for double jeopardy. In response to the preliminary motion to amend the original pleading, prior to a witness being sworn in to testify or the matter being put to trial for a second time, the Appellee timely lodged its double jeopardy defense. The double jeopardy defense is not waived simply by the filing of a responsive pleading. Stated differently, it makes no difference that the Defendant had already made one substantive motion to dismiss and the Appellant had set the matter for trial at a future date. In conclusion, the Appellee did not waive her ability to object.

[97] *Clark v. State*, 97 S.W.2d 644 (1936).
[98] *Clark*, 97 S.W.2d at 648.
[99] T.R. 130, 149 (emphasis added).

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests this honorable court to

(1) affirm that M.C.L. § 17.16.070.U.4.l.iv. requires both a fifty dollar ($50.00) fine and a three year injunction be assessed by the Trial Court;

(2) affirm the Trial Court's application of *Miles* to the above-styled matter;

(3) affirm the Trial Court's holding that the double jeopardy clause applies; and,

(4) affirm the Trial Court's denial of Metro's attempt to obtain a *de novo* review of the Environmental Court's ruling dismissing the allegations against Ms. Dreher.

CERTIFICATE OF COMPLIANCE

Pursuant to Section 1.01(b) of the Tennessee Supreme Court Rule 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3.02 of Tennessee Supreme Court Rule 46 and contains 12,031 words.

/s/ Seth N. Cline
Seth N. Cline

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of November, 2020, a true and exact copy of the foregoing Reply Brief of the Appellee was served *via* the Court's electronic filing system and *via* electronic mail on the following:

Addressee:	Method(s) of Service:
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