STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF WASHINGTON **TENTH JUDICIAL DISTRICT**
Case Type: Civil/Other (Misc.)

John P. Norusis,

Plaintiff,

vs.

City of Marine on Saint Croix,

Defendant.

Court File No. 82-CV-20-3974
The Hon. Douglas B. Meslow

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

INTRODUCTION

Plaintiff John Norusis owns property in the City of Marine on St. Croix ("City"), which he operates as a short-term rental. After the City adopted a Short-term Rental Licensing Ordinance, Norusis brought this action claiming his commercial activities were subject to protection as a legal non-conforming use. He also immediately brought a Motion for a Temporary Injunction [Doc. #9] to preclude enforcement of the Ordinance, which the Court denied in an Order and Memorandum dated December 22, 2020. Doc. #33. Despite the Court's denial of his motion, Norusis has continued to operate his property as a short-term rental without a license in flagrant violation of the Ordinance.

The City is entitled to summary judgment dismissing Norusis' claims, and granting judgment on its counterclaims. Because the Ordinance is a valid exercise of the City's police power, because Norusis is violating the Ordinance, and because Norusis,

like everyone else who wants to operate a short-term rental in the City, must do so in compliance with the law, none of his claims have merit. The City is also entitled to a permanent injunction to preclude the ongoing violations of the Ordinance.

STATEMENT OF THE ISSUES

1. Whether the Short-term Rental Licensing Ordinance represents a lawful exercise of the City's police powers?

2. Whether Norusis' current use of the property as a short-term rental without a license constitutes a violation of the Short-term Rental Licensing Ordinance?

3. Whether the City is entitled to a permanent injunction prohibiting Norusis' ongoing unlawful use of the property as a short-term rental without a license?

STATEMENT OF THE RECORD

Affidavit of Andrew A. Wolf ("*Wolf Aff.*"), with exhibits, June 11, 2021.

Exhibit A: Marine on St. Croix Public Meeting Minutes.
Exhibit B: Marine on St. Croix Official Records related to Short-Term Rentals.
Exhibit C: Public Comments regarding Short-Term Rentals.
Exhibit D: Marine on St. Croix, Short-Term Rental Surveys and Survey Summaries.
Exhibit E: Marine on St. Croix Planning Commission and City Council Short-Term Rental Committee, Working Outline of Issues, Options, and Recommendations Regarding Short-Term Rental Regulations.
Exhibit F: Supplemental Materials
Exhibit G: Complaints regarding Short-Term Rentals since 2019.
Exhibit H: Deposition of John P. Norusis, June 4, 2021 ("*Norusis Dep*").
Exhibit I: Transcript of the Deposition of Lynette Peterson, April 7, 2021.
Exhibit K: Transcript of the Deposition of Gerald Mrosla, April 30, 2021.

See also, **Appendix to Defendant's Memorandum of Law In Support of Summary Judgment**, (filed concurrently herewith).

STATEMENT OF UNDISPUTED FACTS[1]

On August 13, 2020, the City of Marine on St. Croix adopted Ordinance No. 2020-156 "AN ORDINANCE REGULATING SHORT-TERM RENTALS AND PROHIBITING UNPERMITTED SHORT TERM RENTALS." ("STR Licensing Ordinance" or the "Ordinance"). *See Wolf Aff. Ex. A* at 138.

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[1] The City's Statement of Undisputed Facts is based upon facts contained within public records and Plaintiff John Norusis' sworn statements and pleadings, as Norusis has effectively refused to participate in the discovery process, necessitating a Motion to Compel Discovery. Doc. #38. During his deposition Norusis also repeatedly claimed he was invoking his "Fifth Amendment protections afforded under the Constitution." *Norusis Dep.* 35:20-35:21; *see also*, pp. 37-39, 50, 67-69. Assuming Norusis is entitled to invoke the Fifth Amendment, despite the lack of any actual criminal proceedings, he must also assume the consequences of his decision.

Minnesota law is consistent in its treatment of an individual who endeavors to prosecute a claim, only to later withhold information on the basis of the Fifth Amendment. "[T]he party who seeks affirmative judicial relief from the court and at the same time invokes this privilege should not be permitted to prevail and, in effect, eat his cake and have it too." *Christenson v. Christenson*, 281 Minn. 507, 521, 162 N.W.2d 194, 203 (1968) (citations and quotations omitted). "This court will not permit a plaintiff to use the judicial forum to make allegations only to later insulate himself by invoking the Fifth Amendment as a shield from cross-examination. As we have previously stated a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened." *Parker v. Hennepin Cty. Dist. Court, Fourth Judicial Dist.*, 285 N.W.2d 81, 83 (Minn. 1979) (internal quotations and citations omitted). **As the Court is already aware, this is precisely the manner in which Norusis conducted himself during the remainder of the discovery process, as he was unwilling to disclose any information or produce any documents requested during written discovery.** "Minnesota law prohibits a civil plaintiff from prosecuting his claim while at the same time withholding information that might relieve a defendant of liability." *Steele v. Mengelkoch*, No. A08-0791, 2009 WL 1182005, at *3 (Minn. App. May 5, 2009).

"While [Norusis] cannot be compelled to waive [his] privilege against self-incrimination, in this [] action, as in any other civil action, [he] must either waive it or have [his] action dismissed." *Christenson*, 281 Minn. at 524, 162 N.W.2d at 204.

A. Short-Term Rentals.

A short-term rental ("STR") refers to a room or housing unit that is rented to a person or group for a short period of time, typically under 30 nights. Unlike a long-term rental, which houses tenants who work, attend school, or otherwise wish to reside in the area indefinitely, STR guests are typically transient occupants such as travelers who would otherwise stay in a hotel or similar accommodation. STRs are not new, but they have seen a rapid increase due to internet-based STR marketplaces, like Airbnb and VRBO, which make facilitating these arrangements much easier.

B. Public Interest in Short-Term Rentals in the City of Marine on St. Croix.

STRs became a matter of public interest in the City in 2018, and came to the attention of the City at roughly the same time. *Wolf Aff. Ex. A* at 1-5. During a City Council meeting on July 12, 2018, a citizen raised the issue during the public comment portion of the meeting, and Planning Commission Chairman Gerry Mrosla reported the Planning Commission would begin looking into the issue at their August meeting. *Id.*

At the August 28, 2018, Planning Commission meeting, Chairman Mrosla explained the City Council's request and provided review materials, which other cities had already prepared. *Id*. at 5-7. The resulting discussion made clear these materials were merely informative. *Id*. Many communities approach the issue differently, and the City would have to decide for itself what was best for their community. *Id*. Though the Commission had yet to dive into the issue, the Commission members understood how

important it would be to clarify values and guide the discussion based on accepted principles. *Id*.

At the meeting on September 25, 2018, the Commission considered both detailed and big picture issues relating to STRs. *Id*. at 7-8. Chairman Mrosla opined, while STRs did not appear to be a consequential issue in the City at the time—given the small number of existing STRs—it was important for the City "to formulate a policy now to get ahead of the issue." *Id*. Mrosla began the discussion by summarizing some aspects of the City of Stillwater's STR ordinance. Stillwater, as Mrosla explained, set performance standards for STR applicants, such as code compliance, building and fire code inspections, parking, number of guests, and proximity of assistance. *Id*. He also noted a major aspect of Stillwater's regulatory approach involved drawing a distinction between hosted STRs (where the owner is present while guests are in the home), un-hosted STRs (where the home is the owner's primary residence, but they are absent while guests are in the home), and dedicated vacation rentals (where the home is not the owner's primary residence). He explained the performance standards differed depending on how the STR was classified, based on the idea the owner's willingness and ability to maintain the property or provide assistance to guests differed depending on the classification. *Id*. While the Commission would have to consider these detailed aspects of the City's STR approach, the issues involved were not so limited. *Id.* As other Commission members noted, there were also questions regarding how STRs fit into the City's broader community vision and future goals. *Id*.

At the meeting on October 30, 2018, the Planning Commission considered the City's options for addressing STRs, and—should they decide to allow STRs with regulation—the issues they would need to consider while deciding how to regulate STRs. *Id*. at 9-10. The Planning Commission outlined a number of important considerations, such as: the Marine quality of life (the possible impact of short-term rentals on neighborhoods and the overall community), operational details (code compliance, parking, noise), regulation (how to process licenses or permits and enforcement), the zoning code (how short-term rentals is defined, when does it become commercial use, etc.), and the availability of the landlord (present on the premises, accessible within a distance, or a designated local individual as a point of contact). *Id*. This non-exhaustive list did not include other issues, which did not fit neatly into a category—e.g., STR waste generation, use of STRs for event space, and STRs causing a reduction in affordable housing—but were no less important. *Id*. At the meeting on November 27, 2018, the Planning Commission decided to recommend the City Council adopt a moratorium on allowing new STRs for the next year. *Id*. at 11-13.

C. The City's Extensive and Purposeful Deliberative Process.

Over the next year and a half, the City went through an extensive and purposeful fact-finding and recommendation process. As the Planning Commission paused for the holidays, the City Council approved a 12-month moratorium on new STRs in December, and continued to study the STR issue at a committee level. *Wolf Aff. Ex. B* at 1-4. The committee, composed of City Council Member Gwen Roden, and Planning Commission

members Kristina Smitten and Anna Hagstrom, researched existing regulatory structures by reviewing STR ordinances from various cities. *Wolf Aff. Ex. A* at 14-25. The committee included in its research "big cities, small cities, commuter towns, and destination spots to look at a variety of approaches." *Id.* at 22. Based on this research and public input, the committee narrowed down the issue to six general topics for discussion, and generated recommendations of what might work for Marine based on resident feedback. *Id.* at 15, 20. The committee completed their initial study at the end of January 2019, and continued update and revise its recommendations as more meetings were held and the public continued to weigh in. *Wolf Aff. Ex. E.*

To say more meetings were held and the public continued to weigh in would be an understatement. The Planning Commission held another twenty meetings—in addition to the four it had already held—at which it discussed the STR issue and the City's approach for regulating STRs. *See generally*, *Wolf Aff. Ex. A*. In that time the Planning Commission received 46 written comments and an additional 64 public comments at the various meetings. *Id.*; *see also Wolf Aff. Ex. C*. This level of public interest in STRs would be noteworthy in any city, but in a city with a population of 733 people it was remarkable. (For context, this would be the equivalent of a city the size of Woodbury receiving 4,570 written comments and hearing testimony from 6,359 individuals in regard to a proposed ordinance). The Planning Commission not only considered the public's input, it also considered the secondary sources and studies influencing these opinions. *Wolf Aff. Ex. C* at 30-32, 55-93. As if this was not enough, the City sought feedback from

members of the community who may not have been interested enough to attend a meeting or submit a comment. *Wolf Aff. Ex. D*. Through two separate surveys the City got a clearer picture of the issues important to the community. *Id.*

This extensive process revealed a vast array of different perspectives, concerns about different issues, and different ideas for solutions to the concerns. While it is impossible to concisely encapsulate all the information gathered through multiple community surveys, numerous public comments, and extensive discussions continued over the course of 24 meetings, one prevailing sentiment became clear: STRs had the potential to benefit the community, but they also had the potential to cause irreparable damage.

D. The Potential Benefits

Members of the public primarily focused on two potential benefits attributable to STRs in the City. *Wolf Aff. Exs. C-D*. First, STRs could increase tourism to the City and be good for local businesses. *Id*. Second, they could provide lodging accommodations to resident's friends and relatives, and allow these individuals to enjoy the City, where they might otherwise not be able to due to the limited accommodations in the area. *Id*.

E. The Likely Damage Absent Appropriate Regulation

While STRs certainly carried potential benefits, the primary sentiment among the public was STRs could tear apart the very fabric of the City. *Id*. While this may seem overly dramatic, the reasoning was sound. Early in the deliberative process members of the Planning Commission raised concerns about the community's fate if permitting STRs

led to an influx of absentee landowners. *Wolf Aff. Ex. A* at 8-10. Because Marine on St. Croix is such a small community it relies heavily on volunteerism and willing participation in the community. *Id.* Thus, from the outset some Planning Commission members felt regulations should strive to prevent commercial properties with absentee owners. *Id.*

The deliberative process confirmed this was a widely held belief. Regarding the threat to volunteerism and community participation, one community member keenly observed:

> While the people who stay [in an STR] might eat a dinner at the Brookside, they won't volunteer at the library, or the fire department, or become members of the church, or help with the progressive dinner. They might be back next year, but they won't be here next week. Communities are built by, with, and for the people who will be here next week.

Wolf Aff. Ex. C at 5-8. As another community member observed regarding the fabric of the City's neighborhoods: "What is the main ingredient of a residential neighborhood: Your neighbors." *Id.* at 1-2. In the context of an STR run by an absent owner, there would no longer be a neighbor and the only regular visitors to the property would be STR guests, i.e. "literal strangers" with no connection to the community, and no concern for what happens after their brief stay. *Id.* Unlike permanent residents, these folks have little to no reason to be respectful to neighboring property owners. *Id.* at 1-20. From the visitor's perspective, an increase in traffic, noise, late-night disruptions, etc. only lasts for a couple of days. *Id.* But to neighboring property owner, who regularly deals with these intense

recreational occurrences, it is not only extremely frustrating, it morphs the essential character of the locality from a residential neighborhood to something more akin to a commercial area. *Id.*

This problem may be acute in the context of an absent landlord—who, because they do not live in the community, has little incentive to foster and maintain a good relationship with neighboring property owners—but it is not unique to that context. Even when the STR owner is not absent for longer than they are present, the conduct of their STR visitors can breed conflict between neighbors and lead to tensions. As one community member observed this "damage[s] neighborhoods by pitting neighbors against each other." Ex. C at 97. These were not merely hypothetical concerns, many of them were based upon lived experience.

F. John P. Norusis and the Castle on the St. Croix River

In 2020, John P. Norusis ("Norusis") was "an individual resident of the City of Saint Paul," and "the owner of real property located at 801 Pine Cone Trl." (the "Castle"), in the City of Marine on St. Croix. *Amended Compl.* ¶¶1-2. This property is currently listed as an STR called the "CASTLE ON ST CROIX RIVER" on Airbnb.[2] Norusis purchased the Castle on May 17, 2018, for $1,130,000.00. *Amend. Compl.* ¶ 13. Since purchasing the Castle, Norusis has used and operated it primarily as a short-term rental, earning—in November

[2] *See*: https://www.airbnb.com/rooms/24359931?guests=1&adults=1&s=39&unique_share_id=0d6fac72-3498-4247-bed3-b41de1e76ac9

2020—in excess of $95,000. *Id.* ¶¶ 17, 20. Norusis operates the Castle not merely in the manner of a boarding house, but also as an event center. In fact, hosting "seminars[,] "retreats[,] and "weddings" "is literally one of the reasons [Norusis] purchased it[.]" *Wolf Aff. Ex. C* at 85. There is no dispute these events lead to an increase in traffic with, in one case, an upwards of "40 cars" being parked on the Castle property. *Id*. at 85-87. In Norusis' opinion it is "NONE of my neighbors business who is staying at" the Castle, and it is "no ones[sic] business" what he tells them before they arrive. *Id*. Likewise, whether Norusis lives in the Castle between rentals, is "frankly no ones[sic] business. Not the city's and certainly not the residents of Pine Cone Trail." *Id*.

While Norusis' operation of the Castle has been beneficial to him personally, it "has caused a large amount of tension." *Wolf Aff. Ex. A* at 14. Norusis himself admitted the conflict created by his operation of the Castle and the "stress," and "agitation" he personally felt from the purported "blatant and intentional disrespect from all of Pine cone trail[.]" *Wolf Aff. Ex. C* at 85-87. On the flipside, Norusis' operation of the Castle "has had, and continues to have, a substantial adverse impact on our neighborhood." *Wolf Aff. Ex. G* at 7-9. Since Norusis began operating the Castle, his neighbors have experienced "speeding, parking outside STR property boundaries, traffic noise, lost customers . . . at all hours asking for directions or information" as well as "excessive traffic . . . , drunken customers parking on our properties, and yelling." *Id.*; *Ex. C* at 33-34. In some cases these "nuisances" and activities "extend[] late into the evening" and in general "adversely affect[] the quality of life in our neighborhood." *Id.*

From his neighbor's perspective, Norusis is a living example of what can happen when STRs are permitted without regulation. Norusis "is renting out [the Castle as an] STR . . . without living in it." *Ex. C* at 112-13. Norusis is more interested in burning bridges, through threats and intimidation, than building a community. *Id*. In essence, Norusis represents, in corporeal form, "investment in real estate without community commitment versus year round residents," i.e. "our Community." *Id*. at 125.

Without taking sides or deciding whose account is correct, one thing is clear: the concern unregulated operation of STRs can breed conflict, foster contemptuous relationships between neighbors, and ultimately threaten the very fabric of residential neighborhoods is genuine.

G. The City's STR Licensing Ordinance.

The culmination of the City's deliberative process came on July 22, 2020, when the Planning Commission held a public hearing devoted entirely to the issue of STRs, and got additional information from the community regarding a proposed draft ordinance. *Ex. A* at 115-130. The Planning Commission closed the meeting on July 22nd by recommending the City Council adopt the STR ordinance with a few minor revisions. *Id*.

This decision did not go unquestioned. Some members of the community praised the draft ordinance, and commended it for acknowledging short-term rentals introduced a nonresidential use into residential neighborhoods. *Id*. at 116, 123. Others, however, felt the ordinance did not go far enough because "allowing three rental properties per district would fundamentally change some neighborhoods." *Id*. at 117. From this perspective, the

ordinance did "not consider the rights of existing homeowners to live in a noncommercial neighborhood that's private and quiet and neighborly. The STR ordinance needs to protect all our residential rights, not just give new rights to some residents to run essentially a motel in our neighborhood." *Id.* at 115, 122.

Still others asked the City "to prohibit short-term rentals altogether, based on the observation that they can cause problems between neighbors and destroy the sense of community in Marine." *Id*. at 117, 127. These community members felt "lucky to live in such a unique community where neighborhood, pride of ownership and concern for neighbors are key values for us all." *Id*. at 129. Nevertheless, they felt the "very 'charm' of Marine for which we are so proud, will attract additional STRs to other locations and likely affect their sense of community and neighborhood." *Id*. Not only could short-term rentals negatively affect the quality of life, but they could also present tangible threats to safety caused by increased traffic and drivers who are unfamiliar with the area. *Id.*

In the end, the City addressed the STR issue as thoughtfully as it could. *Wolf Aff. Ex. B* at 22-29. The City recognized STRs, by nature involve "the introduction of a commercial use into existing residential areas" and create "a potential for conflict between varying land uses" and neighboring property owners. STRs provide "recreational housing, for transient, often vacationing short term guests" who have "no maintenance obligations" both in terms of property or "building maintenance" as well as a "corresponding interest in maintaining ongoing relationships with long-term neighbors." *Id.* Thus, the City concluded an ordinance was "necessary to regulate, limit

and control short term rentals to eliminate potential nuisances, to ensure that they are compatible with the neighborhoods in which they are located and to maintain their activities in a way that avoids the disruption that can occur because of transient stays among otherwise permanent residential and other occupancies." *Id.* As such, on August 13, 2020, the City Council adopted the STR Licensing Ordinance, the intent of which was to preserve the City's:

> [E]ssentially residential character while, at the same time, permitting short term rentals on terms which make them unintrusive, not disruptive, not excessive in number and which does not lead to the proliferation of absentee-held properties offered only for rent and not materially owner-occupied. Such things would not be conducive to the stability and building of neighborhoods and commercial uses in the Old Village area of the City, all of which are objectives of the City under its comprehensive plan.

Id.; Ex. A at 131-138. Likewise, the City explicitly noted the purpose of STR Licensing Ordinance was:

> [T]o allow Short-Term Rentals, where appropriate, within dwellings that are a primary residence, while mitigating impacts upon surrounding properties by implementing balanced regulations to protect the integrity of the Community as well as protecting the public health, safety and general welfare of the long term residents by regulating the time period a transient guest is allowed.

Id. The goal of the STR Licensing Ordinance was to equitably address the issue, or—to borrow one resident's words—to maintain the "delicate balance . . . between 'individual rights' and the 'good of the community'" without elevating "the rights of an individual to 'make a profit'" over "the 'general cohesiveness' of the community[.]" *Ex. C* at 45-46.

The City Council exercised their legislative discretion to adopt an STR Licensing Ordinance, which balanced the concerns of individuals on both sides of the issue, while, in its opinion, best advancing the public interest and preserving the community's health, safety, and welfare.

Following the adoption of the STR Licensing Ordinance, the City Council returned to the issue to direct the placement of the STR Licensing Ordinance into the City Code, to approve the STR License application materials, and establish the STR license fee. *Ex. B* at 5-29. The Resolution the Council approved explicitly noted the STR Licensing Ordinance was a regulatory licensing ordinance, and therefore directed it should be placed in the City Code, rather than its Zoning Ordinance. *Id*. As such, the Zoning Ordinance was not amended, but the STR Licensing Ordinance was on May 13, 2021, to further clarify the ordinances regulatory character. *Id*.

On October 16, 2020, Norusis filed this lawsuit alleging he had "an interest in continuing to use the Property in a way it was used before the Ordinance was passed making it nonconforming." *Complaint* at 5 ¶36, October 16, 2020; *see also*, *Amended Compl.* ¶38. Norusis sought a declaration his "use of the Property as a Short-Term Rental, Type C as defined by the Ordinance is grandfathered-in and permissible under the Ordinance." *Compl*. ¶49; *see also Amended Compl.* ¶53.

STANDARD OF REVIEW

"A party may move for summary judgment," and a Court must "grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01.

ARGUMENT

I. THE ORDINANCE IS A LAWFUL EXERCISE OF THE CITY'S POLICE POWERS.

Whether the Ordinance is viewed through the lens of a business regulation or a rental regulation, it is clearly established both of these matters traditionally fall under the City's purview pursuant to its police power, as expressly authorized by Minnesota Statute Section 412.221, Subdivision 32 (enabling the enactment of ordinances for, *inter alia,* the promotion of health, safety, and the general welfare of the community).

Under its police power, the governing body of a "municipality, in the interests of public health, safety, morals, or general welfare, may restrict an owner's use of his property for commercial or annoying occupations deemed undesirable to the community as a whole." *State ex rel. Howard v. Vill. of Roseville*, 244 Minn. 343, 347, 70 N.W.2d 404, 407 (1955). Per "its police power a municipality may regulate by license any business or trade which may injuriously affect the public health, morals, safety, convenience, or general welfare." *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955). "Every business and occupation is subject to the reasonable exercise of the police power of the municipality where the business activity occurs and in the exercise of the power a city or village may regulate that which the state has failed to regulate." *Minnesota Chamber of*

Commerce v. City of Minneapolis, 944 N.W.2d 441, 449 (Minn. 2020) (quoting *Power v. Nordstrom*, 150 Minn. 228, 232, 184 N.W. 967, 969 (1921) (internal marks omitted)).

The same is true with regard to rental and housing related regulations. "Governments have broad powers and legitimate interests in regulating housing conditions in general and the landlord-tenant relationship in particular." *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. App. 1996). Given the breadth of a city's police power, courts have "easily conclude[d] that the public has a sufficient interest in rental housing to justify a municipality's use of police power as a means of regulating such housing." *Dean v. City of Winona*, 843 N.W.2d 249, 257 (Minn. App. 2014).

Most importantly, however, the police power is not limited to certain pre-defined categories. A city exercises police power to "the same extent as the state itself." *City of Duluth v. Cerveny*, 218 Minn. 511, 517, 16 N.W.2d 779, 783 (1944). "This power is not confined to the narrow limits of precedents based on conditions of a past era. Rather, it is a power which changes to meet changing conditions, which call for revised regulations to promote the health, safety, morals, or general welfare of the public." *Id*. "This government power is essential and difficult to limit, as it includes 'all matters' of public welfare." *In re 1994 & 1995 Shoreline Imp. Contractor Licenses of Landview Landscaping, Inc.*, 546 N.W.2d 747, 750 (Minn. App. 1996) (quoting *Alexander Co. v. City of Owatonna*, 222 Minn. 312, 322, 24 N.W.2d 244, 250 (1946)). The government is not confined, in the exercise of its police powers, "to matters relating strictly to the public health, morals, and

peace, but, as has been said, there may be interference whenever the public interests demand it[:]

> If, then, any business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end.

State ex rel. Beek v. Wagener, 77 Minn. 483, 494–95, 80 N.W. 633, 635 (1899)(quotations omitted). "The subjects which may be legislated upon are, of necessity, continually arising as business increases, and new phases, conditions, and methods appear." *Id*. "And the limit of this power cannot and never will be accurately defined, and the courts have never been willing, if able, to circumscribe it with any definiteness." *Id*.

STRs were obviously a subject of significant public interest in the City. This interest alone is sufficient to justify the City's adoption of the Ordinance. Even so, this is not the only justification.

Even if the Ordinance is analyzed through the lens of its specific intent and purpose there can be no dispute it is a valid exercise of the City's police power. The City adopted the STR Licensing Ordinance to preserve the essential character of its residential districts, to maintain the cohesiveness of its residential neighborhoods, and to balance the potential benefits of STRs—to both individuals and the community at-large—with the likely damage resulting to the community if STRs were permitted without regulation.

Deciding how to balance these conflicting interests in a way that best advances the public interest and preserves the community's health, safety, and welfare, is a proper subject of the City's police power. "The concept of the public welfare is broad and inclusive." *Berman v. Parker*, 348 U.S. 26, 32–33 (1954). "The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Id.* "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). It is within the government's power "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman*, 348 U.S. at 32–33.

Recognizing the City's adoption of the STR Licensing Ordinance was an exercise of the City's police power results in an insurmountable burden, which Norusis cannot satisfy. City ordinances "enacted pursuant to the police power" cannot be successfully attacked "unless there is affirmative proof that the restriction is clearly arbitrary, discriminatory, and unreasonable and without any substantial relation to public health, safety, morals, or general welfare." *Naegele Outdoor Advert. Co. of Minn. v. Vill. of Minnetonka*, 281 Minn. 492, 494–95, 162 N.W.2d 206, 209 (1968). Ordinances enacted pursuant to the police power are presumed valid, and constitutional, and the burden is on the party attacking an ordinance's validity to show "overwhelming evidence" the "legislative determination is so clearly erroneous[,] Minnesota State Bd. of Health by Lawson v. City of Brainerd, 308 Minn. 24, 32–33, 241 N.W.2d 624, 629–30 (1976), and

"affirmative proof" the legislative determination "is clearly discriminatory or arbitrary and without any substantial relation to the public health, safety, or general welfare." *Wedemeyer v. City of Minneapolis*, 540 N.W.2d 539, 543 (Minn. App. 1995); *see also Minnesota Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009) (citing *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955)). Courts exercise the power to declare laws invalid, unenforceable, or unconstitutional "with extreme caution and only when absolutely necessary." *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 521–22 (Minn. 2013) (quotation omitted).

This cautious approach stems from the fact a legislative body has "wide discretion to use their police power to regulate matters of public health[,]" Minnesota Chamber of *Commerce v. City of Minneapolis*, 944 N.W.2d 441, 455 (Minn. 2020), and their decision "on what promotes the public health, safety, morals, and general welfare . . . is entitled to great weight." *Naegele Outdoor Advert. Co. of Minn. v. Vill. of Minnetonka*, 281 Minn. 492, 494–95, 162 N.W.2d 206, 209 (1968). It is not a court's function to second-guess the "accuracy of a legislative determination of fact" or "to determine the wisdom of or necessity for a legislative enactment." *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 308 Minn. 24, 32, 241 N.W.2d 624, 629 (1976). Courts "are limited to correcting errors . . . not creat[ing] public policy." *Hayden v. City of Minneapolis*, 937 N.W.2d 790, 796 (Minn. App. 2020), *review denied* (Apr. 14, 2020). A legislative body "is in the first instance the judge of what is necessary for the public welfare." *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 308 Minn. 24, 32–33, 241 N.W.2d 624, 629 (1976) (quotation

omitted). Legislative "economic reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind." *Fed. Distillers, Inc. v. State*, 304 Minn. 28, 43, 229 N.W.2d 144, 156 (1975). The fact reasonable minds may differ, does not open the door for a court to "pass on the soundness or expediency of theories embodied" in legislation "enacted in the exercise of the police power for the social benefit of the citizen and the public welfare." *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 308 Minn. 24, 33, 241 N.W.2d 624, 629 (1976). Such questions are not "within the range of judicial cognizance" but rather are purely matters "of legislative cognizance." *Id.*

Thus, it is well-accepted the standard of review for legislative decisions "is narrow[,]" *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414–15 (Minn. 1981), and must be exercised "most cautiously." *Kayo Oil Co. v. City of Hopkins*, 397 N.W.2d 612, 614 (Minn. App. 1986). Courts will not strike down an ordinance as invalid, unenforceable, or unconstitutional when the facts on which the legislative decision is based *could reasonably be conceived to be true by the governmental decision maker* such that the question is at least debatable. *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 11 (Minn. 2020) (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S. Ct. 715, 724, 66 L. Ed. 2d 659 (1981)).

"In other words, the test is a 'rational basis' test." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 415 (Minn. 1981). If "the reasonableness of an ordinance is debatable, the courts will not interfere with the legislative discretion." *N. States Power Co. v. City of*

Oakdale, 588 N.W.2d 534, 541 (Minn. App. 1999) (quotation omitted). The party attacking an ordinance's validity "must therefore prove that it is not even debatable that the challenged ordinances have no substantial relationship to public health, safety, or general welfare." *Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 445 (Minn. App. 1997). Norusis cannot meet this burden.

If any question remained regarding whether the Ordinance was a valid exercise of the City's police power, the decision in *Dean v. City of Winona*, puts all doubts to rest. There, residential property owners brought an action to challenge the City of Winona's ordinance limiting the number of lots on a block eligible to obtain certification as a rental property to %30. 843 N.W.2d 249 (Minn. App. 2014). The city arrived at the ordinance after a substantial amount of public involvement. *Dean v. City of Winona*, 843 N.W.2d 249, 253–54 (Minn. App. 2014). Proponents of the ordinance felt it would "protect neighborhoods and prevent areas from becoming dominated by rental units." *Dean v. City of Winona*, 843 N.W.2d 249, 254 (Minn. App. 2014).

As such, the Minnesota Court of Appeals concluded the City adopted the ordinance as an exercise of its police power, because the city "determined that the conversion of owner-occupied homes to rental properties and the concentration of such properties in some neighborhoods began to have a negative impact on the quality and liveability of those neighborhoods. That occurrence implicated the public interest and welfare." D*ean v. City of Winona*, 843 N.W.2d 249, 257–58 (Minn. App. 2014).

As in *Dean*, the City here arrived at the short-term-rental ordinance after an extensive and purposeful deliberative process. *Dean v. City of Winona*, 843 N.W.2d 249, 261 (Minn. Ct. App. 2014). This process included the consideration of research, data, expert opinions, and the public's input. *Id.* The process the City engaged in is precisely the same as the process the City of Winona engaged in in *Dean*. Likewise, just like the City of Winona, this process resulted in a recognition the conversion of owner-occupied homes to STR properties "and the concentration of such properties in some neighborhoods began to have a negative impact on the quality and liveability of those neighborhoods." *Dean v. City of Winona*, 843 N.W.2d 249, 257 (Minn. App. 2014). Just as the Court of Appeals concluded in *Dean*, this Court should conclude the City's adoption of the ordinance was an appropriate exercise of its police power. *Dean v. City of Winona*, 843 N.W.2d 249, 258 (Minn. App. 2014). Consequently, the Ordinance is valid.

A. The Ordinance is not required to contain a grandfather provision.

The legislature has recognized a city may, by ordinance, impose reasonable regulations upon individuals and businesses to prevent and abate nuisances and to protect the public health, welfare, or safety. Minn. Stat. § 412.221, subd. 32. This "police power" can be lawfully exerted to "regulate by license any business or trade which may injuriously affect the public health, morals, safety, convenience, or general welfare." *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955). "Every business and occupation is subject to the reasonable exercise of the police power of the municipality where the business activity occurs and in the exercise of the power a city or village may

regulate that which the state has failed to regulate." *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441, 449 (Minn. 2020) (quoting *Power v. Nordstrom*, 150 Minn. 228, 232, 184 N.W. 967, 969 (1921) (internal marks omitted)).

The Ordinance is a commercial licensing ordinance not a zoning ordinance. This fact is clear from the City's reference to the Ordinance as a licensing ordinance—rather than a zoning ordinance—and its placement of the Ordinance in the City's general code, rather than the zoning ordinance. *Wolf Aff. Ex. B* at 5-29. Additionally, when the entire ordinance is reviewed—as it must be if there were any doubt as to its nature[3]—it is apparent the object of the ordinance is to regulate the relationship between a property owner and short-term tenant, as well as license and regulate the business of operating a short-term rental dwelling.

B. Even if the Ordinance was construed as a zoning ordinance, not a licensing ordinance, it would not be required to contain a grandfather provision.

Zoning ordinances are not required to contain so-called "grandfather" provisions because Minnesota law already provides clear protections for legal nonconformities. A legal non-conforming use "is a use of land that is prohibited under a current zoning ordinance but nonetheless is permitted to continue because the use lawfully existed before the ordinance took effect." *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330,

[3] *See State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) ("The same rules that apply to the interpretation of a statute apply to the interpretation of an ordinance."); *and*, *Hibbing Taconite Co., J.V. v. Comm'r of Revenue*, 958 N.W.2d 325 (Minn. 2021) ("We read a statute as a whole and give effect to all its provisions.") (quotation omitted).

335 (Minn. 2020). The nonconforming use exception is a byproduct of "the valuable property rights of citizens guaranteed protection under the Due Process and Equal Protection Clauses of the Minnesota and United States Constitutions[,]" and it is a limitation of the municipal authority defined by statute. *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 335 (Minn. 2020). Minnesota statutes recognize the exception as well, and dictate a nonconformity, may not be expanded, "but may be continued," unless it "is discontinued for a period of more than one year." Minn. Stat. § 462.357, subd. 1e(a). Zoning ordinances are not required to contain so-called "grandfather" provisions because the right of pre-existing non-conforming uses to continue is already clearly defined in the Minnesota and United States Constitutions as well as Minnesota Statutes.

Nonetheless, the City's zoning ordinance recognizes the right of nonconformities to continue anyway. Under Section 401 of the Marine on St. Croix Zoning Ordinance ("Zoning Ordinance"): "The lawful use of any land or buildings existing at the time of the adoption of this Ordinance may be continued even if such use does not conform to the regulations of this Ordinance, except as provided below." Marine on St. Croix, Minn., ZONING ORDINANCE, § 401 (2018) ("*MZO*").

Thus, even if the Ordinance was a zoning ordinance, not a licensing ordinance, it would not be required to contain a grandfather provision because the right of pre-existing non-conforming uses to continue is already clearly defined in the law as well as the City's Zoning Ordinance. Nevertheless, the Ordinance is not a zoning ordinance, but a regulatory licensing ordinance adopted per the City's police power.

II. NORUSIS OPERATION OF A SHORT-TERM RENTAL WITHOUT A LICENCE REPRESENTS A CONTINUING VIOLATION OF THE ORDINANCE.

The Ordinance expressly prohibits short-term rentals without a license. It is undisputed Norusis continues to operate the property as a short-term rental, in flagrant violation of the Ordinance, despite the denial of his Motion for a Preliminary Injunction. There is no basis in fact or law that would allow Norusis to ignore the Ordinance.

A. Norusis needs a license to operate a short-term rental.

There is no support for the idea an existing business is exempt from compliance with a city's regulatory licensing regime. Minnesota courts have long held the opposite is true. *See State v. Hovorka*, 100 Minn. 249, 252, 110 N.W. 870, 871 (1907) (holding person can acquire a right to continue "in a business, trade, or occupation which is subject to legislative control and regulation under the police power. The rights and liberty of the citizen are all held in subordination to that governmental prerogative, and to such reasonable regulations and restrictions as the Legislature may from time to time prescribe."); *see also*, *State ex rel. Rose Bros. Lumber & Supply Co. v. Clousing*, 198 Minn. 35, 39–45, 268 N.W. 844, 847–49 (1936) (holding ordinance requiring license to maintain lumber yard properly applied to existing lumber yard, which had been operating for many years.); *Paron v. City of Shakopee*, 226 Minn. 222, 227–30, 32 N.W.2d 603, 606–08 (1948) (existing business no more entitled to continue operating without license than new first-time license applicant.); *Arens v. Vill. of Rogers*, 240 Minn. 386, 401, 61 N.W.2d 508, 518–19 (1953) (no person has a right "to engage in or continue to engage in" business

subject to licensing requirement without first obtaining a license.); *and*, *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 717–20 (8th Cir. 1995) (applying Minnesota law and holding business had no right to license or continued operation in absence of license).

Indeed, even when a business has a right to continue operating as a legal non-conforming use, it does not mean the business has a right to continue operating without a license. Under Minnesota Statutes Section 462.357, a city may, by ordinance, "impose upon nonconformities reasonable regulations to prevent and abate nuisances and to protect the public health, welfare, or safety." Minn. Stat. § 462.357, subd. 1e(b). While the legislature's explicit directive does not require an analysis of precedent to understand, case law is consistent with the principle legal nonconformities are not exempt from regulatory licensing regimes.

In *State v. Reinke*, the Minnesota Court of Appeals upheld an individual's conviction for violating a township ordinance regulating dog kennels, even though the individual had operated the kennel for a year and a half before the township adopted its ordinance. 702 N.W.2d 308, 310–13 (Minn. App. 2005). Likewise, in *Hooper v. City of St. Paul*, the Minnesota Supreme Court recognized non-conforming use rights protect a property owner from zoning related changes, but they do not otherwise exempt a property owner from compliance with ordinances unrelated to land use planning. 353 N.W.2d 138, 141 (Minn. 1984) (holding city could not prohibit lawful non-conforming use, but could still "seek its remedy in the enforcement provision of the building code."). This is consistent with the longstanding principle that there is a difference between a

regulatory licensing regime adopted pursuant to a city's police power and a land use and zoning regime. *See State v. Bjork*, 157 Minn. 276, 277–78, 195 N.W. 926, 927 (1923) (noting there "is a difference between licensing the following of a vocation" and "controlling by permit the place where a vocation, which may be a nuisance in certain localities, may be conducted.").

Thus, even if operating the Castle as an STR was a legal non-conforming use, there is nothing which would prevent the City from requiring Norusis to apply for and obtain a license.[4] In reality, however, Norusis is not, and never was operating the Castle as a legal nonconformity.

B. Norusis is not exempt from the application of the Ordinance.

Assuming the Ordinance is a zoning ordinance and not a licensing ordinance, Norusis' commercial use of the Castle does not qualify as a legal non-conforming use. "Although a zoning ordinance may constitutionally prohibit the creation of nonconforming uses, existing uses must be allowed to remain or be eliminated through eminent domain." *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 335 (Minn. 2020); *see also Freeborn Cty. v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972).

[4] This is especially true now, where Norusis has abandoned any claim it would be impossible for him to obtain a license. While Norusis initially claimed the Ordinance purportedly prevented him from obtaining a license, he now claims he lives in the Castle. Norusis Dep. 6:8-7:3. Even if he had not abandoned his previous claim it would not render the ordinance invalid. The Court of Appeals found as much in *Lam v. City of St. Paul*, 714 N.W.2d 740, 745 (Minn. App. 2006).

The Zoning Ordinance permits the continuation of a "***lawful*** use of any land or buildings existing at the time of the adoption of this Ordinance" but it does not permit the continuation of unlawful uses. *MZO* § 401. Instead, the Zoning Ordinance dictates "no structure shall be erected, converted, enlarged, reconstructed, or altered, and no structure or land shall be used for any purpose nor in any manner which is not in conformity with this Ordinance." *MZO* § 104(3).

For Norusis' operation of the Castle to be considered a legal non-conforming use both case law and Minnesota statutes mandate he establish the Castle was lawfully used at some point in the past. This requirement is inherent in the meaning of a legal non-conforming use, which is a "use permitted to continue *because the use* ***lawfully existed*** before the ordinance took effect." *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 335 (Minn. 2020) (emphasis added). Likewise, the statutory allowance for nonconformities explicitly applies to "*the* ***lawful*** *use* or occupation of land or premises existing at the time of the adoption of an [official] control…" Minn. Stat. § 462.357, subd. 1e(a) (emphasis added).

Similarly, Norusis must establish the Castle was lawfully used prior to an adverse zoning change, which made the use unlawful. This requirement is implicit in the statutory language, which permits a "lawful use" to continue, notwithstanding "the adoption of an additional control" making the use a nonconformity. Minn. Stat. § 462.357, subd. 1e(a). Furthermore, it is explicit in Minnesota caselaw. "'It is a fundamental principle of the law of real property that uses **lawfully** existing *at the time of an adverse*

zoning change may continue to exist until they are removed or otherwise discontinued.'" *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 336 (Minn. 2020) (quoting *Hooper v. City of Saint Paul*, 353 N.W.2d 138, 140 (Minn. 1984)) (**bold** emphasis added).

The corollary to this requirement is when a use did not comply with the law prior to the adverse zoning change, it cannot be considered a legal non-conformity. This logically follows from the fact a legal non-conformity is a "***lawful*** use that exists when an ordinance prohibiting that use becomes effective." *Hamline-Midway Neighborhood Stability Coal. v. City of St. Paul*, 547 N.W.2d 396, 398 (Minn. App. 1996) (emphasis added). While this is clear as a matter of logic, caselaw buttresses this point. *See State v. Reinke*, 702 N.W.2d 308, 312–13 (Minn. App. 2005) (holding dog-breeding business lacked conditional use permit required under previous ordinance and thus was not a lawfully existing business at the time township ordinance was enacted, and thus nonconforming-use exception did not apply); *County of Morrison v. Wheeler*, 722 N.W.2d 329 (Minn. App. 2006) (finding use could not be legally non-conforming, when it never lawfully opened or operated, due to existing ordinance violation).[5]

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[5] *See also*, *Vermillion Twp. v. McCarthy*, No. A09-1242, 2010 WL 1541364, at *3 (Minn. App. Apr. 20, 2010) (rejecting argument "that any use that predates the enactment of the current ordinance qualifies as a preexisting non-conforming use even if the prior ordinance would have prohibited it" as "a novel theory unsupported by caselaw or logic."); *State v. Thibodeau*, No. C3-96-2419, 1997 WL 600594, at *3 (Minn. App. Sept. 30, 1997) (no legal non-conforming rights to accessory use, when it was not accessory to either a permitted or conditional use); *Vier v. City of Woodbury*, No. A11-1948, 2012 WL 1658932, at *3 (Minn. App. May 14, 2012)(holding use was unlawful prior to adverse zoning change, and therefore could not gain legal non-conforming status).

It would be Norusis' burden to prove these matters because, under Minnesota law, the "party seeking to continue a nonconforming use bears the burden of proving that an exception is warranted." *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1100 (8th Cir. 1997) (citing *Freeborn Cty. v. Claussen*, 295 Minn. 96, 100, 203 N.W.2d 323, 326 (1972)).

Norusis cannot satisfy this burden because his operation of the Castle was never lawful prior to an adverse zoning change. The Castle is located in the City's "St. Croix – Urban Residential District (SC-UR)." *Declaration of Paul Reuvers*, Exs. 15-16, December 4, 2020. Within the SC-UR district the following uses are permitted:

> (1) Conservancy.
> (2) Agriculture.
> (3) Single-family detached residences.
> (4) Essential Services – telephone, telegraph, and power distribution poles and lines and necessary appurtenant equipment and structures such as transformers, unit substations, and equipment houses.
> (5) Home occupations as defined in Section 407.2 of this Ordinance.

MZO § 507.2. Norusis' operation of the Castle does not fit within any of these designated uses.[6]

[6] To be considered a home occupation, the Castle would need to conform to the requirements of Zoning Ordinance § 407.2. Norusis' operation of the Castle violates several of these requirements. *MZO* § 407.2. What is more, there is no dispute Plaintiff's property, which contains a primary structure totaling more than 3,000 square feet, does not conform to the requirement "[n]o home occupation shall be more than three hundred fifty-five (355) square feet of the gross floor of a dwelling or the total gross floor area of a single accessory building." *MZO* § 407.2.

To be considered a single-family detached residence, Norusis' operation of the Castle would need to meet the definition of this use, which is contained in Section 202 of the Zoning Ordinance. Under the Zoning Ordinance definitions, a single-family detached residence is a "detached dwelling unit designed exclusively for occupancy by one family." *MZO* § 202 at 2-5. A "dwelling" is, in turn, defined as "a building or portion thereof, designated exclusively for residential occupancy." *Id*. Therefore, to be considered a single-family detached residence Norusis must use the Castle for residential occupancy by one family.

Norusis' operation of the Castle did not meet this definition. Norusis admits his primary use of the Castle was as an STR. Since purchasing the Property, Norusis has offered the property to individuals renting, using, or occupying a room or rooms for fewer than 30 consecutive days, and has rented the property to such individuals on at least 40 different short-term occasions. *See Norusis Aff.* at 3, ¶¶ 14, 17-18, 22-24, November 2, 2020. Additionally, Norusis admitted he did not physically inhabit or occupy the Castle for more days or nights than it was rented, prior to the adoption of the Ordinance. *Id*. Thus, it is undisputed Norusis' operation of the Castle did not meet the definition of a single-family detached residence before the City adopted the Ordinance.

Though Norusis did not use the Castle as a single-family detached residence before the City adopted the Ordinance, Norusis' use is, and was, defined in the Zoning Ordinance. Under the Zoning Ordinance a "Boarding House (Rooming or Lodging House)" is defined as a "building other than a motel or hotel where, for compensation

and by prearrangement for definite periods, . . . lodgings are provided for three or more persons, but not to exceed twenty persons." *MZO* § 202 at 2-3. Unfortunately for Norusis, this use is and was expressly prohibited. As noted, the definition of a dwelling under the Zoning Ordinance is "a building or portion thereof, designated exclusively for residential occupancy." *MZO* § 202 at 2-5. This definition includes a single family detached residence, but it does not include "hotels, motels and **boarding houses**." *Id*. (emphasis added).

Norusis' operation of the Castle was prohibited under any definition. Even if the Castle would not have been considered a Boarding House use, and therefore expressly prohibited, the SC-UR zoning district does not include any additional permitted uses. Zoning Ordinance Section 106 dictates whenever "in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited." *MZO* § 106. In other words, the result is the same; Norusis' commercial use of the Castle was prohibited.

Courts have uniformly treated activities, like those Norusis conducts at the Castle as commercial uses. *See Ten Lake Township v. Ryce Southerland*, Beltrami Dist. Ct. File No. 04-CV-09-785, *Reuvers Decl., Ex. 17*. In *Town of W. Lakeland v. Auleciems*, Karl and Susanne Auleciems were sued by West Lakeland Township for violating the West Lakeland Township zoning code. No. A19-1211, 2020 WL 1130318, at *1 (Minn. App. Mar. 9, 2020), *review denied* (May 27, 2020). The relevant facts of the case were concisely stated in a subsequent decision:

> The Auleciemses own a home with seven bedrooms, nine bathrooms, and 14,000 square feet of space, which is located on a cul de sac in the Town of West Lakeland, in Washington County. Beginning in 2017, the Auleciemses advertised the home for short-term rentals on websites such as HomeAway and VRBO. On several occasions in 2017 and 2018, the Auleciemses rented the home to persons hosting special events with large numbers of guests, such as weddings and family reunions. The Auleciemses' neighbors frequently complained to the township about large numbers of people on the property and on the roads leading to and from the property.
>
> The applicable West Lakeland zoning ordinance allows property owners in the Auleciemses' neighborhood to rent out their property only if they apply for and obtain a permit. The Auleciemses did not apply for a permit before starting to rent out the property in June 2017, and they never have obtained a permit. . . .

Town of W. Lakeland v. Auleciems, No. A19-1992, 2021 WL 79789, at *1 (Minn. Ct. App. Jan. 11, 2021).

In June 2018, the township commenced an action against the Auleciemses, to enforce both its zoning ordinance and its home occupation licensing ordinance. *Id*. Specifically, the township sought "an order enjoining the Auleciemses from 'operating and using any property in the applicable zoning district for anything other than single family use pursuant to Town Code,' an order 'compelling the Auleciemses to comply with the Town Code,' and damages." *Id*. (internal marks omitted).

Washington County District Court Judge John C. Hoffman "issued a detailed and well-written 49-page order[,]" which found the Auleciemses "rented their property 18 times in 2018, which included six wedding rentals," and "never obtained a permit or a

certificate" allowing this commercial activity. *Town of W. Lakeland v. Auleciems*, No. A19-1211, 2020 WL 1130318, at *1 (Minn. App. Mar. 9, 2020), *review denied* (May 27, 2020). These findings were based on testimony from "neighbors about the frequency of the rentals" and "exhibits from online rental sites showing [the Auleciemses] advertise their property online for weddings." *Id*.

These findings were not disputed on appeal and, in affirming the district court's decision, the Minnesota Court of Appeals concluded the district court did not err when it determined the Auleciemses "engaged in commercial activity under the code" and were not entitled to an exemption from the code's application. *Town of W. Lakeland v. Auleciems*, No. A19-1211, 2020 WL 1130318, at *1 (Minn. App. Mar. 9, 2020), *review denied* (May 27, 2020).

Nothing about this case suggests the Court should reach a different decision. Norusis' operation of the Castle was prohibited, and therefore could not have obtained lawful non-conforming use status even if the Ordinance were considered an adverse zoning change. The common understanding of an STR is a place where a person can stay for a short period of time, but that is otherwise used as a primary residence for the majority of the year. Other STRs in the City may use their property consistent with this common understanding, but Norusis did not. This is not an incidental rental use of a primarily residential property. It is a primarily commercial use of what was once a residential property. Thus, even if the Court were to view the Ordinance as a zoning

ordinance, as opposed to a regulatory licensing ordinance, Norusis has no leg to stand on in this action because his commercial use of residential property was never lawful.

Likewise, Norusis' recent allegation that he now lives in the Castle does not change the fact his operation of the Castle would not be considered a lawful non-conforming use. It is well-established the "scope of a property owner's nonconforming-use rights is determined by the uses lawfully existing at the time of the adverse zoning change…" *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 336 (Minn. 2020). Stated differently, even if the Court were to view the Ordinance as a zoning ordinance, the scope of Norusis' non-conforming use rights, if any, would be determined based on the operation of the Castle at the time the Ordinance was adopted. That Norusis may have changed how he operated the Castle after filing suit is irrelevant to this analysis.

The uses lawfully existing on a property do not encompass uses a property could have, but did not, lawfully conduct on the property prior to the adverse zoning change. *Pine Cty. v. State, Dep't of Nat. Res.*, 280 N.W.2d 625, 630–31 (Minn. 1979). "A non-conforming use is an actual use." *Application of Cent. Baptist Theological Seminary*, 370 N.W.2d 642, 647 (Minn. App. 1985) (citing *Pine Cty.*, 280 N.W.2d at 630–31). Because the scope of a property owner's non-conforming-use rights is determined by the actual use—"as distinguished from merely contemplated use"—lawfully existing at the time of the adverse zoning change, "it is not the present intention to put property to a future use but the present use of the property," which "is essential to its protection as a lawful nonconforming use." *Hawkinson v. Itasca Cty.*, 304 Minn. 367, 374, 231 N.W.2d 279, 283

(1975) (quotation omitted). Thus, while a property owner cannot be prevented from carrying on a use "at the same level which obtained before the zoning ordinance was adopted[,]" the property owner is only "entitled to carry on the precise business in which he was engaged at the time that the zoning ordinance was adopted." *Id*. at 282.

While other STRs may have experienced an adverse zoning change when the Ordinance was adopted, Norusis was primarily using the Castle as a boarding house. His decision to move into the Castle does not change the fact it was not used for a residential purpose before the adoption of the Ordinance. Norusis' subsequent activities do not distinguish him in any way from anyone else who illegally starts operating an STR out of their residence without a license.

Thus, Norusis does not have any interest in continuing to operate the Castle however he pleases. Even if the Ordinance were viewed as a zoning ordinance, Norusis operated the Castle as a boarding house and his subsequent decision to move into the Castle does not change the fact his use was unlawful at the time the Ordinance was adopted. Nevertheless, there is no reason to treat the Ordinance as a zoning ordinance. The Ordinance is a regulatory licensing ordinance, and even if Norusis' operation of the Castle was a legal non-conforming use—which it is not—Norusis would still be required to obtain a license to operate an STR. It is undisputed Norusis never obtained a license from the City, and is thus in violation of the City's code and ordinances.

III. THE CITY IS ENTITLED TO A PERMANENT INJUNCTION PROHIBITING NORUSIS' CONTINUING VIOLATION OF THE ORDINANCE.

A party seeking an injunction "must establish that his legal remedy is not adequate and that the injunction is necessary to prevent great and irreparable injury." *Cherne Industrial, Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979). The City Code expressly authorizes the City to seek injunctive relief, among other remedies, to enforce the Ordinance.

> In the event of a violation or threatened violation of this Ordinance, the City, in addition to other remedies, is entitled to seek injunctive relief or proceedings to prevent, restrain, correct, or abate such violations or threatened violations.

Ordinance § 6. In light of Norusis' ongoing refusal to comply with the Ordinance, the City's legal remedy is not adequate as a matter of law, and an injunction is necessary to require compliance and abate the ongoing violations.

CONCLUSION

For the forgoing reasons, the City respectfully requests the Court grant its Motion for Summary Judgment in all respects. The Ordinance is a valid exercise of the City's police powers. Norusis has continued to operate his property as a short-term rental, without a license, in clear violation of the Ordinance. As a result, the City is entitled to an injunction to require compliance and abate the ongoing violations.

Dated: June 11, 2021

s/Paul D. Reuvers

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