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 OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff John Norusis owns property in the City of Marine on St. Croix ("City"). After the City adopted a Short-Term Rental Licensing Ordinance, Norusis brought this action requesting a declaration the property, which he operates as a short-term rental, was subject to protection and the Short-Term Rental Ordinance was otherwise invalid. The Court concluded Norusis could not continue his commercial activities without following the Short-Term Rental Licensing Ordinance, but Norusis chose to do so anyway. *See* Order Denying Motion for Temporary Injunction, [Doc. #33], p. 8 ("The Court will not grant injunctive relief based on a 'harm' caused by a knowing violation of the law."). He chose to do so because it was beneficial to him, and neither the Court's decision, the City's Ordinance, nor the injurious effect he had on his neighborhood would get in his way. Norusis now asks the Court to grant him summary judgment based on his

belief he sufficiently masqueraded the futility of his claims by withholding all relevant and damaging information. His ill-conceived motion should be denied.

The law is clearly established. The Ordinance is valid, and does not violate Equal Protection, even if Norusis properly pled such a claim. For these reasons the City, not Norusis, is entitled to summary judgment on all of Norusis' claims and the City's counterclaim.

STATEMENT OF UNDISPUTED FACTS

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 Affidavit of Andrew A. Wolf, Exhibit A* at 138, June 11, 2021.

The City adopted this Ordinance after studying the STR issue at more than twenty Planning Commission meetings. *Wolf Aff. Ex. A* at 1-30, 36-50, 59-65, 70-72, 78-84, 92-98, 104-106, 115-130. The Planning Commission studied the issue at length and considered how other communities were addressing it. *Id*. at 5-10. At the beginning of 2019, the City Council approved a 12-month moratorium on new STRs, 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 to update and revise its recommendations as more meetings were held and the public continued to weigh in. *Wolf Aff. Ex. E.*

The City did not just study other cities' regulations, it also considered the effect STRs had on its own residents. The City conducted two resident surveys and received over 100 responses regarding the STR issue. *Wolf Aff. Ex. D*. Moreover, the City considered more than 130 pages of written comments, and even more public comments, which were presented during related meetings. *Wolf Aff. Exs. A, C*. Many of the public comments the City received related to STRs specifically mentioned the way John Norusis' commercial use of the "Castle on St. Croix River" negatively affected the community. *See*, *e.g.*, *Ex. C* at 3-4, 19-20, 33-44, 94-98, 102-103, 112-118, 125-126. Norusis operates an STR in the City, but has never applied for a license as the Ordinance requires. *First Affidavit of John P. Norusis*, November 2, 2020; *Second Affidavit of John P. Norusis*, April 23, 2021; *Declaration of Lynette Peterson*, ¶ 15, December 4, 2020; *Second Affidavit of Lynette Peterson*, ¶ 2, June 24, 2021. Norusis rents the Castle out on a short-term basis through his Airbnb

account "Ralph/John," *see Norusis Dep.* 34:14-38:2, which he also maintains in order to reserve STRs for his own use:

Available online.[1] The City's potential STR regulations captured the public's interest, and the City considered the public's input before it adopted the Ordinance here. This not only meant considering a variety of opinions, it also meant considering a variety of bases for those opinions. *Wolf Aff. Ex. C* at 30-32, 55-93. For example, the City considered a cost-benefit analysis study provided by a resident and conducted by the Economic Policy Institute. *Wolf Aff. Ex. C* at 55-83. This cost-benefit analysis study concluded the costs of STRs outweigh their benefits, confirmed some initial concerns regarding the negative effect STRs could have on the City, and dispelled what many in the City viewed as one of the potential benefits of STRs. *See Wolf Aff. Exs. A* at 9-13; *C* at 59-78; *and see generally Exs. C-D*.

[1] *At*: https://www.airbnb.com/users/show/144031864

The City engaged in an extensive and purposeful deliberative process before it adopted the Ordinance. While this included consideration of research into STR regulations, the recommendations of the STR committee, data from two public surveys, the public's input—including studies and cost-benefit analyses provided by citizens—and two years' worth of public meetings and comments, *see generally Wolf Aff. Exs. A, C-F*, the decision regarding whether to adopt the Ordinance or not was ultimately one which belonged to the City Council. *Peterson Dep.* 36:22-37:8, 64:2-64:9, 66:8-66:18, 67:1-67:7, 68:18-68:25; *Mrosla Dep.* 14:3-14:6, 22:15-22:24, 30:4-32:18; *see also* Minn. Stat. § 412.211, and § 412.221.

In the end the City Council adopted the Ordinance out of a concern raised early on, and which the deliberative process confirmed was widely held: allowing STRs without regulation would create an influx of absentee landowners, which would have a negative impact on the quality and live-ability of the City's residential neighborhoods. *Wolf Aff. Exs. A* at 8-10, *B* at 22-23, *C* at 1-20, 97, *E*.

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. In resolving Plaintiff's motion, the Court will "view the evidence in the light most favorable" to the City, with the benefit of all reasonable inferences. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002) (citations omitted).

ARGUMENT

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

The City has broad authority to regulate through its police powers. *See Defendant's Memorandum of Law In Support of Motion For Summary Judgment*, 16-19, June 11, 2021. A city "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) (emphasis added).

Consistent with the Minnesota Supreme Court's explicit holding in *Dalsin*, a municipality may exercise its police power to regulate a business or trade based on nothing more than a ***potential*** the business or trade may injuriously affect the public health, safety, and welfare. Stated differently, the government is not required to wait until a community is negatively affected before it adopts regulations.

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). A legislative 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." *Lawson v. City of Brainerd*, 241 N.W.2d at 629. 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." *Id*. Such questions are not "within the range of judicial cognizance" but rather are purely matters "of legislative cognizance." *Id*.

A. Norusis' argument is irrelevant to the fact the Ordinance is a lawful exercise of the City's police powers.

Contrary to the Minnesota Supreme Court's explicit holding in *Dalsin*, among others, Norusis claims the City "**may only** exercise its police power" if it can prove a business or trade has already injuriously affected the public health, morals, safety, convenience, or general welfare. *Plaintiff's Memorandum of Law In Support of Motion For Summary Judgment*, 31-35, June 11, 2021. There is no support for this claim, and Norusis supplies none.[2] Instead, he notes "before the exercise of the police power can be held unconstitutional," he must satisfy the burden to show the Ordinance "has no substantial

[2] In addition to misconstruing the holding in *Dalsin*, Norusis cites *In re 1994 & 1995 Shoreline Imp. Contractor Licenses of Landview Landscaping, Inc.*, 546 N.W.2d 747, 750 (Minn. App. 1996). In this case the Court of Appeals held "there are significant differences between a watershed district and a municipality" and therefore watershed districts "are not sufficiently similar to municipalities to warrant extending **broad municipal police powers** to watershed districts." *Id.* The only "limits" the court recognized on these "broad municipal police powers" are the limits imposed by the state through the doctrine of preemption. *See Id.* (citing *Minnetonka Elec. Co. v. Village of Golden Valley*, 273 Minn. 301, 308, 141 N.W.2d 138, 143 (1966); *and*, *Welsh v. City of Orono*, 355 N.W.2d 117, 121 (Minn. 1984)). Norusis makes no such argument, and this decision is irrelevant.

relationship to public health, safety, morals, or general welfare." *Freeborn Cty. v. Claussen*, 295 Minn. 96, 100, 203 N.W.2d 323, 326 (1972). Norusis fails to meet this burden.

Norusis does not meet his burden because his entire argument is based on the unfounded assertion the City may only exercise its police power if it can prove a business or trade has already injuriously affected the public health, safety, or general welfare. Norusis claims the Court of Appeals' decision in *Dean v. City of Winona*, "distinguishes between when a city properly exercises its police powers and" when it allegedly does not. *Pl.'s Mem.* at 33 (citing 843 N.W.2d 249, 257 (Minn. App. 2014)). Norusis proceeds to outline what the City of Winona did in *Dean*, apparently to establish the City's process here was not exactly the same. *Pl.'s Mem.* at 33-34. What is missing from Norusis' review of *Dean* is an explanation of how these facts were relevant to the court's decision. Understandably, Norusis focuses on the facts at the exclusion of the *Dean* court's reasoning to avoid acknowledging the City's actions here were a proper exercise of its police power as a matter of law.

Regarding the limits of a city's police power, the *Dean* court stated "it is very broad and comprehensive, and . . . the limit of this power cannot and never will be accurately defined." *Dean v. City of Winona*, 843 N.W.2d 249, 257 (Minn. App. 2014) (quotation omitted). In considering whether the city's ordinance was a lawful exercise of its police power, the court did not review the process the city went through. Contrary to Norusis' suggestion, the court's decision was not based on the fact the city hired an independent "consulting firm" or the fact the "Parking Advisory Task Force" could support its

"***belie***[***f***] that neighborhoods heavily populated with student rental housing tend to become run-down and unattractive" by reference to police calls for service. *Dean*, 843 N.W.2d at 254-255 (emphasis added). Instead, the court held:

> We easily conclude 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. In fact, the landlord-tenant relationship is currently subject to extensive government regulation. In this case, the record establishes that respondent 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.

Id. at 257 (quotations and citations omitted). The only limit the court recognized to the police power was the constitutionality of the resulting law. *See id.* (quoting *State ex rel. Beek v. Wagener*, 77 Minn. 483, 494, 80 N.W. 633, 635 (1899)). As such, it was not until the court analyzed the plaintiff's Substantive Due Process claim that it considered the process the City went through to arrive at the ordinance. The court acknowledged the ordinance "was adopted after a long, deliberate information-gathering process that considered public input, data, and expert review, including the HKG memorandum." *Id.* at 261. While the court considered the information the City relied upon, it made clear: "In any event, the decision . . . belongs to respondent's city council, not to this court. . . . These issues are not within our scope of review." *Id.* n.3 (citing *Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 445 (Minn. App. 1997) ("If the reasonableness of an ordinance is debatable, the courts will not interfere with the legislative discretion.")).

In other words, Norusis' own authority rejects his unfounded assertion the City may only exercise its police power if it can prove a business already injuriously affected the community. Cities "are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Rather it is Norusis who ***must 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) (emphasis added). Norusis cannot meet this burden simply by noting minor differences between the City's process here, and the City of Winona's process in *Dean*. Because Norusis has otherwise made no attempt to prove the Ordinance is not a lawful exercise of the City's police powers, his argument must be rejected.

Nonetheless, even if the City were held to this non-existent standard, the Ordinance would still be a valid exercise of the City's police power.

B. Even if Norusis had a legal basis for his argument, it flounders on the undisputed public record.

The undisputed evidence establishes the City adopted the Ordinance out of concern allowing STRs without regulation would have a negative impact on the quality and live-ability of its residential neighborhoods. The City arrived at this conclusion after studying the issue at more than twenty Planning Commission meetings. *Wolf Aff. Ex. A* at 1-30, 36-50, 59-65, 70-72, 78-84, 92-98, 104-106, 115-130. The City studied the issue at

length and considered how other communities were addressing it, but the City also considered the effect STRs had on its own residents.

The City's potential STR regulations were clearly an issue of public interest. A city 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." *Wagener*, 80 N.W. at 635. The City considered more than 130 pages of written comments, and even more public comments, which were presented during related meetings. *Wolf Aff. Exs. A, C*. Moreover, the City conducted two resident surveys and received over 100 responses regarding the STR issue. *Wolf Aff. Ex. D*. Based on the community's input, the City's potential STR regulations were clearly an issue of public interest.

A legislative decision does not need to be supported by anything more than what a decisionmaker could have reasonably conceived to be true. *See Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 11 (Minn. 2020) ("We will not strike down a law as irrational when . . . the question is at least debatable and the government decision maker could reasonably have conceived those facts and considerations to be true.") (quoting *Clover Leaf Creamery*, 449 U.S. at 464 ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is *apparently* based ***could not reasonably be conceived to be true*** by the governmental decisionmaker.") (emphasis added)). The City was not required to base the Ordinance on evidence STRs were negatively affecting the community. But, even if it was, the City had such evidence.

Many of the public comments the City received related to STRs specifically mentioned the way Norusis' commercial use negatively affected the community. *See, e.g.*, *Ex. C* at 33. That this information came in the form of complaints, rather than police calls or registered criminal activity like in *Dean,* does not change the fact the City received information STRs were negatively affecting the community.

Likewise, pointing out the City could have hired "independent consultants" misses the point on multiple levels. *Pl.'s Mem.* at 33. First, and most importantly, it is another example of Norusis' attempt to elevate the facts of *Dean* to the status of law, while ignoring the law itself. Second, it is not a correct comparison of the facts. The City considered the public's input before it adopted the Ordinance here. Even when fundamental rights, like speech, are at stake, which is not the case here, a municipality may justify its decision by showing it relied "on any evidence that is 'reasonably believed to be relevant'" including studies from other jurisdictions or sources. *Cty. of Morrison v. Wheeler*, 722 N.W.2d 329, 339–42 (Minn. App. 2006). Considering the public's input not only meant considering a variety of opinions, it also meant considering a variety of bases for those opinions. *Wolf Aff. Ex. C* at 30-32, 55-93. For example, the City considered a cost-benefit analysis study provided by a resident and conducted by the Economic Policy Institute ("EPI"). *Wolf Aff. Ex. C* at 55-83. This cost-benefit analysis study concluded the costs of STRs outweigh their benefits. *Id.* at 59. In so concluding, the EPI study confirmed one of the major bases for the Ordinance.

> When owners do not reside in their residential property, this can lead to externalities imposed on the property's neighbors. If absentee owners, for example, do not face the cost of noise or stress on the neighborhood's infrastructure (capacity for garbage pickup, for example), then they will have less incentive to make sure that their renters are respectful of neighbors or to prevent an excessive number of people from occupying their property.
>
> These externalities could be worse when the renters in question are short term. Long-term renters really do have some incentive to care about the neighborhood's long-run comity and infrastructure, whereas short-term renters may have little to no such incentive.…

Ex. C at 74-75. This was not the only concern the EPI study confirmed,[3] and in some areas the EPI study purportedly dispelled what the City viewed as the potential benefits of STRs. A potential—and frequently referenced—benefit of allowing STRs in the City was the potential STRs could increase tourism to the City and be good for local businesses. *Wolf Aff. Exs. C-D*. The EPI study, however, concluded the "potential benefit of increased tourism supporting city economies is much smaller than commonly advertised" and there "is little evidence that cities with an increasing supply of short-term Airbnb rental accommodations are seeing a large increase in travelers." *Ex. C* at 59-70. Nonetheless, the City maintained this was a potential benefit of STRs, and it was one of the primary reasons the City decided to allow STRs with regulation. *See Ex. B* at 22. The balancing

[3] It also confirmed initial concerns regarding the negative effect STRs could have on the City's existing housing stock. *See Ex. A* at 9-13; *Ex. C* at 59-78.

approach the City ultimately took is one for which its duly elected representatives are uniquely suited.

Though the process the City engaged in here is not determinative, it is precisely the same as the process the City of Winona engaged in in *Dean*, 843 N.W.2d at 258. Norusis claims the opposite is true because the City here ***supposedly*** did not rely on any studies, data, or evidence when it decided the Ordinance advanced the public interest and preserved the community's health, safety, and welfare. *Pl.'s Mem.* 32-33. But Norusis entirely ignores the public record detailing the historical background and sequence of events leading to the Ordinance's adoption.

The public record reveals the City engaged in an extensive and purposeful deliberative process, which included consideration of research into STR regulations, the recommendations of the STR committee, data from two public surveys, the public's input—including studies and cost-benefit analyses provided by citizens—and two years' worth of public meetings and comments. Just like the City of Winona in *Dean*, the City here adopted the Ordinance "after a long, deliberate information-gathering process that considered public input, data, and expert" studies. *Dean*, 843 N.W.2d at 261. The City does not have to point out the lengths it went to to reach this legislative determination, but Norusis is not entitled to ignore it.

Instead of considering the public record detailing the historical background and sequence of events leading to the Ordinance's adoption, Norusis focuses on irrelevant evidence, which is not even material under his non-existent standard. In attempting to

argue "it is not even debatable that the" Ordinance has "no substantial relationship to public health, safety, or general welfare[,]" *Holt*, 559 N.W.2d at 445, Norusis relies on the deposition testimony of Lynette Peterson and Gerry Mrosla; neither of whom were members of the legislative body, which adopted the Ordinance. This testimony does not shed any light on the government decisionmaker's (i.e., the City Council's) purposes for adopting the Ordinance. Even if these individuals testified there were no injurious affects to the public health, safety, and welfare from STRs—which they did not—or testified they were unaware of such affects, it would have absolutely no bearing on the material issues in this case, even under Norusis' non-existent standard.

Norusis has failed to show the City's decision to adopt the Ordinance is "without any substantial relation to public health, safety, morals, or general welfare." *Naegele*, 162 N.W.2d at 209. Norusis buries his head in the sand and points to irrelevant evidence to try to support his argument. But the relevant questions before the Court **ARE NOT** whether the City had sufficient evidence to conclude STRs implicated the public interest or whether the Ordinance was the best approach to promoting the public health, safety, and welfare. These decisions belong to the "city council, not to this court." *Dean*, 843 N.W.2d at 261 n.3. Just as the Court of Appeals concluded in *Dean*, this Court should conclude the City's adoption of the ordinance was a proper exercise of its police power.

II. THE ORDINANCE DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTEE.

In support of summary judgment, Norusis argues the Ordinance violates the Equal Protection clause. Norusis did not plead this claim, but even if he had, he has not supported it. Even so, ignoring these deficiencies and conducting the analysis required by the Minnesota Supreme Court leads to the conclusion any equal protection claim Norusis purportedly intended to allege is futile and must be dismissed.

A. There is no Equal Protection claim before the Court.

Norusis' attempt to manufacture a constitutional claim he did not plead is foreclosed as a matter of law. The Supreme Court's subsequent decision in *Dean* provides guidance. *Dean v. City of Winona*, 868 N.W.2d 1 (Minn. 2015). There, the appellants argued they pleaded a claim the City of Winona's ordinance was unconstitutional under the Remedies Clause of the Minnesota Constitution, in addition to constitutional claims ***they explicitly pleaded*** under the Equal Protection, Substantive Due Process, and Procedural Due Process clauses. *Id.* at 7-8. While analyzing the complaint, the Minnesota Supreme Court observed:

> While appellants' prayer for relief included a generalized request for "nominal damages of $1.00 for violations of their constitutional rights," that request, untethered to a specific claim or constitutional provision, was not enough to implicate the Remedies Clause. In other words, it did not put respondents on notice of the cause of action for nominal damages under the Remedies Clause, which appellants now present to our court.

Id. Unlike in *Dean*, Norusis did not specifically plead any constitutional claim. Instead, he simply asked the Court to declare "the Ordinance is invalid, unenforceable and/or unconstitutional." *Amended Compl.* ¶¶53-55. Like *Dean*, this request was "untethered to a specific claim or constitutional provision[.]" *Dean*, 868 N.W.2d at 8. To the extent the request was connected to any claim, it was connected to Norusis' allegation the "Ordinance is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare." *Amended Compl.* ¶44. As just shown, however, Norusis cannot support this claim. To the extent Norusis attempts to manufacture any claim based on the constitutional provisions explicitly referenced in *Dean* ("equal protection, substantive due process, and procedural due process") Norusis' "generalized request" is "not enough to implicate" any of these constitutional claims. *Dean*, 868 N.W.2d at 8.

B. Any Equal Protection claim Norusis has necessarily fails.

Article I of the Minnesota Constitution provides: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless the law of the land or the judgment of his peers." Minn. Const. art. I, § 2.

Until recently, Minnesota "precedent on equal protection under the Minnesota Constitution has not been a model of clarity." *Fletcher Properties*, 947 N.W.2d at 19. The Minnesota Supreme Court, however, recently issued a detailed opinion, which rigorously outlines Minnesota's equal protection analysis. *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020). Under this analysis it must be recognized "[l]egislative bodies regularly, and for many different reasons, pass laws that treat people

differently. . . . [I]t is in the nature of the work of balancing different policy considerations in a complex and diverse polity." *Fletcher Properties,* 947 N.W.2d at 20. "As appropriate under principles of separation of powers and the distinct institutional roles played by elected legislative representatives and judges, courts are deferential to those legislative decisions." *Id.* "[T]he legislative body's action is presumed to be constitutional and the burden rests with the person challenging the law to prove that the legislative body's reason for treating one class differently from another class was not legitimate." *Id.* "Because we are deferential to the judgment of the lawmaking body, in the absence of overwhelming evidence to the contrary, we will not second-guess the accuracy of a legislative determination of facts." *Id.* at 19.

"When fundamental rights or suspect classes are not at issue, the legislative body generally may enact laws that treat similarly situated people differently as long as the different treatment of classes of people is a rational means of achieving—there is 'some fit' with—the legislative body's policy goal." *Id.* at 20. A law "does not violate the Equal Protection Clause of the Minnesota Constitution when it is a rational means of achieving the legislative body's legitimate policy goal." *Id.* at 22. If there is a "conceivable rational basis for the distinction" in light of "the stated legislative purpose," a classification will satisfy Minnesota's rational basis review. *Id.* at 26. "If the classification has some reasonable basis, it does not offend the constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality." *Guilliams v. Comm'r of Revenue*, 299 N.W.2d 138, 143 (Minn. 1980) (quotation omitted). The "difference

between classes need not be great, and if any reasonable distinction can be found, a court should sustain the classification." *Hegenes v. State*, 328 N.W.2d 719, 721 (Minn. 1983).

Minnesota's equal protection analysis "start[s] by identifying the relevant group of similarly situated persons." *Fletcher Properties*, 947 N.W.2d at 27. Norusis must identify the similarly situated comparators "as a threshold matter" for his claim to proceed. *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012). The "first step is to identify whether the law creates distinct classes within a broader group of similarly situated persons or whether those treated differently by the law are sufficiently dissimilar from others such that the law does not create different classes within a group of similarly situated persons." *Fletcher Properties*, 947 N.W.2d at 22. Unless the Ordinance treats one group differently from others, to whom they are "similarly situated in all relevant respects . . . there is no equal protection violation." *Id*. Courts in Minnesota "routinely reject equal-protection claims when a party cannot establish that he or she is similarly situated to those whom they contend are being treated differently." *Schatz*, 811 N.W.2d at 656.

Norusis skips this step entirely, which is fatal to any purported equal protection claim he may have intended to bring. This omission is especially pernicious here, where Norusis never pleaded an equal protection claim, but is attempting to manufacture one at summary judgment. This omission mandates dismissal, but for the sake of thoroughness the City will assume the relevant group of similarly situated persons is residential property owners because the ordinance regulates the conduct of "[a]ny

property owner offering, using or desiring to offer or use a Dwelling as a Short-Term Rental within the City…" *Ex. B* at 24 (§ 4.C); *see also*, *Fletcher Properties*, 947 N.W.2d at 27–28 ("Because the ordinance regulates the conduct of persons who rent residential units in the city, we conclude that the relevant class is residential landlords.").

Under step two, the Court "precisely identif[ies] the distinction at issue." *Fletcher Properties,* 947 N.W.2d at 28. Norusis argues the Ordinance "restricts one class of persons (Type C) which are not imposed on others (Types A and B) engaged in the same business (STRs) and under similar circumstances." *Pl.'s Mem.* at 35. This argument, however, is based on a misunderstanding of one Ordinance section and does not consider the entire Ordinance framework. *See Fletcher Properties*, 947 N.W.2d at 28. The distinction between Short-Term Rental, Types A and B, and Short-Term Rental, Type C, is not a distinction between any "class of persons" at all, but between different types of STRs. *Pl.'s Mem.* at 35; *see also Wolf Aff. Ex. B* at 23-24. When considering the entire Ordinance framework, it is clear it applies equally to all residential property owners.

The Ordinance establishes a license requirement for STRs, *Ex. B* at 24 (§ 4.A), requires any property owner "offering, using or desiring to offer or use a Dwelling as a Short-Term Rental" to apply for and obtain a license from the City, *id*. (§ 4.C), and establishes the criteria for issuance of the license. *Id*. (§ 4.E). The license requirement applies equally to all residential property owners regardless of the type of STR they intend to operate. *See Id*. (§ 4.A "Type A, B or C"). Claiming the Ordinance draws a distinction between different types of STRs assumes a residential property owner is

already licensed to operate any STR. But a residential property owner cannot receive a license to operate an STR unless it meets the Ordinance's criteria for issuance. The only criteria for issuance, which resembles the distinction Norusis claims the Ordinance draws, is the requirement: "The Dwelling must be materially used for its owner's enjoyment-which shall mean to state the owner shall accurately certify and document to the City annually that the Dwelling has been physically inhabited by the owner for more days and nights than it has been rented." *Ex. B* at 25 (§ 4.E.vi). Thus, to the extent the Ordinance draws any distinction between residential property owners, it draws a distinction between those who materially use their dwelling for their enjoyment, by physically inhabiting it for more days and nights than they rent it, and those who do not.

Thus, the question the Court must answer—if Norusis' recently manufactured equal protection claim makes it this far—is whether prohibiting certain residential property owners from qualifying for a license is a rational means of achieving the City's purpose for adopting the Ordinance. *Fletcher Properties*, 947 N.W.2d at 28. Prohibiting certain residential property owners from qualifying for a license is undoubtedly a rational means of achieving the City's purpose for adopting the Ordinance.

The preservation and protection of residential neighborhoods is a legitimate governmental objective, *Dean*, 843 N.W.2d at 257, and Minnesota courts have long recognized the differences between owner-occupied property and renter-occupied property present a valid basis for a legislative body to distinguish between these classes. *See Apartment Operators' Ass'n v. City of Minneapolis*, 191 Minn. 365, 369, 254 N.W. 443, 445

(1934) (noting distinguishing between owner-occupied property and renter-occupied property "has a tendency to encourage the use of land for homestead purposes and is in furtherance of a sound public policy. The stability of government is promoted thereby."); *and*, *Lund v. Hennepin Cty.*, 403 N.W.2d 617, 620 n.3 (Minn. 1987) (acknowledging "an important distinction between homestead property and rented residential property—the rental property represents income-producing property to the owner.").

The City adopted the Ordinance out of concern allowing STRs without regulation would have a negative impact on the quality and live-ability of its residential neighborhoods. *Ex. B* at 22-23 (§§ 1-2). This concern stemmed from the fact STRs by their nature introduce a commercial use into existing residential areas, creating conflicts not only with the character of the area, but between permanent neighbors and absent property owners, who have less incentive to maintain their property or their relationships with the neighborhood. *Id*. Economic policy experts the City relied upon recognize this is a valid distinction. *See Ex. C* at 60 (concluding city residents suffer when STRs are introduced in residential neighborhoods because short-term travelers "impose greater externalities on long-term residents than do other long-term residents. . . . In the case of neighbors on a street with short-term renters, externalities include noise and stress on neighborhood infrastructure like trash pickup. These externalities are why hotels are clustered away from residential areas."). More importantly, binding precedent recognizes this is a valid distinction to draw when determining the scope of legislation. *See Apartment Operators'*, 254 N.W. at 445. "The distinction between owner occupiers and

renter occupiers is genuine, not fanciful, in light of the added responsibilities of homeowners and their different relation to the property from renters." *Lund*, 403 N.W.2d at 620.

There can be no doubt prohibiting residential property owners from qualifying for a license, when they live in a dwelling less than they rent it out, is a rational means of achieving the City's purpose of protecting and preserving the quality and live-ability of its residential neighborhoods. As such, the City's Ordinance would not violate the Minnesota Constitution's equal protection guarantee, even if Norusis had pleaded such a claim.

III. THE ORDINANCE IS NOT IMPOSSIBLE TO COMPLY WITH.

"Under Minnesota law," the status of an "ordinance is to be determined at the time the Court is called upon to act…" *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780, 790–91 (D. Minn. 2006) (citing *Rose Cliff Landscape Nursery, Inc. v. City of Rosemount*, 467 N.W.2d 641, 643 (Minn. App. 1991) (affirming summary judgment for the city based on amendment enacted subsequent to the city's denial of application which precluded the sought after use); *Prop. Rsch. & Dev. Co. v. City of Eagan*, 289 N.W.2d 157, 157–58 (Minn. 1980) (concluding that mandamus order was inappropriate when the ordinance was amended after the complaint was filed but prior to trial).

Likewise, "when an ordinance is repealed, an action based upon the repealed ordinance is moot." *Advantage Media*, 408 F. Supp. 2d at 794 (D. Minn. 2006) (applying Minnesota law); *see also Troy v. City of St. Paul*, 155 Minn. 391, 393–94, 193 N.W. 726, 727

(1923) (holding appeal was moot because the city ordinance on which the appeal was based had been amended while the appeal was pending).

Norusis' argument the Ordinance is impossible to comply with is based upon a former version of the Ordinance, which no longer exists and does not apply. *Compare*, *Second Affidavit John P. Norusis, Ex. A.*, April 23, 2021; *with*, *Wolf Aff. Ex. B5*. The City amended the Ordinance to remove any purported ambiguity. As such this argument must be rejected.

IV. THE CITY IS NOT LIMITED TO CRIMINAL CITATIONS TO ENFORCE THE ORDINANCE.

Norusis argues the City's counterclaim must be dismissed because the City failed to comply with the Minnesota Rules of Criminal Procedure, and the City has produced no admissible evidence of any Ordinance violation. Neither argument has any merit.

The City's counterclaim does not initiate a misdemeanor violation against Norusis, as he seems to believe, nor is the City required to enforce the Ordinance through a criminal citation. The City's counterclaim is clearly limited to declaratory judgment and injunctive relief. Defendant has authority to pursue non-criminal remedies under the Ordinance. *See Ex. B5* at § 6.A.3 ("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.").

Likewise, the City need not produce any evidence to prove an Ordinance violation beyond what has already been established in previous affidavits, including Norusis' own sworn statements. *1st Norusis Aff.*; *2nd Norusis Aff.*; *Peterson Decl.*, ¶ 15 ("Mr. Norusis could apply for a short-term rental license, but he has not done so."), December 4, 2020; *2nd Peterson Aff.*, ¶ 2 ("Mr. Norusis could apply for a short-term rental license, but as of today's date he has not done so."). It is undisputed Norusis operates an STR in the City and has never applied for a license as the Ordinance requires.

To the extent Norusis believes additional evidence is necessary, his claims must be dismissed. Norusis has effectively refused to participate in the discovery process, necessitating a Motion to Compel Discovery. *Doc. #38*.[4] 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.

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[4] While the City's Motion to Compel was not limited to Norusis' failure to produce records from his Airbnb account—rather was focused on Norusis' failure to adequately respond to all discovery requests—Norusis claimed he was not required to produce these documents because the account is not "maintained and managed" by Plaintiff, but by Ralph Norusis. *Pl.'s Mem.* at 24-26, April 23, 2021. Notably, Norusis did not claim he did not have access to the account, which is all that matters. *See Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000); *and*, *Triple Five of Minnesota, Inc. v. Simon*, 212 F.R.D. 523, 527 (D. Minn. 2002), *aff'd*, No. CIV.99-1894 PAM/JGL, 2002 WL 1303025 (D. Minn. June 6, 2002). What is more, Norusis confirmed during his deposition Ralph Norusis is not technology savvy enough to actually manage the account. *Norusis Dep.* 34:14-38:2. This is consistent with the activity of the "Ralph/John" account, which was used by John Norusis as recently as January 2021 to reserve an STR for his own use.

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. In light of Norusis' arguments on summary judgment, it is apparent he has chosen dismissal.

CONCLUSION

For the foregoing reasons, the City respectfully requests the Court deny Plaintiff John Norusis' Motion for Summary Judgment in all respects and grant the City's Motion for Summary Judgment on all of Norusis' claims as well as the City's counterclaim. 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.

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