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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF WASHINGTON TENTH JUDICIAL DISTRICT

John P. Norusis,

Plaintiffs,

v.

City of Marine on Saint Croix,

Defendant.

Case Type: Declaratory Judgment
Court File No.: 82-CV-20-3974

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

There is no admissible evidence in this record to establish that Short-Term Rentals ("STRs") or events have, would, or could injuriously affect the public health, safety and welfare thereby necessitating the Short-Term Rental Ordinance, Ordinance No. 2020-156 ("Ordinance"). As a result, the City of Marine on Saint Croix ("City") overstepped its authority and the Ordinance must be found unconstitutional and unenforceable. John P. Norusis ("Norusis") respectfully requests that his Motion for Summary Judgment be granted and that the City's Motion for Summary Judgment be denied.[1]

Besides not being a valid exercise of its police powers, the Ordinance violated the equal-protection clause – a claim properly before this Court and briefed many times. Creating three classes of individuals and treating them differently without justification is legally improper and cannot stand.

The City's Counterclaim must also be dismissed. There is an utter lack of any admissible evidence in the record that Norusis violated the Ordinance. The City offered no more than hearsay from undefined individuals on redacted forms to try to assert claims against Norusis. These efforts fail as a matter of law and must be dismissed

The parties have thoroughly briefed the issues on the competing Motions. Norusis fully incorporates by reference his Memorandum in Opposition to the City's Motion for Summary Judgment (Doc. No. 74) and will not reiterate said arguments here. Norusis notes that said Memorandum was filed on June 24, 2021 and highlighted that Mr. Wolf lacked foundation to offer nearly all of the 700-plus pages and 107 exhibits the City relied on. Acknowledging the

[1] Norusis will not respond in kind to the City's prolific use of adjectives in describing Norusis' legal positions and will instead elect to allow the facts and law speak for themselves.

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evidentiary deficiencies, on June 25, 2021, the City filed the Second Declaration of Lynette Peterson. (Doc. No. 73). While Ms. Peterson's Second Declaration addressed the admissibility issue, the City has not addressed and cannot address its failure to offer any admissible evidence that STRs or events have, would, or could injuriously affect the public health, safety and welfare.

ARGUMENT

I. THE ORDINANCE IS NOT A VALID EXERCISE OF THE CITY'S POLICE POWER.

To be clear, there is no binding appellate precedent affirming a city's or municipality's adoption of an ordinance or law regulating STRs or events pursuant to its police powers. This is a matter of first impression in Minnesota. While there is no case law directly on point, both parties heavily rely on *Dean v. City of Winona*, 843 N.W.2d 249 (Minn. Ct. App. 2014). Page 9 of the City's Memorandum, citing verbatim from *Dean*, establishes that Norusis must prevail on these competing motions:

> In this case, the **record establishes**[2] 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 livability of those neighborhoods**. **That occurrence implicated the public interest and welfare**.

(Doc. No. 71, p. 9 *quoting Dean*, 843 N.W.2d at 257 (emphasis added)).

In *Dean*, the admissible record established that the City of Winona determined that the conversion of owner-occupied homes to rental properties indeed had a negative impact. The admissible evidence was that the City of Winona made several findings supporting the necessity

[2] The City asserts that the Court of Appeals did not review the City of Winona's process until analyzing the Due Process claim in *Dean*. (Doc. No. 71, p. 9). This assertion is belied by the City's own referenced quotation from *Dean*. The Court of Appeals held that "the record establishes that respondent determined…". The Court of Appeals was referring to the studies and findings ("the record") conducted by the City of Winona and establishing negative impact in affirming the adoption of the ordinance at issue. No such studies nor findings are present here.

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of the adopted regulation including that:

- "52% of the complaints received by the Community Development Department (CDD) related to rental properties";
- "student rental housing tend to become run-down and unattractive";
- "95 of the 99 addresses that had two or more calls for police service based on noise and party-related complaints were rental properties"; and
- rental-housing concentration on neighborhood quality and livability resulted "in increased levels of nuisance and police violations in those neighborhoods and that the concentration of rental housing leads to a decreased neighborhood quality and livability."

It was this admissible evidence and findings from the City of Winona that supported the implication of the public interest and welfare thereby prompting the affirmation of the City of Winona's use of its police powers in adopting the ordinance at issue.

Here, this record is glaringly barren of any admissible evidence that the City made any determination of any negative impact from STRs or events or even any potential negative impact. If there was such a determination by the City within the 700-plus pages it submitted on this Motion, the City would have pointed out the same to the Court. The City did not do so. This Court will search in vain for any factual determination from the City that STRs had, could have, or may have any injurious affect.

This record is barren of an affidavit or declaration from the City's Mayor, from any City Councilmember, or from any City Planning Commission member testifying to any past, present, future or potential injurious affect to the public health, safety and welfare from STRs or events. Had the City made such a determination, the City would have submitted such evidence. It did

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not.

Norusis, on the other hand, deposed the City's Clerk and Zoning Administrator (Lynette Peterson) as well as the City's Chairperson of the City's Planning Commission (Gerald Mrosla). The Planning Commission is the body that was tasked with investigating STRs and events to provide recommendations to the City Council. Both Ms. Peterson and Mr. Mrosla were asked if they were aware of "any" injurious affect to the public health from STRs or events and both unequivocally stated they were not. (Doc. No. 60, p. 9-19). Neither Ms. Peterson nor Mr. Mrosla offered any past, present, future or potential injurious affect to the public health from STRs or events. Neither Ms. Peterson nor Mr. Mrosla offered any determinations that the City had made about any past, present, future or potential injurious affect to the public health from STRs or events. (*Id*.). Instead, both Ms. Peterson and Mr. Mrosla unambiguously testified of no such injurious affects from STRs or events. (*Id*.).

The City, relying on *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624 (Minn. 1976), asserts that it "is not a court's function to second-guess the 'accuracy of a legislative determination of fact'". (Doc. No. 71, p. 6-7). In *City of Brainerd*, the Minnesota Supreme Court held: "In enacting the fluoridation law, the legislature relied on the **overwhelming weight of scientific opinion** that fluoridation afforded a safe and effective means of reducing dental caries. We cannot say that this legislative determination is so clearly erroneous as to be arbitrary and violative of due process." *Id*. at 630 (emphasis added). But here, the City did not rely on any data or studies that STRs or events had, could or would have any injurious affect, increase crime, increase nuisance claims, decrease neighborhood quality, increase police calls, or increase noise complaints. Because STRs and events did not. And the

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City made no such determinations of fact and there certainly is not "overwhelming" opinion or data supporting the City's intrusion into the private life and affairs of its citizens by adopting the Ordinance.

The distinctions between what the City of Winona did (conducted studies and made findings of injurious affects) versus what the City did (conducted no independent studies[3] and made no findings of any injurious affect or potential injurious affect) establishes that the City did not validly exercise its police powers. Because the Ordinance has "**no substantial relationship to public health, safety, morals, or general welfare**", the **exercise of the City's police power is unconstitutional**. *County of Freeborn v. Claussen*, 203 N.W.2d 323, 326 (Minn. 1972) (emphasis added).

In response to Norusis' Motion, no City official offered any testimony about any past present, future or potential injurious affect to the public health from STRs or events. The admissible record is glaringly barren of any support to the City's position. This Court can scour through the 700-plus pages dumped on it by the City, but the Court will be unable to find any admissible evidence of any past, present, future or potential injurious affect to the public health from STRs or events and no such findings by the City. Here, the purpose of the Ordinance was not to serve the general public of the City's residents, but rather was admittedly aimed at Norusis to try to appease his disgruntled neighbors and aid their efforts to rid the City of this formerly incarcerated man – this was most notably undisputed by the City in its briefing. Because there was findings by the City based on any data or studies that STRs or events had, could or would injuriously affect the City, there is no basis for this Court to conclude that the City's adoption of

[3] The City attempts to argue that it relied on a study from the Economic Policy Institute. (Doc. No. 71, p. 12). Exhibit C27 to Mr. Wolf's Affidavit is an email from Suzanne Lindgren Dammann which is hearsay and inadmissible. Nor does the email state that the City relied on or even reviewed the Economic Policy Institute study.

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the Ordinance was a valid exercise of its police powers. Norusis' Motion should be granted.

II. NORUSIS ADEQUATELY PLED THAT THE ORDINANCE VIOLATED THE EQUAL-PROTECTION CLAUSE.

The City, again relying on *Dean*, asserts that it was not on notice that Norusis was challenging the Ordinance's constitutionality as a violation of the equal-protection clause. This too misses the mark.

Minnesota is a notice pleading state. *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 917-18 (Minn. 2012); *see also* Minn. R. Civ. P. 8.01 (requiring pleading to include a "short and plain statement of the claim showing that the pleader is entitled to relief"). And "[a]ll pleadings shall be construed as to do substantial justice." Minn. R. Civ. P. 8.06. There is no case law that states that an allegation that an ordinance violates the equal-protection clause must be pled with heightened specificity under Minn. R. Civ. P. 9.02. Simply, the City must have notice of a claim against it and an opportunity to oppose it before a binding adverse judgment may be rendered. *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983). The City was on such notice.

Norusis' Amended Complaint specifically requested a declaration from this Court that the Ordinance be held invalid, unenforceable and/or unconstitutional. (Doc. No. 19, ¶ 55, and Prayer for Relief ¶ C). On December 11, 2020, Norusis filed his Reply Memorandum of Law in Support of Motion for Temporary Injunction asserting, in pertinent part:

- "The ***Ordinance also violates the equal protection clause*** as it imposes restrictions upon one class of persons (those who primarily use their property as STRs) which are not imposed upon others (those who use their property as STRs, but not as a primary purpose or they are present during the transient guest's stay)." (Doc. No. 28, p. 6 (emphasis added)).

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- "This ***unequal treatment will likely result in the Ordinance ultimately being declared unconstitutional as a violation of the equal protection clause***." (*Id*., p. 17-18 (emphasis added)).
- "The Ordinance is ***also unconstitutional as violative of the equal protection clause*** by imposing restrictions upon Norusis which are not imposed on other similarly situated property owners." (*Id*., p. 19-20 (emphasis added)).

On April 23, 2021, Norusis filed his Memorandum of Law in Opposition to Rule 37 Motion to Compel and for Sanctions, and to Allow Defendants to Supplement Pleadings to Assert Counterclaim, again making clear that Norusis asserted that the Ordinance violated the equal-protection clause:

- "This unequal treatment requires ruling that the Ordinance ***is unconstitutional as a violation of the equal protection clause***." (Doc. No. 44, p. 35-36 (emphasis added)).

All of these filings occurred prior to the City conducting Norusis' deposition on June 4, 2021. The City was aware of and had every opportunity to question Norusis on his allegation that the Ordinance violated the equal-protection clause.

The City's reliance on *Dean v. City of Winona*, 868 N.W.2d 1 (Minn. 2015) in asserting that Norusis' equal-protection clause was not properly pled is inappropriate. In *Dean*, the plaintiffs did not specifically plead a claim for relief for monetary damages under the Remedies Clause. *Id*. at 8. As a result, the Minnesota Supreme Court held that the City of Winona was not on notice of damages being sought under the Remedies Clause as such claim went beyond the relief sought in the complaint.

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But here, the City was on notice that Norusis asserted that the Ordinance was unconstitutional. Asserting that the Ordinance violates the equal-protection clause did not surprise the City and is not a new claim for relief – asserting that the Ordinance was unconstitutional was in Norusis' Complaint, Amended Complaint and multiple briefs.

The City does not dispute that it treats similarly situated persons (property owners) differently. Indeed, property owners can obtain a license for Types A and B STRs, but not a Type C STR. The City failed to point this Court to any admissible evidence justifying this disparate treatment. There is no evidence, information, data or studies that Type C STRs caused higher crime or more nuisance calls or more domestic disturbances than Type A or B STRs thereby supporting the differential treatment. There is no evidence that Type C property owners were more apt to allow their property to fall into disarray than Type A or B property owners. There is no evidence that visitors of a Type C STR were more likely to wreak havoc in the City than Type A or B property owners. Indeed, there is no evidence in this record to support this different treatment.

The lack of any justification supporting this unequal treatment requires ruling that the Ordinance is unconstitutional as a violation of the equal protection clause.[4]

III. THERE IS NO ADMISSIBLE EVIDENCE THAT NORUSIS VIOLATED THE ORDINANCE.

The City does not deny that it violated the Minnesota Rules of Criminal Procedure. (Doc. No. 71, p. 24-27). The City claims that notwithstanding a violation of the Ordinance is a

[4] Exhibit B6 or Mr. Wolf's Affidavit is dated May 13, 2021 and appears to be the City's belated efforts to address Norusis' argument that the Ordinance is impossible to comply with, as first set forth in his Memorandum of Law filed on April 23, 2021 (Doc. No. 45) and addressed during the deposition of Ms. Peterson on April 7, 2021. At the pertinent time in question, the adoption of the Ordinance, the Ordinance was impossible to comply with and therefore unconstitutional.

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misdemeanor, the City need not comply with the basic tenants of criminal law. As previously set forth by Norusis, the City's position lacks merit.

The City also does not deny that it has no admissible evidence of any violation by Norusis of the Ordinance. (*Id*.). Indeed, it does not. There is not one individual who filed an affidavit or declaration with this Court or who testified under oath that has firsthand knowledge of any violation of the Ordinance by Norusis.

Instead, the City demands the Court infer from Norusis' proper invocation of his Fifth Amendment right that Norusis violated the Ordinance. But that is not what the case law provides.

In the divorce action of *Christenson v. Christenson*, 162 N.W.2d 194 (Minn. 1968), both husband and wife charged each other with cruel and inhuman treatment and both sought custody of their children – the claims against each other were 'apples to apples' claims. The Minnesota Supreme Court held that the wife cannot on the one hand seek custody and charge husband with cruel and inhuman treatment and on the other hand refuse to answer questions about her own treatment of the children. Most notably, the husband in *Christenson* not only sought to depose the wife, but served requests for admissions[5] as well, then moved to compel answers to the deposition questions, or to strike the wife's claims. The City took no such action here. Moreover, comparing the wife's conduct in *Christenson* to Norusis' conduct here or the City's discovery requests to the husband's discovery requests are not comparing 'apples to apples'.

[5] Likewise, in *Parker v. Hennepin Cty. Dist. Court, Fourth Judicial Dist*., 285 N.W.2d 81 (Minn. 1979) the issue was whether responses to requests for admissions which invoked the Fifth Amendment could be deemed admitted in a civil action. The City served no such requests for admissions and thus *Parker* does not support the City's contention that its counterclaim can be summarily granted without a scintilla or admissible evidence.

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Norusis challenged the validity and constitutionality of the Ordinance. The City, on the other hand, asserted that Norusis violated the Ordinance. These are not the same claims, but rather comparing 'apples to oranges'. Whether Norusis has or has not complied with the Ordinance has no bearing on whether the Ordinance is valid and constitutional. Had Norusis alleged that he and the City executed a contract, he performed, but the City breached the contract, he could not refuse to answer questions during his deposition if the City asserted the same counterclaim. That is not the case here and Norusis' invocation of his Fifth Amendment right does not support summarily finding he violated the Ordinance.

Instead, because the City has not offered a single piece of admissible evidence to support its counterclaims against Norusis, as a matter of law, the same must be summarily dismissed.

CONCLUSION

Norusis respectfully request that the Court grant his Motion for Summary Judgment and deny the City's Motion.

Dated: July 2, 2021

Sincerely,
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ACKNOWLEDGMENT

The undersigned hereby acknowledges that sanctions may be imposed pursuant to Minnesota Statute § 549.211.

Dated: July 2, 2021

Sincerely,
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