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 REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In response to the City's Motion for Summary Judgment Plaintiff John Norusis confirms his claims must be dismissed, confirms he lacks a basis in existing law to argue the City's Short-term Rental Licensing Ordinance is invalid, and resorts to futile evidentiary arguments. For these reasons the City, not Norusis, is entitled to summary judgment on all Norusis' claims and the City's counterclaim.

ARGUMENT

I. NORUSIS' EVIDENTIARY ARGUMENTS ARE UNAVAILING.

Lacking any legal basis to argue the City's Short-term Rental Licensing Ordinance is invalid, Norusis resorts to two evidentiary arguments, neither of which has merit.

A. Norusis' argument the public record is unauthenticated is misguided.

Norusis argues the public record detailing the extensive and purposeful deliberative process the City went through to adopt the Ordinance is unauthenticated under Minn. R. Evid. 901(a). But under Minn. R. Evid. 902 "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to" certified copies of public records. Minn. R. Evid. 902(4). Lynette Peterson, the Marine on St. Croix City Clerk, and the custodian of the City's official and public records, certified Exhibits A-G "are true and correct copies of official records and public records maintained by the City of Marine on St. Croix" per Minn. Stat. § 358.116. *Second Peterson Decl.* As such, extrinsic evidence of authenticity is not a condition precedent, and the public records are admissible on summary judgment.[1]

Further highlighting the trivial nature of Norusis' argument the Court can take judicial notice of public records. *See Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010). Thus, even if Norusis' argument was not misguided the documents are properly before the Court.

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[1] Norusis argues "the City cannot try to belatedly cure this defect" because "the City is only permitted to file a Reply pursuant to Minn. Gen. R. Prac. 115.03(c) and not any additional affidavits or exhibits." *Pl.'s Resp. Mem.* at 10. But Norusis forgets he brought a dispositive motion as well, and the City was entitled to file "Supplementary affidavits and exhibits" in response to this motion. Minn. R. Gen. Prac. 115.03(b). Nothing prohibits the City from referring to documents properly before the Court when addressing "new legal or factual matters raised by an opposing party's response to a motion[.] Minn. R. Gen. Prac. 115.03(c).

B. None of the evidence in the record is hearsay.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The evidence submitted here, however, was not submitted to prove the truth of the matters asserted therein (with the exception of statements in the minutes detailing what the City Council or Planning Commission actually did at a meeting).[2] For example, the City did not submit the public comments it received regarding STRs to prove STRs caused "divisiveness, breakdown of cohesion, and most of all, destruction of our Community." *Exhibit C* at 125. The City submitted these comments, as well as the other evidence because the Planning Commission and City Council actually considered them during the Ordinance adoption

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[2] Norusis agrees to the extent the minutes are cited for this purpose they are admissible. *Pl.'s Resp. Mem.* at 12. Likewise, Norusis does not realize the exceptions in Minn. R. Evid. 803 apply to the entire public record. *Carter v. Olmsted Cty. Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 732 (Minn. App. 1998) dealt with Minn. R. Evid. 803(8)(B), which applies to "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," not Minn. R. Evid. 803(8)(A), which Norusis focuses on. The court noted the exception would only apply to the government officials because the third-party had no duty to report the party's statement truthfully. Here there is no similar issue because the City has a duty imposed by law to report all matters observed "necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1. This includes statements made by members of the public at public meetings. *Id*. Furthermore, Minn. R. Evid. 803(8)(A) applies to "the activities of the office or agency," which likewise includes "all records necessary to a full and accurate knowledge of their official activities." Minn. Stat. § 15.17, subd. 1. Written public comments, studies, surveys, complaints, recommendations from the City's Short-Term Rental committee, and supplemental materials considered by the City are all necessary to a full and accurate knowledge of the City's official activities because they were considered by the City, and as such "are **admissible as evidence in all courts and proceedings of every kind**." Minn. Stat. § 15.17, subd. 1 (emphasis added).

process. *See Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978) ("The statements made at such a public hearing, unlike a regular judicial proceeding, are not given under oath and are not limited by the traditional rules of evidence. They are usually broad expressions of opinion in favor or against the application. . . . **But the information clearly was made a part of the record** in the present case. . . . [T]his information was a part of the record **on which the city council could base its decision**.") (emphasis added); *and*, *Matter of Hibbing Taconite Co.*, 431 N.W.2d 885, 895 (Minn. App. 1988) (holding documents considered by governmental body in reaching decision are part of the record). Whether STRs in fact had caused these issues is irrelevant. What is relevant is the fact these comments were part of the record considered by the City, and the City based its decision, in part on the record. *See Gilmore v. City of Minneapolis*, No. CIV. 13-1019 JRT/FLN, 2015 WL 1189832, at *6 (D. Minn. Mar. 16, 2015) [3] (noting third-party statements, offered to show their effect on the hearer, and why they did what they did are "offered for their truth and are therefore not hearsay.").

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

Norusis relies exclusively on misguided evidentiary arguments because he believes the City may only exercise its police power if it can prove a business already injuriously affected the community. This is the only explanation why Norusis would

[3] *Modified sub nom. Gilmore v. Dubuc*, No. CIV. 13-1019 JRT/FLN, 2015 WL 3645846 (D. Minn. June 10, 2015), *aff'd sub nom. Gilmore v. City of Minneapolis*, 837 F.3d 827 (8th Cir. 2016), *and aff'd sub nom. Gilmore v. City of Minneapolis*, 837 F.3d 827 (8th Cir. 2016).

think the City submitted the public record in an attempt to prove the truth of the matters asserted therein. Norusis is wrong about the reason the public record is relevant, and is wrong about his imagined preconditions to a municipality's use of its police powers. The City has already addressed this misguided argument in detail in its response to Norusis' Motion for Summary Judgment. *See Def.'s Mem. of Law Opp'n. Pl.'s Summ. J. Mot.,* 6-15, June 24, 2021. For the sake of judicial economy, and because the City's previous response to the same argument still applies, the City incorporates by reference this argument to the same extent as if it was fully stated herein.

III. NORUSIS IS NOT PERMITTED TO CONTINUE HIS COMMERICAL USE.

Norusis argues **if** the Ordinance is a zoning ordinance, he must be permitted to continue his use of the Castle. *Pl.'s Resp. Mem.* at 33-35. Norusis apparently believes the Court may reach this conclusion on its own initiative, because he does not argue the Ordinance is in fact a zoning ordinance or respond to the City's argument the Ordinance is a licensing ordinance. S*ee generally Pl.'s Mem.* Likewise, Norusis does not dispute he operated the Castle as a *boarding house*, a prohibited use, or if not, his use was undefined and thus prohibited. *MZO* § 106. These matters are all conceded for the purposes of the City's Summary Judgment Motion. *See* Minn. R. Civ. P. 56.05. In light of these concessions, there is no avenue permitting Norusis to continue his commercial use of the Castle. This conclusion necessarily follows as a matter of law and therefore the City is entitled to an order granting its Motion for Summary Judgment.

A. Norusis' attempts to manufacture new claims are equally unsuccessful.

Norusis responds to the City's Summary Judgment Motion by attempting to manufacture new arguments. While Norusis is not entitled to continue his commercial operation, he argues he must be permitted to continue his commercial operation, not as a matter of law, but as a matter of equity. *Pl.'s Resp. Mem.* 33-35. Norusis argues he should be permitted to continue his commercial operation because he was not specifically told his planned operation was prohibited when he contacted the City. Norusis has not pleaded any claim, which would allow him to make this argument. *See generally*, *Am. Compl.* But even if he had, this claim would fail.

First, Norusis has not made the required factual showing for his claim to proceed. Regardless of the theory Norusis now claims to be advancing, he was required to prove the City provided him false information to guide his conduct. *See Bonhiver v. Graff*, 311 Minn. 111, 122, 248 N.W.2d 291, 298 (1976); *Nw. Airlines, Inc. v. Cty. of Hennepin*, 632 N.W.2d 216, 221–22 (Minn. 2001). But Norusis claims the City Clerk told him the City did not regulate short term rentals, which at the time was true. Moreover, this information did not guide Norusis' actions or induce his detrimental reliance because,[4] while the City

[4] If Norusis had pleaded an equitable estoppel claim he would have been required to prove both *reasonable reliance* and *actual inducement*. See *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980); *Nw. Airlines, Inc. v. Cty. of Hennepin*, 632 N.W.2d 216, 221–22 (Minn. 2001); *see also*, *Bourcy v. Ravenna Twp.*, No. A07-0129, 2008 WL 495699, at *3 (Minn. App. Feb. 26, 2008) (same); *Bruce Twp. v. Schmitz*, No. A15-1163, 2016 WL 1081276, at *8 (Minn. App. Mar. 21, 2016) (same). As noted below relying on a statement about the City's ordinances, when he could determine for himself his intended use was clearly prohibited, is not reasonable. Furthermore, pointing to a statement about short-term

did not regulate short-term rentals at the time, it did regulate boarding houses, *i.e.*, properties used primarily to 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. There is no dispute this is exactly what Norusis was operating when the Ordinance was passed, s*ee First Affidavit of John P. Norusis*, November 2, 2020, and there is no contention the City **EVER** represented this use—as opposed to a primarily residential use, which is rented out on a short-term basis from time to time—was legal. A property owner cannot claim they relied on the governmental conduct when they never made their intent clear or their actual plans known. *See State v. Lee*, 584 N.W.2d 11, 14–15 (Minn. App. 1998) ("Banasik's obtaining a building permit for a six-inch thick driveway is not sufficient evidence to charge the city with knowledge that Banasik was going to use the driveway in a prohibited manner so as to make the city's failure to act unjustified."); *and*, S*totts v. Wright Cty.*, 478 N.W.2d 802, 805 (Minn. App. 1991) ("When issuing the permit for 'repairs, remodelling[sic] and new block,' the county did not have a duty to inform Stotts that this meant he could not build an entirely new boathouse."). Likewise, a property owner "cannot be heard to say that the [municipality] acted wrongfully" when the property owner's "representations misled the" municipality. *Yeh v. Cty. of Cass*, 696 N.W.2d 115,

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rentals, a use not defined in the Zoning Ordinance, does not come close to proving actual inducement when Norusis' undisclosed intent and resulting use was a boarding house, a use clearly prohibited.

131 (Minn. App. 2005). Norusis has not established the facts necessary to maintain his argument, and the law is not on his side either.

Second, it is well-established under Minnesota law that there is no actionable claim against municipalities for misrepresentations of the law. *Northernaire Prods., Inc. v. Crow Wing Cty.*, 309 Minn. 386, 388–90, 244 N.W.2d 279, 280–82 (1976); *see also*, *Williams v. Smith*, 820 N.W.2d 807, 820 (Minn. 2012) ("the holding in *Northernaire* was that county officials were not liable when 'they negligently misrepresent the legal requirements of their zoning ordinance to members of the public who rely on that misrepresentation.' The holding in Northernaire . . . essentially stands for the unremarkable proposition that city officials are generally not liable for misrepresentations of law."); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 637 (Minn. App. 2002); *Gatz v. Frank M. Langenfeld & Sons Const., Inc.*, 356 N.W.2d 716, 718 (Minn. App. 1984). If the City had represented to Norusis the Zoning Ordinance did not prohibit operation of a boarding house in a residential district, this would be a misrepresentation of the law, and as such, would not present an actionable claim. The City, however, never made such a representation.

Third, even if Norusis could somehow frame the alleged representation as misrepresentation of fact, a "misrepresentation of fact against a government official or employee is not actionable when the requested information is available to the public through alternate means and when the person requesting such information is aware of that availability." *Vaa v. Clay Cty.*, No. A04-311, 2004 WL 2590602, at *6 (Minn. App. Nov. 16, 2004). Not only could Norusis review the Zoning Ordinance himself, it was his legal

obligation to do so. A property owner does "not rely in good faith on the action of" a local zoning authority when the authority's action purports to authorize conduct prohibited by local controls. *Dege v. City of Maplewood*, 416 N.W.2d 854, 856-857 (Minn. App. 1987). Even if the City had officially approved of Norusis' use, "[t]hose who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law." *Brown v. Minnesota Dep't of Pub. Welfare*, 368 N.W.2d 906, 912 (Minn. 1985) (quoting *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 64 (1984)). It is "the duty" of a property owner "to determine for itself the propriety of the proposed" use of its property. *Jasaka Co. v. City of St. Paul*, 309 N.W.2d 40, 44 (Minn. 1981). Had Norusis investigated the legality of his boarding house "the most cursory inquiry would have disclosed the problems [he] now seeks to correct." *Id.*

Fourth, even if Norusis could raise an equitable defense for the first time in his response to a summary judgment motion, the administration of municipal ordinances is a governmental function and a "municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on" prior municipal action. *SLS P'ship, Apple Valley v. City of Apple Valley*, 511 N.W.2d 738, 743 (Minn. 1994); *see also*, *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d at 607 (Minn. 1980). The state of the law in this regard is "well settled." *Yeh*, 696 N.W.2d 115, 131 (Minn. App. 2005).

Norusis' attempt to manufacture another new claim fails. The City is entitled to an order granting its motion for summary judgment as a matter of law.

CONCLUSION

For the foregoing 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.

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s/Paul D. Reuvers
Paul D. Reuvers, #217700
Andrew A. Wolf, #398589
IVERSON REUVERS
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200
paul@iversonlaw.com
andrew@iversonlaw.com

David K. Snyder, #251392
JOHNSON TURNER
56 E. Broadway Ave. #206
Forest Lake, MN 55025
david@johnsonturner.com
(651) 403-8972

Attorneys for Defendant