STATE OF MINNESOTA **DISTRICT COURT**

TENTH JUDICIAL DISTRICT **COUNTY OF WASHINGTON**

John P. Norusis,

Plaintiff,

vs.

City of Marine on St. Croix,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM

Court File No. 82-CV-20-3974

The above-entitled matter came on for a remote hearing on cross-motions for summary judgment before Douglas B. Meslow, Judge of District Court, Washington County Courthouse, Stillwater, Minnesota, on July 9, 2021. Plaintiff was represented by Brandon M. Schwartz, Esq. Defendant was represented by Paul D. Ruevers, Esq. and David K. Snyder, Esq.

Based upon all the files, records, and proceedings herein, including the arguments of counsel, the Court now makes the following:

ORDER

1. Plaintiff's motion for summary judgment on his complaint is DENIED.
2. Plaintiff's motion for summary judgment on Defendant's counterclaim is DENIED.
3. Defendant's motion for summary judgment on Plaintiff's complaint is GRANTED.
4. Defendant's motion for summary judgment on its counterclaim is DENIED.
5. The attached memorandum of law constitutes the Court's Findings of Fact and its Conclusions of Law and is incorporated and made a part of this Order.
6. The Court Administrator shall serve a copy of this Order and Memorandum on counsel of record, which constitutes due and proper notice of its provisions for all purposes.

BY THE COURT:

Dated: _____

Meslow, Douglas (Judge)
2021.10.05 15:42:43 -05'00'

Douglas B. Meslow
Judge of District Court

MEMORANDUM

Facts Viewed in the Light Most Favorable to the Non-Moving Party

Plaintiff John P. Norusis ("Plaintiff") owns real property located at 801 Pine Cone Trail ("Property") in the City of Marine on St. Croix ("City"), Washington County, Minnesota. Plaintiff purchased the Property on or around May 17, 2018. Prior to purchasing the Property, Plaintiff contacted Lynette Peterson, City's Clerk, Zoning Administrator, and Treasurer. Peterson told Plaintiff that City did not regulate short term rentals. (Wolf Aff. - Ex. I [Peterson deposition transcript] p. 16, lines 17-24; p. 17, lines 1-4). Plaintiff asked Peterson if there were any permits required to hold weddings and she told him that City did not regulate weddings. (*Id*. p. 18, lines 1-8).

On August 13, 2020, City enacted Ordinance No. 2020-156 regulating short-term rentals in the City. (Norusis Aff. – Ex. A). [1] The Ordinance defines Short-Term Rental as: "A dwelling that is offered to transient guests for a period of less than 30 consecutive days at a time." (*Id*. - Section 3).

The Ordinance defines Short-Term Rental, Type A (hosted short-term rental) as: "A dwelling, or portion thereof, that is offered to transient guests for a period of less than 30 consecutive days, where an owner of the property is primarily present (i.e., from 10:00 p.m. to 7:00 a.m. during overnight stays) during the period of occupancy by the transient guest." (*Id.*). The Ordinance defines Short-Term Rental, Type B (unhosted short-term rental) as: "A dwelling, or portion thereof, that is offered to transient guests for a period of less than 30 consecutive days, where an owner of the property is not present while the transient guests are present." (*Id*.) The Ordinance defines Short-Term Rental, Type C (dedicated short-term rental) as: "A dwelling, or portion thereof, that is offered to transient guests for a period of less than 30 consecutive days, where the primary property use ("use" is a typical term) is a short-term rental." (*Id*.)

Section 4 A. of the Ordinance provides as follows (Emphasis Added):

> License Required. No property, structure or dwelling may be used as a Short-Term Rental (Type A, B or C) unless an application is submitted and a license is first granted by the City provided,

[1] Plaintiff cites to his affidavit dated April 23, 2021 and filed as Index #45 in his pleadings submitted in support of his motion for summary judgment and in opposition to City's motion for summary judgment. Plaintiff's affidavit was originally submitted in opposition to City's motion to compel and for sanctions which was heard on May 7, 2021.

> however, that Short-Term Rentals located exclusively within the Central Business District shall not be subject to the restrictions of this Ordinance. The License shall be entered on a short-term rental registry. *Type C Short Term Rentals are not permitted in the City.*

(*Id*. Sec. 4 A.).

The criteria for issuance of a Short-Term Rental ("STR") license requires the owner to certify annually to City that the "Dwelling has been physically inhabited by the owner for more days and nights than it has been rented." (*Id*. – Section 4 E. (a)(vi)). The criteria also requires that the licensee certify on the application that "Short Term Rentals are a permitted use in the zoning district of the subject property." (*Id*. – Section 4 E. (a)(i)).

The Ordinance provides that operating a STR without a license shall constitute a misdemeanor. (*Id*. – Sec. 6 A. 2.). The Ordinance further provides that "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." (*Id.* -Sec. 6 A. 3.).

Plaintiff did not reside on the Property when he initially purchased it, but he later moved on to the Property in the late summer of 2020. (Wolf Aff. - Ex. H [Norusis deposition transcript] p. 6, lines 15-24; p. 7, lines 1-3). It is undisputed that Plaintiff rents the Property "for short-terms." (*Id*. - ¶¶ 12, 13). It is also undisputed that Plaintiff has not obtained a STR license from City.

On November 11, 2020, Plaintiff filed an Amended Complaint against City seeking a declaratory judgment as follows:

> Judgment declaring that Plaintiff's use of the Property as a Short-Term Rental, Type C as defined by the Ordinance is grandfathered-in and permissible under the Ordinance;
>
> Alternatively, judgment declaring that the Ordinance does not apply to the Property;
>
> Alternatively, judgment declaring that the Ordinance is invalid, unenforceable and/or unconstitutional; and
>
> An order temporarily and permanently enjoining Defendant from enforcing the Ordinance.

On July 20, 2021, City filed the following Counterclaims: (1) A declaratory judgment from the Court identifying and confirming all violations of the Ordinance on the Property; and (2) A permanent injunction ordering Plaintiff to eradicate all violations of the Ordinance on the Property and cease any and all uses of the Property in violation of the Ordinance. In addition, City seeks an order from the Court prohibiting Plaintiff from allowing the same or similar violations or uses to exist or occur on the Property in the future. [2]

On May 13, 2021, City filed a motion for summary judgment to dismiss Plaintiff's Amended Complaint and grant judgment on City's Counterclaims. City contends that the Ordinance is a licensing ordinance and represents a lawful exercise of its police powers.

On June 11, 2021, Plaintiff filed a motion for summary judgment seeking a judgment that the Ordinance is unconstitutional and unenforceable and dismissing City's counterclaims. Plaintiff contends that the Ordinance is a zoning ordinance and not a licensing ordinance and that his use of the Property before the Ordinance was enacted was a legal use. Thus, Plaintiff alleges that his use of the Property should be grandfathered-in and permissible under the Ordinance. Plaintiff also contends that, even if the Court treats the Ordinance as a licensing ordinance, City failed to validly exercise its police powers because it failed to demonstrate that STRs are in any way injurious to public health, safety, morals, convenience, or general welfare.

Analysis

Summary Judgment Standard

Summary judgment should be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 68 (Minn. 1997). While the court must view the facts in a light most favorable to the nonmoving party, the nonmoving party may not simply rely upon his general statements of fact or averments in his pleadings to defeat the summary judgment. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1980) *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The moving party has the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Vieths v. Thorp Finance Co*, 232 N.W.2d 776, 778 (Minn. 1975). The court does not weigh the evidence on a motion for summary

[2] On July 14, 2021, the Court issued an Order granting City's motion to amend its pleadings to add a counterclaim.

judgment. *DLH* at 70. The court may, however, take into account whether a piece of evidence lacks probative value, such that reasonable persons could not draw different conclusions from it. *Id*. A motion for summary judgment must be denied when reasonable persons could reach differing outcomes after reviewing the evidence. *Wagner v. Schwegmann's Southtown Liquor, Inc.*, 485 N.W.2d 730, 733 (Minn. App. 1992)(citing *Anderson v. Twin City Rapid Transit Co*., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). However, "[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben,* 505 N.W.2d 323, 328 (Minn.1993).

Character of the Ordinance

Plaintiff contends that this Court should treat the Ordinance as a zoning ordinance and not a licensing ordinance and, **if** the Court treats the Ordinance as a zoning ordinance, he must be permitted to continue his use of the Property. "[W]e have repeatedly acknowledged that although a 'zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming,' existing nonconforming uses must be permitted to remain." *AIM Development (USA) v. City of Sartell*, 946 N.W.2d 330, 336 (Minn. 2020).

Plaintiff argues that there was no city code or zoning ordinance that regulated STRs or events when he bought the Property, relying on his conversation(s) with City Clerk and Zoning Administrator Peterson. Thus, he contends that his prior use of the Property was a permitted use. The Property is located in City's "St. Croix –Urban Residential District (SC-UR)." (Ruevers Declaration, Exs. 15-16, filed December 4, 2020). The permitted uses within the SC-UR district are: (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; and (5) Home occupations as defined in Section 407.2 of this Ordinance. (City Zoning Ordinance §507.2). Whenever "in any zoning district a use is neither specifically permitted nor denied, the use shall be considered prohibited." (City Zoning Ordinance §106). Thus, City contends that even if the Court treats the Ordinance as a zoning ordinance, rather than a licensing ordinance, Plaintiff's use of the Property prior to the enactment of the Ordinance was not a permitted use.

In *Dean v. City of Winona*, property owners challenged an ordinance limiting the number of lots on a block that were eligible to obtain certification as rental property in the city. *Dean v.*

City of Winona, 843 N.W.2d 249, 253 (Minn. App. 2014)(citation omitted). Like the Ordinance in this case, the ordinance in *Dean* requires property owners to obtain a license before they can use their property for rental purposes as evidenced by the fact that it was placed in the "Rental Housing License" of the City code. *Id*. at 256. The ordinance in *Dean* was originally placed in the city's **zoning** ordinance and was part of the city's zoning ordinance when the lawsuit was filed. *Id*. at 255. The ordinance in *Dean* was moved from the city's zoning code to its rental housing code, in part "because other **cities** codified similar provisions in housing codes instead of in zoning codes." *Id*. Following the adoption of this Ordinance, the City Council directed the placement of the Ordinance into the City Code (not the Zoning Ordinance). (Wolf Aff. – Ex. B5 at 29).

As Plaintiff argues in this case, the property owners in *Dean* argued that the Winona ordinance was a zoning ordinance. *Id* at 257-58. The Court in *Dean* concluded that the city adopted the ordinance pursuant to its police power and "did not address appellants zoning arguments." *Id* at 258. The Ordinances in this case and the one in *Dean* are similar in that they regulate rental properties through licensing and they were both placed in portions of the cities' codes and not the cities' zoning ordinances. Additionally, Plaintiff cites no legal authority for his contention that the Court should disregard City's decision to place the Ordinance in the City Code and, instead, treat the Ordinance as a zoning ordinance. This Court concludes, like the Court of Appeals did in *Dean*, that the Ordinance is a licensing ordinance. As such, Plaintiff's motion for summary judgment "declaring that Plaintiff's use of the Property as a Short-Term Rental, Type C as defined by the Ordinance is grandfathered-in and permissible under the Ordinance" is denied.

Police Powers

City argues it has the authority to enact the Ordinance as part of its police powers. Police power "refers to the power of the state and its political subdivisions to impose such restraints upon private rights as are necessary for the general welfare. This government power is essential and difficult to limit, as it includes all matters of public welfare." *Dean* at 256. Additionally, Minn. Stat. §412.221, subd. 32 provides as follows:

> The council shall have power to provide for the government and good order of the city, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of residence, trade, and commerce, and *the promotion of health, safety,*

> *order, convenience, and the general welfare* by such ordinances not inconsistent with the Constitution and laws of the United States or of this state as it shall deem expedient.

(Emphasis Added).

"Since a municipal ordinance is presumed constitutional, the burden of proving that it is unreasonable or that the requisite public interest is not involved, and consequently that the ordinance does not come within the police power of the city, rests on the party attacking its validity." *City of St. Paul v. Dalsin*, 71 N.W.2d 855, 858 (Minn. 1955). "[O]rdinances enacted pursuant to the police power in this state 'cannot be successfully attacked on constitutional grounds 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 Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206, 209 (Minn. 1968). If the party who is challenging an ordinance establishes "that the legislative body has acted arbitrarily or unreasonably and that there is no substantial relationship to the public health, safety, morals, or welfare," then the ordinance is unconstitutional. *County of Freeborn v. Claussen*, 203 N.W.2d 323, 100 -101 (Minn. 1972).

"While a decision of a legislative body on what promotes the public health, safety, morals, and general welfare is not conclusive, it is entitled to great weight." *Naegele* at 209. "Even where the reasonableness of a zoning ordinance is debatable, or where there are conflicting opinions as to the desirability of the restrictions it imposes * * *, it is not the function of the courts to interfere with the legislative discretion on such issues." *Id.* "The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and within *the broad discretion* accorded them by statutes and the relevant ordinances." *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983)(Emphasis Added).

Plaintiff contends that the Ordinance is not a valid exercise of City's police power and, therefore, unconstitutional because "there is no evidence that STRs were in any way injurious to the public health, morals, safety, convenience, or general welfare of the City." In *Dean*, the City of Winona formed a task force that reviewed issues such as the percentage of complaints related to rental properties, the percentage of police calls on rental properties, and the percentage of zoning violations on rental properties. *Id.* at 254. The City of Winona also retained a consulting

firm to provide a report about rental housing concentration on neighborhood quality and liveability. *Id*. at 255. City retained the consulting firm **after** the ordinance was enacted and after the lawsuit had commenced. *Id*. Thus, this "study" did not have an impact on the City of Winona's decision-making with respect to its ordinance limiting the number of lots per block that were eligible to receive certification as rental properties.

The Court of Appeals held that the City of Winona's adoption of its ordinance was a proper exercise of its police power concluding that "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 livability of those neighborhoods. That occurrence implicated the public interest and welfare." *Id* at 257. Plaintiff attempts to distinguish *Dean* from the facts of this case by asserting that, unlike the City of Winona, City in this conducted no studies and has no data regarding the injurious effects of STRs on City, on any City residents, or on neighborhood quality within the City. Thus, Plaintiff contends that the Ordinance has no substantial relationship to public health, safety, morals, or general welfare and the City's exercise of its police power is unconstitutional.

On June 11, 2021, City submitted the Affidavit of Attorney Andrew A. Wolf which included the following records related to STRs within the City:

Ex. A: City Public Meeting Minutes;

Ex. B: City Records;

Ex. C: Public Comments;

Ex. D: City Resident Surveys and Survey Summaries;

Ex. E: Planning Commission and City Council STR Committee (Review, Findings, and Recommendations)

On June 25, 2021 City Clerk Lynette Peterson, as custodian of the records, certified that the above-referenced records attached to the Wolf Affidavit are true and correct copies of the records maintained by City.

The issue of STRs was first raised at the July 12, 2018, City Council meeting by a citizen during the public comment section of the meeting. (Wolf. Aff. - Ex. A1-3). City Council directed the City Planning Commission to review the issue. (*Id*. – Ex. A2-6). The Planning Commission began discussing this issue at its August 2018 meeting, which began with a review

of materials from other cities. (*Id*. – Ex. A2-6). STRs were further addressed at the September and October 2018 Planning Commission meetings, where topics such as hosted vs. un-hosted STRs; regulation of STRs; and STRs for events were discussed. (*Id*. – Ex. A3 – 8; Ex. A4 – 10). The Planning Commission looked at three options early on, which were: (1) prohibit STRs, (2) allow STRs with regulation or (3) allow unregulated STRs. (*Id*. Ex A4 – 10). On November 27, 2018, the Planning Commission voted to recommend to City Council that the Council adopt a moratorium for new STRs. (*Id*. Ex. A5 – 12,13).

In December 2018, City Council voted to adopt the moratorium finding that City needed to undertake a "thoughtful and meaningful review of STRs in the City" and consider the following factors:

1. Whether STRs are compatible with the City and its residential uses;

2. What regulatory tools are available and in use elsewhere to permit, regulate, allow or prohibit STRs;

3. What public input and opinion exists and suggests on the subject of STRs in or around the City; and

4. Whether amendments to the City's land use and planning regulations are in order to address STRs.

(*Id*. Ex. B1 – 1-4).

City Council formed a committee composed of City Council and Planning Commission members to study STRs. (*Id*. Ex. A – 15). The committee completed its initial study in January 2019 and continued to review the issue through July 2019. (*Id*. Ex. E). The Planning Commission held (20) public meetings discussing short-term rentals between March 2019 – July 2020. (*Id*. – Ex. A). The Planning Commission reviewed a cost/benefit analysis of an Airbnb published in January 2019 by the Economic Policy Institute in Washington D. C. (*Id*. – Ex. C – 57-83). City sent surveys on STRs to residents on June 25, 2019 and June 27, 2019. (*Id*. – Ex. D).

Plaintiff contends that City's actions are "inadequate" compared to the actions that the City of Winona undertook in passing its ordinance. Plaintiff suggests that the City may only exercise its police power if it can prove that an injury to the public health, safety, morals, or welfare has already occurred. Plaintiff interprets the *Dean* case too broadly. *Dean* does not hold

that a City **must** conduct studies or find that there has been a demonstrable injury to the public health, safety, or welfare before it can exercise its police power.

The *Dean* Court recognizes that "[t]he breadth of police power is equally well established." *Dean* at 257. "The development of the law relating to the proper exercise of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state.... And the limit of this power cannot and never will be accurately defined...." *Id*. Additionally, the notion that City must demonstrate that an injury has already occurred **before** it may exercise its police power is inconsistent with the Minnesota Supreme Court's holding that "pursuant to 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." *Dalsin* at 858 (Emphasis Added).

City was presented with information regarding both the benefits of STRs (such as benefits to local businesses) and the detriments of STRs (such as absentee owners as "neighbors," increase in traffic and noise) through public comments, citizen surveys, review of Airbnb costs v. benefits study, and its analysis of other cities' STR policies. The Court finds that City passed the Ordinance regulating STRs after an extensive and focused process. The Court concludes that Plaintiff, who has the burden of proof, has failed to demonstrate that City has acted arbitrarily or unreasonably, and that Ordinance bears no substantial relationship to the public health, safety, morals, or welfare. This Court concludes that City's adoption of the Ordinance was a proper exercise of its police power.

Equal Protection

Plaintiff contends that the Ordinance violates equal protection by "imposing restrictions upon one class of persons ("Type C") which are not imposed upon others ("Type A" and "Type B") engaged in the exact same business (STR) and under similar circumstances." "An equal-protection challenge requires an initial showing that 'similarly situated persons have been 'treated differently.'" *Dean* at 259. "In determining whether two groups are similarly situated, the focus is on 'whether they are alike in all relevant respects.'" *Id.* "Appellate courts '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.'" *Id*.

The Minnesota Supreme Court recently issued an opinion analyzing an equal protection claim. *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020). "As we

have acknowledged on several occasions over the past few decades, our precedent on equal protection under the Minnesota Constitution has not been a model of clarity. So today we state our rule: a law subject to rational basis review does not violate the equal protection principle of the Minnesota Constitution when it is a rational means of achieving a legislative body's legitimate policy goal." *Id*. at 19.

"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*. "Legislative bodies regularly, and for many different reasons, pass laws that treat people differently. There is nothing inherently wrong with that. Indeed, it is in the nature of the work of balancing different policy considerations in a complex and diverse polity." *Id.* at 20. "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. 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*.

"[U]nless a law that treats groups of people differently impacts fundamental rights or creates a suspect class, it 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. "[T]he 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." *Id.* "To make this determination, we ask whether 'the claimant is treated differently from other [persons] to whom the claimant is similarly situated in *all relevant respects.*" *Id*. (emphasis in original).

The Court can infer that Plaintiff identifies the group of "similarly situated persons" as residential property owners wishing to obtain a Type A, B, or C STR license. Plaintiff contends that the Ordinance imposes restrictions on one class of persons (Type C STRs) which are not

imposed on others (Type A and B STRs). Type B and Type C are both unhosted STRs. However, the criteria for issuance of a STR license requires the owner to certify annually to City that the "Dwelling has been physically inhabited by the owner for more days and nights than it has been rented." Thus, the owner wishing to obtain a Type A or B STR license owns an owner-occupied home while the owner wishing to obtain a Type C STR owns a renter-occupied home.

"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." *Id*. The Court concludes that residential property owners wishing to obtain a Type A or Type B STR license and residential property owners wishing to obtain a Type C STR license are not similarly situated *in all relevant aspects*. "When the claimant is not treated differently than all others to whom the claimant is similarly situated, there is no equal protection violation." *Fletcher* at 22.

Even if this Court determined that residential owners wishing to obtain a Type A, Type B or Type C STR license are similarly situated persons, Plaintiff must still demonstrate that City's reasons for treating the classes differently was not legitimate. City adopted the Ordinance for several reasons including, but not limited to:

- the need to preserve [City's] essentially 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;

- short term rentals are in the nature of providing housing, principally recreational housing, for transient, often vacationing short term guests who do not maintain an ongoing relationship with the property or its neighbors or its neighborhoods; and

- it is believed that there is more potential for nuisances to arise from such uses including increased noise, inappropriate parking, parties, late hours, multiple invitees, intensive uses over short periods and other features of transient stays as the users come to the property for a short period, recreate and then leave.

(Wolf Aff. – Ex. B – 22, 23).

The Court concludes that Plaintiff has failed to demonstrate that City's reasons to adopt the Ordinance prohibiting owners who do not occupy their property for more days than nights to obtain an STR license are not rational reasons. "[T]he preference given to homestead 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.'" *Lund v. Hennepin County*, 403 N.W.2d 617, 620 (Minn. 1987)(citation omitted). The Court concludes that the Ordinance does not violate Minnesota's Equal Protection clause. Plaintiff's motion for summary judgment for an Order declaring the Ordinance unconstitutional is denied.

Enforceability of the Ordinance

Plaintiff contends that the Ordinance is impossible to comply with and, therefore, unenforceable. The "void for vagueness" doctrine "stems from the common-law principle of strict construction and nonenforcement of incomprehensible penal statutes." *City of St. Paul v. Franklin*, 175 N.W.2d 16, 18 (Minn. 1970)(citations omitted). "Such a legislative enactment offends the first essential of due process when it forbids the doing of an act or a course of conduct in language so vague 'that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id*. "We have applied these fundamentals to cases involving similar attacks on statutes proscribing a course of conduct as well as specific acts." *Id*.

The Ordinance provided that "Short Term Rentals are a permitted use in the zoning district of the subject property." (Norusis Aff. – Ex. A - Sec. 4 E.(a)(i)). Peterson, City's zoning administrator, testified in her April 7, 2021 deposition that STRs are not allowed in City's zoning ordinance. (Schwartz Aff. – Ex. A – p. 69, lines 1-4 [filed 4/23/21]). However, Plaintiff's argument is based on the prior version of the Ordinance, which was amended on May 13, 2021. (Wolf Aff. - Exs. B5 and B6). Section 4 E.(a)(i) of the Ordinance was amended to provide as follows: "The Proposed Short—Term Rental is located in a Residential or Village Center zoning District." (*Id*.)

"Under Minnesota law, the status of a zoning ordinance is to be determined *at the time the Court is called upon to act*, rather than when the property owner applies for permission to use the property for the particular purpose requested." *Advantage Media, LLC v. City of Hopkins*, 408 F. Supp.2d 780, 790-91 (D. Minn. 2006)(Emphasis Added). In another case, a landowner of property zoned (R-4 apartment) sought approval of a preliminary plat from the City of Eagan to construct single-family dwellings (R-1 zoning), which R-4 zoning permitted at the time of

preliminary plat approval. *Property Research and Development Co. v. City of Eagan*, 289 N.W.2d 157, 157- 58 (Minn. 1980). The city council denied the plat approval. *Id*. at 158. Plaintiff brought a mandamus action to compel approval of the preliminary plat. *Id*. The Supreme Court denied mandamus noting that "[t]he important part of this appeal is that prior to trial the Eagan zoning ordinance was amended so as to preclude the plaintiff from building single-family dwellings on its R-4 zoned land." *Id*. The Supreme Court held that "[t[here is no vested right in zoning, therefore, the plaintiff lost whatever right it may have had to approval of the plat when the zoning ordinance was amended." *Id*. (internal citations omitted).

"No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power." *Paron v. City of Shakopee*, 32 N.W. 603, 608 (Minn. 1948). "One who is merely an applicant for a … license has no vested interest which the courts are able to protect." *Id*. at 609. Like the landowner in the *Property Research and Development Co*., Plaintiff in this case has no vested right to apply for a license. The Court concludes that City properly amended the Ordinance. Thus, Plaintiff's motion for summary judgment on the basis that the ordinance is unenforceable and unconstitutional is denied.

City Counterclaims

City filed counterclaims seeking the following relief: (1) A declaratory judgment from the Court identifying and confirming all violations of the Ordinance on the Property; and (2) A permanent injunction ordering Plaintiff to eradicate all violations of the Ordinance on the Property and cease any and all uses of the Property in violation of the Ordinance.

Plaintiff contends that since the Ordinance provides that "operating a STR without a license shall constitute a misdemeanor," City was required by Minn. R Civ. P. 6.01 to issue a citation. The Court disagrees. The Ordinance also provides that "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." City's counterclaims are limited to a declaratory judgment action and injunctive relief.

City submitted (5) complaints brought by residents from December 2020 – May 2021. These complaints are not in the form of an affidavit and the names of the residents who lodge the complaints are redacted. (Wolf Aff. – Ex. G). City took Plaintiff's deposition on June 4, 2021.

Plaintiff invoked his Fifth Amendment right several times in his deposition. (Wolf Aff. - Ex. H). City contends that the Court should grant its motion for summary judgment on its counterclaim due to Plaintiff's refusal to cooperate in discovery.

"It is well-settled that the Fifth Amendment right against self-incrimination may be invoked in civil as well as criminal proceedings." *Parker v. Hennepin County District Court, Fourth Judicial District*, 285 N.W.2d 81, 83 (Minn. 1979). However, "the 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*, 162 N.W.2d 194, 203 (Minn. 1968).

The *Parker* case involved civil defendants' failure to respond to requests for admissions by invoking their Fifth Amendment rights. *Parker* at 82.[3] The trial court deemed the requests to be admitted and was affirmed on appeal. *Id*. The Court held that "that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 83. "To deem an answer admitted has much the same effect as allowing an adverse inference; it is a procedural device used to focus the matter at issue and thereby expedite the trial of the case." *Id*. The *Parker* court noted that "[i]nvocation of the Fifth Amendment by a civil defendant, however, requires a more subtle response [than a civil plaintiff] because of the involuntary nature of a defendant's participation in a lawsuit …" *Id* at 82.

The cases cited by City are distinguishable from the facts of this case. The party invoking her Fifth amendment rights in *Christenson* was seeking affirmative relief on the claims she was prosecuting. In this case, the Court has already dismissed Plaintiff's claims on summary judgment.

City's counterclaims are premised on the allegations that Plaintiff has violated the Ordinance by continuing to operate an STR without a license. Although the Court can draw a negative inference from Plaintiff's invocation of his Fifth Amendment right, the Court is not prepared to grant City's motion for summary judgment on its counterclaims based on a negative inference. The redacted and unverified citizen complaints are the only evidence offered in support of City's motion for summary judgment. This is insufficient to grant summary judgment on Defendant's counterclaims.

[3] Plaintiff in this case is a civil defendant for purposes of City's counterclaims.