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THOMAS A. WILDER
DISTRICT CLERK

CAUSE NO. 236-342969-23

KELRAY LLC, *et al.*,	§	**IN THE DISTRICT COURT**
	§	
***Plaintiffs*,**	§	
	§	
v.	§	**236TH JUDICIAL DISTRICT**
	§	
CITY OF FORT WORTH,	§	
	§	
Defendant.	§	**OF TARRANT COUNTY, TEXAS**

DEFENDANT CITY OF FORT WORTH'S
TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Defendant City of Fort Worth (the "**City**") files this Traditional Motion for Summary Judgment and respectfully shows the Court the following:

I. INTRODUCTION

The City possesses broad authority to enact regulations that promote the health and welfare of the community. As part of this authority, the City can regulate land use within its boundaries to ensure the land is being used consistently and in a manner that is beneficial—and not harmful—to its residents. In this case, the City used this broad authority to enact zoning ordinances that prohibit by right the short-term rental of properties ("**STRs**") in districts zoned residential and to regulate STRs in commercial and mixed-use districts.

But the City did not take this action lightly. The City undertook a comprehensive and unbiased review of STRs and how STRs affect a community. Everything—even the conditional allowance of STRs in residential districts—was on the table. The City sought and received feedback from residents and property owners. Public meetings took place. Surveys were distributed. And interested parties—on both sides of the STR debate—were engaged.

After three-plus years of study and debate, the City Council concluded that STRs corrode the character of residential neighborhoods by undermining those neighborhoods' community and

camaraderie. But the City also recognized that STRs are part of modern-day tourism, so it sought to enact regulations balancing the welfare of its residents with the realities of tourism.

The City's findings are not novel. Courts and legislative bodies throughout the country have recognized the harmful impact STRs can have on residential neighborhoods. Just three years ago, the Fort Worth Court of Appeals, in upholding the City of Arlington's STR ordinances, observed that "the 'residential character' of a neighborhood is threatened" when homes are occupied by transient tenants and that STRs "undoubtedly affect the essential character of a neighborhood and the stability of a community."[1]

Plaintiffs, who own property in the City and want to lease that property short-term to make money, lost the STR debate. And rather than accept that loss (or seeking relief with the Texas Legislature), they ask this Court to undo a legislative act supported by the evidence and a mandate from the City's residents. The common thread running through all of Plaintiffs' theories is that they have the absolute right to use their properties as STRs (or rent their properties out "by the hour" if they so choose). And the City, despite the harmful impact STRs have, can't do anything about it. But property owners do *not* possess unfettered and unregulated rights to do whatever they want with their property to the detriment of their neighbors and fellow citizens. To the contrary, "[a] city may enact reasonable regulations to promote the health, safety, and general welfare of its people as a valid exercise of its police power."[2]

Because that is exactly what the City has done, it is entitled to summary judgment as a matter of law. The Court should dismiss Plaintiffs' attempt to elevate their pecuniary desires over the health and safety of the City's residents.

[1] *Draper v. City of Arlington*, 629 S.W.3d 777 at 729 n.21 (Tex. App.—Fort Worth 2021, pet. denied).

[2] *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984).

II. STATEMENT OF FACTS

1. The City's comprehensive zoning ordinance has designated STRs as an impermissible use of property in residential districts.

The City of Fort Worth has historically prohibited property owners from renting their properties for less than thirty days in districts that are zoned residential. [Ex. A-9; Ex. B at ¶¶ 4-5; Ex. C at ¶ 6]. Although the modern concept of an STR — a homeowner renting out its property for a few days at a time—is a new one, the City considered any home rental of less than thirty days as falling under its comprehensive zoning ordinance's general prohibition of "bed and breakfasts" in residential districts (the "**Zoning Ordinance**"). [*Id.*].[3] In line with that policy, the City consistently informed curious property owners that they could not rent their homes for less than thirty days. [Ex. B at ¶ 4]. And on at least one occasion, the City filed suit against property owners who violated the general prohibition by leasing their residential property on a short-term basis. [Ex. A-9].

2. Despite the prohibition against STRs in residential districts, the City experienced a significant uptick in the short-term rental of residential properties, which caused problems for the City's permanent residents.

Over the last decade, as hosting platforms such as Airbnb and Vrbo have made it easier for property owners to market their properties as STRs to prospective renters, the STR market has exploded in the City (and throughout Texas). [Ex. B at ¶ 6; *see also* Ex. Ex. A-1 at 67:22-68:11; Ex. A-2 at 50:15-21, 73:05-73:13; Ex. A-5 at 62:18-63:02; Ex. A-6 at 44:04-07]. As a result, the City, beginning in roughly 2016, experienced an influx in the number of inquiries it received from property owners about the permissibility of STRs in residential districts. [Ex. B at ¶¶ 6-7]. On the

[3] The Zoning Ordinance defines a "Bed and Breakfast Home" as a property "designed for and occupied as a one-family residence providing overnight accommodations to transient guests." [Ex. A-13]. A "transient" guest is a person "occupying a dwelling unit, including rental of a home or room, for a period of less than 30 days." [*Id.]*. Under the Zoning Ordinance's land-use tables, a Bed and Breakfast is not a permitted use of property in residential districts.

flip side, the City received a spike in citizen complaints about residential property owners who, despite the preexisting STR prohibition, were leasing their residential properties to weekend vacationers. [*Id.*]. Inevitably, the influx of STRs and transitory tenants into the City's residential neighborhoods led to the problems that follow STRs everywhere they are located: noise disturbances, wild parties, excessive street parking, and overflowing trash. [*Id.*; Ex. C at ¶ 5; Ex. C-2; Ex. F; Ex. G; *see also* Ex. A-1 at 117:20-118:07].[4]

The confluence of the increased inquiries and citizen complaints prompted the City to study the STR issue further and clarify where—and under what circumstances—STRs were allowed under the Zoning Ordinance. [Ex. B at ¶¶ 6-7]. In 2016, the City began researching how other cities were addressing STRs through zoning ordinances, as well as researching how STRs affect residential neighborhoods. [*Id.]*. That process resulted in the City's Development Services Department helping prepare at least two informal reports for the City Council outlining the City's then-existing STR policy—*i.e.*, that STRs were like bed and breakfasts and thus not an authorized property use in residential districts. [Ex. B-1; Ex. B-2].

3. In 2018, the City Council clarified and affirmed that STRs are not permitted in residential districts and that STRs are a "commercial" use of property—and no one complained.

In 2018, the City Council adopted Ordinance No. 23110-02-2018 (the "**2018 Ordinance**"), which, relevant here, amended the Zoning Ordinance to clarify and affirm the City's preexisting STR policy. [Ex. B at ¶¶ 10-12; Exs. B-3-5]. In particular, the City Council added a definition of "Short Term Home Rental"—*i.e.*, homes rented for more than one night but less than thirty days for compensation—to the Zoning Ordinance and included a "Short Term Home Rental" as an

[4] For example, Mark Lang, a Fort Worth resident, testified that the house next door to his was consistently used as a "party house," and the guests often parked on his lawn and "urinat[ed] on [his] fence." [Ex. G at ¶¶ 3-8]. Roy Barker, another Fort Worth resident, reported similar problems with the STR located next door to his house. [Ex. F].

unauthorized property use in the City's residential districts. [Ex. B-5].[5] The 2018 Ordinance also clarifies that STRs are allowed in non-residential districts as a "commercial" use of property. [*Id.*].[6]

After the enactment of the 2018 Ordinance, no one complained about the City's "new" regulation of STRs in residential districts or its classification of STRs as commercial. [Ex. B at ¶¶ 10-11].

4. In 2019, the City began a formal study into STRs and the impact they have on residential neighborhoods.

The debate over STRs within the City was rekindled. In 2019, the City began its formal investigation into whether STRs should be a permissible property use in residential districts (or elsewhere). [Ex. B at ¶¶ 16, 19]. The City's Development Services Department spearheaded the investigation, which lasted roughly three years. During this period, City officials:

- researched other cities' ordinances regulating STRs;
- reached out to other cities on their experiences regulating STRs;
- consulted with the National League of Cities and the American Planning Association—organizations widely relied on in the field of city planning and zoning—on STR regulation;
- reviewed scholarly articles (including from the Harvard Law & Policy Review) that evaluated the negative impacts of STRs on residential neighborhoods;

[5] The thirty-day "cut-off" matches most of the national and state definitions that distinguish lodging/transient stays from resident status. [Ex. B at ¶ 12].

[6] Plaintiffs agree that an STR is a commercial use of property, rather than a residential use. [Ex. A-1 at 46:23-47:24 (Plaintiff Smith stating that operating an STR is a "business opportunity"); Ex. A-2 at 13:24-14:03, 30:22-31:02; 60:17-61:05 (Plaintiff Brady acknowledging that she has a "commercial interest" in her STRs and that she is "not conducting residential business by renting a home" and that she's running business to "earn money"); Ex. A-4 at 11:05-8 (Plaintiff Harper conceding that the operation of an STR is a "business" and not a residential use); Ex. A-5 at 29:10-22, 45:14-46:02 (Plaintiff Amaya agreeing that his STR is a "business" and that he "us[es] that home for a business use"); Ex. A-6 at 11:14-19, 41:17-42:01, 42:23-43:06, 93:14-94:13, 95:03-95:16 (Plaintiff Germain stating that short-term rentals are a "commercial use" and that he's a "business operator")].

- analyzed how the City could track and ensure payment of the City's Hotel Occupancy Tax ("**HOT**") from legally-operating STRs[7]; and
- tracked and compiled STR complaints and violations in the City.

[*Id.* at ¶¶ 19-20, 26]. The City Council also met several times to discuss STRs. [Exs. B-8-13, 16, 25-31, 34]. The City's investigation was memorialized by both reports prepared for and presentations made to the City Council. [*Id.*].

5. In 2022, the City opened up the STR issue for public debate.

In or around 2022, the City opened the STR issue up for public debate. [Ex. B at ¶¶ 28-29; Exs. B-6-7,14-15, 17-24, 32-33, 35-36]. The City held multiple public comment meetings, at which City residents and property owners—including many Plaintiffs—were able to (and did) express to the City Council their opinions on STRs. [*Id.*; *see also* Ex. A-1 at 94:02-96:01, 100:15-101:04]. The City also held in-person and virtual meetings to educate the public on STRs, answer questions about STRs, and seek more input from residents. [*Id.*]. The City also created surveys and questionnaires for residents and property owners to express their thoughts and concerns about STRs, and the completed surveys were given to the City Council for its consideration. [*Id.*]. Finally, the City created a webpage to house all of the STR data.[8] [Ex. B at ¶ 28].

One of the options that the City proposed and considered was to allow owner-occupied STRs by right in certain neighborhoods and citywide with some conditions. [Ex. B-27 at pp. 21-22]. The majority of feedback the City received from its permanent residents and neighborhood organizations, however, was overwhelmingly in support of continuing to disallow STRs by right in residentially zoned districts. [*Id.*; *see also* Ex. B at ¶ 28]. There was also general support (from

[7] Plaintiffs continue to illegally operate STRs, but do not pay HOT to the City. [Ex. A-1 at 105:22-24; Ex. A-4 at 70:05-07; Ex. A-5 at 64:10-18; Ex. A-6 at 91:16-18 (pleading the "Fifth")]. Plaintiffs' out-right refusal to follow the law alone warrants the need for STR regulations.

[8] https://www.fortworthtexas.gov/short-term-rentals.

all sides of the STR debate) for an ordinance requiring the registration of legally-operating STRs. [Ex. B at ¶ 42].

Meanwhile, the City engaged Deckard Technology, a data mining company, to collect information about the amount, frequency, and location of STR activity in Fort Worth. Deckard Technology summarized its findings in a presentation made to City Council. [Ex. B at ¶ 29]. It was reported to City Council that the majority of operating STRs were in proximity to areas attractive to tourists/vacationers such as downtown, the cultural district, and the historic stockyards. [*Id.*; Ex. B-25].

6. In 2023, the City Council amended the Zoning Ordinance to require STR owners in commercial and mixed-use districts to obtain permits and provide certain information to the City.

In February 2023, after three years of study and public engagement, the City Council adopted Ordinance No. 26005-02-2023 (the "**2023 Ordinance**") (together, the 2018 Ordinance and the 2023 Ordinance are called the "**STR Ordinances**"). [Ex. B-37]. The 2023 Ordinance amended the Zoning Ordinance to include several regulations for STRs operating in the City's commercial and mixed-use districts, but—after careful consideration—did not alter the 2018 Ordinance's general prohibition of STRs in residentially zoned districts. [*Id.*]. In adopting the 2023 Ordinance, the City Council found, among other things, that STR regulation was "necessary for the health, safety and welfare of the general public, the promotion of consistent land uses and development, and the protection of landowners and residents of the City of Fort Worth[.]" [*Id.*]. At the same time, however, the City stated that it wanted to "support tourism in a balanced way" and that the 2023 Ordinance's regulations "balance the rights of all stakeholders in a fair and balanced" manner and "ensure that STR owners do not become a nuisance." [*Id.*]. To accomplish that balance, the City continued promoting residential use within the City's historically residential neighborhoods (*e.g.*, Arlington Heights, Fairmount, Berkeley, Mistletoe Heights, Como, and so

on), and lodging use within the mixed-use and commercially zoned districts to promote tourism (*e.g.*, the entertainment districts in and surrounding downtown, the cultural district, and the historic stockyards). [Ex. B at ¶¶ 11, 42, 56-59].

As a result, the 2023 Ordinance affirms the City's preexisting prohibition against STRs in residential districts and continues the policy of permitting STRs to operate in districts zoned commercial or mixed use, but prescribes a permitting process and imposes regulations on STR owners in those districts. [Ex. B-37]. In applying for a permit, a property owner who wants to lease its property for less than thirty days must provide the City with the property's address, contact information for the owner, and contact information for a "designated local responsible party," who can be contacted in the event of a problem on the property. [*Id.*]. The 2023 Ordinance also (among other things):

- proscribes the advertising of an on-premises special event such as a "banquet, wedding, reception, reunion, bachelor or bachelorette party, concert, or any similar activity that would assemble large numbers of invitees";
- limits the number of STR occupants; and
- requires STR owners to notify occupants of the STR regulations on noise, trash, parking, *etc.*

Violations of the 2023 Ordinance's provisions could result in either revocation of an STR permit, a fine, or both. [*Id.*].

7. Plaintiffs Can Request a Zoning Change.

The STR Ordinances do not operate as a complete ban on STRs in the City's residential districts, as Plaintiffs wrongly contend. [Pet. at 3 (¶4)]. A property owner in a residential district who wants to rent his property for less than thirty days can apply with the Zoning Commission and City Council for a zoning change to allow STRs as a permitted use for that property. [Ex. B at ¶ 60]. At least one such zoning change has been approved by the City. [Ex. B-38].

8. Plaintiffs sued the City to invalidate the STR Ordinances.

In June 2023, Plaintiffs (individuals and companies who own houses in the City's residential districts and desire to (legally) rent them short-term) filed this lawsuit. They seek declarations that the STR Ordinances violate: the due course of law clause in article I, section 19 of the Texas Constitution; the equal protection clause in article I, section 3; and the retroactivity clause in article I, section 16; and also exceed the City's authority under Texas's Zoning Enabling Act, TEX. LOC. GOV'T CODE § 211. [Pet. at 30-35 (¶¶41-78)]. As relief, Plaintiffs seek a permanent injunction prohibiting the City from enforcing the STR Ordinances "to prohibit short-term rentals in residential areas[.]" [Pet. at 35-36 (¶¶79-83)].

The number of Plaintiffs does not reflect the popular opinion of Fort Worth residents regarding STR regulation. Plaintiffs are mostly—if not entirely—members of the Fort Worth Short Term Rental Alliance ("**FWSTRA**"). [Ex. A-2 at 20:11-15]. The FWSTRA is an advocacy group comprised mostly of STR owner/operators who have commercial and monetary interests in STRs. [*Id.* at 21:23-22:01]. Plaintiffs do not all reside in Fort Worth. Plaintiff Lauren Brady (a founder of the FWSTRA), for instance, lives in a residentially zoned neighborhood in Arlington, Texas where STRs are not permitted by city ordinance. [Ex. A-2 at 10:12-11:13]. David St. Germain (principal of Plaintiff Modern Builders, LLC) has used up to seven properties in family neighborhoods as illegal STRs, but lives in Dallas County. [Ex. A-6 at 7:17-24, 14:12-24]. These Plaintiffs want to contravene the will of Fort Worth's permanent residents.

III. EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Along with the pleadings and papers on file with the Court, the City relies on and fully incorporates by reference the summary-judgment evidence contained in the Appendix it has filed separately in support of this Motion.

IV. SUMMARY JUDGMENT STANDARD AND APPLICABLE LAW

A court should grant summary judgment when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004). Whether a zoning ordinance violates the Texas Constitution is a question of law. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015); *City of San Antonio v. TPLP Off. Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007). Courts presume the challenged ordinance is constitutional and the challenging party has an "extraordinary burden" to prove otherwise. *See Patel*, 469 S.W.3d at 87; *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 792-93 (Tex. 1982) ("The party attacking the ordinance bears an extraordinary burden to show that no conclusive or even controversial or issuable fact or condition existed which would authorize the municipality's passage of the ordinance.").

This high burden exists because a zoning ordinance is one of the most fundamental tools of urban planning in this country—*i.e.*, the right of a city to regulate land use within its boundaries.[9] Property owners do *not* possess unfettered and unregulated rights to do whatever they want with their property to the detriment of their neighbors and fellow citizens. "A city may enact reasonable regulations to promote the health, safety, and general welfare of its people as a valid exercise of its police power." *City of Coll. Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *see also* TEX. LOC. GOV'T CODE § 211.001.[10] Relevant here, zoning ordinances and land-use restrictions—like the City's STR Ordinances—have long been recognized as a valid exercise of this power. *See Truong v. City of Houston*, 99 S.W.3d 204, 210-11 (Tex. App.-Houston [1st Dist.]

[9] A zoning ordinance is "a city ordinance that regulates the use to which land within various parts of the city may be put." *Powell v. City of Houston*, 628 S.W.3d 838, 844 (Tex. 2021).

[10] A city's police power "is not confined to elimination of filth, stench, and unhealthy places" but may also include the laying out of zones (like single-family residential zoning districts) "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Ville of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

2002, no pet.); TEX. LOC. GOV'T CODE § 211.003. And if reasonable minds can differ about whether a zoning ordinance, in fact, promotes the public health, the ordinance must stand. *Comeau*, 633 S.W.2d at 792; *see also City of Waxahachie v. Watkins*, 275 S.W.2d 477, 481 (Tex. 1955) (explaining that "if there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material").

V. ARGUMENT & AUTHORITIES

I. The City is entitled to summary judgment on Plaintiffs' due course of law claim.

Plaintiffs' claim that the STR Ordinances violate the due course of law provision in article I, section 19 of the Texas Constitution fails as a matter of law because Plaintiffs do not have a vested right to rent their houses for less than thirty days in residential districts. But even if such a vested right existed, the claim still fails because the Ordinances are rationally related to a legitimate purpose; and they are not so burdensome as to be oppressive.

A. Because Plaintiffs do not have a constitutionally-protected right to rent their properties for less than thirty days in residential districts, their due course claim fails.

The Texas Constitution states that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. ART. I, § 19. To succeed on a claim that an ordinance violates this provision, a plaintiff must first "allege[] the deprivation of an interest the due-course clause protects." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 653 (Tex. 2022).[11]

[11] A due-course analysis is a "two-step inquiry"—courts first "consider whether the plaintiff has a liberty, property, or other enumerated interest that is entitled to protection," and if so (and only if so), courts next "consider whether the defendant followed due course of law in depriving the plaintiff of that interest." *State v. Loe*, 692 S.W.3d 215, 228 (Tex. 2024).

Because the "right" that Plaintiffs allege has been deprived—*i.e.*, the right to rent property for less than thirty days in residential districts—is not protected by Texas's due-course provision, their due-course claim fails.[12]

1. Because the due-course clause does not provide substantive rights and instead only ensures procedural protections are observed, Plaintiffs substantive due-course claim fails.

For starters, Texas's due-course clause—unlike its federal due process counterpart—is "not a freestanding font of substantive rights" and thus "offers no freestanding substantive protection in general." *Crown Distrib.*, 647 S.W.3d at 668, 675 (Young, J., concurring).[13] Instead, the due-course clause is an important "*procedural* limitation" on government action. *Id.* at 686 (emphasis added). That is, if the government wants to regulate a citizen's "life, liberty, property, privileges or immunities," it can, so long as it provides the citizen with "due course of the law of the land." TEX. CONST. ART. I, § 19; *see Crown Distrib.*, 647 S.W.3d at 668 (Young, J., concurring) (explaining that "any substantive interest that is *otherwise unprotected* by the law may be extinguished so long as the deprivation follows the due course of the law"); *see also, e.g.*, *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 908-10 (Tex. 2021) (noting the substantial procedural protection guaranteed by the due-course clause despite the lack of substantive protections).

The Texas Constitution "already contains a rich repository of carefully written, detailed, well-known, expressly stated, unambiguous individual liberties," including the right to fish and hunt. *Crown Distrib.*, 647 S.W.3d at 677 (Young, J., concurring). Thus, "our distinct Texas

[12] In *City of Grapevine v. Muns*, the Fort Worth Court of Appeals narrowly held that "a property owner has a vested right to lease his property[,]"sufficient to assert "a viable due-course-of-law claim" that pierced the City of Grapevine's immunity. 651 S.W.3d 317, 347 (Tex. App.—Fort Worth 2021, pet. denied). But the court made clear that it was *not* holding that "Texas property owners have a vested right to lease their homes on a short-term basis" and that "[w]hether the durational restrictions imposed by the STR Ordinance violate the Homeowners' due-course-of-law rights regarding their right to lease goes to the case's merits." *Id.* In other words, the court simply allowed whether short-term renting is a vested right to proceed to the trial court for determination.

[13] Justice Young's concurrence in *Crown Distributing* was joined by Chief Justice Hecht and Justices Devine and Blacklock.

constitutional tradition seems to provide some evidence that the judiciary exists to protect rights that are textually expressed, but not to discover new ones in the due-course clause itself." *Id.*; *see also Villarreal*, 620 S.W.3d at 910 ("If the people of Texas want a fundamental right to higher education, they can create one by amending our Constitution. It is not our role as judges to adopt such a right for them. As a matter of Texas constitutional law, therefore, we decline to recognize substantive protections for educational rights that emanate implicitly from the due course of law clause.").[14]

Simply put, the due-course clause in article I, section 19 of the Texas Constitution does *not* create substantive rights that are given protection, such as the right to rent a house for less than thirty days in a residential district. Instead, and importantly, the due-course clause ensures that Texas citizens' "life, liberty, and property" are not taken without "due course of law." In general, "due course" means" notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *see also Loe*, 2024 WL 3219030, at *13 (before a citizen is deprived of property, he is "first entitled to notice and a hearing under the Due Course of Law Clause.").

Plaintiffs do not complain that they were not provided with adequate procedural due course of law. Nor could they. Before adopting the 2023 Ordinance (and deciding to maintain the 2018 Ordinance), the City studied the STR issue for years and then opened the issue up for public debate

[14] This concept—that un-enumerated rights are not given substantive constitutional protection—is consistent with the federal approach to due process claims. Under federal law, while common law rights, such as property ownership, "are protected in many situations by *procedural* due process, those rights "are *not* equivalent to fundamental rights, which are created only by the Constitution itself." *See DeKalb Stone, Inc. v. Cnty. of DeKalb, Ga.*, 106 F.3d 956, 959 n.6 (11th Cir. 1997) (emphasis added); *see also Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring) ("While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution." (internal citation omitted)); *Frey Corp. v. City of Peoria, III.*, 735 F.3d 505, 508 (7th Cir. 2013) ("[s]ubstantive due process is not a blanket protection against unjustifiable interferences with property[,] [a]nd it does not confer on federal courts a license to act as zoning boards of appeals" (first alteration in original)).

for over a year. [Ex. B at ¶¶ 28-29; Exs. B-6-36]. Several City Council meetings took place, at which interested parties could speak on the issue—either for or against STRs. [*Id.*]. And the City held other public meetings at which it sought more public input. [*Id.*].[15] For their part, Plaintiffs acknowledged that they knew about the debate on the STR issue and could participate if they wanted to. [Ex. A-2 at 91:10-92:18; Ex. A-4 at 51:22-25, 52:07-52:21]. Lauren Brady testified that she went to three or four of the City Council's STR hearings where she—and several others—spoke for STRs. [Ex. A-2 at 91:11-92:18]. Plaintiff Susan Harper also spoke at the meetings and "fe[lt] heard." [Ex. A-4 at 51:22-25, 52:07-52:21].

Because the due-course clause ensures that proper *procedure*—notice and a hearing—is provided before the deprivation of an interest but "offers no freestanding substantive protection in general," *Crown Distrib.*, 647 S.W.3d at 668, 675 (Young, J., concurring), Plaintiffs' substantive due-course claim fails as a matter of law. The Court should grant summary judgment on that claim.

2. Even if the due-course clause provided substantive protection, Plaintiffs' right to rent their homes for less than thirty days in residential districts is not within the clause's scope.

Even if the due-course clause provided substantive protection for certain rights, Plaintiffs have not alleged such a right. Their claim thus fails for this reason as well.

The due-course clause applies only if a plaintiff "allege[s] the deprivation of an interest the due-course clause protects." *Crown Distrib.*, 647 S.W.3d at 653. The interest must be "vested," which means it is not "predicated upon the anticipated continuance of an existing law" or "subordinate to" the government's "right to change the law and abolish the interest" altogether. *Id.*; *see, e.g.*, *Tex. Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex.

[15] *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939-40 (Tex. 1998) (rejecting a procedural due process claim to a zoning ordinance and noting that "[t]o satisfy the requirements of procedural due process, then, the Town must only provide notice and an opportunity to be heard, which it did").

1970) (holding that a government-issued permit to operate a private club that sells alcohol "is not a vested property right but is a privilege that is granted and enjoyed subject to regulations prescribed by the Legislature").

Plaintiffs' due-course claim is based on the alleged interest to "lease their homes short-term"—*i.e.*, less than thirty days—no matter where in the City their homes are located. [Pet. at pp. 30-31 (¶¶ 41-52)]. But because Plaintiffs can still rent their properties for thirty or more days in residential neighborhoods *and* can rent their properties for less than thirty days in commercial and mixed-use districts, Plaintiffs have overstated their alleged interest. Plaintiffs' overstatement contravenes the Texas Supreme Court's instruction to define an asserted interest as *specifically as possible* when deciding whether it is entitled to protection under the due-course clause. *Crown Distrib.*, 647 S.W.3d at 656; *see State v. Loe*, 692 S.W.3d 215, 235 (Tex. 2024) ("the first step in our inquiry under the Due Course of Law Clause is to carefully define the interest of which these plaintiffs are allegedly being deprived"); *see also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that the U.S. Supreme Court requires a "careful description" of the asserted fundamental liberty interest).[16]

With Plaintiffs' interest carefully described as it must be, the question before the Court is not whether they have some broad right to "lease their homes short-term." Instead, the question is:

> ***Do Plaintiffs have a vested right to rent their properties for less than thirty days in residential districts?***

[16] The Supreme Court's reluctance to broadly define an asserted right exists because constitutional protection extends only to rights that "are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Loe*, 692 S.W.3d at 230. And by "extending constitutional protection to an asserted right or liberty interest, [courts], to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* As a result, courts must "exercise the utmost care whenever [they] are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of judges. *Id.* (rejecting the plaintiffs' attempt to characterize the asserted right as "parental autonomy" and redefining it as the narrow " right of parents to allow their children access to relatively new medical procedures and treatments for a relatively newly defined medical condition"); *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 905 (Tex. 2021) (noting that a constitutional challenge to a student's dismissal for poor academic performance requires courts to focus on whether the dismissal "interferes with the student's liberty interest in his or her reputation and employability, not on whether education is a protected liberty interest").

Because, under Texas law, Plaintiffs do not have a vested right to use their property in any way, least of all as an STR, the answer is "No."

The City does not dispute that "[p]rivate property ownership is a fundamental right in the United States." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012). Even so, because "government cannot exist if the citizen may at will use his property to the detriment of his fellows," property rights are not "absolute." *Crown Distrib.*, 647 S.W.3d at 654 (noting that "[n]either property rights nor contract rights are absolute"); *Nebbia v. People of New York*, 291 U.S. 502, 523 (1934) ("[a]ll property is held subject to the valid exercise of the police power."); *Lombardo v. City of Dallas*, 3 S.W.2d 475, 478 (Tex. 1934); *Severance v. Patterson*, 370 S.W.3d 705, 710 (Tex. 2012) (explaining that "[l]imitations on property rights may be by … appropriate government action under its police power"); *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398, at *9 (Tex. App.—Dallas June 29, 2018, pet. denied) (mem. op.) ("The rights of private property owners, of course, are not absolute and are subject to restrictions such as zoning laws, as is the case here.").

Pertinent to this case, Texas law has long recognized a municipality's zoning authority to regulate or eliminate particular *uses* of property, particularly when that use is harmful or out-of-step in the district in which it exists. *See City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) (property owners do not have a vested right to use their property in a specific manner); *Lombardo*, 73 S.W.2d at 481 (explaining that "the police power may be exerted to regulate the use, and where appropriate or necessary prohibit the use, of property for certain purposes in aid of the public health, morals, safety, and general welfare").[17] Were it otherwise, local governments

[17] *See, e.g.*, *City of Grapevine v. CBS Outdoor, Inc.*, No. 02-12-00040-CV, 2013 WL 5302713, at *8 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.) (mem. op.) ("[W]hile CBS may have a vested property right in its sign, it does not have a vested property right in maintaining the sign as a nonconforming use under the City's relevant zoning ordinances.").

would be prevented from carrying out their "solemn duty" of exercising its zoning authority for the public good. *Nebbia*. 291 U.S. at 523 (it is the "solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conductive to these ends"); *see Truong v. City of Houston*, 99 S.W.3d 204, 210-11 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Land-use ordinances protect local residents from the ill effects of urbanization and enhance the quality of life, and, as such, are proper exercises of a city's police power."); TEX. LOC. GOV'T CODE. § 211.001 ("The [zoning] powers granted under this subchapter are for the purpose of promoting the public health, safety, morals, or general welfare ….").

Not surprisingly then, Texas courts—and courts throughout the country—have held that a person's general "right to rent" property is not a fundamental right and that cities *can* regulate that activity through their zoning powers.[18] *See Euclid*, 272 U.S. at 395; *Benners*, 485 S.W.2d at 778; *City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (plaintiffs' "right to lease" is not an "absolute right" and does not "establish[] a vested property interest"). If the "right to rent" property is not fundamental, neither is "right to rent property for less than thirty days." *Marfil v. City of New Braunfels*, No. 6:20-CV-00248-ADA-JCM, 2021 WL 8082644, at *5 (W.D. Tex. July 29, 2021) ("[T]he law is clear that a property

[18] See *also Selvaggi v. Borough of Point Pleasant Beach*, No. CV 22-00708 (FLW), 2022 WL 1664623, at *5 (D.N.J. May 25, 2022) ("[T]he unilateral and unconditional right to use property, such as the right to rent a property, is not supported by case law. A nationwide survey demonstrates that there is no such fundamental right*."); Bondar v. Town of Jupiter Inlet Colony*, 321 So. 3d 774, 783-84 (Fla. Dist. Ct. App. 2021) ("The Owners have not cited any cases that hold that the right to rent property to others is a fundamental right in the constitutional sense, and we have been unable to find any such authority."); *Mogan v. City of Chicago*, No. 21 C 1846, 2022 WL 159732, at *16 (N.D. Ill. Jan. 18, 2022) ("Mogan's ability to rent the Unit on home sharing websites is not a fundamental right."); *Fletcher Props., Inc. v. City of Minneapolis*, 931 N.W.2d 410, 418-20 (Minn. Ct. App. 2019), aff'd, 947 N.W.2d at 1 ("Our review of the caselaw leads us to conclude that neither Minnesota nor the nation overall has a history of recognizing the right to rent property as a fundamental right."); *Hills Devs., Inc. v. City of Florence, Kentucky*, Civ. A. No. 15-175, 2017 WL 1027586, at *7 (E.D. Ky. Mar. 16, 2017) (there is "no support for the proposition that a citizen has a fundamental right or liberty interest in renting their property"); *Longacre v. W. Sound Util. Dist.*, No. C16-5122, 2016 WL 3186855, at *2 (W.D. Wash. June 8, 2016) ("Plaintiff offers no legal authority suggesting that his right to use, rent, or sell his property as he chooses is a fundamental property right subject to constitutional protection.").

owner within a city cannot lease property in a manner that the city has declared unlawful via zoning ordinances."), *report and recommendation adopted*, No. 6:20-CV-00248- ADA-JCM, 2022 WL 18034356 (W.D. Tex. Sept. 15, 2022), *vacated and remanded*, 70 F.4th 893 (5th Cir. 2023).[19]

For their part, Plaintiffs have identified no authority holding that they have a vested right to rent their homes for less than thirty days in residential districts.[20] This makes sense. The substantive rights entitled to constitutional protection are carefully restricted to "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Loe*, 692 S.W.3d at 230. And because "the right to lease property for short durations is objectively out of place on that list," *Marfil*, 2021 WL 8082644, at *4-5, the right to rent property for less than thirty days in residential districts is not a vested right entitled to due course of law protection.

Because Plaintiffs cannot satisfy the first prong of a due course claim—the deprivation of a vested right—the City is entitled to summary judgment on that claim.

B. Regardless, the City is still entitled to summary judgment on the due-course claim because the STR Ordinances are rationally related to a legitimate purpose and are not unduly burdensome.

Even if Plaintiffs have a vested right to lease their properties for less than thirty days in residential districts, their due-course claim still fails. On top of identifying a protected right, Plaintiffs must show that either: (1) the STR Ordinances' purpose "could not arguably be

[19] Although the district court's 12(b)(6) dismissal in *Marfil* was vacated to allow limited discovery in an attempt to surmount the currently high bar for challenging local zoning ordinances under the Constitution, the Fifth Circuit's decision to remand is procedural, and the substantive standards the district court applied remain persuasive authority. *Marfil*, 70 F.4th at 893.

[20] Plaintiffs' reliance on *Zaatari v. City of Austin*, 615, S.W.3d 172 (Tex. App.—Austin, 2019, pet. denied), is misplaced. *See Cauthorn v. Pirates Prop. Owners' Ass'n*, 679 S.W.3d 876, 882 (Tex. App.—Houston [1st Dist.] 2023, pet. denied) (observing that Zaatari "did not hold that the right to lease for short terms is fundamental").

rationally related to a legitimate governmental interest," or (2) "when considered as a whole, the [STR Ordinances'] actual, real-world effect as applied to [them] could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Patel*, 469 S.W.3d at 87. Because Plaintiffs cannot make either showing, the Court should grant the City's summary judgment on Plaintiffs' due-course claim.

1. The STR Ordinances are rationally related to the City's legitimate interests in protecting the public health and safety and preserving the residential character of its community.

In determining whether the STR Ordinances are rationally related to a legitimate government interest, the question is "reduce[d] to whether there is *any* rational basis for the particular actions taken" by the City. *Crown Distrib.*, 647 S.W.3d at 667 (Young, J., concurring) (when a law is challenged, the government "need not prove up some precise 'purpose' or 'interest'"). If it is at least "fairly debatable" that the City reasonably believed that the STR Ordinances would promote a legitimate government objective, the STR Ordinances must be upheld. *Mayhew*, 964 S.W.2d at 938; *see Draper*, 629 S.W.3d at 786 ("We are not concerned with whether the ordinance was effective; we ask only if the City could rationally have believed at the time of enactment that the ordinance would promote its objective.").[21] Under this "deferential" standard, the City's decision is "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015).

Without question, the STR Ordinances were designed to promote legitimate government objectives—*i.e.*, to protect the "health, safety and welfare of the general public, the promotion of

[21] *See also Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 754 (5th Cir. 1988) ("As long as there is *a* conceivable rational basis for the official action, it is immaterial that it was not *the* or a primary factor in reaching *a* decision or that it was not *actually* relied upon by the decision makers or that some other nonsuspect irrational factors may have been considered." (emphasis in original)).

consistent land uses and development, and the protection of landowners and residents in the City of Fort Worth."[22] [Ex. B at ¶¶ 11, 42, 56-59; Ex. B-5; Ex. B-37]; *see Draper*, 629 S.W.3d at 786 ("safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public" and "minimizing the adverse impacts resulting from increased transient rental uses in neighborhoods that were planned, approved, and constructed for single-family residences" are "legitimate governmental interests").[23]

Consequently, the "only" question is whether the "City could rationally have believed at the time of enactment that the [STR Ordinances] would promote its objective." *Draper*, 629 S.W.3d at 786. The answer is "Yes."[24]

There is a mountain of evidence that STRs are disruptive to residential neighborhoods and that prohibiting them in residential districts is rationally related to the City's objectives of promoting the health and safety of its residents.[25] For starters, several Plaintiffs admitted that

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[22] Several Plaintiffs agreed that these are legitimate objectives. [Ex. A-1 at 109:25-110:10; Ex. A-2 at 94:01-08; Ex. A-3 at 38:24-39:16; Ex. A-4 at 75:08-14; Ex. A-5 at 57:22-58:05].

[23] *See Villanueva v. Vill. of Volente, Tex.*, No. 1:23-CV-1246-RP, 2024 WL 2143596, at *8 (W.D. Tex. May 13, 2024) (a city's desire to regulate STRs "in order to protect the public health, safety, and welfare of its residents and preserve the historically quiet and residential nature of the community" are "compelling public interests"); *see also Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (noting that a city's police power "is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people").

[24] Courts throughout the country have upheld STR ordinances as rationally related to legitimate government objectives. *See Nekrilov v. City of Jersey City,* 45 F.4th 662, 681 (3d Cir. 2022) (upholding a short-term rental zoning restriction against a substantive due process challenge because it furthered "several legitimate state interests," including "(1) protecting the long-term housing supply; (2) reducing 'deleterious effects' on neighborhoods caused by short-term rentals; and (3) protecting the residential character and density of neighborhoods"); *Stone River Lodge, LLC v. Vill. of N. Utica*, No. 20-3590, 2020 WL 6717729, at *4 (N.D. Ill. Nov. 15, 2020) (finding ordinance regulating short term rentals was rationally related to the village's interests in protecting "life-safety concerns, quality of neighborhood and related life concerns, security concerns, fire safety concerns, and tax revenue concerns" and dismissing substantive due process claim); *Calvey v. Town Bd. of N. Elba*, No. 20-711, 2021 WL 1146283, at *12 (N.D.N.Y. Mar. 25, 2021) (dismissing substantive due process claim because a short-term rental ordinance was "rationally related to the Defendants' interest in planning how to use land in a way that balances the interests of homeowners, renters, and short term visitors"); *Murphy v. Walworth Cnty.*, 383 F. Supp. 3d 843, 851 (E.D. Wis. 2019) (finding a short-term rental ordinance that imposed a minimum stay requirement passed rational basis review because "[t]he Ordinance's stated purpose—to protect the health, safety, and general welfare of the public from seasonal over-occupancy—is an obvious and rational justification for the requirements imposed").

[25] As the Fort Worth Court of Appeals observed:

> It stands to reason that the "residential character" of a neighborhood is threatened when a significant number of homes ... are occupied not by permanent residents but by a stream of

"reasonable persons can differ in their opinions on [STRs]," including whether STRs should be permitted in residential districts. [Ex. A-1 at 20:17-24, 21:09-21:19; Ex. A-2 at 41:06-42:01; Ex. A-4 at 25:16-22, 26:03-20]. And City residents detailed the problems that STRs have caused. [Ex. B at ¶ 28; Exs. B-6-7, 15, 18-22, 24, 33, 36; Ex. C at ¶ 5; Ex. C-2; Ex. F; Ex. G]. For example, Mark Lang testified that the house next door to his is an STR and is specifically marketed as an "event venue" on Airbnb. [Ex. G at ¶ 5]. That STR has "negatively impacted the area in several ways," including noise disturbances, a constant influx of new people in and out of the neighborhood—including "scantily-clad women"—parking congestion and trash in the streets. [*Id.* at ¶¶ 4-7]. And on at least one occasion, an STR guest "urinat[ed] on his fence." [*Id.* at ¶ 8]. Roy Barker, who lives in an otherwise quiet, secluded neighborhood, had a similar experience with the STR next door to his home. [*See generally*, Ex. F].

Dana Burghdoff, the City's Assistant City Manager (who oversaw the City's investigation into the STR issue), stated that STRs are "inherently incompatible with a residentially-zoned neighborhood where there exists a sense of community and camaraderie (or, at least, familiarity) between neighbors." [Ex. B at ¶ 11]. Moreover, a dwelling in a single-family neighborhood being used as an STR is unavailable on the market for a long-term or permanent resident. [*Id.*]. Thus, in enacting the STR Ordinances, it was the City's goal to, among other things, "preserv[e] the residential quality of neighborhoods," "protect[] neighborhoods from commercial lodging

> tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other "unmitigatable [sic], adverse impacts" cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.

Draper, 629 S.W.3d at 792 n.21 (quoting *Ewing v. City of Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 286 Cal. Rptr. 382, 388 (1991)).

encroachment," and "ensure[] the health and safety of guests and residents[.]" [Ex. B, ¶¶ 11, 42, 56-59; Ex. B-5; Ex. B-37; *see also* Ex. A-2 at 74:19-75:06 (Plaintiff Brady admitting that most of her STR guests are "vacationers")].[26] At the same time, however, the City wanted to "support[] tourism in a balanced way[.]" [Ex. B-37].

Burghdoff also stated that the STR Ordinances were developed through public comment and input, and the City Council's findings in the 2023 Ordinance, which are entitled to deference,[27] support her testimony and the City's objectives in enacting it:

- The City "has conducted research on the nature and extent of [STRs] in the City and has obtained public input at public meetings regarding the impact of STRs on neighborhoods in the City[.]"
- "[T]he City has received numerous complaints about STRs from citizens who have contacted code enforcement, police and city councilmembers about STRs[.]"
- "[T]he City Council desires to ensure the health and safety of guests and residents, but also support tourism in a balanced way[.]"
- "[The] City Council finds that regulating the short-term rental property is necessary for the health, safety and welfare of the general public, the promotion of consistent land uses and development, and the protection of landowners and residents in the City of Fort Worth[.]"

[Ex. B-37].

This evidence conclusively establishes that the City's decision to restrict STRs to mixed-use and commercial districts is rationally related to objectives within the City's police powers—particularly when coupled with Plaintiffs' admissions that "reasonable minds can disagree" about

[26] Dr. Peter Tarlow, a tourism industry expert who has decades of experience studying transient visitors from a sociological perspective, corroborated Burghdoff's view of STRs. [*See generally*, Ex. E].

[27] Legislative findings enjoy deference, *Hunt v. City of San Antonio*, 462 S.W.2d 536, 538 (Tex. 1971), and to overcome that deference, a plaintiff "must convince the court that the legislative facts on which the [decision] is apparently based *could not reasonably be conceived to be true by the governmental decision-maker." FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996) (emphasis added). It violates the separation of powers doctrine not to accept the factual findings of a legislative body absent a showing of arbitrary and capricious actions. *See Comeau*, 633 S.W.2d at 792-796 (judicial review of a municipality's regulatory action is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions).

the effect of STRs. The evidence at least conclusively establishes that it is "fairly debatable" that the STR Ordinances promote the City's twin goals of (i) ensuring the health and safety of residents while preserving the residential characteristics of their neighborhoods and (ii) supporting tourism.

The Court should grant summary judgment dismissing Plaintiffs' due course of law claim for this sole reason.

2. The Ordinances are not so burdensome as to be oppressive under *Patel*.

Because the STR Ordinances are rationally related to a legitimate interest, Plaintiffs must show that, "when considered as a whole, the [STR Ordinances'] actual, real-world effect as applied to [Plaintiffs] could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Patel*, 469 S.W.3d at 87. To meet this standard, the STR Ordinances must be more than "harsh" or "unreasonable" as applied to Plaintiffs. *Id.* at 90. The STR Ordinances must *completely prevent* Plaintiffs from pursuing a chosen occupation. *See id.* (economic regulation violated due-course clause because the plaintiffs were "entirely shut out from practicing their trade" until they completed objectively burdensome regulatory mandates). But if the STR Ordinances have "left room" for Plaintiffs "to participate in the affected industry," they do not violate *Patel. See Crown Distrib*., 647 S.W.3d at 668 (Young, J., concurring) (concluding that the challenged regulation did not violate *Patel* because the plaintiffs could still "participate in the affected industry"); *see, e.g.*, *Garrett v. Tex. State Bd. of Pharmacy*, No. 03-21-00039-CV, 2023 WL 376900, at *6-7 (Tex. App.—Austin Jan. 25, 2023, pet. denied) (mem. op.) (rejecting due course challenge under the unduly burdensome standard because the plaintiffs did not show that the challenged law "erected an entry barrier into their medical profession so as to deprive them of their occupational freedom"); *Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 292-93 (Tex. App.—Austin 2018, no pet.) (rejecting due course challenge because statute "does not impair an individual's ability to obtain a charter and establish an open-enrollment charter

school" but only governs rights and obligations of recipients of state funding); *Live Oak Brewing*, 537 S.W.3d at 657 (rejecting due course challenge to statute because it did not prevent the plaintiffs "from operating within their chosen trade").

It is undisputed that the STR Ordinances do not prohibit Plaintiffs from renting their properties. Instead, Plaintiffs with properties in residential neighborhoods can lease or rent their homes for thirty days or more. [Ex. B-5]. Those same Plaintiffs have the right to apply with the Zoning Commission and City Council for a zoning change to allow STRs as a permitted use for that property. [Ex. B at ¶ 60; *see also* Ex. A-6 at 86:07-14 (admitting no such zoning change had been sought)]. To date, the City has approved at least one such zoning change. [Ex. B-38]. In addition, Plaintiffs who own properties in other non-residential districts can lease or rent their properties short-term provided they comply with the 2023 Ordinance's regulations. [Ex. B-37]. Many Plaintiffs admitted that many of the 2023 Ordinance's regulations are reasonable—*i.e.*, *not* oppressive. [Ex. A-1 at 107:02-108:03, 108:17-23, 108:25-109:09, 109:11-18; Ex. A-2 at 98:03-17; Ex. A-5 at 50:22-51:12, 64:23-65:14].[28]

Because the STR Ordinances do not completely prohibit Plaintiffs from engaging in any industry, they are not oppressive under *Patel* and the City is entitled to summary judgment as a matter of law.

II. The City is entitled to summary judgment on Plaintiffs' equal protection claim.

Plaintiffs' claim that the STR Ordinances violate the equal protection clause in article I, section 3 of the Texas Constitution fails because the City has not treated Plaintiffs differently from other similarly situated landowners. And even if the City has, it had a rational basis for doing so.

[28] Plaintiffs contend that the STR Ordinances are oppressive because they deprive Plaintiffs of income. [Ex. A-4 at 70:17-71:04; Ex. A-5 at 66:09-18]. But it is not enough that the Plaintiffs are (allegedly) being denied rental income that they could make renting out their houses for less than thirty days (rather than thirty days or more). [Pet. at 29 (¶40)]; *see Luse*, 131 S.W.2d at 1084 (an ordinance does not violate the constitution simply because it decreases the "pecuniary profits of the individual owner").

A. Plaintiffs cannot show they have been treated differently than other similarly situated parties.

A litigant asserting an equal protection claim "must show" it has been "treated differently from others similarly situated." *Klumb*, 458 S.W.3d at 13. Plaintiffs cannot make this required showing for two reasons: (1) they have not been "treated differently" from any other property owner in the City; and (2) in any event, short-term renters and conventional residential landlords are not "similarly situated."

1. Plaintiffs have not been "treated differently" than any other Fort Worth homeowner.

Plaintiffs allege that the City, through the STR Ordinances, is treating them differently from other Fort Worth property owners—and in particular, property owners who lease for thirty or more days. [Pet. at 32 (¶57)]. But the STR Ordinances apply equally to *all* Fort Worth property owners. That is, *all* Fort Worthians who own homes in residential districts are prohibited from renting those homes for less than thirty days (absent a zoning change). The STR Ordinances do not "single out" Plaintiffs—or anyone for that matter—for disparate treatment. [Ex. B-5; Ex. B-37]. This is fatal to Plaintiffs' equal protection claim. *See Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004) (rejecting equal protection claim where "all Sun Valley residents suffered the same injury" and there was "simply no evidence that [the plaintiffs] were singled out or treated disparately with regard to these alleged [injuries]"); *Sanders v. Palunsky*, 36 S.W.3d 222, 225 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (same because the challenged law "appl[ied] to *all* inmate suits" and thus the plaintiff was not "being treated differently" from others); *see also City of Floresville v. Starnes Inv. Grp., LLC*, 502 S.W.3d 859, 868 (Tex. App.—San Antonio 2016, no pet.) (rejecting equal protection where, "[o]ther than a conclusory statement that it was treated differently from others similarly-situated, Starnes failed to allege, in its amended petition, any facts describing the parties similarly situated or the nature of the different

treatment").[29]

2. STR operators and conventional residential landlords are not similarly situated.

Plaintiffs' equal protection claim also fails because they are not "similarly situated" to City property owners who lease their homes for thirty days or more.

"Similarly situated" means "in *all* relevant respects alike." *Tex. Entm't Ass'n, Inc. v. Hegar*, 10 F.4th 495, 513 (5th Cir. 2021) (emphasis added); *see also City of Port Arthur v. Thomas*, 659 S.W.3d 96, 115 (Tex. App.—Beaumont 2022, no pet.) (an equal protection claim plaintiff "must allege that he is being treated differently from those whose situation is directly comparable in all material respects"); *Cordi-Allen v. Conlon*, 494 F.3d 245, 250-51 (1st Cir. 2007) ("[p]laintiffs claiming an equal protection violation must first identify and relate *specific instances* where persons situated *similarly in all relevant aspects* were treated differently" (emphasis in original)). To be considered "similarly situated," it is not enough for a plaintiff to show the challenged law has been enforced against some and not others. *State v. Malone Serv. Co.*, 829 S.W.2d 763, 766 (Tex. 1992). Rather, a plaintiff must show that "the government has purposefully discriminated on the basis of such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *Id.* (citations omitted). This is a "very significant burden" that "demands more than lip service. *Cordi-Allen*, 494 F.3d at 251. In the land-use context, the "'similarly situated' requirement must be enforced with particular rigor … because zoning decisions will often, perhaps almost always, treat one landowner differently from another." *Lindquist v. City of Pasadena, Tex.*, 656 F. Supp. 2d 662, 688 (S.D. Tex. 2009).

[29] Moreover, to the extent that Plaintiffs based their equal protection claim on being property owners in residential districts, i.e., "geographic disparate treatment" [Pet. at 23 (¶57)], Texas law does not recognize such a claim. *See City of Sunset Valley*, 146 S.W.3d at 647 (an equal protection claim cannot be based on a "geographic" classification because when the government "exercises governmental powers, such as building highways, it necessarily draws distinctions between different geographic areas").

Plaintiffs do not meet their burden of proving that they are "similarly situated," *i.e.*, "directly comparable in all material respects," to other residential property owners in the City who lease their homes for thirty or more days. Nor could they. [Ex. B at ¶ 12]; *see Draper*, 629 S.W.3d at 792 (rejecting equal protection challenge to STR ordinances where the STR operators "offer[ed] no argument or authority or point[ed] to any facts demonstrating that they are similarly situated to property owners who lease their properties long-term"). For starters, many statutes apply the thirty-day threshold to distinguish the operations, rights, and obligations of STRs and long-term rentals. *See generally* TEX. TAX CODE §§ 156.001(b), .101; TEX. PROP. CODE § 92.001 (excluding a rental of property for less than thirty days from the definition of a "residential tenancy" because it does not qualify as the lease of a "dwelling" for use as a "permanent residence"); *e.g.*, *Draper*, 629 S.W.3d at 792 ("[The thirty-day cutoff is] based upon a common distinction made between transient occupancy versus longer-term occupancy"); *see Comeau*, 633 S.W.2d at 795-96 (rejecting equal protection claim by mobile home owners because "mobile homes are different and thus may be classified separately from other residential structures for purposes of regulation").

Moreover, STRs necessarily experience frequent turnover—Plaintiffs testified, for example, that between ten and twenty STR groups were hosted in a residentially zoned property over the course of a single month. Thus, STRs are more comparable to other commercial lodging uses, such as hotels, with a high volume of renters and high turnover. The law uniformly reflects that reality. [Ex. A-2 at 61:06-62:03; Ex. A-4 at 34:14-17, 34:21-35:07; Ex. A-5 at 30:16-31:01; Ex. A-6 at 46:04-47:02, 49:11-50:11, 51:11-15; Ex. A-12; Ex. H]. By contrast, rentals of thirty days or more lead to less tenant turnover and are more like residential uses of property. [Ex. B at ¶¶ 11-12]. And, as explained, the use of single-family residences by individuals for short periods of time corrodes the residential character of many neighborhoods by reducing communication and

accountability.[30] [*Id*.]. Finally, an STR agreement is effectively a temporary license to use the property, unlike a traditional leasehold, which conveys to the tenant a right to establish a residence and exclude others from the property. [Ex. A-11]; *see generally* TEX. PROP. CODE §§ 92.001-.002.

B. In any case, because the City's "classification" is rationally related to a legitimate government interest, it must be upheld.

Even if Plaintiffs can show that the City, through the STR Ordinances, has treated them differently from similarly situated property owners, their equal protection claim still fails because the STR Ordinances are rationally related to a legitimate government interest.

Unless a challenged ordinance "discriminates against a suspect class"—and Plaintiffs do not allege they are part of a suspect class[31]—the ordinance "must only be rationally related to a legitimate state interest to survive an equal-protection challenge."[32] *Mayhew*, 964 S.W.2d at 939 ("[e]conomic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny under the equal protection clause"). As a result, the ordinance "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the [ordinance's] classification." *Heller*, 509 U.S. at 320. A government "has no obligation to produce evidence to sustain the rationality of a … classification." *Id.* Nor must the government "actually articulate at any time the purpose or rationale supporting its classification." *In re G.C.*, 66 S.W.3d 517, 524 (Tex. App.—Fort Worth 2002, no pet.). Instead, a party challenging the rationality of the classification has the burden to "negate *every conceivable*

[30] Relatedly, the transient characteristics of STRs raise enforcement issues unique to STRs. [Ex. C at ¶ 10; Ex. D at ¶¶ 2-6; Ex. E at ¶¶ 2-9].

[31] Nor could they seriously argue that an STR operator is a suspect class. "[S]uspect classes include gender, race, alienage, and national origin. Persons in suspect classes must possess either an immutable characteristic determined solely by the accident of birth, or be saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Mauldin v. Tex. State Bd. of Plumbing Examiners*, 94 S.W.3d 867, 871 (Tex. App.—Austin 2002, no pet.) (internal citations omitted); *see, e.g.*, *Draper*, 629 S.W.3d at 792 (applying rational basis standard to challenge to STR ordinance).

[32] Plaintiffs acknowledge that the rational-basis standard applies to their equal protection claim. [Pet. at 31 (¶55)].

basis which might support [the classification], whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320 (emphasis added).

Even if the STR Ordinances treat the City's residential property owners who lease their homes for less than thirty days differently from other residential property owners, they do so to advance legitimate government objectives—to protect the "health, safety, and welfare of the general public," among other things. [*Supra* at section (V)(I)(B)(1)]. As discussed, STRs harm the residential characteristics of neighborhoods. [*Id.*]. Indeed, several City residents lodged complaints about STRs operating near their homes.[33] [*Id.*]. Several Plaintiffs have even acknowledged the differences between STRs and long-term rentals and why the City may need to distinguish between the two.

> Q. Given that you've already kind of distinguished between short-term rentals and long-term rentals, would you agree that the long -- long-term rental situation is a completely different arrangement than a short-term rental?
>
> A. Yes.
>
> ***
>
> Q. Okay. So -- so let me -- let me make sure I understand you right. The relationship that you as a property owner and a short-term renter who books through a hosting platform have is decidedly different than the relationship between a landlord and a tenant, correct?
>
> A. Yes, totally different.
>
> Q. Totally different, right?
>
> A. Yes.

[Ex. A-4 at 37:02-39:06, 58:19-59:02, 59:12-21; Ex. A-6 at 28:06-16; *see also* Ex. A-5 at 60:10-24, 61:03-15].

[33] "Courts have recognized a rational basis for government entities focusing and allocating their limited resources based on complaints by impacted citizens." *City of Port Arthur v. Thomas*, 659 S.W.3d 96, 116 (Tex. App.—Beaumont 2022, no pet.).

Another conceivable basis for the distinction between property rentals of less than thirty days and rentals of thirty days or more is that any rental of less than thirty days triggers the hotel occupancy tax. TEX. TAX CODE §§ 156.001(b), .101. As Dana Burghdoff stated in her affidavit and at her deposition—and as the 2023 Ordinance expressly states—the City has an interest in identifying STRs so that it can collect those taxes. [Ex. A-8 at 28:24-29:07; Ex. B at ¶ 26; Ex. B-13].

In short, the summary-judgment record provides ample evidence that the STR Ordinances' distinction between STRs and conventional residential rentals or leases is intended to promote legitimate governmental interests. Even if the City's distinction were "an arbitrarily drawn line," it would be "irrelevant under rational basis review because municipalities must draw the line somewhere." *Marfil*, 2021 WL 8082644, at *8; *see Draper*, 629 S.W.3d at 792 (finding STR operators are neither similarly situated to long-term landlords nor a suspect classification).

III. The City is entitled to summary judgment on Plaintiffs' retroactivity claim.

Because Plaintiffs do not have "settled expectation" to rent their houses for less than thirty days in the City's residential districts, Plaintiffs' claim that the STR Ordinances violate the Texas Constitution's prohibition against retroactive laws fails. But even if Plaintiffs had such a settled expectation, their claim still fails because the STR Ordinances serve a compelling public interest.

A. A plaintiff challenging an ordinance as unconstitutionally retroactive must show that the ordinance has significantly impaired a settled expectation and does not serve a compelling public interest.

Article I, section 16 of the Texas Constitution prohibits legislative bodies from enacting "retroactive laws"—*i.e.*, laws that "extend[] to matters that occurred in the past."[34] *Hogan v. S. Methodist Univ.*, 688 S.W.3d 852, 858 (Tex. 2024). But because most laws "change existing

[34] TEX. CONST. ART. I, § 16 ("No … ex post facto law[or] retroactive law … shall be made.").

conditions," not every retroactive law is unconstitutional. *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 139 (Tex. 2010); *Mbogo*, 2018 WL 3198398, at *4 ("A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law."). Instead, a law is unconstitutionally retroactive only if, when applied, it "takes away what should not be taken away." *Robinson*, 335 S.W.3d at 143.

Texas's prohibition against retroactive laws "advances two fundamental objectives of [its] system of government: the protection of 'reasonable, settled expectations' and protection against 'abuses of legislative power."' *Fire Prot. Serv., Inc. v. Survitec Survival Prods., Inc.*, 649 S.W.3d 197, 201 (Tex. 2022). Through the lens of these twin objectives, the Texas Supreme Court has explained that, in analyzing whether a law violates the Texas Constitution's retroactivity bar, courts "first consider the nature of the rights claimed and the statute's impact on them." *Id.*; *see also Robinson,* 335 S.W.3d at 145 (considering the "nature of the prior right impaired by the statute" and "the extent of the impairment"). And only if "the statute disturbs a party's settled expectations," courts next "consider whether the statute serves a public interest as opposed to simply benefiting one or a few private entities." *Fire Prot.*, 649 S.W.3d at 201 ("a law is not retroactive in the constitutional sense unless it disrupts or impairs settled expectations"); *see also Robinson*, 335 S.W.3d at 145 (considering the "nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings").[35]

[35] In undertaking this analysis, "courts must be mindful that statutes are not to be set aside lightly." *Robinson*, 335 S.W.3d at 146. Indeed, the Texas Supreme Court has sustained constitutional retroactivity challenges just four times, "all of which dealt with laws that revived expired claims or fully extinguished vested rights." *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 389 (5th Cir. 2019). What's more, the Supreme Court has *never* "struck down a zoning or property-use law as unconstitutionally retroactive, though Texas municipalities have been zoning and regulating property for decades." *Zaatari v. City of Austin*, 615 S.W.3d 172, 204 (Tex. App.—Austin 2019, pet. denied) (Kelly, J., dissenting). The Court's reluctance to strike down laws as unconstitutionally retroactive is unsurprising given that "the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess." *Robinson*, 335 S.W.3d at 146.

B. Because Plaintiffs do not have a "settled expectation" to rent their homes for less than thirty days in the City's residential districts, the STR Ordinances are not unconstitutionally retroactive.

If an alleged right or expectation is uncertain, never existed, or could be eliminated or changed at any time, it is, by definition, unsettled. *See Hogan*, 688 S.W.3d at 858 (noting that a law is not retroactive when it resolves "lingering uncertainty"); *see, e.g.*, *Fire Prot.*, 649 S.W.3d at 205 ("Survitec had no reasonable settled expectation that it could continue to operate under its open-ended, at-will agreement in perpetuity"); *Tex. Water Rts. Commission v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971) (rejecting retroactivity challenge to statute authorizing the forfeiture of water permits for non-use, even though the permits were issued before the statute's enactment because the permit holders "could reasonably expect that their rights would be subjected to a remedy enforcing the conditions inherently attached to those rights").

Relevant here, "the right to lease property for a profit can be subject to restriction or regulation under certain circumstances …." *Zaatari v. City of Austin*, 615 S.W.3d 172, 191 (Tex. App.—Austin 2019, pet. denied) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)). Further, the Texas Supreme Court has recognized that "limitations on property rights" may arise as a result of "appropriate government action under its police power," including when regulating nuisances. *Severance v. Patterson*, 370 S.W.3d 705, 710 (Tex. 2012). In addition, because a municipality has the power to regulate or eliminate a property use through its zoning powers, even after that use has commenced, a property owner's expectation that the use will continue forever is necessarily unsettled. *Mbogo*, 2018 WL 3198398, at *5 (rejecting retroactivity claim because the plaintiff's "reliance and expectation that the City would allow him to continue using the property as a nonconforming use or under a SUP in perpetuity was not reasonable").

Here, because that right to lease properties for less than thirty days in the City's residential districts never existed and, in any event, was subject to valid zoning changes. Plaintiffs have not identified a "settled expectation" the retroactivity clause protects. Prior to the enactment of the STR Ordinances, the City did not permit STRs in residential districts. To the contrary, the City treated STRs like bed and breakfasts—an impermissible use in residential districts. [Ex. A-9; Ex. B at ¶¶ 3-5; Ex. C at ¶ 6]. And this policy "was communicated to the City's residents and/or property owners in response to direct inquiries." [Ex. B at ¶ 4].

For their part, Plaintiffs uniformly testified that they had no expectation about whether they could lease their properties for less than thirty days. Plaintiffs admitted that they:

- had never spoken to anyone at the City about whether they could lease their properties for less than thirty days;
- had never researched whether they could operate an STR in a residential district;
- had no idea if they could; and
- believed their ability to lease their properties short-term was "unsettled" but "hope[d]" it would work out in their favor.[36]

[Ex. A-1 at 79:21-80:03, 81:09-21, 90:19-91:12; Ex. A-2 at 102:23-103:04; Ex. A-3 at 40:17-41:01; Ex. A-4 at 31:15-18, 45:09-12, 69:14-25; Ex. A-5 at 37:14-37:22, 65:16-66:08; Ex. A-6 at 63:16-19, 65:25-66:05, 77:08-19].

Plaintiffs acknowledged that the City's zoning laws are subject to change and thus any "expectation" based on an existing zoning law is necessarily unsettled:

[36] This is far different from *Zaatari* where the City of Austin "acknowledge[d] that Austinites have long exercised their right to lease their property by housing short-term rentals," and even admitted that STRs are an "established practice and a historically … allowable use." *Zaatari*, 615 S.W.3d at 191.

Q. Would you agree that up until the February 2023 ordinance, the issue of whether short-term rentals would be allowed in the city was unsettled?
A. Yes.

[Ex. A-2 at 102:23-103:04; *see also id.*]; *see Villanueva v. Vill. of Volente, Tex.*, No. 1:23-CV-1246-RP, 2024 WL 2143596, at *8 (W.D. Tex. May 13, 2024) (in rejecting retroactivity challenge to STR ordinance, holding that the plaintiffs did not have a settled expectation "in leasing their properties for short terms by right and without restriction").

In sum, and as Plaintiffs admitted, any expectation that Plaintiffs have about renting their properties for less than thirty days in the City's residential districts is speculative and by no means settled. As a result, their retroactivity claim fails as a matter of law. *See Fire Prot.*, 649 S.W.3d at 205 (law was not unconstitutionally retroactive when it did not disrupt any reasonable settled expectation); *In re A.V.*, 113 S.W.3d 355, 361 (Tex. 2003) ("A law that does not upset a person's settled expectations in reasonable reliance upon the law is not unconstitutionally retroactive.").

C. The STR Ordinances' impact on Plaintiffs' ability to rent their homes is slight.

At any rate, Plaintiffs' ability to rent their properties has only been slightly impaired by the STR Ordinances. Again, the STR Ordinances *do not* prohibit Plaintiffs from renting out their homes. Absent a zoning change, Plaintiffs are only prohibited from renting out their homes for less than thirty days in residential districts. [Ex. B-5]. They can still rent out their residential properties for thirty or more days and can operate STRs in districts zoned commercial or mixed use. [*Id.*]; *see Villanueva*, 2024 WL 2143596, at *9 (any impairment on plaintiffs' right to lease short-term was slight because STRs were not completely banned).

The only plausible impairment Plaintiffs face is the alleged loss of income that STRs provide, which Plaintiffs say is, "on a per-diem basis, more lucrative than longer-term rentals."

[Pet. at 29 (¶40); *see* Ex. A-4 at 70:17-71:04; Ex. A-5 at 66:09-18]. But whether the STR Ordinances "will cause pecuniary loss to those affected by it does not require that it be held invalid." C*ity of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 779 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). Indeed, a loss of income is not enough to find a law unconstitutionally retroactive. The loss of *investment* is the standard. *See Mbogo*, 2018 WL 3198398, at *7; *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (lack of "avenue for recoupment" of "existing investment" was relevant). Plaintiffs have presented no allegation or evidence that have failed to recoup their investments in their STRs.

Moreover, between 2018 and the adoption of the 2023 Ordinance, Plaintiffs knew that the STR issue was "up for debate" and a "hot-button topic." [*See e.g.*, Ex. A-2 at 90:04-12, 91:11-14]. Plaintiffs, in effect, had a three-year grace period to try to either change the STR prohibition in residential districts or to adapt to it.[37] *See Fire Prot.*, 649 S.W.3d at 201-02 ("In determining whether a law disrupts or impairs settled expectations, courts consider whether the law gives parties a 'grace period' to adapt before the law takes effect.").[38]

Finally, Plaintiffs acknowledge that the City can change its zoning laws. [*See e.g.*, Ex. A-2 at 102:23-25]. Thus, they had no reason to assume that City would allow STRs in residential districts or would not regulate them in other districts. *See Liberty Mut. Ins. v. Texas Dep't of Ins.*, 187 S.W.3d 808, 825-26 (Tex. App.—Austin 2006, pet. denied).

[37] A grace period gives a party time to escape or prepare for the effect of the new law. In that sense, it negates the reliance element on which retroactivity claims are based, because parties cannot have "reasonable expectations that the" old law will govern when the new law "forewarned them that [it] would not." *Union Carbide,* 438 S.W.3d at 60.

[38] *See, e.g.*, *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (holding that an amendment to the Tort Claims Act that made the city immune from a certain negligence claim was not unconstitutionally retroactive because the amendment gave potential claimants two months before it took effect); *see also Halbert v. San Saba Springs Land & Live-Stock Ass'n*, 89 Tex. 230, 34 S.W. 639, 639 (1896) (explaining that the reason behind the retroactivity clause "was to give notice to the people of its passage, that they might obey it when it should become effective, and also to enable them to adjust their affairs to the change made, if any").

D. Because the STR Ordinances serve a compelling public interest, they are not unconstitutional.

As the Texas Supreme Court has explained, even some impairment of settled expectations does not necessarily result in a constitutional violation if the governing body has shown a compelling interest in doing so. *See Fire Prot.*, 649 S.W.3d at 201, 205 (explaining that only if the law "disturbs a party's settled expectations" do courts consider "whether the statute serves a public interest as opposed to simply benefiting one or a few private entities" and rejecting retroactivity claim because the plaintiff did not identify a settled expectation).

The legislative record amply establishes that the STR Ordinances serve the compelling public interest of protecting the health and safety of its residents; it is not an ordinance that "simply benefit[s] one or a few private entities." *Fire Prot.*, 649 S.W.3d at 201; *Robinson*, 335 S.W.3d at 145 (a reviewing court must examine "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings").[39] A municipality's proper exercise of its police power, including through zoning, is *"not merely reasonable but [is] compelling*, notwithstanding the statute's effect on prior rights." *Robinson*, 335 S.W.3d at 146 (emphasis added); *Caruthers v. Bd. of Adjustment*, 290 S.W.2d 340, 345 (Tex. Civ. App.—Galveston 1956, no writ) (zoning ordinance was not unconstitutionally retroactive because it was justified by the police power). And because efforts to "safeguard the public safety and welfare" are sufficiently strong public interests under the retroactivity clause, this is unsurprising. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 634 (Tex. 1996); *Kilpatrick v. State Bd. of Registration for Pro. Eng'rs*, 610 S.W.2d 867, 871 (Tex. Civ. App.—Fort Worth 1980, writ

[39] In *Robinson*, the law failed this test because "[t]he Legislature made no findings to justify" the statute, and "[e]ven the statement by its principal House sponsor fail[ed] to show how the legislation serves a substantial public interest." *Id.* at 149. Worse, the "legislative record" made it "fairly clear" that the statute "was enacted to help only [one specific company] and no one else." *Id.* The Legislature's own record thus showed that it had engaged in precisely the conduct the retroactive-law clause was designed to preclude: permitting a single "powerful" company to "obtain special and improper legislative benefits." *Id.* at 139.

ref'd n.r.e.) (concern for public safety and welfare can override retroactive law prohibition).

As discussed above, the City, in enacting the STR Ordinances, used its zoning powers to safeguard the "health, safety and welfare of the general public," and minimizing the negative impact STRs have on residential neighborhoods, among other things. And again, this purpose is backed-up by City's study of how STRs affect neighborhoods and how other cities have regulated STRs, as well as the testimony of several citizens who conveyed their first-hand experiences with living near STRs. And the City Council incorporated these findings into the STR Ordinances. [Ex. B-37].[40]

In short, because the STR Ordinances serve compelling public interests, Plaintiffs' retroactivity claim fails.

IV. The City is entitled to summary judgment on Plaintiffs' claim that the STR Ordinances violate the Zoning Enabling Act.[41]

Plaintiffs' claim that the STR Ordinances violate the Zoning Enabling Act is specious. To "promot[e] public health, safety, morals, or general welfare," TEX. LOC. GOV'T CODE § 211.001, the Zoning Enabling Act empowers municipalities to regulate "the *location and use* of buildings, other structures, and land for business, industrial, residential, or other purposes." *Id.* § 211.003 (emphasis added). In accordance with a comprehensive plan, municipalities may enact zoning regulations designed to, among other things, "lessen congestion in the street" and "promote health and the general welfare." *Id.* § 211.004. Because these government interests are "objective[s] within the city's police power," they are reviewed under the highly deferential rational-basis

[40] While Plaintiffs seek to frame the STR issue as simply a few bad actors operating "nuisance" properties [Pet. at 35 (¶77)], this position ignores the broader issue the STR Ordinances were designed to address—i.e., the effect of STRs on residential neighborhoods. [Ex. B at ¶¶ 11, 42, 56-59; *see generally*, Ex. E].

[41] It is debatable whether the Court has jurisdiction over this claim. *See Patel*, 469 S.W.3d at 76 ("[S]uits complaining of ultra vires actions may not be brought against a governmental unit, but must be brought against the allegedly responsible government actor in his official capacity.").

standard. *Mayhew*, 964 S.W.2d at 938. As with due-course-of-law claims, a municipality does not have to prove that a zoning regulation *will* have a beneficial effect on the governmental interests at issue; it need show only that the government reasonably believed the zoning regulation *could* have such an impact. *Walker v. State*, 222 S.W.3d 707, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (noting that courts "will uphold a statute as long as it implements any rational purpose, even if the legislature never considered the purpose when enacting the statute," and that "it is irrelevant whether the conceived reason for the challenged distinction actually motivated the legislature").

As discussed and as the record shows, the STR Ordinances are designed to address at least two of the objectives in the Zoning Enabling Act—*i.e.*, to "lessen congestion in the street" and to "promote health and the general welfare." *Id.* § 211.004. As part of the legislative process, City representatives, and officials received significant input regarding problems associated with STRs, including excessive trash and noise, parking problems, traffic, and safety concerns. [Ex. B at ¶ 6; Exs. B-6-7,14-15, 17-24, 32-33, 35-36; Ex. C at ¶ 5; Ex. C-2; Ex. F; Ex. G]. To address these issues, the City enacted the STR Ordinances. [Exs. B-5, 37]. Thus, the Ordinances carry out, rather than violate, the Zoning Enabling Act.

Plaintiffs argue that the STR Ordinances violate the Zoning Enabling Act because "prohibiting short-term renting is not a 'use' restriction." [Pet. at 33 (¶67)]. But renting property *is* using property. *See JBrice Holdings, L.L.C. v. Wilcrest Walk Townhomes Ass'n*, 644 S.W.3d 179, 186 (Tex. 2022) (a lease is "the right to use and occupy the property"). Plaintiffs also contend that STRs are "residential in nature." [Pet. at 33 (¶67)]. But in their depositions, Plaintiffs acknowledged that STRs are "commercial" in nature and that they want to operate STRs to make money. [Ex. A-1 at 46:23-47:24; Ex. A-2 at 13:24-14:03, 30:22-31:02, 60:17-61:05; Ex. A-4 at 11:05-8; Ex. A-5 at 29:10-22, 45:14-46:02; Ex. A-6 at 11:14-19, 41:17-42:01, 42:23-43:06, 93:14-

94:13, 95:03-95:16]. As one Texas federal court explained, just because STRs are operated out of houses and guests eat and sleep in them, it does not mean an STR is "purely residential":

> STRs involve the residential use of property because visitors reside or live in the home for a period of time. However, there is also a commercial aspect of STRs and because of the transient nature of STR guests, STRs share attributes of hotels. Therefore, STRs may be better characterized as a quasi-residential use of property.

Villanueva, 2024 WL 2143596, at *11.

Even if STRs could be characterized as residential, courts have found that municipalities can enact zoning regulations to address residential-type uses within residential zoning districts. *See Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833, 840 (N.D. Tex. 2000) (upholding a city zoning law that required special-use permits to operate care homes in residential districts); *Jackson Court Condominiums, Inc. v. New Orleans*, 874 F.2d 1070, 1077 (5th Cir. 1989) (upholding a prohibition on time-share condominiums in residential areas). Thus, "even if STRs are classified as a purely residential land use, it is not clear that restricting them in residential districts would be impermissible under a municipality's zoning authority." *Villanueva*, 2024 WL 2143596, at *11 (rejecting argument that STR regulation violated the Zoning Enabling Act).

Finally, Plaintiffs' reliance on *Zaatari v. City of Austin*, 615 S.W.3d 172, 190 (Tex. App.—Austin 2019, pet. denied), is misplaced. [Pet. at 33 (¶67)]. *Zaatari*'s entire analysis about whether STRs are "residential" was one sentence long and relied on a case that interpreted whether STRs were allowed under a restrictive covenant. *Id.* (citing *Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 291 (Tex. 2018)). "But a restrictive covenant is not the same concept as a zoning regulation." *Villanueva*, 2024 WL 2143596, at *11. Indeed, after *Zaatari*, the Fort Worth Court of Appeals found that a zoning-based STR ordinance permissibly exercised the city's police power. *See Draper*, 629 S.W.3d at 786-87. The Fort Worth Court found that the municipality had

identified a series of "legitimate governmental interests" that supported the STR ordinance, including "(1) safeguarding the life, health, safety, welfare, and property of STR occupants, neighborhoods, and the general public and (2) minimizing the adverse impacts resulting from increased transient rental uses in neighborhoods that were planned, approved, and constructed for single-family residences." *Id.* at 786. The same is true here. Plaintiffs' claim should likewise be dismissed.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Fort Worth prays that the Court GRANT its Traditional Motion for Summary Judgment in its entirety, enter judgment that all of Plaintiffs' claims against the City of Fort Worth be dismissed with prejudice, and, upon further motion, award the City of Fort Worth its court costs and reasonable and necessary attorneys' fees and all further relief to which it is justly entitled, whether at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 15th day of October, 2024, a true and correct copy of the foregoing document was served on counsel of record via the Court's electronic case filing system pursuant to TEX. R. CIV. P. 21a.

/s/ W. Chase Medling
W. Chase Medling

Automated Certificate of eService

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Filing Code Description: Motion (No Fee)
Filing Description: Defendant City of Fort Worth's Traditional Motion for Summary Judgment
Status as of 10/15/2024 12:00 PM CST

Associated Case Party: THECITY OF FORT WORTH

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