No. 03-17-00812-cv

In the Court of Appeals for the Third Judicial District Austin, Texas

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HERBERT, JOSEPH "MIKE" HERBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH,

Plaintiffs-Appellants / Cross-Appellees,

and

THE STATE OF TEXAS,

Intervenor-Plaintiff Cross-Appellant,[*]

v.

CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN,

Defendants-Appellees / Cross-Appellants.

On Appeal from the
53rd Judicial District Court, Travis County

APPELLANT'S BRIEF FOR THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

[Counsel listed on inside cover]

[*] The State of Texas requests that the docket be amended to reflect that the State of Texas is an Appellant and Cross-Appellee.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General

ANDREW B. DAVIS
Assistant Solicitor General
State Bar No. 24082898
Andrew.Davis@oag.texas.gov

Counsel for the State of Texas

Identity of Parties and Counsel

Plaintiffs-Appellants / Cross-Appellees:
Ahmad Zaatari
Marwa Zaatari
Jennifer Gibson Herbert
Joseph Herbert
Lindsay Redwine
Ras Redwine VI
Tim Klitch

Appellate and Trial Counsel for Plaintiffs-Appellants:
Robert Henneke (lead counsel)
Chance Weldon
Texas Public Policy Foundation
901 Congress Avenue
Austin, Texas 78701
rhenneke@texaspolicy.com

Intervenor-Plaintiff
The State of Texas

Appellate and Trial Counsel for Intervenor-Plaintiff:
Ken Paxton
Jeffrey C. Mateer
Scott A. Keller
Andrew B. Davis (lead counsel)
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Andrew.Davis@oag.texas.gov

Michael Toth (trial counsel)
Austin R. Nimocks (trial counsel)
David J. Hacker (trial counsel)
Office of the Attorney General

Defendants-Appellees / Cross-Appellants:
The City of Austin Texas
Steve Adler, Mayor of the City of Austin

Appellate and Trial Counsel for Defendants-Appellees / Cross-Appellants:
Anne L. Morgan

Meghan L. Riley
Michael Siegel (lead counsel)
Brandon W. Carr
City of Austin Law Department
P.O. Box 1546
Austin, Texas 78767-1546
Michael.Siegel@austintexas.gov

Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules

Other Authorities

Record References

1.CR refers to the clerk's record of January 18, 2018;

2.CR refers to the clerk's record of January 19, 2018;

3.CR refers to the clerk's record of January 25, 2018;

4.CR refers to the clerk's record of March 6, 2018;

5.CR refers to the clerk's record of March 7, 2018.

Statement of the Case

Nature of the Case: This lawsuit, filed by private plaintiffs, seeks relief on claims that a City of Austin ordinance banning property owners from leasing certain properties on a short-term basis is unlawful. The State of Texas intervened and asserted that the City of Austin's ordinance violates the anti-retroactivity clause of the Texas Constitution and is an uncompensated taking of private property.

Course of Proceedings: After the State of Texas intervened, 1.CR.192, the private plaintiffs and the State of Texas each moved for summary judgment, 2.CR.95 (private plaintiffs); 5.CR.781 (State of Texas). The City then filed pleas to the jurisdiction as well as a "No Evidence Motion for Summary Judgment," *see* 2.CR.1299, 1392.

Trial Court: 53rd Judicial District Court, Travis County
The Honorable Tim Sulak

Trial Court Disposition: The trial court denied Plaintiffs' Motion for Summary Judgment, the State of Texas' Motion for Summary Judgment, and the City's Pleas to the Jurisdiction; it granted the City's No Evidence Motion for Summary Judgment. 2.CR.1965-66; Appx. A. The Court separately granted the City's motion to exclude certain of the State's summary judgment evidence. Appx. B.

Statement Regarding Oral Argument

This appeal presents multiple constitutional issues about the validity of an ordinance enacted by the Austin City Council. Because of the complexity of the issues, the State of Texas requests oral argument.

Issues Presented

The issues presented are:

1. Does the Court have civil jurisdiction to resolve claims brought by the State of Texas as intervenor seeking to enforce the Texas Constitution by declaring that a City of Austin ordinance is unconstitutional?

2. Is an ordinance prohibiting property owners from leasing their property on a short-term basis unconstitutionally retroactive when property owners invested under a different legal regime and there is no evidence that the ordinance is in the public interest?

3. Is it an unconstitutional taking for a city to prohibit property owners from exercising a fundamental property right in which they have invested without providing those owners compensation?

4. Did the trial court err in excluding competent summary judgment evidence that was disclosed to, did not prejudice, and did not surprise the City of Austin?

To the Honorable Third Court of Appeals:

The City of Austin has decided to suppress a property right its citizens have long-enjoyed: the right to lease property to others on a short-term basis. Texans, and Austinites in particular, have enjoyed this right at least since Texas independence. Decisions from the mid-1800s recognize short-term renting in the form of house-boarders; academic articles recognize short-term renting as a common phenomenon throughout the United States at the turn of the 20th century; and evidence and scholarly work demonstrate that Texans used short-term rentals to accommodate GI's home from World War II and minority travelers denied public accommodations in the Jim Crow era.

Modern short-term renters are no different. They seek a place to rest when in Austin, and many Austinites, including the plaintiffs in this case, have invested their time and money to accommodate them. They had no reason to anticipate that their right to lease their property on a short-term basis—a right firmly planted and left to flourish unregulated until 2012—would be ripped from its roots.

But it was—suddenly and without reason. The City attempted to show through studies and sting operations that short-term rentals are nuisances, but the results were always the same: short-term rental properties are not more disruptive than other residential properties. To the contrary, "short-term rental properties have significantly fewer 311 calls and significantly fewer 911 calls than other single family properties." 2.CR.192. As it turns out, short-term rental guests sleep, eat, and enjoy themselves just the same as their neighbors do. There is accordingly no public-policy basis for banning short-term rentals as a residential nuisance. The ban makes sense

only as a gift to the hotel industry or Austin residents who seek reduced home prices—two rationales that illegitimately use government action to enrich private parties contrary to the provisions of the Texas Constitution.

The City's unjustified ban unconstitutionally (1) alters the legal import of prior transactions and investments without advancing a compelling public interest and (2) takes a vested property right for the enrichment of private persons. The Court should reverse the trial court's judgment and remand for further proceedings.

Statement of Facts

I. Homeowners Have Long-Exercised Their Right to Lease Their Property on a Short-Term Basis.

Rachel Nation has a long history with short-term renting. Her family has provided furnished rentals in Austin on a short-term basis since just after World War II. 5.CR.1004.[1] Veterans were returning home, and many veterans on the "GI Bill" needed places to stay as they explored new educational and work opportunities. *See* 5.CR.428. Rachel's widowed grandmother used her property near the University of Texas to serve this need and to "ma[ke] ends meet." 5.CR.1004. Times have changed, but Rachel's connection to short-term renting has not. Like her grandmother, she uses short-term rentals to "try to make ends meet" and to "support" her family. 5.CR.1004.

[1] The trial court excluded the declarations of Carole Price, Cary Reynolds, Pete Gilcrease, Gregory Cribbs, Rachel Nation, and Travis Sommerville. Appx. B (designated but not included in clerk's record, *see* 2.CR.1980). Because this exclusion was erroneous, *see infra* at 43-46, this brief refers to this evidence. Reliance on the declarations is not necessary, however, for this Court to reverse and remand. *See infra* at 46-47.

The Nation family is not unique. "For generations, people have let visitors stay in their homes, rather than in hotels, sometimes in exchange for money or for doing chores." Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. Haw. L. Rev. 395, 396 (2017). At times, short-term renting has been essential to meet critical needs, such as providing "traveling businessmen" who were "excluded from hotels" on the basis of their race with a place to stay "[d]uring the days of segregation," *id.*—a problem Austin knows all too well, *see* Visit Austin, African American Historical Landmarks, https://tinyurl.com/ydyhhzc9 (last visited March 21, 2018). At other times, short-term rentals have provided "affordability" for those looking for a place to stay. Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 Hastings Const. L.Q. 557, 561 (2015).

Websites such as Airbnb.com and Austin-based Homeaway.com have undoubtedly "reinvigorated" this "old phenomenon" that was once "typical, if not the norm." Emily M. Speier, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 Pepp. L. Rev. 387, 392 (2017). But they have not fundamentally altered the nature of home-sharing and short-term renting. Austin short-term rentals still serve community needs, as they house people from all walks of life, including people evacuated due to natural disasters, 5.CR.450-51 (short-term rentals used during the Bastrop Fires of 2011); Amy Wang, *Airbnb Offers Free Housing for Harvey Evacuees*, Wash. Post, Aug.

26, 2017, https://tinyurl.com/y8b5dgjf (short-term rentals used to house those affected by hurricane Harvey); who are moving to the city and searching for a new home, 5.CR.430, or who are visiting the city for its many cultural events.

Hotels are no substitute for short-term rentals because they offer a different, less personal, and often more expensive, service that is not conducive to the needs of some guests. A hotel is not an option for a mother whose autistic son cannot stay in hotels when he visits Austin for treatment. 5.CR.424-25. It is also no option for a short-term rental owner who lives part-time in Austin and wants to stay connected to her neighborhood and community by staying in her own short-term rental home when she is in Austin. 2.CR.176.

II. Austinites Invest In Short-Term Rentals.

To meet the community's need for short-term rentals, property owners invest their own resources to make homes comfortable and attractive for guests. For example, Pete Gilcrease purchased property specifically for the purpose of exercising his right to lease the property short-term. 5.CR.775. The Zaatari plaintiffs purchased $25,000 worth of furnishings for their short-term rental. 5.CR.1146. And the Hebert plaintiffs spent over $60,000 to prepare their properties for guests. 5.CR.773, 777.

These outlays were made with the "expectation"—backed up by decades of experience—that owners have a right to lease their property to residential guests for whatever duration they desire. 5.CR.1004-05 (Decl. of Rachel Nation). Their expenditures do not make sense otherwise. As Pete Gilcrease explained: "The investment I made would not increase the sale price enough to justify the investment with-

out the ability to rent short term." 5.CR.995. Short-term renting often allows property owners to obtain significantly more in rent than they otherwise could by renting long-term. Rachel Nation and Carole Price, for instance, stated that they could each receive $1,000 more per month for short-term renting than for long-term renting. 5.CR.1004-05 (Decl. of Rachel Nation); 5.CR.987-88 (Decl. of Carole Price). And even if investments yield minimal profit, they help owners "financially survive in the face of ever increasing property taxes." 5.CR.991-92 (Decl. of Cary Reynolds).

III. The City Outwardly Recognizes the History of the Right to Lease Residential Property on a Short-Term Basis While Inwardly Seeking to Undermine that Right.

The City knew that Austinites often invest in their longstanding right to lease property on a short-term basis. A 2011 memorandum from the City openly admits that "[t]he practice of renting out a house, or a portion of a house[,] for a short period of time is an established practice in Austin." 1.CR.796. As a city with legislative, academic, and entertainment events happening on a daily basis, "the practice of renting out a residential unit for . . . short term visitors has historically been treated as an allowable use." 1.CR.196. In fact, Austin did not impose *any* restrictions unique to the right to lease on a short-term basis until 2012, when it began a licensing regime. 5.CR.1124. The City accordingly acted consistent with historical practice and the common-law right of property owners to lease their properties when it outwardly promoted short-term rentals as a way for visitors to enjoy "a more authentic [Austin] experience." 5.CR.848.

But behind the scenes the City was laying the groundwork to extinguish this right. It conducted a study in May 2012 comparing complaints against short-term rentals to complaints against other residential properties, perhaps hoping to find that short-term rentals were detrimental to their communities and thus in need of regulation or, perhaps, banishment. But that is not what the City found. The study instead "found that the average number of calls per property and the percent of properties associated with 311 or 911 calls were similar for [short-term rentals] and the sample of residential properties." 2.CR.1774. One City official put it more bluntly: "short-term rental properties have significantly fewer 311 calls and significantly fewer 911 calls than other single family properties." 2.CR.192.

Two additional efforts to cast short-term rentals as nuisances provided only further proof that they are no different from—and may be *more* code-compliant than—other residential properties. First, in the summer of 2015 the City executed sting operations in the form of late night "inspections" to enforce code violations against short-term rentals. 4.CR.16. But there were no code violations to enforce. The City had to concede that, although "a number of activities [were] going on . . . in Austin" the weekend of the sting, everything was "quiet," with no "noisy parties [or] overparking." 4.CR.16.

Faced with these results, the City planned a second and even more targeted sting. The City would conduct an "enhanced enforcement pilot program" during which it would "perform proactive spot inspections" and respond to any complaints. 5.CR.766; 4.CR.16 (discussion with Councilwoman Gallo). But yet again, there was

no nuisance problem with short-term rentals. Over the five-week period that the enhanced enforcement program operated, only two complaints resulted in notices of violations. 5.CR.766. And, ironically, the only parties that the Police Department had to shut down or ask to lower their noise levels were those at ordinary residential—*i.e.*, *not* short-term rental—properties. 5.CR.766.

Review of the City's records confirms that short-term rentals are not a nuisance to the community. Tellingly, despite having the authority to revoke a license for violating the City codes, the City did not revoke a single short-term rental license for causing a disturbance to the community. 5.CR.1188-95. After all, the record reflects that many allegations of loud parties and other disturbances against licensed short-term rentals are simply false. *See, e.g.*, 5.CR.766, 1005. Of the City's 500 pages of citations for code citations, virtually all are for operating without a license, and none regard noise violations. *See* 5.CR.3-397, 468-764, 1201-1521.

IV. The City Bans Type 2 Short-Term Rentals Without Any Evidence That They Harm the Public.

Without any evidence that short-term rentals are a nuisance to the community—and plenty of evidence to the contrary—the City adopted a draconian short-term rental ordinance to curb a non-existent problem: Ordinance Number 20160223-A.1 (Feb. 23, 2016) (the "Ordinance"); 5.CR.971-985 (Ordinance reprinted in record); Appx. C (Ordinance reprinted in appendix).

The most severe restriction is the ban on "Type 2" short-term rentals. A Type 2 short-term rental is a single family residential home, not claimed by its owner as a homestead for tax purposes, that is rented for periods of less than thirty consecutive

days. Ordinance § 25-2-789; 5.CR.972-73. And the ban is two-fold. First, the Ordinance prohibits all new Type 2 rentals after November 12, 2015. Ordinance § 25-2-791(G); 5.CR.976. Second (and critically for this suit) it prohibits *all* property owners from exercising their right to lease as Type 2 rentals after April 1, 2022—in other words, after a 6-year amortization period. Ordinance § 25-2-950; 5.CR.982. Type 1 rentals, where the owner claims the property as a homestead, and Type 3 rentals, which are multifamily residential homes, Ordinance §§ 25-2-788, 25-2-790, are treated differently. *See generally* 5.CR.971-85.

The City can enforce this restriction in multiple ways. At a first level, the City may issue a notice of violation about an offending property. That notice states:

> After receipt of this Notice, and until compliance is attained, the Austin City Code prohibits the sale, lease, or transfer of this property unless: You provide the buyer, lessee, or other transferee a copy of this Notice of Violation; and You provide the name and address of the buyer, lessee, or other transferee to the Code Official.

5.CR.360. In essence, the owner of a short-term rental property loses additional fundamental property rights after receiving a notice of violation. If the property is not brought into compliance, the City may fine the property owner up to $2,000. Austin, Tex. Code of Ordinances Code § 25-1-462 (2014).

V. Private Plaintiffs File Suit Against the City and Mayor of Austin.

In June 2016, seven individuals filed suit in the district court of Travis County, Texas, 53rd Judicial District against the City of Austin and Steve Adler, the Mayor of Austin. 1.CR.5. These private plaintiffs asserted six separate counts alleging that the Ordinance is unlawful. 1.CR.21-44. The State of Texas intervened on the private

plaintiffs' behalf, alleging that the Ordinance is unconstitutional both as a retroactive law and an uncompensated taking for private—not public—purposes, and seeking declaratory and injunctive relief. 1.CR.590 (second amended petition in intervention). The City did not move to strike the State's intervention.

Private plaintiffs and the State each moved for summary judgment. 2.CR.95; 5.CR.781. The City then filed two pleas to the jurisdiction, one against private plaintiffs and one against the State. 2.CR.1392 (plea to the jurisdiction seeking dismissal of private plaintiffs' claims).[2] It also filed a combined "No Evidence Motion for Summary Judgment" against the private plaintiffs and the State, 2.CR.1299, as well as a motion to strike certain of the State's summary judgment evidence, 5.CR.1522.

On November 21, 2017, the trial court denied the private plaintiffs' motion for summary judgment, the State's motion for summary judgment, and the City's pleas to the jurisdiction. 2.CR.1965. It granted the City's combined no-evidence motion for summary judgment. 2.CR.1966. On December 1, it granted the City's objections to certain summary judgment evidence. Appx. B (designated but not included in clerk's record). Private plaintiffs and the State filed timely notices of appeal to this Court. 1.CR.826-27; 2.CR.1973. The City timely filed a notice of cross-appeal. 1.CR.831.

Summary of the Argument

Although it is unclear whether the trial court accepted any of the City's jurisdictional arguments raised in its motion for summary judgment, none has merit. The

[2] The City's plea to the jurisdiction seeking dismissal of the State's claims was filed on October 20, 2017. It is not included in the clerk's record.

State of Texas has standing as an intervenor not only through the Uniform Declaratory Judgments Act, which specifically states that the State of Texas through the Attorney General is "entitled to be heard" "[i]n any proceeding that involves the validity of a municipal ordinance . . . alleged to be unconstitutional," Tex. Civ. Prac. & Rem. Code § 37.006(b), but also through its freestanding sovereign interest in enforcing the Texas Constitution. The State's claims are ripe because the ban on short-term rentals is already codified and immediately injures property owners by shortening the lives of their investments and depressing their property values. Moreover, the trial court had civil jurisdiction to provide relief because the Ordinance is a civil law, and even if it were considered a penal law, there is jurisdiction because the Ordinance threatens harm to a vested property right—the longstanding right to lease private property on a short-term basis.

The Ordinance violates the Texas Constitution's command that "[n]o . . . retroactive law . . . shall be made." Tex. Const. art. I § 16. The Texas Supreme Court has interpreted this language to impose a "heavy presumption against retroactive laws" defeatable only by demonstrating that the law at issue advances a "compelling public interest." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 146 (Tex. 2010). But the Ordinance purports to solve a nonexistent problem. The City's own evidence, acquired in part through failed sting operations, demonstrates that short-term renters are more neighborly than the prototypical residential long-term lessee or owner. They are certainly not a nuisance. Short-term rental properties also remain residential in nature—as the City concedes—so there is no possible public interest in consistent zoning, even if that could, by itself, be a public interest. Because the

Ordinance changes the legal consequences of previous property transactions by eliminating a vested property right without advancing a compelling public interest, it is unconstitutionally retroactive.

The Ordinance also commits an unconstitutional regulatory taking. The First Court of Appeals recently held that a short-term rental ban constitutes a regulatory taking. *See Village of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.). And the Ordinance here is not materially different than the law *Village of Tiki Island*—it eliminates a traditional property right, reduces by upwards of 40% the rent that owners may obtain, and significantly harms those who invested in short-term rentals. It is beside the point that the ban does not take effect until 2022 because delay cannot avoid a taking. The problem with this taking, however—besides it being uncompensated—is that it does not advance the public interest and instead appears only to benefit the economic interests of other private citizens at the expense of those who have invested in short-term rentals. For that reason, the taking is ultra vires and void.

The Ordinance's unconstitutionality is made particularly clear by declarations from Type 2 short-term rental owners that the trial court erroneously excluded. Although these declarations are not necessary for this Court to find the Ordinance unconstitutional, the record demonstrates that the State timely disclosed the witnesses who submitted declarations, and that, even if it did not, any resulting prejudice is due to the City's own decision not to depose or even speak to these individuals.

Standard of Review

Courts review their subject matter jurisdiction de novo. *See Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality*, 131 S.W.3d 271, 276 (Tex. App.—Austin 2004, no pet.). Similarly, courts "review a no-evidence summary judgment de novo." *Balas v. Smithkline Beecham Corp.*, No. 03-06-00254-CV, 2009 WL 1708831, at *1 (Tex. App.—Austin 2009, pet. denied) (mem. op.). In doing so, the Court must consider the evidence in the light most favorable to the State as the non-moving party. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "[T]he denial of summary judgment is normally not appealable," but a court "may review such a denial when both parties moved for summary judgment and the trial court granted one and denied the other." *Texas Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

Courts "apply an abuse of discretion standard to the question of whether a district court erred in excluding evidence." *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 161 (Tex. App.—Austin 2001, no pet.)

Argument

I. The District Court Has Jurisdiction to Review the State's Claims as Intervenor.

A. The State has standing to defend the Texas Constitution.

The Texas Legislature may create standing for the Attorney General. *See Brady v. Brooks*, 89 S.W. 1052, 1057 (Tex. 1905) ("The Legislature had the power to create causes of action in favor of the state, and to make it the exclusive duty [of the Attorney General] to prosecute such suits"). The Texas Uniform Declaratory Judgment

Act ("UDJA") does just that: "In any proceeding that involves the validity of a municipal ordinance . . . alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is *entitled to be heard*." Tex. Civ. Prac. & Rem. Code § 37.006(b) (emphasis added).

Courts have uniformly held that this UDJA entitlement to be heard confers on the Attorney General standing to intervene where a law is alleged to be unconstitutional. *See, e.g.*, *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 & n.3 (Tex. 2011) (per curiam) (recognizing that "the state may be a proper party to a declaratory judgment action that challenges the validity of a statute"); *City of Austin v. Travis Cent. Appraisal Dist.*, 506 S.W.3d 607, 612 n.3 (Tex. App.—Austin 2016, no pet.) (noting that Tex. R. Civ. P. 60 and Tex. Civ. Prac. & Rem. Code § 37.006(b) authorized the State to file "a petition in intervention").[3] This entitlement is so strong that the Attorney General has been permitted to intervene post-judgment under the doctrine of virtual representation. *See Motor Vehicle Bd. of Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.*, 1 S.W.3d 108 (Tex. 1999) (per curiam).

To be sure, the State ordinarily intervenes as a defendant to secure a state law against a constitutional challenge. *See, e.g.*, *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 473 (Tex. App.—Austin 2012, pet. denied). But not always. Section 37.006(b) does more than permit the State to intervene to defend a State statute; it entitles the State through the Attorney General to intervene in any

[3] The UDJA also waives any sovereign immunity the City may possess as to the State's claims that the Ordinance is unconstitutional. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (noting that the UDJA waives immunity for claims challenging the validity of ordinances or statutes).

proceeding "involv[ing]" the "validity" of an "ordinance." Tex. Civ. Prac. & Rem. Code § 37.006(b). The statutory language itself therefore makes clear that the State has discretion to intervene—as it did here—to allege that an ordinance is *not* valid as a matter of Texas law. *See Kilgore Indep. Sch. Dist. v. Axberg*, 535 S.W.3d 21, 27 (Tex. App.—Texarkana 2017, no pet.) (the State of Texas intervening on behalf of plaintiff alleging that ordinance was contrary to state law); *cf. Mercer v. Phillips Nat. Gas Co.*, 746 S.W.2d 933, 940 (Tex. App.—Austin 1988, writ. denied) (the State of Texas intervening on behalf of plaintiff to argue that a state statute was unconstitutional).

In addition to its standing under the UDJA, the State has standing due to its free-standing sovereign interest in defending the Texas Constitution. As the Texas Supreme Court has said, the State's "justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt." *Yett v. Cook*, 281 S.W. 837, 843 (Tex. 1926). "The Attorney General is the chief law officer of the State," and so may "institute in the proper courts proceedings to enforce or protect any right of the public that is violated." *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943). This includes the ability to protect not only state statutory law from direct challenge, but the ability to protect the State's highest law—the Constitution—from an encroaching and unconstitutional local ordinance. *Cf. In re State*, 489 S.W.3d 454, 456 (Tex. 2016) (Willett, J., concurring) (recognizing primacy of State constitution and the Attorney General's role in constitutional litigation).

And, in any event, the City has waived any objection to the State's intervention. It is well-established that a party who opposes intervention "has the burden to challenge it by a motion to strike." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). A party's failure to challenge the intervention through "a motion to strike" results in "waive[r]," *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 660 (Tex. App.—Dallas 2010, pet. dismissed), even where the party opposing intervention filed a plea to the jurisdiction, *Bryant v. United Shortline Inc. Assurance Servs., N.A.*, 972 S.W.2d 26, 31 (Tex. 1998) (holding that "the Liquidator waived [objection to intervention] by failing to move to strike the plea in intervention" and instead filing a plea to the jurisdiction). Because the City never filed a motion to strike and filed only a plea to the jurisdiction, it has waived any standing argument related to the State's intervention.

B. The State's claims are ripe.

Ripeness is a "functional" "question of timing" that "serves to avoid premature adjudication." *Perry v. Del Rio*, 66 S.W.3d 239, 249-52 (Tex. 2001) (describing ripeness doctrine). The doctrine asks "whether a dispute has yet matured to a point that warrants decision." *Id.* at 249 (citation omitted); *see also State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) ("For a controversy to be justiciable, there must be a real controversy between the parties that will be actually resolved by the judicial relief sought."). Here, it has, because "there is nothing 'hypothetical' or 'abstract' about the [State's] claims." *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 270 S.W.3d 777, 781 (Tex. App.—Austin 2008, no pet.). The City is not simply contemplating a law banning Type 2 short-term rentals; it *passed* that law.

The fact that the ban is set for a later date does not matter, as the Ordinance immediately harmed property values and investments in short-term rentals.

The Fourth Circuit understood this well when addressing a takings claim about a law very similar to the Ordinance.[4] In *National Advertising Company v. City of Raleigh*, the City of Raleigh banned various outdoor billboards but afforded property owners a five and one-half year "grace period" for nonconforming billboards, 947 F.2d 1158, 1160 (4th Cir. 1991). The question at issue was when the takings claim became ripe. *Id.* at 1161-66. The Fourth Circuit held that it was ripe on the date the law was enacted, because on that date the law "interfered in concrete ways with [an owner's] primary use of specific property." *Id.* at 1166. The court specifically rejected the argument that the taking did not occur until the end of the grace period because the law "permit[ted] the current use of property to continue unhindered," *id.* at 1166, reasoning that the useful lives of the investments were immediately affected by the law's enactment and that "the present value of the [property] was reduced accordingly," *id.* at 1163-64; *see also Capital Outdoor Advert., Inc. v. City of Raleigh*, 446 S.E.2d 289, 297 (N.C. 1994) (finding claim ripe despite grace period because "[i]t was on that precise date [of enactment] that the expected useful life of the plaintiffs' billboards was foreshortened").

So too here. As soon as the Ordinance was enacted, the expected life of an investment in short-term renting was cut to expire in 2022, and the lowered profit expectations from long-term renting were priced into owners' property values. *See Vill.*

[4] Federal and Texas ripeness doctrines overlap significantly. *See Del Rio*, 66 S.W.3d at 249.

of Tiki Island, 463 S.W.3d at 578 (recognizing drop in property value associated with banning short-term rentals). This is an existing—not a speculative or hypothetical—harm. Accordingly, this is an actual dispute with concrete injury; there is no reason to delay "judicial decision" and keep private parties stuck in property-rights purgatory. *Del Rio*, 66 S.W.3d at 252-53.

C. This Court has civil jurisdiction.

1. This Court has civil jurisdiction to enjoin and declare invalid the City's civil ordinance.

Courts of appeals routinely hear challenges to the constitutionality of civil laws. *See, e.g.*, *Tex. Alcoholic Beverage Comm'n v. Live Oak Brewing Co.,* 537 S.W.3d 647, 649 (Tex. App.—Austin 2017, pet. filed). And that is exactly what the Ordinance is—a civil law. As the City's own notices of violation make clear, once the City notifies a property owner that she is unlawfully operating a short-term rental unit, "the Austin City Code prohibits the sale, lease, or transfer of the property" unless certain conditions are met. 5.CR.360 (notice that property is operating as a short-term rental without a license). Put differently, once the City notifies a property owner that she is unlawfully using the property, the City precludes her from exercising fundamental property rights without so much as a hearing. This is a civil remedy that seeks to achieve compliance with the City's Ordinance, and demonstrates the civil nature of the Ordinance's ban. *See, e.g.*, *Tafel v. State*, 536 S.W.3d 517, 520 (Tex. 2017) (holding that proceedings against property are civil); *Jernigan v. State*, 313 S.W.2d 309, 310 (Tex. Crim. 1958) (recognizing that license cancelation enforceable through administrative process was civil); *see also United States v. One Assortment of 89 Firearms*,

465 U.S. 354, 364 (1984) (holding that a forfeiture provision was a civil sanction despite codification in criminal code).

The City may *also* enforce the Ordinance—and any other land use provision—with so-called "criminal" fines that appear to be imposed through an administrative process. *See* 2.CR.1803. But still, this Court has jurisdiction. Although civil courts lack jurisdiction "to construe or enjoin enforcement of a criminal statute," *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 441 (Tex. 1994) (citing *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994)), "the ordinance in this case [is] not exclusively penal in nature" because it can also be enforced civilly, *City of Dallas v. Brewster*, No. 05-00-00335-CV, 2000 WL 1716508, at *4 (Tex. App.—Dallas Nov. 17 2000, no pet.) (mem. op.) (exercising jurisdiction because "the ordinance included two separate and distinct components—one civil and one penal"). Because the Ordinance, like all other land use restrictions in the City's code, can be enforced through civil *or* purportedly criminal means, it is properly subject to this Court's jurisdiction.

2. The ordinance implicates vested property rights.

Even if the Ordinance is considered penal in nature, this Court still has civil "jurisdiction to declare [it] constitutionally invalid and enjoin [its] enforcement" because it is unconstitutional and threatens "irreparable injury to vested property rights." *Morales*, 869 S.W.2d at 942, 945; *see also City of New Braunfels v. Stop The Ordinances Please*, 520 S.W.3d 208, 214 (Tex. App.—Austin 2017, pet. filed). Specifically, the Ordinance threatens injury to the vested property right to lease one's own property.

a. The right to lease is well-established in Texas. Under Texas law, "[a] person's property interests include actual ownership of real estate, chattels, and money." *Stratton v. Austin Indep. Sch. Dist.*, 8 S.W.3d 26, 29 (Tex. App.—Austin, 1999, no pet.). And ownership of real estate is further broken down into a number of "sticks in the bundle of rights that are commonly characterized as property" rights, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004), including the right to lease. The Texas Supreme Court has stated that "the right to lease [property] to others, and therefore derive profit, is an incident of [fee] ownership." *Calcasieu Lumber Co. v. Harris*, 13 S.W. 453, 454 (Tex. 1890). An owner has the "absolute right to lease her property and collect the rents." *Markley v. Martin*, 204 S.W. 123, 125 (Tex. Civ. App.—San Antonio 1918, writ ref'd). *See also Stark v. Coe*, 134 S.W. 373, 376 (Tex. Civ. App.—Dallas 1911, writ ref'd) ("The railroad company . . . , owning the fee in the land, had the right to lease it to be used in any manner not to injure the surrounding property.").[5]

Texans, and Austinites in particular, have always exercised their fundamental right to lease their property by housing short-term tenants. *See supra* at 2-5. Not only does the City admit that short-term rentals are an "established practice" and "historically . . . allowable use," 1.CR.796, but the evidence adduced at the trial court

[5] Similarly, a property owner has the right to license use of her property. *See Long Island Owner's Ass'n, Inc. v. Davidson*, 965 S.W.2d 674, 683 (Tex. App.—Corpus Christi 1998, pet. denied) ("An easement or license extends the right to use property to only a limited number of people and for certain purposes."); *Latimer v. Hess*, 183 S.W.2d 996, 997 (Tex. Civ. App.—Texarkana 1944, writ ref'd) (If "permission is given . . . for one to do some act or acts on the land of the one granting the right, then it is a license only."). There is no difference in analysis, therefore, if short-term rentals are treated as licenses to be on the property as opposed to short-term leases.

confirms Austin's history with short-term rentals, *see* 5.CR.1004 (Rachel Nation noting that her family has been in the short-term rental business since just after World War II); 5.CR.428 (City Council testimony describing the experience of a family that participated in STRs when they moved to Austin in 1942). And judicial decisions from as far back as the mid-1800s demonstrate that short-term rentals are an ingrained part of Texas culture. *See, e.g.*, *Gouhenant v. Cockrell*, 20 Tex. 96, 98 (1857) (litigant "boarded for some months" in a certain location); *Ruhl v. Kauffman & Runge*, 65 Tex. 723, 726 (1886) (involving cottage rental of "two rooms" "for about two months"); *Holmes v. Coalson*, 178 S.W. 628, 631 (Tex. Civ. App.—Fort Worth 1915) (involving room rentals in multiple houses "per week"), *aff'd*, 240 S.W. 896 (Tex. 1922).

b. Every Austinite who invested in this property right has a vested interest in maintaining it. Because the right to lease, much like the right to exclude or the right to sell, is a fundamental property right implicit in virtually every property transaction in the State, it is a "definitive" and not merely a "potential" right possessed by every residential-property owner in the City—put differently, the right is "vested" for all. *Stop The Ordinances Please*, 520 S.W.3d at 214 ("A right is vested when it has some definitive, rather than merely potential existence." (internal quotation marks omitted)).

But at the very least, and as *Village of Tiki Island* correctly held, the right to lease residential property to visitors, temporarily displaced residents, or whomever else on a short-term basis is vested for those who have invested time and money into short-term renting. 463 S.W.3d at 587 (holding right to lease vested because the

plaintiff "bought [the property] as an investment for the purpose of rentals, and made substantial improvements to the property"). This describes many Austin property owners. For example, plaintiffs Jennifer and Mike Hebert invested over $60,000 renovating their property to make it appealing to short-term tenants who occupy the home whenever Mrs. Hebert, a native Austinite, is not in town operating her business. 2.C.R.1848, 1849, 1851. Likewise, plaintiffs Ahmad and Marwa Zaatari spent approximately $20,000 and 500 hours of their own time after Mr. Zaatari lost his job to make their home into a desirable home for short-term renters. 2.CR.1840-41. And these are only some of the countless Austinites who have a vested right in short-term rentals.

This is not, of course, to say that every use of property is a vested property right. Courts have held that a fireworks company does not have a vested property right to sell fireworks on its property, *see Mr. W. Fireworks, Inc. v. Comal Cty.*, No. 03–06–00638–CV, 2010 WL 1253931, at *8 (Tex. App.—Austin Mar. 31, 2010, no pet.) (mem. op.) ("Mr. W does not have a vested property right to sell or dispense fireworks in Comal County."); *Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 240 (Tex. App.—Eastland 2007, pet. dism'd); an animal shelter does not have a vested right in continuing to use its property to house animals, *Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211, 216 (Tex. App.—Tyler 2012, no pet.); *see also Truckload Fireworks*, 230 S.W.3d at 240 ("no vested property right in any particular zoning classification"); and a retail business does not have a vested interest in selling food and drink in disposable containers from its property, *Stop The Ordinances Please*, 520 S.W.3d at 223.

But an investment in the exercise of a fundamental property right—the right to lease property, frequently for profit—is categorically different, especially where, as here, the lease does not change the underlying residential character of the property. *See infra* at 25-26. As a deeply rooted property right, the right to lease is inextricably tied to property in a way that selling items from the property (or otherwise using it in a specific way) is not. And a contrary holding would not only require short-term lessors to violate the ordinance to challenge it, but would require anyone alleging a regulatory taking to split their compensation and equitable claims.

c. This vested right to lease is plainly and significantly threatened by the Ordinance. The First Court of Appeals recently recognized as much in *Village of Tiki Island*, when it enjoined a law prohibiting short-term rentals. 463 S.W.3d at 564-65, 569; *see also Consumer Serv. Alliance of Tex. v. City of Dall.*, 433 S.W.3d 796, 806 (Tex. App.—Dallas 2014, no pet.) ("a statute harms vested property rights if it completely shuts down an otherwise lawful business" (citing *Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958))). Indeed, by telling owners that, despite their investments, in a few years they will no longer be able to use their property for short-term renting, the Ordinance does not simply *threaten* harm to an owner's vested right to lease, it affirmatively abolishes that right.

II. The Ordinance Is Unconstitutionally Retroactive.

Our legal system recognizes that laws altering the legal consequences of past actions are often fundamentally unjust. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994).

After all, "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 265-66. The nation's founders expressed their distrust for retroactive legislation in no fewer than five separate provisions of the United States Constitution that prohibit—or at the least, inhibit—certain types of retroactive legislation: *Ex Post Facto* Clauses, U.S. Const. art. 1, § 9, cl. 3 & art. 1, § 10, cl. 1; the Contracts Clause, *id.* art. 1, § 10, cl. 1 (prohibiting legislation "impairing the Obligation of Contracts"); the Fifth Amendment's Takings Clause, *id.* amend. V; prohibitions on "Bills of Attainder," *id.* art. 1, §§ 9-10; and the Due Process Clause, *id.* amend. V. *See Landgraf*, 511 U.S. at 266.

Texas goes even further. The Texas Constitution explicitly commands that "[n]o . . . retroactive law . . . shall be made." Tex. Const. art. 1, § 16. And while this is not a blanket and absolute prohibition on *any* retroactive legislation, it does "protect[] settled expectations" and prevent "abuses of legislative power" by imposing a "heavy presumption against retroactive laws" that can only be "overcome" through proof of a "compelling public interest." *Robinson*, 335 S.W.3d at 145-46. This is not a "bright-line test," but a test that requires this Court to examine three factors in light of this "heavy presumption": (1) "the nature and strength of the public interest served by the statute as evidenced by the" legislative record, (2) "the nature of the prior right impaired by the [Ordinance]," and (3) "the extent of the impairment." *Id.* at 145.

Here, the Ordinance would be unconstitutional even if it only minimally burdened the established property interest to lease one's own property, because there

is *nothing* in the legislative record demonstrating harm to be remedied by banning short-term rentals. That the Ordinance significantly disrupts a fundamental property right and destroys some Texans' livelihood in the process makes its unconstitutionality manifest.

A. The legislative record does not demonstrate a "compelling public interest."

Because the City cannot demonstrate through the legislative record that the Ordinance advances a "compelling public interest," this Court could hold the Ordinance unconstitutionally retroactive without examining the other two *Robinson* factors. *Robinson*, 335 S.W.3d at 145-46; *see also Tenet Hospitals Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014) (*Robinson* "require[s] a compelling public interest"). Because of the presumption against retroactive laws, it is insufficient for the City to speculate and argue about the public interests the Ordinance *could* advance; it must adduce evidence from the City Council to demonstrate that there is—and was at the time of enactment—a public harm to be remedied and that the Ordinance will remedy that harm. *Id.* No such evidence exists.

In the four years preceding the Ordinance, not a single citation was issued to a licensed short-term rental owner or guest for violating the City's noise, trash, or parking ordinances. *See* 2.CR.199-495; 4.CR.1018-2414 (citation and notice of violation documents from calendar years 2012-2016). And during this same four-year period the City issued notices of violations—not *citations*—to licensed short-term rentals only 10 times: seven for alleged overoccupancy (4.CR.1762; 4.CR.1807; 4.CR.1810; 4.CR.1813), two for failure to remove trash receptacles from the curb in

a timely manner (4.CR.1730; 4.CR.1112), one for debris in the yard (4.CR.1947), and *none* for noise or parking issues. So it is no surprise that, despite supposed concern about short-term rentals operating "party houses," the City has not initiated a single proceeding to remove a property owner's short-term rental license for multiple party complaints, 4.CR.35, and the assistant city manager, when under oath, could not say even that he *believed* more than one party house exists. 3.CR.2179 (saying he "thinks" there "may be" more than one).

And it is not as if short-term rentals receive a disproportionate number of *complaints* from neighbors who are in the best position to monitor guest behavior.[6] As the City knew and conceded, "short-term rental properties have significantly *fewer* 311 calls and significantly *fewer* 911 calls than other single family properties." 2.CR.192 (emphasis added). Against this data, the City at most can support its nuisance rationale with *unverified* anecdotes and accusations from the public—the same public who advocated the ban for impermissible purposes, such as to protect the hotel industry and to prevent racial diversity. 4.CR.23, 25. But the City cannot elevate anecdotes over evidence. *Spann v. City of Dallas*, 235 S.W. 513, 516 (Tex. 1921) ("It is a doctrine not to be tolerated in this country that either State or municipal authorities can by their mere declaration make a particular use of property a nuisance which

[6] Even if short-term rentals received a disproportionate number of complaints, the lack of citations would demonstrate that the City does not have a significant interest in remedying the conditions leading to these (rare) complaints. *See State v Morales*, 826 S.W.2d 201, 205 (Tex. App.—Austin 1992) ("Further, it is disingenuous to suggest that [the challenged provision] serves to protect public morality when the State readily concedes that it rarely, if ever, enforces this statute."), *rev'd on other grounds*, 869 S.W.2d 941 (Tex. 1994).

is not so, and subject it to the ban of absolute prohibition."). The City Council did not have any evidence in front of it to support a nuisance rationale.

The Ordinance also does not advance an interest in consistent zoning because both short-term rentals and owner-occupied homes are residential in nature. As the Second Court explained in *Garrett v. Sympson*, "if a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes"—as occurs with short-term rentals—"this use is residential, not commercial, no matter how short the rental duration," or how high the price, 523 S.W.3d 862, 868 (Tex. App.—Fort Worth 2017, pet. filed) (receiving rental income "in no way detracts from or changes the residential characteristics of the use by the tenant"). This Court agreed in *Boatner v. Reitz*, where it relied on *Garrett* and held that a restrictive covenant requiring residential use permitted short-term rentals. *Boatner v. Reitz*, No. 03-16-00817-CV, 2017 WL 3902614, at *6 (Tex. App.—Austin 2017, no pet.) (mem. op.). And state courts across the country are in accord. *See, e.g.*, *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569, 580 (Ala. Civ. App. 2012) (on reh'g) (similar).

In any event, even if short-term rentals *could* be considered non-residential, the City has expressly made the determination to treat them as residential for purposes of its own laws. *See* Austin, Tex. Code of Ordinances § 25-2-4(B) (listing short-term rentals as a residential use); 1.CR.795 (Memorandum from City stating that a property "leased for less than 30 days" "continues to be used as a residential structure").

Because short-term rentals, like their neighbors, are residential properties, there is no governmental interest in banning them to achieve zoning consistency.[7]

B. The ordinance significantly impairs property owners' well-settled leasing expectations.

Robinson requires courts assessing the constitutionality of a retroactive law to consider not necessarily whether the impaired right was "vested," but the extent to which that right was "settled." *Robinson*, 335 S.W.3d at 142-43, 147, 149. In *Robinson*, for example, the Court held that the plaintiffs had a settled expectation that the Legislature would not extinguish their already filed common-law personal injury suit. *Id.* at 147-49. By contrast, in *Union Carbide Corp. v. Synatzke*, the Court held that plaintiffs asserting a statutory cause of action *after* the Legislature altered certain aspects of that statute had no settled expectation in the previous version of the statute because "the Legislature may repeal a statute and immediately eliminate any right or remedy that the statute previously granted." 438 S.W.3d 39, 59 (Tex. 2014).

Because Austinites—and especially those who invested in short-term rental properties—have a vested right to lease their property, *see supra* at 18-21, they also had a settled expectation that the City would not eliminate this right. The right to lease is not a creature of statute that may be eliminated at any time, like the asserted right in *Synatzke*. Rather, it is a "fundamental, natural, inherent, inalienable" right "not derived from the legislature" and "preexist[s] even constitutions." *Eggemeyer*

[7] Assuming short-term rentals were considered commercial rather than residential in this case, there would still be no public interest in excluding them, because the evidence demonstrates that they present the same externalities as long-term rentals. Excluding short-term rentals from "residential" areas would therefore advance only a bureaucratic interest in maintaining zoning semantics, not a public interest rooted in reality.

v. Eggemeyer, 554 S.W.2d 137, 140 (Tex. 1977) ("The protection of one's right to own property is said to be one of the most important purposes of government."); *see also Tex. Rice Land Partners v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 n.34 (Tex. 2012) ("[p]rivate property rights" are a "foundational liberty not a contingent privilege"). The right to lease is thus far more settled even than the common-law right to sue for personal injury recognized in *Robinson*, because that right was not considered a property interest under the common law. *Robinson*, 335 S.W.3d at 148. Property owners in Austin had no reason to expect—especially given the City's promotion of short-term rentals only a few years before—that the City would extinguish a fundamental property right that they have enjoyed for at least over a century.

By taking away this fundamental and settled property right, the Ordinance operates retroactively. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective." *Landgraf*, 511 U.S. at 269 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756 (No. 13,156) (CCNH 1814) (Story, J.)). This "functional" approach to retroactivity, *id.*, means that any law "that acts on things which are past," *Subaru of Am., Inc. v. David McDavid Nissan Inc.*, 84 S.W.3d 212, 219 (Tex. 2002), by "chang[ing] the legal consequences of acts completed before its effective date," *Ramirez v. Texas*, 184 S.W.3d 392, 395 (Tex. App.—Dallas 2006, no pet.) (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987)), is retroactive. *See also Union Pac. R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (retroactive law is

one that gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed").

There is no question that the Ordinance changes the legal consequences of previous transactions. When Austinites purchased property before the Ordinance, they purchased it under a regime that allowed them—if they wanted—to rent their home for fewer than 30 days. When certain Austinites invested in improvements for the purpose of renting their homes on a short-term basis, they were transacting under a legal regime that allowed them to profit from this investment. But the Ordinance upends these transactions. The family that bought their home pre-Ordinance and thereby obtained the right to lease their property for fewer than 30 days has had that right stripped from them. And the entrepreneur who invested pre-Ordinance in furnishings and remodeling to make his property more attractive to short-term renters can no longer lawfully recoup his investment. *See, e.g.*, 5.CR.995 (Decl. of Pete Gilcrease) ("The investment I made would not increase the sale price enough to justify the investment without the ability to rent short term. I would not have made the investment if short term rentals were not possible."). They transacted under one legal regime, and must now live with the consequences of those transactions under another—that is retroactivity.

The City's decision to upend the consequences of previous property transactions significantly and negatively affects many Austinites' livelihoods. Rachel Nation, a realtor and single mother, "purchased and invested in all of [her] properties with the expectation of being able to rent them" on a short-term basis, but under the Ordinance she "might not be able to make enough income with [her] properties to

meet expenses and needs" because her short-term rentals "readily pull in" $1,000 more per month than a long-term rental. 5.CR.1004-05 (Decl. of Rachel Nation). Similarly, Carole Price and her husband invested in rental properties for their retirement, but will receive over $1,000 less per month for each of their properties if they must engage in long-term rather than short-term rentals. 5.CR.987-88 (Decl. of Carole Price). And this is only the tip of the iceberg—many other Austinites will suffer economically from the City's decision to alter the consequences of their investments in short-term rentals. *See, e.g.*, 5.CR.991-92 (Decl. of Cary Reynolds) ("Utilizing my property as a Type 2 short-term rental enables me to financially survive in the face of ever increasing property taxes."); 5.CR.1000 (Decl. of Gregory Cribbs) ("We would face a substantial loss in income if unable to rent for periods of less than 30 days.").

III. The Ordinance Is An Invalid Use of the Takings Power Because It Impairs Property by Committing a Regulatory Taking Based on Facts that Indicate the Taking Occurs for the Benefit of Private Persons.

A city may take a person's private property for a *public* purpose. Tex. Const. art. I, § 17(a) ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."); *see also* U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation."). But the exercise of eminent-domain authority for *private* enrichment is improper and voidable. *E.g.*, *Lone Star Gas Co. v. City of Fort Worth,* 98 S.W.2d 799, 801 (Tex. 1936); *Benat v. Dallas County,* 266 S.W. 539, 541-42 (Tex. Civ.

App.—Dallas 1924, writ ref'd). As a result, a taking is a lawful exercise of governmental power only when the property taken is for "the State, a political subdivision of the State, or the public at large['s]" "ownership, use, and enjoyment." Tex. Const. art. I, § 17. Because the Ordinance is a taking with no established public benefit, it is ultra vires and void.

A. The Ordinance is a regulatory taking.

"The protection of one's right to own property is . . . one of the most important purposes of government." *Eggemeyer*, 554 S.W.2d at 140. For that reason, property "may be regulated to a certain extent," but "if regulation goes too far it will be recognized as a taking" that must be compensated. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004) (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).[8] Whether a regulation goes "too far" is a "question of degree," *id.* (quoting *Penn. Coal*, 260 U.S. at 413, 415, 416), that asks whether the City is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978)).

To answer this question here, this Court must examine how the Ordinance "affects the balance between the public's interest" and the interests of Austin homeowners. *Id.* at 672. This requires, at a minimum, examining (1) "the economic impact" the Ordinance has on Austinites, (2) "the extent to which the [Ordinance] has

[8] Courts often look to federal jurisprudence when analyzing takings claims under Texas law because the two bodies of law are "consistent." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012).

interfered with [their] economic expectations," and (3) "the character of the [City's] action." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477-78 (Tex. 2012) (citing *Penn Cent.*, 438 U.S. at 124). It also requires this Court to examine any other relevant factors, *see City of Houston v. Trail Enters., Inc.*, 377 S.W.3d 873, 879 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (noting that *Penn Central* factors are "non-exclusive"), including the "strength of the [City's] interest" in enacting the Ordinance. *Cienega Gardens v. United States*, 503 F.3d 1266, 1279 (Fed. Cir. 2007); *see also Weatherford v. City of San Marcos*, 157 S.W.3d 473, 489 (Tex. App.—Austin 2004, pet. denied).

1. The Ordinance severely harms Austin property owners.

When one "compares the value that has been taken from the property with the value that remains in the property," *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935-36 (Tex. 1998), there can be no doubt the Ordinance economically harms Austin property owners. As detailed *supra* at 29-30, the Ordinance prohibits short-term rentals that would provide significantly more income to property owners than long-term renting or sale. *See Sheffield*, 140 S.W.3d at 677 ("[L]ost profits are clearly one relevant factor to consider in assessing the value of property and the severity of the economic impact . . . on a landowner."). Peter Gilcrease states that his net monthly income would plummet by 41%, as he currently rents his units for $8,853 but under the Ordinance will receive $3,653 less per month. 5.CR.995. Similarly, Gregory Cribbs's average short-term rental income per property is $2,825, but based on "data from the Multiple Listing Service database of long term rentals with similar characteristics" he would receive only $1,817 per month from a long-term rental—a

35% drop. 5.CR.1000. Rachel Nation stated in her declaration that she could get approximately $1,000 more per month—or 33% more—if she converted her long-term rental to a short-term rental. 5.CR.1005-06 (Rachel Nation noting that this figure is based on her owning a short-term rental next to her long-term rental). *See also* 5.CR.987-88 (Carole Price will lose $4,000 per month); 5.CR.1009 (Travis Somerville will lose $16,000 per year on two rental properties).

For each of these owners—and for many more—this lost income is significant, especially when considered in relation to the amount of money that they invested into converting their properties into short-term rentals, *see, e.g.*, 5.CR.988 (Carole Price detailing investment in converting properties to short term rentals); 5.CR.995 (Decl. of Pete Gilcrease describing same), and accounting for the fact that these outlays do not materially bolster the property's sale price *unless* the property can be rented short-term, *see* 5.CR.995-96 (Decl. of Pete Gilcrease) ("The investment I made would not increase the sale price enough to justify the investment without the ability to rent short term. . . . [We] most likely [will] have to sell [the properties] and lose the investments that we made."); 5.CR.1004-05 (Decl. of Rachel Nation) ("If I am unable to get a Type 2 license for [my property], I will probably sell it, which will also negatively impact my income.").

The economic reality for Austinites is no different from that facing the short-term lessor in *Village of Tiki Island* who obtained an injunction on her takings claim. 463 S.W.3d at 582. In *Village of Tiki Island*, the First Court recognized that, although property "is worth at most 10% more if short-term rentals are permitted," a home "that can be used for short-term rentals can be sold for more money, and be sold

faster, than one that cannot be used for short-term rentals." *Id.* at 578. This is a direct result of the fact that the inability to conduct short-term rentals costs owners "quite a bit of money" in established rental income. *Id.* at 579. And so, like here, there was more than sufficient evidence to demonstrate that banning short-term rentals has "an economic impact on the value of" short-term rental property sufficient to "establish a viable taking claim." *Id.* at 582.

2. The Ordinance disrupts reasonable investment-backed expectations.

Few things were more reasonable than an Austin property owner's expectation before the Ordinance that she could invest in her right to lease. "The existing and permitted uses of the property [at issue] constitute the 'primary expectation' of the landowner that is affected by regulation." *Hearts Bluff*, 381 S.W.3d at 491 (quoting *Mayhew*, 964 S.W.2d at 936). And there is no escape from the fact that short-term renting was an "existing and permitted" use of residential property in Austin, as it was an "established practice" since well before anyone involved in this litigation was born. 1.CR.796. *See supra* at 2-5, 18-19. Shortly before passing the Ordinance, the City affirmatively *encouraged* its citizens to use their property for short-term rentals to provide others with "a more authentic Austin experience." 5.CR.848-52, 854-55. With this history, Austinites had every reason to expect that they could invest in developing their right to lease their property on a short-term basis. *Vill. of Tiki Island*, 463 S.W.3d at 580-81 (holding that plaintiff had reasonable investment backed expectation because "short-term rentals have long been done in Tiki Island").

Because every residential property owner purchased her property on the (at least implicit) assumption that she *could* rent that property on a short-term basis, every property owner has an investment-backed interest. But those who developed and invested their property *specifically* for purposes of short-term renting, *see, e.g.*, 5.CR.1146 (plaintiff Zaatari discussing purchase of $25,000 in furnishings for short-term renting); 5.CR.1096-97 (plaintiff Redwine discussing investment made in anticipation of short-term renting); 5.CR.994 (Gilcrease stating that he purchased his properties to use as short term rentals); 5.CR.773, 777 (Hebert discussing expenses of $60,000 to prepare home for short-term renting), undoubtedly have reasonable investment-backed expectations in being able to continue to use their property in this way, *see Vill. of Tiki Island*, 463 S.W.3d at 580-81 (plaintiff had reasonable investment backed expectations because she was "doing short-term rentals" when they were lawful).

B. The City cannot establish a public purpose on the pleadings or the record.

The government's authority to exercise eminent domain is inherent and is not granted by the Constitution. *McInnis v. Brown Cty. Water Improvement Dist., No. 1*, 41 S.W.2d 741, 744 (Tex. App.—Austin 1931, writ ref'd); *see Whittington v. City of Austin*, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied). It is defined as being for a public purpose. Tex. Const. Art. I, § 17. By requiring takings to be solely for public purposes, these limitations have always implicitly prohibited takings for private purposes or benefit. *Maher v. Lasater*, 354 S.W.2d 923, 924 (1962). This analysis is all the more stringent under the recent amendments to the Texas Constitution

specifying that public purpose requires that the benefits of the taking inhere to the State, a political subdivision, or the public as a whole. Tex. Const. art. I, § 17 (a)(1)(A).

Because the restriction is based on compensation, rather than a limitation on power, it is improper to bring a lawsuit to invalidate otherwise appropriate eminent-domain actions based on the lack of prior compensation (unless required by statute or subsection (d) of Article I, section 17). Exercise of the eminent-domain power, even by a private entity,

> legalizes all acts done in strict pursuance of the power conferred, and that persons whose property has been damaged, but not taken, must suffer the loss. If the power does not confer authority to do the act despite the damage, it would be the right of an owner whose property was injuriously affected ... to enjoin such operation as a nuisance, and thus defeat the grant.

Gainesville, H. & W.R. Co. v. Hall, 14 S.W. 259, 260 (Tex. 1890). The coordinate limitation on the exercise of this power is that the government must, as a result, pay compensation when it purposefully invokes the eminent-domain power. *E.g.*, *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71 (Tex. 1949).

A taking occurs only if the government physically harms or destroys property or so impairs its use that the property can no longer be used for its intended purpose, *DuPuy v. City of Waco,* 396 S.W.2d 103, 108-09 (Tex. 1965), or when regulation deprives a property of an expectation of use subject to investment-backed expectations of future use, *see supra* at 34-35. To ensure that an exercise of the eminent-domain power has occurred, the Court requires evidence that a taking or significant property damage is substantially likely to occur as a result of a public action it undertakes. *E.g.*,

Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 554 (Tex. 2004); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 829-830 (Tex. 2005) (intent to take must be proven by objective indicia of intent demonstrating awareness at the time government action occurred).

1. Valid use of the eminent-domain power requires a bona fide public purpose.

An attempt to exercise eminent domain power without authority is void. *E.g.*, *Lone Star Gas*, 98 S.W.2d at 801 ("It is universally recognized that an attempt, or threatened attempt, to take private property for public use by virtue of eminent domain may be restrained by injunction when the proceeding is for any reason void."); *see also Benat*, 266 S.W. at 540-41 (holding attempt to exercise eminent domain over street invalid where city had no statutory authority to lay out street in question). One basis for voidness is lack of demonstrated necessity for a particular public purpose. *E.g.*, *Whittington*, 174 S.W.3d at 896-97; *Central Power & Light Co. v. Willacy Cty.*, 14 S.W.2d 102, 103 (Tex. App.—San Antonio 1929, no writ). Even a contemporaneous recitation of public use is insufficient to render an exercise of eminent-domain power valid if the "true intended use is a private use." *Id.* at 897 (discussing, *e.g.*, *City of Dallas v. Higginbotham*, 143 S.W.2d 79, 88 (Tex. 1940)). The question of whether the use is a "public" one is a question of law. *Maher*, 354 S.W.2d at 925; *Cascott LLC v. City of Arlington*, 278 S.W.3d 523, 528 (Tex. App.—Fort Worth 2009, pet. denied).[9]

[9] It is not sufficient for a municipal defendant merely to assert that its exercise of a regulatory authority is based on the police power.

2. The City's interest in banning short-term rentals borders on baseless—it is in effect a transfer of wealth to private persons rather than to the public.

The objective indicia of intent in the record demonstrate that the City's interest is not supported by the public interest, but at heart is designed to benefit another class of private property owner. As demonstrated in the context of retroactivity, all evidence demonstrates that short-term renters are no more disruptive to the residential community than their residential neighbors, including long-term renters or owners. *See supra* 24-27. Indeed, the City effectively acknowledges this by allowing short-term rentals where the owner claims his home as a homestead, Austin, Tex. Code of Ordinances §§ 25-2-789(A)(3), § 25-2-950, or where no compensation is paid, 5.CR.1082-83.

Of course, the Court could conclude that the City intended to help certain *private* parties. It is well-known and no surprise that short-term rentals often compete with hotels, and that hotel associations will try to prevent short-term rentals from operating. *See* Jim Edwards, *Why Hotel Industry Lobbyists Want a Global Crackdown on Airbnb*, Business Insider, May 27, 2013, *available at* https://tinyurl.com/nm8sok3 (last accessed Mar. 21, 2018). As one commentator put it: "Home-sharing regulations are often nothing more than a turf war by existing businesses, such as hotels, who use political connections to block potential competition." Sandefur, *Turning Homeowners into Outlaws*, at 425. There is also some testimony in the record that the Ordinance was motivated by a desire to lower property values so that homes can be purchased by those who plan to live in them, *see* 5.CR.460-461 (Councilmembers arguing that STRs need to be restricted to reduce the value of homes); 5.CR.426,

443-45, 452-54, 464-65 (public commenters asserting property value rationale), although the City argued this did *not* motivate the Ordinance's passage, 5.CR.1031 (Assistant City Manager agreeing that "the STR Ordinance was not aimed at high property values[] in any way"). But preventing hotels and potential home-buyers from competing with those who operate or hope to operate short-term rental properties advances only a *private* interest that cannot "withstand the scrutiny of the *public* use requirement" and is "void." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (emphasis added); *see also Marrs v. R.R. Comm'n*, 177 S.W.2d 941, 949 (Tex. 1944) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid" (citation omitted)).

The City may also believe that preventing short-term rentals advances the public interest in keeping out-of-towners out of Austin neighborhoods. But that is an *illegitimate* purpose as it contradicts every citizen's right to freely move throughout the country. *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (Privileges and Immunities Clause forbids discrimination on basis of residence).

That there is no *legitimate* basis for the Ordinance by itself requires that it be deemed a taking. *Sheffield*, 140 S.W.3d at 674-75 ("[T]he lack of a legitimate purpose alone would make the rezoning a taking."); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."). But even if there were a minor nuisance benefit to banning short-term rentals, the balance of the public and private interests here is not even close.

C. The Ordinance's delayed effect does not alter the analysis.

The fact that the ban on Type 2 short-term rentals does not come into effect until 2022 does not alter the analysis, because this six-year delay does not provide sufficient time for investors to recoup their investments. Texas courts have generally permitted cities to prohibit the existing use of a property if the owner of that property is given sufficient time and opportunity "to recover his investment in that property." *Eller Media Co. v. City of Houston*, 101 S.W.3d 668, 683 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). For example, in *Lubbock Poster Co. v. City of Lubbock*, an ordinance that "require[d] all existing billboards to either conform to [new] regulations or be removed" was not a taking because it provided a 6.5-year amortization period—the same as the tax depreciation period—in which billboard owners could recoup their investment. 569 S.W.2d 935, 943-44 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); *see also Bd. of Adjustment of City of Dall. v. Winkles*, 832 S.W.2d 803, 807 (Tex. App.—Dallas 1992, writ denied) (finding 11-year amortization reasonable because it allowed the owners the opportunity to collect sufficient funds to pay to remove the offending mobile equipment from the property).

But many of the investments that owners make in their properties to convert them to short-term rentals cannot be recouped in a mere six years, as is evidenced by tax depreciation schedules. Owners have improved their homes for short-term renting by landscaping and adding a new tankless water heater, 5.CR.1096-97, painting the exterior and remodeling the interior of the home, 5.CR.1106, and otherwise remodeling, 5.CR.988—all of which are improvements to real property that are amortized over 27.5 years, *see* 26 U.S.C. § 168(c), (i)(6); *see also* Internal Revenue Service,

Publication 527: Residential Rental Property, Table 1-1 (2017), *available at* https://www.irs.gov/pub/irs-pdf/p527.pdf. Even still, a typical amortization analysis ignores that many short-term rental investments are recouped very slowly, whatever the depreciation schedule, because potential profits are drowned by rising property taxes, *see, e.g.*, 5.CR.988, 991-92. In this context, six years is insufficient to provide owners with the opportunity to recoup their investment that the case-law requires.

But even more importantly, the amortization doctrine cannot alter the takings analysis because it is contrary to the federal Constitution.[10] The amortization doctrine in Texas stems from *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972), which was decided *before* the Supreme Court of the United States set forth the appropriate federal regulatory takings analysis in *Penn Central*, and has not been reexamined in the years since. Under *Penn Central*, there is no room to ask whether the effect of the regulation is delayed, but only whether the regulation goes too far. If it does, it is a taking that must be compensated; if it does not, it is a valid exercise of the police power.

[10] Some states have rejected the amortization doctrine for various reasons. *See PA Nw. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991) (amortization doctrine unconstitutionally takes property without just compensation); *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) ("Of course, every comprehensive zoning ordinance limits and thereby regulates the use of property prospectively. But we cannot embrace the doctrine espoused by advocates of the amortization technique that there is no material distinction between regulating the future use of property and terminating pre-existing lawful nonconforming uses."); *City of Oakbrook Terrace v. Suburban Bank & Trust Co.*, 845 N.E.2d 1000, 1011 (Ill. App. Ct. 2006) (amortization doctrine violates just compensation requirement of State Eminent Domain Act).

Where, as here, a City's decision to eliminate a property right goes too far and constitutes a taking as a matter of federal law under *Penn Central*, the City cannot paper over the unconstitutionality of its actions by arguing that property owners have sufficient opportunity to recoup their investments. This is because owners of property are entitled to receive as compensation the "fair market value" of the *property* that was taken, not simply the amount of their *investment* in that property. *United States v. Miller*, 317 U.S. 369, 374 (1943). Of course, the fair market value of property may be the same as the investment value of property in some cases, but in others, where the property taken is the *result* of productive investment, the fair market value of the property will often be substantially more than the investment to produce that property. *See Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2433 (2015) (appropriate compensation is the "fair market value" of taken raisins, not the investment of producing those raisins).

That is the case here. The City is taking from property owners their right to transact short-term leases—a fundamental property right with a fair market value above and beyond owners' investments in converting properties to short-term rentals. And it is that fair market value to which the owners are entitled.

It would also be a grave mistake to conceive of the opportunity to recoup investment funds as infecting the *Penn Central* takings analysis itself. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. Rev. 1222, 1244-45 (2009) (noting that some courts have held "that the revenue earned during the amortization period can be included in regulatory takings analysis in order to de-

cide whether the regulation has 'gone too far'"). Although the ability to recoup investment funds admittedly lessens the Ordinance's economic blow, allowing what amounts to *partial* compensation to defeat an otherwise valid taking claim by considering it in the *Penn Central* analysis would throw the just compensation requirement out the window. Instead of paying full compensation for the property taken through regulation, governments would always provide partial compensation in the form of amortization to defeat the takings claim altogether. The Constitution cannot be so easily gamed.

IV. The Trial Court Erroneously Excluded Competent Summary Judgment Evidence.

A. The State made timely disclosures, and even if not, there was good cause for, and no prejudice caused by, any untimeliness.

The trial court erred when it excluded the declarations of Carole Price, Cary Reynolds, Pete Gilcrease, Gregory Cribbs, Rachel Nation, and Travis Sommerville. Appx. B. These witnesses were timely disclosed under Tex. R. Civ. P. 194.2(e), and, even if they were not, any prejudice to the City is attributable to the City's inaction. The trial court's decision to exclude their declarations was accordingly not "supported by the record" and an abuse of discretion. *See Dyer v. Cotton*, 333 S.W.3d 703, 717 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

The State provided the City with Tex. R. Civ. P. 194.2(e) disclosure information in a timely manner. Because the State needed evidence regarding short-term rental investments and harms attributable to the Ordinance, it had to identify people who actually made these investments and suffer these harms—*i.e.*, Type 2 short-term

rental owners. Given that the State had no way to easily discover the names of short-term rental licensees, and the City did not disclose the list of licensees until February 10, 2017, *see* 5.CR.1555-1605, the State simply required more time than plaintiffs or the City to identify pertinent witnesses. As a result, when the State in mid-March had to respond to the City's request that it disclose the names of "persons having knowledge of relevant facts, and each person's connections with this matter," the State provided the City with the best information it had at the time: it would rely on "individuals who currently hold, or were previously granted, Short-Term Rental (STR) permits by [the City]." 5.CR.1608.

Both before and after this mid-March disclosure, the State worked diligently to find appropriate witnesses. And when it found those witnesses, it disclosed their names—and the evidence they would provide—in a supplemental disclosure to the City under Tex. R. Civ. P. 193.5 (May 16, 2017 disclosure of names and documents underlying their testimony). The State recognizes that this disclosure came at the end of discovery, but given the circumstances, it and the March disclosure were timely and fully compliant with Rule 194.2(e). *See Van Heerden v. Van Heerden*, 321 S.W.3d 869, 879 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that trial court erred in striking testimony were "responses were sufficient under Rule 194.2(e).")

In any event, it was an abuse of discretion not to admit the declarations even if they were untimely disclosed. Texas Rule of Civil Procedure 193.6(a) states that untimely disclosed evidence should be admitted when there is "good cause for the fail-

ure to timely" disclose *or* "the failure . . . will not unfairly surprise or unfairly prejudice the other parties." The State demonstrated both to the trial court. First, the State demonstrated "good cause" by describing that it worked to develop witnesses and then disclosed the names of those witnesses once they were known. 5.CR.1534-1538; *see also Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex. 1989) (indicating that good faith efforts at locating a potential witness can support a finding of good cause); *see also Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992) (noting that good cause exists where "circumstances" make disclosure "difficult or impossible"). The Court should have admitted the evidence on good cause alone.

Second, the record shows that admitting the declarations would have neither "*unfairly* surprise[d]" nor "*unfairly* prejudice[d]" the City. Rule 193.6(a)(2) (emphasis added). There could be no unfair surprise as to the names of the persons submitting declarations because they were licensees of the City. The City knew that they had relevant information and it is hardly surprising that they would come forward to provide testimony against the City in this matter. Moreover, the State timely disclosed that it would rely on licensed Type 2 short-term rental owners, all of whose names and contact information the City already had in its possession. And apart from the names of the licensees, there could be no unfair surprise as to the content of their declarations because they addressed the same key points as the private plaintiffs' testimonial evidence. *See State v. Target Corp.*, 194 S.W.3d 46, 48-51 (Tex. App.—Waco 2006, no pet.) (holding that it was abuse of discretion for trial court to exclude expert testimony regarding subjects and bases that had already been disclosed).

For the same reasons plus more, there was no *unfair* prejudice. The City's only asserted ground for prejudice is that the witnesses were disclosed the day discovery closed and thus the City lacked the ability to speak to them. But any prejudice lays at the City's feet. The City was free at any time to speak to these non-party witnesses. Indeed, had the City wanted to depose these witnesses, it could have done so, as the City requested and took other depositions without objection outside of the discovery period. At the very least, the City could have asked for a continuance. *See* Tex. R. Civ. P. 193.6(c). The City's decision to sit on its hands rather than pursue discovery is the cause of any prejudice.

B. The declarations are highly relevant.

The declarations are also relevant under the Texas Rules of Evidence. Tex. R. Evid. 402, 403. As the merits of this brief make clear, the declarants provide a holistic and vivid view of the harm that the Ordinance causes Austinites who have invested in their right to lease their property on a short-term basis. To be sure, their testimony is not strictly necessary for the Court to see the basic picture of unconstitutionality—the private plaintiffs' testimony and accompanying evidence is sufficient for this Court to reverse. *See, e.g.*, 5.CR.1140-49 (plaintiff Zaatari stating that he invested $25,000 in short-term renting and would lose substantial revenue if forced to lease his property long-term); 5.CR.1093-99 (plaintiff Redwine stating that he purchased property for purpose of leasing short-term and that there is "quite a large [financial] difference" between short-term and long-term renting); 5.CR.771-78 (plaintiff Herbert) (stating that she made "significant modifications" to property for short-term renting, and that she could no longer afford the property if forced to lease long-term).

But evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." Tex. R. Evid. 401. The declarations unquestionably meet that low threshold.

Prayer

The Court should reverse the judgment below and remand to the trial court with instructions that it enter judgment in favor of the State of Texas and afford the State appropriate relief.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Scott A. Keller
Solicitor General

/s/ Andrew B. Davis
Andrew B. Davis
Assistant Solicitor General
State Bar No. 24082898
Andrew.Davis@oag.texas.gov

Counsel for the State of Texas

Certificate of Service

On March 29, 2018, this document was served electronically on Robert Henneke and Michael Siegel, lead counsel respectively for Plaintiffs-Appellants and the Defendants-Appellees, via rhenneke@texaspolicy.com and Michael.Siegel@austintexas.gov.

/s/ Andrew B. Davis
Andrew B. Davis

Certificate of Compliance

Microsoft Word reports that this brief contains 13,177 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Andrew B. Davis
Andrew B. Davis

No. 03-17-00812

In the Court of Appeals for the Third Judicial District Austin, Texas

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HERBERT, JOSEPH "MIKE" HERBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH,

Plaintiffs-Appellants / Cross-Appellees,

v.

THE STATE OF TEXAS,

Intervenor-Plaintiff Cross-Appellants,

v.

CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN,

Defendants-Appellees / Cross-Appellants.

On Appeal from the
53rd Judicial District Court, Travis County

APPENDIX

Tab A: Trial Court's Order Granting City's No Evidence Motion

CAUSE NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH, Plaintiffs,	§	IN THE DISTRICT COURT
&	§	
STATE OF TEXAS, Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, Defendants.	§	53rd JUDICIAL DISTRICT

ORDER ON PLAINTIFFS' AND TEXAS' MOTIONS FOR SUMMARY JUDGMENT AND THE CITY'S PLEA TO THE JURISIDICTION AND NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

BE IT REMEMBERED that on this day, the Court considered *Plaintiffs' and Texas's Motions for Summary Judgment* ("Plaintiffs' and Intervenor's Motions") and *Defendants' Pleas to the Jurisdiction and No Evidence Motion for Summary Judgment* (the "City's Motions"). After considering the pleadings, the applicable law, the arguments of counsel, and the evidence on file, the Court is of the opinion that the motions should be granted, as follows:

1. Plaintiffs' Motion for Summary Judgment is ~~GRANTED~~ / DENIED
2. State of Texas Texas's Motion for Summary Judgment is ~~GRANTED~~ / DENIED
3. The City's Plea to the Jurisdiction against Plaintiffs is ~~GRANTED~~ / DENIED
4. The City's Plea to the Jurisdiction against Texas is ~~GRANTED~~ / DENIED

11/21/17

5. The City's No Evidence Motion for Summary Judgment is GRANTED ~~DENIED~~.

So ordered on this 21st day of November, 2017

PRESIDING JUDGE
TIM SULAK

Tab B: Trial Court's Order Granting City's Objections to Evidence

CAUSE NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSEPH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH, Plaintiffs,	§	IN THE DISTRICT COURT
&	§	
STATE OF TEXAS, Intervenor,	§	TRAVIS COUNTY, TEXAS
v.	§	
CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN, Defendants.	§	53rd JUDICIAL DISTRICT

ORDER GRANTING CITY'S OBJECTIONS TO EVIDENCE

On November 13, 2017, the Court considered the *City's Objections to Plaintiffs' Summary Judgment Evidence* and *City's Objections to Texas's Summary Judgment Evidence*, including the parties' responses. After considering the pleadings, the applicable law, the arguments of counsel, and the evidence on file, the Court makes the following rulings:

City's Objections to Plaintiffs' Summary Judgment Evidence

Objection #1: Plaintiffs' Exhibit 2 – Declaration of Rachel Nation. The City objects on the grounds that this document is irrelevant and inadmissible under Texas Rules of Evidence, Rules 402 and 403; and on the grounds that Plaintiffs failed to disclose Ms. Nation as a witness in response to the City's discovery requests. TEX. R. CIV. PROC, R. 194.2(e) (disclosure of witnesses); TEX. R. CIV. PROC., R. 193.5 (duty to supplement discovery responses); *Clark v.*

Trailways, Inc., 774 S.W.2d 644, 647 (Tex. 1989) (undisclosed witness must be excluded absent facts supporting good cause); *see also* Ex. 1 (Plaintiffs' response to request for disclosure).

GRANTED: JWA **DENIED:** _____

Objection #2: Plaintiffs' Exhibit 24 – Fox 7 News Article. The City objects on the grounds that this document is irrelevant and inadmissible under Texas Rules of Evidence, Rules 402 and 403; and on the grounds that the document contains inadmissible hearsay. TEX. R. EVID., R. 801, 802.

GRANTED: JWA **DENIED:** _____

City's Objections to Texas's Summary Judgment Evidence

Objection #1:* Texas's Exhibits A-1[1], A-2[2], A-3[3]. The City objects on the grounds that these documents are irrelevant and inadmissible under Texas Rules of Evidence, Rules 402 and 403; and on the grounds that the documents contain inadmissible hearsay. TEX. R. EVID., R. 801, 802.

*In a post-hearing written response, Texas withdrew these exhibits.

GRANTED: JWA **DENIED:** _____

Objection #2: Texas's Exhibits C ("Declaration of Carole Price"), D ("Declaration of Cary Reynolds"), E ("Declaration of Pete Gilcrease"), F ("Declaration of Gregory Cribbs"), G ("Declaration of Rachel Nation"), and H ("Declaration of Travis Somerville"). The City objects on the grounds that these documents are irrelevant and inadmissible under Texas Rules of

[1] Lily Leung, *Business Booming for Airbnb "Hosts" Who Rent Out Their Homes*, Orange County Register, Sept. 15, 2015.
[2] Dustin Waters, *Advocates for Short-Term Rentals Gain Traction*, Charleston City Paper, Feb. 15, 2015.
[3] *The Local Economic Impact of Short Term Rentals in Los Angeles* (2015)

Evidence, Rules 402 and 403; and on the grounds that Texas failed to disclose Ms. Price, Ms. Reynolds, Mr. Gilcrease, Mr. Cribbs, Ms. Nation, and Mr. Somerville as witnesses in response to the City's discovery requests. TEX. R. CIV. PROC, R. 194.2(e) (disclosure of witnesses); TEX. R. CIV. PROC., R. 193.5 (duty to supplement discovery responses); *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex. 1989) (undisclosed witness must be excluded absent facts supporting good cause); *see also* Ex. 1 (Texas's response to request for disclosure).

GRANTED: ✓ **DENIED:** _____

SIGNED this 1st day of December, 2017.

TIM SULAK
PRESIDING JUDGE

Tab C: Ordinance Number 20160223-A.1 (Feb. 23, 2016)

THE STATE OF TEXAS §

COUNTY OF TRAVIS §

I, Jannette S. Goodall, City Clerk of the City of Austin, Texas, do hereby certify that the foregoing instrument is a true and correct copy of Ordinance Number 20160223-A001, consisting of a total of fourteen pages, as approved by the City Council of Austin, Texas, at a Work Session Meeting on the 23rd day of February, 2016, as on file in the Office of the City Clerk.

WITNESS my hand and official seal of the City of Austin at Austin, Texas, this 6th day of July, 2016.

JANNETTE S. GOODALL
CITY CLERK
CITY OF AUSTIN, TEXAS

ORDINANCE NO. 20160223-A.1

AN ORDINANCE AMENDING CITY CODE CHAPTERS 25-2 AND 25-12 RELATING TO SHORT-TERM RENTALS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. City Code Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), 25-2-791 (*License Requirements*), and 25-2-792 (*Notification Requirements*) are amended to read as follows:

§ 25-2-789 SHORT-TERM RENTAL (TYPE 2) REGULATIONS.

(A) This section applies to a short-term rental use that:

(1) is rented for periods of less than 30 consecutive days;

(2) is not part of a multifamily residential use; and

(3) is not owner-occupied and is not associated with an owner-occupied principal residential unit.

(B) A short-term rental use under this section may not:

(1) include the rental of less than an entire dwelling unit;

(2) operate without a license as required by Section 25-2-791 (*License Requirements*);

(3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*); or

(4) include a secondary dwelling unit or secondary apartment except as provided by Sections 25-2-774(C)(6) (*Two Family Residential Use*) and 25-2-1463(C)(6) (*Secondary Apartment Regulations*).

(C) If a license for a short-term rental (Type 2) use meets the requirements for annual renewal under Section 25-2-791(E) (*License Requirements*) and the property received a notice of violation related to the life, health, or public safety of the structure, the property is subject to an inspection every three years by the building official to determine if the structure poses a hazard to life, health, or public safety.

(D) A short-term rental (Type 2) use may not be located on a lot that is within 1000 feet of a lot on which another short-term rental (Type 2) use is located unless the license:

(1) was issued on or before November 23, 2015;

(2) is not suspended after November 23, 2015; and

(3) is renewed timely.

§ 25-2-790 SHORT-TERM RENTAL (TYPE 3) REGULATIONS.

(A) This section applies to a short-term rental use that:

(1) is rented for periods of less than 30 consecutive days; and

(2) is part of a multifamily residential use.

(B) A short-term rental use under this section may not:

(1) include the rental of less than an entire dwelling unit;

(2) operate without a license as required by Section 25-2-791 (*License Requirements*); or

(3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*).

§ 25-2-791 LICENSE REQUIREMENTS.

(A) This section applies to a license required under Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), and Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*).

(B) To obtain a license, the owner of a short-term rental use must submit an application on a form approved [~~provided for that purpose~~] by the director. The application must include the following:

(1) a certification by the property owner and, if applicable, property manager that the property is not subject to outstanding City Code or state law violations [~~a fee established by separate ordinance~~];

(2) the name, street address, mailing address, and telephone number of the owner of the property;

(3) the name, street address, mailing address, and telephone number of the [~~a~~] local [~~responsible~~] contact required by Section 25-2-796 (*Local Contacts*) [~~for the property~~];

(4) the street address of the short-term rental use;

(5) proof of property insurance;

(6) proof of payment of hotel occupancy taxes due as of the date of submission of the application; and

(7) any other information requested by the director.

(C) Except as provided in subsection (G), the director shall issue a license under this section if:

(1) the application includes all information required under Subsection (B) of this section;

(2) the proposed short-term rental use complies with the requirements of Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), or Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*);

(3) for a short-term rental use regulated under Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), no more than 3% of the single-family, detached residential units within the census tract of the property are short-term rental (including Type 2 and Type 1 second dwelling unit or secondary apartment) uses as determined by the Director under Section 25-2-793 *(Determination of Short-Term Rental Density)*; and

(a) the structure has a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or

(b) the structure has been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;

(4) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a non-commercial zoning district, no more than 3% of the total number of dwelling units at the property and no more than 3% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and

(a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*),

issued no more than ten years before the date the application is submitted to the director; or

(b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;

(5) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a commercial zoning district, no more than 25% of the total number of dwelling units at the property and no more than 25% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and

(a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or

(b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;[-]

(6) if applicable, the Austin Water Utility determines the septic system complies with Chapter 15-5 (*Private Sewage Facilities*);

(7) the property is not subject to outstanding City Code or state law violations;

(8) the owner pays the fee established by separate ordinance;

(9) the owner does not meet the standards described in Section 25-2-797 (*Repeat Offenses*); and

(10) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).

(D) A license issued under this section:

(1) is valid for a maximum of one year from the date of issuance, subject to a one-time extension of 30 days at the discretion of the director;

(2) may not be transferred by the property owner listed on the application and does not convey with a sale or transfer of the property; and

A-0153

(3) ~~satisfies the requirement for a change of use permit from residential to~~ short-term rental use.

(E) Except as otherwise provided in Subsection (F), a [~~A~~] license may be renewed annually if [~~the owner~~]:

(1) the licensee pays a renewal fee established by separate ordinance;

(2) the licensee provides documentation showing that hotel occupancy taxes have been paid for the licensed unit as required by Section 11-2-4 (*Quarterly Reports; Payments*) for the previous year; [~~and~~]

(3) the licensee provides updates of any changes to the information required under Subsection (B) of this section;[~~.~~]

(4) the property is not subject to outstanding City Code or state law violations;

(5) the licensee or operator does not meet the standards described in Section 25-2-797 (*Repeat Offenses*);

(6) if applicable, the structure is determined by the building official not to pose a hazard to life, health, or public safety; and

(7) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).

(F) The director may deny an application to renew a license if, on to the date the renewal application was submitted, the license for a short-term rental was suspended as authorized under Section 1307 (*License Suspension*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) [~~An advertisement promoting the availability of short term rental property in violation of city code is prima facie evidence of a violation and may be grounds for denial, suspension, or revocation of a license~~].

(G) After November 23, 2015, the director may not issue a license to operate a short-term rental use described in Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*) except for an application received prior to September 17, 2015. In any event, the director may not issue a license pursuant to an application received after November 12, 2015.

(H) The limitation in subsection (G) does not apply to an annual renewal authorized in subsection (E).

(I) A violation of any provision of the City Code or other applicable law is grounds to deny, suspend, or revoke a license.

§ 25-2-792 NOTIFICATION REQUIREMENTS.

(A) The director shall provide a packet of information with each license summarizing the restrictions applicable to short-term rental use, including:

(1) the name and contact information of the local [~~responsible~~] contact designated in the application;

(2) occupancy limits applicable under Section 25-2-795 (*Occupancy Limits for Short-Term Rentals*) [~~25-2-511 (*Dwelling Unit Occupancy Limit*)~~];

(3) restrictions on noise applicable under Section 25-2-794 (*General Requirements for Short-Term Rentals*) [~~Chapter 9-2 (*Noise and Amplified Sound*)~~], including limitations on the use of amplified sound;

(4) parking restrictions;

(5) trash collection schedule;

(6) information on relevant burn bans;

(7) information on relevant water restrictions;

(8) information on applicable requirements of the Americans with Disabilities Act; and

(9) other guidelines and requirements applicable to short-term rental uses.

(B) The licensee [~~owner~~] or operator of a short-term rental use must:

(1) provide renters a copy of the information packet under Subsection (A) of this section; and

(2) post the packet conspicuously in the common area of each short-term [~~dwelling rental~~] unit included in the registration.

(C) The director shall mail notice of the contact information for the local [~~responsible~~] contact to all properties within 100 feet of the short-term rental use, at the licensee's [~~owner~~] or operator's expense.

PART 2. City Code Chapter 25-2, Subchapter C, Article 4, Division 1, Subpart C (*Requirements for Short-Term Rental Uses*) is amended to add new Sections 25-2-794, 25-2-795, 25-2-796, 25-2-797, 25-2-798, and 25-2-799 to read as follows:

§ 25-2-794 GENERAL REQUIREMENTS FOR SHORT-TERM RENTALS.

(A) A licensee or guest of a short-term rental may not use or allow the use of sound equipment that produces sound in excess of 75 decibels at the property line between 10:00 a.m. and 10:00 p.m.

(B) A licensee or guest of a short-term rental may not use or allow use of sound equipment that produces sound audible beyond the property line between 10:00 p.m. and 10:00 a.m..

(C) A licensee or guest of a short-term rental shall not make or allow another to make noise or play a musical instrument audible to an adjacent business or residence between 10:30 p.m. and 7:00 a.m..

(D) If a building permit prohibiting occupancy of the structure is active, no person may occupy, for sleeping or living purposes, the structure until final inspections have been passed and the building permit is closed.

(E) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental without including:

(1) the license number assigned by the City to the short-term rental; and

(2) the applicable occupancy limit for the short-term rental.

(F) An owner, or a person in control of a dwelling, may not advertise or promote, or allow another to advertise or promote, the dwelling as a short-term rental if the dwelling is not licensed by the director as a short-term rental.

(G) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental in violation of the City Code or state law.

(H) A person must obtain a license to operate a short-term rental before a property may be used as a short-term rental.

(I) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including a partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

§ 25-2-795 OCCUPANCY LIMITS FOR SHORT-TERM RENTALS.

(A) In this section:

(1) ADULT means a person 18 years of age or older.

(2) DOMESTIC PARTNERSHIP means adults living in the same household and sharing common resources of life in a close, personal, and intimate relationship.

(3) UNRELATED means not connected by consanguinity, marriage, domestic partnership, or adoption.

(B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.

(C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.

(D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.

(E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.

(F) For purposes of this section, an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.

(G) A short-term rental use may not be used by more than:

(1) ten adults at one time, unless a stricter limit applies; or

(2) six unrelated adults.

(H) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including the partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

§ 25-2-796 LOCAL CONTACTS.

(A) A licensee of a short-term rental use who does not reside within the Austin Metro Area must identify an individual or individuals to serve as local contacts and respond to emergency conditions.

(B) A local contact designated under subsection (A) must be present within the Austin Metro Area and be available to respond within two hours after being notified of an emergency by a guest of the short-term rental, by a City employee, or by an individual entitled to notice of the contact information under Section 25-2-792(C) (*Notification Requirements*), during any 24-hour period.

(C) If there is a change related to a local contact, the licensee must provide updated or new information to the director in writing within three business days.

§ 25-2-797 REPEAT OFFENSES.

(A) If the director finds that the licensee or operator failed to comply with Section 25-2-794 (*General Requirements for Short-Term Rentals*) or Section 25-2-795 (*Occupancy Limits for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application to renew a short-term rental license for a period of 12 months.

(B) If the director finds that an owner or person in control of a property violated Section 25-2-794 (*General Requirements for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application for a short-term rental license for a period of 12 months.

(C) If a property is the subject of repeated substantiated violations of City Code or state law during a 24-month period prior to applying for a license or renewing a license to operate a short-term rental, the director may deny the short-term rental license based on:

(1) the frequency of any repeated violations;

(2) whether a violation was committed intentionally or knowingly; and

(3) any other information that demonstrates the degree to which the owner or occupant has endangered public health, safety, or welfare.

(D) A licensee may appeal the director's decision to deny an application in compliance with the process in Section 1308 (*Appeal From License Suspension or Denial*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*).

(A) A person that submits an application for a short-term rental license shall pay an additional fee if the application is submitted after the director sends a notice of violation or cites the person for operating a short-term rental without a license.

(B) A person that submits a request to renew a short-term rental license shall pay an additional fee if the request is submitted after the director sends a notice of violation or cites the person for operating with an expired short-term rental license.

(C) The fee described in this section shall be set by separate ordinance and be based on the City's cost to enforce the licensing requirements.

§ 25-2-799 PRIMA FACIE EVIDENCE OF A VIOLATION.

(A) An advertisement promoting the availability of a short-term rental in violation of any City Code or state law requirement is prima facie evidence of a violation and is cause to issue an administrative citation for a violation of Sections 25-2-794(E),(F), or (G) (*General Requirements for Short-Term Rentals*).

(B) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than six adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Sections 25-2-795(B), (E), and (G)(2) (*Occupancy Limit for Short-Term Rentals*).

(C) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than ten adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Section 25-2-795(G)(1) (*Occupancy Limits for Short-Term Rentals*).

PART 3. Subsection (D) of City Code Section 25-2-511(*Dwelling Unit Occupancy Limit*) is amended to read:

(D) Except as provided in Subsection (E), for a conservation single family residential, single family attached residential, single family residential, small lot single family, duplex residential use, or two-family residential use[~~, or short term rental use~~] not more than four unrelated adults may reside on a site, in the following zoning districts:

(1) Lake Austin Residence District (LA) Zoning District;

(2) Rural Residence District (RR) Zoning District;

(3) Single Family Residence Large Lot (SF-1) Zoning District;

(4) Single Family Residence Standard Lot (SF-2) Zoning District;

(5) Family Residence (SF-3) Zoning District;

(6) Single Family Residence Small Lot (SF-4A) Zoning District;

(7) Single Family Residence Condominium (SF-4B) Zoning District;

(8) Urban Family Residence (SF-5) Zoning District; and

(9) Townhouse and Condominium Residence (SF-6) Zoning District.

PART 4. The table in City Code Section 25-2-491(C) (*Permitted, Conditional, and Prohibited Uses*) is amended to replace the existing reference to "Short-Term Rental" with "Short-Term Rental (Types 1 and 3)" and to reflect the following:

Short-Term Rental (Type 2) is a permitted use in the following base districts:

central business (CBD)

downtown mixed use (DMU)

planned unit development (PUD)

general-retail – mixed use (GR-MU)

commercial services – mixed use (CS-MU)

commercial services – vertical mixed use (CS-V)

general retail – vertical mixed use (GR-V).

PART 5. City Code Chapter 25-2, Article 7 (*Nonconforming Uses*) is amended to add a new Section 25-2-950 (*Short-Term Rental Type 2*) to read as follows:

§ 25-2-950 DISCONTINUANCE OF NONCONFORMING SHORT-TERM RENTAL (TYPE 2) USES.

A person shall discontinue a nonconforming short-term rental use that is regulated under Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), not later than the earlier of:

(1) April 1, 2022; or

(2) if the license for a short-term rental use is not renewed, the date on which the existing license expires.

PART 6. Section 202.1 (*Supplemental and Replacement Definitions*) of City Code Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) is amended to add a new definition "short-term rental" to read as follows:

202.1 Supplemental and Replacement Definitions.

SHORT-TERM RENTAL. The use of a residential dwelling unit or accessory building, other than a unit or building associated with a group residential use, on a temporary or transient basis in accordance with Chapter 25-2, Subchapter C, Article 4, Division 1, Subpart C (*Requirements for Short-Term Rental Uses*). The use does not include an extension for less than 30 consecutive days of a previously existing rental agreement of 30 consecutive days or more. The use does not include a rental between parties to the sale of that residential dwelling unit.

PART 7. Section 1301 (*Inspections*), and Section 1307 (*License Suspension*) of City Code Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) are amended to read as follows

1301 Inspections.

The code official shall make inspections to determine the condition of short-term rentals, boarding houses, hotels, rooming houses and bed and breakfast establishments located within the City, to ensure compliance with this chapter and other applicable laws. For the purpose of making inspections, the code official or the code official's representative may enter, examine, and survey, at all reasonable times, all buildings, dwelling units, guest rooms, and premises on presentation of the proper credentials. The owner or operator of a short-term rental, boarding house, hotel, rooming house, or bed and breakfast establishment, or the person in charge, shall give the code official free access to the building, dwelling unit, partial unit, guest room and its premises, at all reasonable times, for the purpose of inspection, examination, and survey.

1307 License Suspension.

(A) Except as provided in subsections (D) and (E), w[~~W~~]henever the code official finds on inspection of the physical premises or review of applicable records of any boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment that conditions or practices exist that violate any provision of the International Property Maintenance Code, City Code, or any rule or regulation adopted under this Code, or that the establishment has failed to comply with any provision, prohibition, or requirement related to the registration, reporting, collection, segregation, accounting, disclosure, or payment of local hotel occupancy taxes, the code official shall give written notice to the owner of the property and the operator of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment

that unless the violations are corrected by an identified deadline, the license shall be suspended.

(B) At the end of the time provided for correction of the violation(s), the code official shall re-inspect the location or records of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment and, if the conditions or practices have not been corrected, shall suspend the license and give written notice to the licensee that the license has been suspended.

(C) On receipt of notice of suspension, the licensee shall immediately stop operation of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment, and no person may occupy for sleeping or living purposes any rooming unit therein, except that the code official may allow continued occupancy by the property owner of a short-term rental use subject to Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*). The notice required by this subsection shall be served in accordance with the notice provisions of applicable law.

(D) The code official may immediately suspend a license if the code official determines that the license was issued in error. A suspension is effective until the code official determines that the licensee has complied with the requirements of the City Code or any rule or regulation adopted under this Code. The code official shall give written notice to the owner of the property and the operator of the establishment that the license is suspended.

(E) If a short-term rental is the subject of two or more substantiated violations of applicable law during the license period, the code official may suspend the short-term rental license. The code official must give notice to the licensee of a notice of intent to suspend a license issued under this subsection.

(F) In determining whether to suspend a license as described in subsection (E), the code official shall consider the frequency of the substantiated violations, whether a violation was committed intentionally or knowingly, and any other information that demonstrates the degree to which a licensee has endangered public health, safety, or welfare.

PART 8. Because of the amendments set forth in Parts 4 and 5 of this Ordinance, Council finds it is not necessary to set or hold the public hearing described in Ordinance No. 20151112-078 and waives the requirement.

PART 9. Parts 4 and 5 of this ordinance take effect on April 1, 2017, and the remaining parts of this ordinance take effect on March 5, 2016.

PASSED AND APPROVED

February 23, 2016 §
§
§

Steve Adler
Mayor

APPROVED:

Anne L. Morgan
City Attorney

ATTEST:

Jannette S. Goodall
City Clerk

A-0163

Tab D: Relevant Constitutional Provisions

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 16

§ 16. Bills of attainder; ex post facto or retroactive laws; impairing obligation of contracts

Currentness

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

Vernon's Ann. Texas Const. Art. 1, § 16, TX CONST Art. 1, § 16
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 17

§ 17. Taking, damaging or destroying property for public use; special privileges and immunities; control of privileges and franchises

Effective: December 1, 2009
Currentness

Sec. 17. (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:

(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

(c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.

(d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

Credits
Amended Nov. 3, 2009, eff. Dec. 1, 2009.

Vernon's Ann. Texas Const. Art. 1, § 17, TX CONST Art. 1, § 17
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 115-132.

End of Document

Tab E: Relevant Statutory Provisions

TX Rules of Civil Procedure, Rule 193.5

193.5. Amending or Supplementing Responses to Written Discovery

Currentness

(a) *Duty to Amend or Supplement.* If a party learns that the party's response to written discovery was incomplete or incorrect when made, or, although complete and correct when made, is no longer complete and correct, the party must amend or supplement the response:

(1) to the extent that the written discovery sought the identification of persons with knowledge of relevant facts, trial witnesses, or expert witnesses, and

(2) to the extent that the written discovery sought other information, unless the additional or corrective information has been made known to the other parties in writing, on the record at a deposition, or through other discovery responses.

(b) *Time and Form of Amended or Supplemental Response.* An amended or supplemental response must be made reasonably promptly after the party discovers the necessity for such a response. Except as otherwise provided by these rules, it is presumed that an amended or supplemental response made less than 30 days before trial was not made reasonably promptly. An amended or supplemental response must be in the same form as the initial response and must be verified by the party if the original response was required to be verified by the party, but the failure to comply with this requirement does not make the amended or supplemental response untimely unless the party making the response refuses to correct the defect within a reasonable time after it is pointed out.

Credits

Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Vernon's Ann. Texas Rules Civ. Proc., Rule 193.5, TX R RCP Rule 193.5
Current with amendments received through February 1, 2018

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 9. Evidence and Discovery (Refs & Annos)
B. Discovery
Rule 193. Written Discovery: Response; Objection; Assertion of Privilege; Supplementation and Amendment; Failure to Timely Respond; Presumption of Authenticity

TX Rules of Civil Procedure, Rule 193.6

193.6. Failing to Timely Respond--Effect on Trial

Currentness

(a) *Exclusion of Evidence and Exceptions.* A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) *Burden of Establishing Exception.* The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or of the lack of unfair surprise or unfair prejudice must be supported by the record.

(c) *Continuance.* Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

Credits
Aug. 5, 1998 and Nov. 9, 1998, eff. Jan. 1, 1999.

Editors' Notes

COMMENT--1999
See comments following Rule 193.7.

Notes of Decisions (245)

Vernon's Ann. Texas Rules Civ. Proc., Rule 193.6, TX R RCP Rule 193.6
Current with amendments received through February 1, 2018

End of Document

TX Rules of Civil Procedure, Rule 194.2

194.2. Content

Currentness

A party may request disclosure of any or all of the following:

(a) the correct names of the parties to the lawsuit;

(b) the name, address, and telephone number of any potential parties;

(c) the legal theories and, in general, the factual bases of the responding party's claims or defenses (the responding party need not marshal all evidence that may be offered at trial);

(d) the amount and any method of calculating economic damages;

(e) the name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case;

(f) for any testifying expert:

(1) the expert's name, address, and telephone number;

(2) the subject matter on which the expert will testify;

(3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;

(4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(B) the expert's current resume and bibliography;

(g) any indemnity and insuring agreements described in Rule 192.3(f);

(h) any settlement agreements described in Rule 192.3(g);

(i) any witness statements described in Rule 192.3(h);

(j) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills that are reasonably related to the injuries or damages asserted or, in lieu thereof, an authorization permitting the disclosure of such medical records and bills;

(k) in a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case, all medical records and bills obtained by the responding party by virtue of an authorization furnished by the requesting party;

(l) the name, address, and telephone number of any person who may be designated as a responsible third party.

Credits

Aug. 5, 1998, Nov. 9, 1998 and Dec. 31, 1998, eff. Jan. 1, 1999. Amended by order of March 3, 2004, eff. March 3, 2004.

Vernon's Ann. Texas Rules Civ. Proc., Rule 194.2, TX R RCP Rule 194.2
Current with amendments received through February 1, 2018

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits (Refs & Annos)

TX Rules of Evidence, Rule 402

Rule 402. General Admissibility of Relevant Evidence

Currentness

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Texas Constitution;
- a statute;
- these rules; or
- other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

Credits
Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Rules of Evid., Rule 402, TX R EVID Rule 402
Current with amendments received through February 1, 2018

End of Document

Vernon's Texas Rules Annotated
Texas Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits (Refs & Annos)

TX Rules of Evidence, Rule 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons

Currentness

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Credits

Eff. March 1, 1998. Amended by orders of Supreme Court March 10, 2015 and Court of Criminal Appeals March 12, 2015, eff. April 1, 2015.

Rules of Evid., Rule 403, TX R EVID Rule 403
Current with amendments received through February 1, 2018

End of Document