From: Kristin Simpson
To: CDPlanning
Subject: [CD Planning]Community Development Long Range Planning
Date: Monday, June 1, 2020 11:12:52 AM

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Hello Chelan County planning board members.

I was on the Zoom call the other day when you were discussing STRs. I understand that you are attempting to form some sort of cohesive plan for STRs moving into the future, but I urge you to slow down and do it in a considered and deliberate way. I'm afraid that if you ram through your proposal as it stands without ANY input from the STR community you will have an uphill battle with legal challenges.

The action items that you are talking about will greatly affect a lot of people and we are all trying to even grasp what you are talking about. There was about an hour of discussion about what "percentage" of STRs should be allowed. You started with 1%, talked about 5%, someone said that there was 13% now (who figured that out and how) and shouldn't we think about 8% and someone else said "no I think 5% is better" and then then conversation went on from there. There was no clarification about what any of the percentages mean and no formal vote. Five percent of what area? The state? All of Chelan county? Houses? Apartments? Condos? Neighborhoods? If you are saying 5% (or whatever percentage that you agree on) of a particular neighborhood then our neighborhood which is in the Leavenworth area would not even qualify for one STR as we don't even have a hundred houses. If you agree to a percentage you MUST clarify what this percentage means and where it applies or there is no way that we in the STR community can know how to proceed. When someone goes to get this permit or whatever you are asking for, who decides whether said person can get it? Are there a certain number of STRs that will be allowed in Leavenworth, Plain, Lake Wenatchee, Manson? If you say that it is just for every neighborhood having 100 houses then Wenatchee would have the same percentage as the tourist town of Leavenworth. This does not make sense. How will this be accomplished? Please clarify.

I will close by once again stating that we are not the enemy. We are just people trying to get by just as restaurants, stores and hotels are. Limiting STRs will not stop people from coming to the tourist areas and wanting to have a wonderful vacation experience. I would argue that they keep "neighborhood feeling" much more than the new chain hotels that are coming to Leavenworth. They are just another option. Also, I get the impression that you think that STR owners are somehow "big business." By and large we are all single family owners that have perhaps bought a vacation home for ourselves and are sometimes renting it out to others so that we can pay the mortgages. By limiting STRs you will not make the houses suddenly turn into full time residences.

Once again please consider slowing down and clarifying your goals and reasoning and letting STR owners into the conversation. That is all that we are asking for. Thank you for your time.

Sincerely,

Kristin Simpson
2Kristinsimpson@gmail.com
(425)830-8110

From:	Jim Brown
To:	CDPlanning
Cc:	CD Director; Lisa Grueter
Subject:	[CD Planning]FW: Comments to be added for the record concerning Short-Term Rentals in Chelan County
Date:	Tuesday, June 2, 2020 12:41:28 PM
Attachments:	Commissioners 6_1_2020.docx image001.png

Jim Brown
Director
Chelan County Community Development
316 Washington Street, Suite 301
Wenatchee, WA 98801
Phone: Direct (509) 667-6228 Main office (509) 667-6225
Jim.Brown@co.chelan.wa.us

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From: Stan Winters <winterss1@me.com>
Sent: Tuesday, June 2, 2020 12:34 PM
To: CD Director <CD.Director@CO.CHELAN.WA.US>; Jim Brown <Jim.Brown@CO.CHELAN.WA.US>; Lisa@berkconsulting.com; Bob Bugert <Bob.Bugert@CO.CHELAN.WA.US>; Doug England <Doug.England@CO.CHELAN.WA.US>; Kevin Overbay <Kevin.Overbay@CO.CHELAN.WA.US>; Prosecuting Attorney <Prosecuting.Attorney@CO.CHELAN.WA.US>
Cc: communitycouncil@peshastin.org; brossing@lstc.edu
Subject: Comments to be added for the record concerning Short-Term Rentals in Chelan County

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Hello,

Please see attached document with comments on short-term rentals in Chelan County.

Stan and Vania Winters
8200 Riverview Rd
Peshastin, WA 98847
509 293-0457

From:	Kathy Blum
To:	Jim Brown; RJ Lott; CDPlanning; Gordon Lester; CD Director
Subject:	[CD Planning]Fwd: Jackie Cagle STR
Date:	Sunday, June 7, 2020 7:33:28 PM

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---------- Forwarded message ---------
From: **Jackie Cagle** <ichasebikes@yahoo.com>
Date: Sun, Jun 7, 2020 at 6:41 PM
Subject: Jackie Cagle STR
To: <kathleenb.mcc@gmail.com>

Chelan County Planning Commission

I am a resident of Manson Washington, who lives next to an STR on Wapato Lake, which makes it a very desirable rental to our dismay. Living next to a STR has been a nightmare that I wouldn't wish on anyone. We have dealt with renters illegally flying drones over our deck filming into our living room, trespassing into our yard, uninvited drunks showing up at our front door, and countless nights of loud music, along with yelling, as they can't hear themselves because of THEIR loud music, but we can. I work, get up early, and I do not feel that I, as a resident of Chelan County should have to monitor disrespectful out of town renters to be respectful. My usual line is, do you want to hear it from me, or the sheriff, your choice! As one group leaves, and the next one arrives, my heart sinks, my anxiety rises, and I wonder, what happened to manners, kindness and being respectful. I am angry and tired of being a captive in our own home. Ask yourself, would you want this quality of life?

Respectfully,
Jackie Cagle

Sent from my iPhone

From:	Kari Sorensen
To:	Kevin Overbay; Bob Bugert; Doug England; Jim Brown; Lynn Machado; RJ Lott; CDPlanning
Cc:	Kathy Blum; Kathy Branch; Cindy Smith; s lester; Beverly Peters
Subject:	[CD Planning]Letter from Kari Sorensen, Manson Community Council & Concerned Citizen
Date:	Sunday, June 7, 2020 4:25:19 PM
Attachments:	Tap Tap Tap is this thing even on letter to Chelan County Planning Commission.docx

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Please read my attached letter and include in the record.

Thank you.

Kari Sorensen
Blueberry Hills Farms

From:	Kathy Blum
To:	Jim Brown; CD Director; CDPlanning; RJ Lott; lisa@berkconsulting.com
Cc:	Kari Sorensen; Cindy Smith; Beverly Peters; Gordon Lester; Kathy Blum
Subject:	[CD Planning]Manson Community Council Input - Draft STR"S
Date:	Sunday, June 7, 2020 7:27:54 PM

External Email Warning! This email originated from outside of Chelan County.

Hello, The Manson Community Council (MCC) would like to thank you for all the work you've done helping Chelan County build good STR codes.

The MCC wanted to make sure you saw our input so that it could be incorporated in the next draft that is done for the June 17th meeting. The proposed STR draft code of May 29, 2020 states on Lines 62 & 63 the Peshastin UGA changes would be made to restrict short term rentals in residential zones to address Peshastin Community Council comments.The Manson Community Council has sent multiple requests for codes specific to Manson. Now that the end is near we want to make sure our requests are front and center as are Peshastin's. Please take the time to read our proposed changes for the Manson Area STR codes.

> "On May 20th, 2020 the County Commissioners sent the Planning Commission a statement of intent for developing code on Short Term Rentals (STR's) They stated that Chelan County needs tools to insure STR owners and operators meet a minimum set of standards:
>
> Two of these are:
>
> 1. "Occupancy limits by zone and neighborhood."
>
> 2. "Density by zone and neighborhood."
>
> THE MANSON COMMUNITY COUNCIL (MCC) requests that Tier 1 STR's (line 147-149) to be owner occupied at all times during rentals inside the Manson Zip Code and UGA zones.
>
> Transfer of ownership (line 483). The MCC requests Option 1 (non-transferable) inside the Manson Zip Code and UGA zones.
>
> Line 484. The STR land use permit must be issued in the name of the owner to include LLC's and is non-transferable to include same name LLC's with new officers.
>
> Line 296. The Manson UGA has STR permits as part of the **current** UGA

code. Line 297-299: keep these lines but add if the STR has not previously been registered with a permit prior to XXX 2020, the STR can not be "grandfathered" as non-conforming in MANSON. They were in **violation of existing code** that will be enhanced on XXX 2020. If they want to reapply they will now need to go through the new initial application process as a new STR. Why allow them to continue when they have been currently violating EXISTING CHELAN COUNTY CODES? If they haven't registered for a permit under the existing code in the Manson UGA, what makes anyone think they will obey the new code AND REGISTER in the future? The Manson UGA STR code has been in existence for over ten years!

Line 484. All approval criteria lines 497-505 must apply. This will keep STR's and private single family homes with like values. This will give everyone in the community the same opportunity to register if they want to make their home an STR.

The MCC **adamantly opposes** a one time transfer for three years when an STR is sold. We need to start now to get down to the 5% limit. Stop kicking the can down the road! Remember, STR's can be located in all areas in the non-incorporated parts of Chelan County. Let's stop the saturation in the Manson and the greater Leavenworth and Lake Wenatchee areas.

Berk Consulting stated that the Manson 98831 zip code in 2019 has approximately 229 STR'S using the AirBnB and Home Away monthly data. What wasn't reported and is missing is VACASA who claim to have over 300 STR's in the 98831 zip code. That equals **529 STR'S** currently in Manson 98831

Commissioners, Manson and the UGA need your help NOW! Your constituents from Manson are depending on you. This area can't wait any longer to get back to what is stated in:

The Chelan County Growth Management Act
Section V, Policy LU 1.2:

"Protect residential neighborhoods from impacts associated with incompatible land uses through application of development standards and permit conditioning.

Rationale: Incompatible land use located in close proximity to residential neighborhoods may create adverse impacts which could lead to a reduction of the high quality of life for the County residents."

Working with you to build Good Code for all of Chelan County!"

The Manson Community Council
Kathleen Blum
Vice Chair

From: Carolyn Bell
To: CDPlanning
Subject: [CD Planning]Our neighborhood Cedar Brae Rd.
Date: Sunday, June 7, 2020 10:00:35 PM

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If commercial rentals in residential neighborhoods are currently illegal, why are they being grandfathered in? We are told of the many issues that need regulation, but we're also told by county officials that the enforcement the proposed regulations is not feasible! Going forward with unenforceable rules Instead of phasing out and limiting STRs as we should in residential neighborhoods, is completely illogical and damaging. We have encountered frequent illegal use of our parking spaces and neighborhood dumpster, noise, traffic and unsafe use of our narrow road. This is a year round problem.

You need to think of the residents who live and vote here and not be swayed by commercial interests who don't care about the quality of life in our community. Let's get our values straight.

Carolyn Bell
(206) 909-8729
Ccbell78@aol.com

From:	Michaela Reeder
To:	CDPlanning
Cc:	Michelle Green; Samuel A. Rodabough
Subject:	[CD Planning]Proposed Short-Term Rental Code Amendments
Date:	Wednesday, June 3, 2020 2:12:55 PM
Attachments:	Michaela Reeder.vcf 2020 06 03 Letter to Planning.pdf Appendices.pdf

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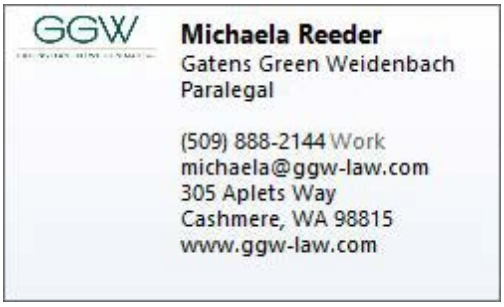
Attached is a letter to the Planning Commission from Michelle Green and Sam Rodabaugh.

Thank you!



From: Stan Winters
To: CDPlanning
Subject: [CD Planning]Question
Date: Thursday, June 4, 2020 10:52:38 AM

External Email Warning! This email originated from outside of Chelan County.

Hi,

The Peshastin Community Council would like to contact our area Planning Commissioners. Could you provide me with their email addresses?

Thanks,

Stan

Stan and Vania Winters
8200 Riverview Rd
Peshastin, WA 98847
509 293-0457

From:	Yen Lam
To:	CDPlanning; Kevin Overbay; Doug England; Bob Bugert; Jim Brown
Cc:	bricklin@bnd-law.com; griefen@bnd-law.com
Subject:	[CD Planning]Resolution of Chiwawa Communities Association in Support of RUN
Date:	Wednesday, June 3, 2020 2:25:34 PM
Attachments:	signed rental resolution.pdf

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Chelan County Board of County Commissioners and Planning Commission:

Please be advised that I represent the Chiwawa Communities Association ("Association"), which has been dealing with the negative and increasing effects of short-term rental operations in its community over the years. The Board of the Association has passed a resolution in support of the efforts of Residents United for Neighbors—Chelan County ("RUN"). Please see attached.

Best Regards,
Yen

Yen Lam
Attorney

Galvin Realty Law Group, P.S.
6100 219th St. SW, Suite 560
Mountlake Terrace, WA 98043
PH: 425-275-9863
www.grlg.net

From:	Kirvil Skinnarland
To:	Prosecuting Attorney; Kevin Overbay; Bob Bugert; Doug England; CDPlanning; Jim Brown; CD Director
Cc:	lisa@berkconsulting.com
Subject:	[CD Planning]RUN Comments on Draft STR Code
Date:	Monday, June 1, 2020 8:59:43 AM
Attachments:	RUN Comments on STR Code 6.1.2020.pdf

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Attached are the comments from Residents United for Neighbors of Chelan County on the revised draft of the STR code released on May 21st 2020. These comments replace those submitted on May 5th, 2020.

Steering Committee for Run

From:	Steve Harada
To:	info@straccwa.org; CDPlanning; Kevin Overbay; Bob Bugert; Doug England
Subject:	[CD Planning]Short Term Rentals (STR)
Date:	Tuesday, June 2, 2020 5:29:39 PM

External Email Warning! This email originated from outside of Chelan County.

Dear County Commissioners and STRACC Executive Board Members,
I have a few questions:
1. Will the meeting on June 17th be in person or virtual?
2. Are the current laws for short term rentals being enforced?
3. Are the owners, renting STRs, paying taxes to the city and state? We pay city and state taxes each year.
4. Do the owners, renting STRs, have a State License? We renew our Business License with the state each year.
5. Are numbers 3 & 4 above the main complaint?
6. If there are problems with the renters making too much noise or destroying property, shouldn't the police be involved and resolve the issue?
7. When we purchased our property as a second home in 2005, we were told that our home could also be a short term rental. Short Term Rentals were allowed only on the Downtown side of Leavenworth off Highway 2.
8. We were told that on the other side of Highway 2 only long term rentals were allowed. If this is the case, perhaps Leavenworth should allow STRs on both sides of the highway to increase the tourists.
9. We have added to the economy by hiring cleaning staff, repair staff, purchasing supplies, and having meals, etc in Leavenworth.
10.Our guests also purchase merchandise, food, gas, activities and other things that help the economy of Leavenworth and surrounding communities.
11.We live in a small town and know the local stores and restaurants would not survive if we did not have tourists.
12.If there are complaints about a shortage of housing to purchase, look on Zillow or local real estate listings. There are several places available.
13.To us, we would think any tourist town would love to be in the situation that Leavenworh is having with so many tourists to spend money and help the economy.
14.Leavenworth has grown in popularity and tourists since we purchased in 2005.
15.We think free public parking is a huge problem.
16. If you get rid of STRs, who do you think will fill the local restaurants, buy the merchandise at the shops and Art Fair near the Gazebo?
17.Think of all the taxes Leavenworth and the state will lose without tourists who stay at STRs and Hotels.
18.Most tourists will not "drive to Leavenworth and return home in one day". They need a place to stay for one or more nights as part of their vacation.
19.The reason tourists use STRs is because Hotels only allow 4 people to a room and if you have 3 children, you have to rent 2 Hotel rooms.
20 .We feel the owners of the STRs should be allowed to decide how many guests can stay in their property. They are responsible for the cleaning and upkeep of the property.
21. If you own a home, does your City or County tell you how many friends and relatives can stay overnight with you?
22. We would be happy to sit down and discuss the above items and more to help both sides

for the future of Leavenworth, WA.
24. When our family is not using our second home, we rent it out as a short term rental. Since we rent it out as a short term rental, we pay increased HOA fees to our condo association and we pay a higher insurance premium to cover the condo and liability for our renters.
25. As a home owner and a short term rental owner, we don't make enough income from the STR to cover property taxes, business and occupation taxes, insurance, HOA fees, repairs, cleaning fees, replacement of supplies (towels bedding,etc) and the mortgage. Therefore, any additional fees or regulations that the county is proposing will have an adverse effect on us.

Sincerely
Kathy and Steve Harada

From:	Brooke Dillon
To:	CDPlanning; +kevin.overbay@co.chelan.wa.us; +bob.bugert@co.chelan.wa.us; +doug.england@co.chelan.wa.us; +info@straccwa.org
Subject:	[CD Planning]STR concerns
Date:	Tuesday, June 2, 2020 1:27:23 PM

External Email Warning! This email originated from outside of Chelan County.

Dear Planning Commission,
I sent this last Wednesday, but it doesn't appear to have gone through. I am sending it again just to make sure that you have had a chance to hear our concerns.

Thank you.

Brooke Dillon
****

Dear Chelan County Planning Commission,

We own a vacation home in Plain that we use part of the year as an STR to generate revenue to help us to continue to enhance the property. We are very proud of our home, work hard to keep it in good repair, and continue to modernize it and make safety modifications. We also made a choice to switch to Northwest Comfy Cabins as our property management company because we fully support their pride of ownership, their emphasis on housecleaning and property management, and their focus on responsible return guests who treat the property with care.

We respectfully request that you:

- Please enforce nuisance codes and other problem issues *prior* to creating new restrictions and requirements. Responsible property owners/management companies who have not had any STR issues should not be penalized for the negligence of other owners/management companies.
- Please do not limit occupancy to 10 people. Our home, for example, was formerly a B & B; it has four bedrooms with en-suite bathrooms and sleeps 18 comfortably. We rent primarily to extended families like ours—grandparents with grown children and grandchildren. A limit of 10 people would prohibit these families from gathering together in beautiful Chelan County, unless they split up in separate hotel rooms.
- Please table any new regulations, restrictions, or permits/fees until the COVID crisis has passed, so that owners can be represented in person to voice their concerns in regard to their property.

We would greatly appreciate your consideration in tackling the issues that any problematic STRS are causing, rather than penalizing all with a new layer of permits, fees, regulations, and restrictions that may ultimately reduce tourism in your county.

With thanks

Mark and Brooke Dillon
Chris and Meg Adams
Dan and Shannon Leach
17033 River Road
Leavenworth

From: Jane Graham
To: CDPlanning
Subject: [CD Planning]Vacation Rentals
Date: Wednesday, June 3, 2020 5:02:43 PM

External Email Warning! This email originated from outside of Chelan County.

Dear Commissioners,

I am the homeowner at 18085 North Shore Drive. I will comment more fully on the latest draft regulations soon, but wanted you to be aware that last night the Omnia Lodge on Lake Wenatchee Highway hosted what appeared to be a wedding. There were approximately 20 cars in the driveway, parked all the way down to the highway, and the music could be heard inside my house even with the windows closed. I recognize the need to protect entities like Tall Timber, but it is located remotely and always has professional management on staff and does not throw large parties that disturb the neighbors. The proposed regulations need to have provisions that are enforceable and actually enforced to preclude bringing these noisy commercial entities to a quiet residential neighborhood. I have no issue with properly regulated small single family rentals, but this is something else entirely.

Thank you for your consideration.

Jane Graham

From: Jim Brown
To: RJ Lott
Subject: FW: Nightly rental complaints and ordinance proposal
Date: Monday, June 1, 2020 8:32:49 AM
Attachments: image002.png

FYI

Jim Brown
Director
Chelan County Community Development
316 Washington Street, Suite 301
Wenatchee, WA 98801
Phone: Direct (509) 667-6228 Main office (509) 667-6225
Jim.Brown@co.chelan.wa.us

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From: Jim Brown
Sent: Monday, June 1, 2020 8:32 AM
To: Mike Smith <Mike@merithomesinc.com>
Subject: RE: Nightly rental complaints and ordinance proposal

Hello Mr. Smith-

The Short Term Rental issue really predates my arrival. I am new to the issues being discussed regarding them. I will say that just because our Code Enforcement records show few complaints, doesn't mean there have not been many, nor for a myriad of issues not yet contained within the county code. Commonly enforcement entities don't keep records for complaints that are **not** violations. If it isn't a code violation already, the caller is often informed of such, and that ends the contact. I have no idea what if any protocols were in place to track those complaints, even if not found in the Chelan County code. That is the main reason regulations are being developed no in order to have a way to have some control on activities viewed as harmful to the community.

I am informed by all three county commissioners that they have received numerous complaints from their constituents. What those were, and whether they tracked those is unknown to me. But it was the Board of Commissioners that asked the planning commission to take the issue up and develop a regulatory framework. Now we are charged with running that process as the board directed us.

Sincerely-

Jim Brown

Director
Chelan County Community Development
316 Washington Street, Suite 301
Wenatchee, WA 98801
Phone: Direct (509) 667-6228 Main office (509) 667-6225
Jim.Brown@co.chelan.wa.us

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From: Mike Smith <Mike@merithomesinc.com>
Sent: Monday, June 1, 2020 8:05 AM
To: Jim Brown <Jim.Brown@CO.CHELAN.WA.US>
Subject: Nightly rental complaints and ordinance proposal

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Good morning Mr. Brown,

My name is Mike Smith. I own a home used as a nightly rental, which I'm certain has never been cited for complaint. However, the draft ordinance would present a considerable burden, and hand our neighbors undue rights over our property.

I submitted a public records request asking for complaints surrounding nightly rentals for the last few years and was sent a handful of cases. The issues of complaint included:

- Residential structure built without a permit (which was then used as a rental)
- Dangerous shed (on a property used as a rental)
- Illegal habitation of a barn, on a property used as a rental
- Excess garbage on a property seasonally used as a rental

Considering how focused the County seems to be on installing a new ordinance, I was surprised how few complaints came up, and their nature. The message I got said additional records may be coming within the next month, after the next hearing on the new ordinance.

I've worked around land use regulations for nearly 30 years. Nothing in these complaints indicates any need for a new ordinance, and the complaint topics are all covered in existing code. Can you help me understand the need for onerous new regulations?

Thanks very much for any help you can provide,

Mike

S. Michael Smith
MERIT HOMES

Development Manager
209-788-9860 206-755-2660
Mike@MeritHomesInc.com | www.MeritHomesInc.com | Facebook
811 Kirkland Ave, Suite 200, Kirkland, WA 98033

From: Jonathan Gasbar
To: Bob Bugert
Cc: Jim Brown; RJ Lott
Subject: Re: Public Access Lake Wenatchee Concerns
Date: Thursday, June 4, 2020 12:16:17 PM

External Email Warning! This email originated from outside of Chelan County.

Commissioner Bugert,

Thank you for your quick response. Yes, short-term rental properties is one of the may issues.

The other main issue is that there do not seem to be any written rules around these access points on lake wenatchee. This allows people to rip out the natural habitat, park motorized watercraft on them, and burn in congested areas.

Thank you again for the work you do.

Sincerely,

Jon

On Sun, May 31, 2020 at 9:22 PM Bob Bugert <Bob.Bugert@co.chelan.wa.us> wrote:

> Jonathan—
>
> Thank you for your email. I am to understand that the concerns that you identify are a result of the proliferation of short-term rentals in your area. The Board of Commissioners is in the process to setting county code to regulate the disturbances to neighborhoods. Our intent is to adopt code by this August, which will hopefully provide you some relief.
>
> I am including your comments as part of our public comments on short-term rentals.
>
> Thanks again. Don't hesitate to contact me if you have questions.
>
> *Bob Bugert*
>
> *Chelan County Commissioner, District 2*
>
> *Office: 509-667-6215*
>
> *Mobile: 509-630-4480*

From: Jonathan Gasbar <jgasbar7@gmail.com>
Sent: Sunday, May 31, 2020 6:13 PM
To: Bob Bugert <Bob.Bugert@CO.CHELAN.WA.US>
Subject: Public Access Lake Wenatchee Concerns

External Email Warning! This email originated from outside of Chelan County.

Commissioner Bugert,

I hope this email finds you well! First off, I would like to say congratulations on your election to the county commissioner position. These are busy times and I appreciate you taking the time to read my concerns.

On the north side of lake wenatchee there are public access points every 5 houses. I believe the intent of these access points is to give people that have homes in the area, off of the lake, a point where they can launch their kayaks, canoes, and spend time by the water.

My family has owned a cabin next to one of these access points for over 30 years. In the last 10 years, since the arrival of airbnb, we have seen the access point next to us change drastically. I will list my concerns with the access point to keep my email concise.

Concerns:

- Frequent trespassing by residents and guests of their airbnb's
- Removal of native plants and vegetation replaced with rock and stairs
- Sand dumped into the lake to make a sandy beach
- Numerous kayaks are left on the property for months
- One resident brings a ski doo and puts a ramp in the water to hold his ski doo for as long as he stays
- Anchors and chains buried in the ground to tie watercraft down
- At one point there was a temporary dock that was rolled into the water (that resident sold his place and left)

- Fire pit less than 5 feet from the other neighbor's home and structures (this is a big safety concern for the area)
- Garbage (bottles and cans) left on the beach

Questions:

- Are there written rules and regulations about these access points?
- Who at the county should I talk to about these concerns?
- Is there a way that the land can be restored to its natural state?
- Who is liable if someone trespasses and hurts themselves on our property?

This is a relatively congested area in the lake and people have had conflicts over the past few years. Just last night a guest at one of the airbnb's was walking across our yard and I told him to get off private property and he refused. I explained where the access point was and his group called me inappropriate names and continued to pushback.

It is quite unsettling to ask someone to get off of private property and have them push back (especially an unknown person).

I hope you can point me in the right direction to someone who can help us with established rules that everyone can follow and be mutually enforced.

Thanks,

Jon

From: Bob Bugert
To: Matt Korsgaard
Cc: Jim Brown; RJ Lott
Subject: RE: Short Term Rentals
Date: Thursday, June 4, 2020 2:30:08 PM

Matt—
Thank you for your email. Your comments will be included in the public record, and in our deliberations.

I recognize that there are vacation rentals that are managed responsibly, but there are clearly many owner/operators that do not manage their properties responsibly. Our challenge is to develop practical and effective rules to address those who are irresponsible, without negatively affecting the responsible parties. I agree that good data guides good decisions.

Thanks again,

Bob Bugert
Chelan County Commissioner, District 2
Office: 509-667-6215
Mobile: 509-630-4480

From: Matt Korsgaard <mattkorsgaard@gmail.com>
Sent: Wednesday, June 3, 2020 10:39 PM
To: Bob Bugert <Bob.Bugert@CO.CHELAN.WA.US>
Subject: Short Term Rentals

External Email Warning! This email originated from outside of Chelan County.

Bob,

I'm writing to share my opinion on the proposed changes to policy and codes regarding short term rentals.

I am a resident of un-incorporated Chelan County near Leavenworth. My home is across from the hatchery on East Leavenworth and I do rent it out as a short term rental with a professional vacation home manager.

I was dis-heartened as I listened to the planning commission meeting last Wednesday. I was expecting to hear informed discussion based in fact and founded in clear and measurable pain points from the community. Instead it was an unfounded conversation relying on ill-informed assertions. I come from a corporate background and to solve a problem you have to be able to clearly identify and measure the issues. In the meeting on Wednesday there was not any data presented around the benefit of tourism dollars/jobs/economic growth to the community financially vs the impact to the community, in increased noise complaints,decreased availability of affordable housing or other measurable detriments. It seems that the

commission is being fueled mainly by angry letters from a few citizens. I am not against some regulation, however how can the commission come to a reasonable conclusion about capping either the number of rentals or occupants unless you have basic data to support the issues? If noise complaints are the issue, do you have any data to support that non-owner occupied properties are the problem, or that limiting the number of rentals will solve the problem? I saw no basis for the cap numbers being thrown around for either the number of rentals or the occupancy of any one unit of any size. These seemed to have been pulled out of thin air. If your goal is to stop receiving angry letters from the community I'm not sure that is ever going to happen nor should that be your goal. Please let the actual data drive the decisions.

I also understand the people are feeling the effects of change in their community. The Wenatchee Valley has experienced much change over the last few years as have many other Washington counties. I think Chelan needs to embrace the inevitable changes and work towards manageable growth. The answer is not to demonize the short term rental industry.

Also just to close. I think that the commission has heard the complaints of a vocal segment of disgruntled neighbors and chose to over-react. If it continues down this path of over-correction it will undoubtedly invoke the voice of the owners that possibly have remained relatively silent so far. I only recently was made aware of this debate. You will awaken a small but powerful and well funded group of owners that will not sit lightly by as you override their property rights. Again I stress that I am definitely for some regulation, however the current planning commission seems to be intent on not striving for a fair and reasonable solution but to strike the first blow against a perceived foe that it blames for the change that is seen in the valley. I hope that cooler heads prevail in this process. However to date I have seen emotion and prejudice override objective and fair analysis.

Matt

From: Matt Korsgaard
To: Bob Bugert
Cc: Jim Brown; RJ Lott
Subject: Re: Short Term Rentals
Date: Saturday, June 6, 2020 7:40:47 AM

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Bob. Much appreciate the reply. That seems like the right approach. There has to be a way to identify habitually impactful properties. The occasional complaint is probably not a big deal, but I'm assuming you guys have line of sight to properties that are constantly getting noise complaints from multiple neighbors or where the Sheriff has to make frequent visits. Also if a property is clearly allowing occupancy that exceeds a reasonable amount is probably harder to get to but a simple calculation of occupancy on their listing vs the number of bedrooms they have might be possible.

The segmentation I have seen so far is simply owner occupied vs non-owner occupied. As I can imagine the majority of complaints happen with non-owner occupied, the fact that this segment most likely encompasses over 90% of the number of properties is in my opinion painting with too broad a brush and needs to be more targeted. More segmentation is necessary. A few other breakouts that might help to become more targeted would be to also look at situations where the owner doesn't live on the property but is a resident of Chelan county. I ran into a gentleman the other day that resides in Chelan County and owns two properties. He keeps very close tabs on his properties. Also the Property Management company can be held somewhat accountable. We recently switched from one company to another in the area and have seen a huge change in how closely the property is monitored and the response time to issues. The # of properties managed per local manager varies widely per company. If one LOM has 40 properties vs another that manages 25, the ability to be attentive and responsive varies significantly. Are there certain management companies that have a much higher rate of complaints? Also property management companies have the choice of continuing to manage and support problematic properties.
It was also recently brought to my attention that certain property management companies are using decibel sensors on the properties that will alert the management companies if the decibel levels get too high. This could be a game changer in the industry.

I think on some level you need to take a closer look at the complaints you are hearing as well. Are these legitimate complaints where the guests are being way too loud and obnoxious or are these neighbors that are fed up with change in general and have chosen to focus their frustrations on the short term rental industry. I read the Leavenworth facebook page and am well aware of how certain people feel about change. I'm sure the people who are railing against STRs are the same people that railed against the adventure park and hate the people that float the icicle. Yes we need regulations and with the icicle float we need education about the redds. There is a way to properly manage change without blind hatred and rage against tourism.

In short, there is much more analysis to be done on this. I know the planning commission wants to act quickly and decisively, but if it makes a knee jerk decision on this it can expect a backlash from those owners and property managers that are responsible and being lumped in with the places that are not being responsible.

Matt

On Thu, Jun 4, 2020 at 2:30 PM Bob Bugert <Bob.Bugert@co.chelan.wa.us> wrote:

> Matt—
>
> Thank you for your email. Your comments will be included in the public record, and in our deliberations.
>
> I recognize that there are vacation rentals that are managed responsibly, but there are clearly many owner/operators that do not manage their properties responsibly. Our challenge is to develop practical and effective rules to address those who are irresponsible, without negatively affecting the responsible parties. I agree that good data guides good decisions.
>
> Thanks again,
>
> *Bob Bugert*
>
> *Chelan County Commissioner, District 2*
>
> *Office: 509-667-6215*
>
> *Mobile: 509-630-4480*
>
> ---
>
> **From:** Matt Korsgaard <mattkorsgaard@gmail.com>
> **Sent:** Wednesday, June 3, 2020 10:39 PM
> **To:** Bob Bugert <Bob.Bugert@CO.CHELAN.WA.US>
> **Subject:** Short Term Rentals
>
> **External Email Warning!** This email originated from outside of Chelan County.

Bob,

I'm writing to share my opinion on the proposed changes to policy and codes regarding short term rentals.

I am a resident of un-incorporated Chelan County near Leavenworth. My home is across from the hatchery on East Leavenworth and I do rent it out as a short term rental with a professional vacation home manager.

I was dis-heartened as I listened to the planning commission meeting last Wednesday. I was expecting to hear informed discussion based in fact and founded in clear and measurable pain points from the community. Instead it was an unfounded conversation relying on ill-informed assertions. I come from a corporate background and to solve a problem you have to be able to clearly identify and measure the issues. In the meeting on Wednesday there was not any data presented around the benefit of tourism dollars/jobs/economic growth to the community financially vs the impact to the community, in increased noise complaints,decreased availability of affordable housing or other measurable detriments. It seems that the commission is being fueled mainly by angry letters from a few citizens. I am not against some regulation, however how can the commission come to a reasonable conclusion about capping either the number of rentals or occupants unless you have basic data to support the issues? If noise complaints are the issue, do you have any data to support that non-owner occupied properties are the problem, or that limiting the number of rentals will solve the problem? I saw no basis for the cap numbers being thrown around for either the number of rentals or the occupancy of any one unit of any size. These seemed to have been pulled out of thin air. If your goal is to stop receiving angry letters from the community I'm not sure that is ever going to happen nor should that be your goal. Please let the actual data drive the decisions.

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Also just to close. I think that the commission has heard the complaints of a vocal segment of disgruntled neighbors and chose to over-react. If it continues down this path of over-correction it will undoubtedly invoke the voice of the owners that possibly have remained relatively silent so far. I only recently was made aware of this debate. You will awaken a small but powerful and well funded group of owners that will not sit lightly by as you override their property rights. Again I stress that I am definitely for some regulation, however the current planning commission seems to be intent on not striving for a fair and reasonable solution but to strike the first blow against a perceived foe that it blames for the change that is seen in the valley. I hope that cooler heads prevail in this process. However to date I have seen emotion and prejudice override objective and fair analysis.

Matt

RJ Lott

From:	Kari Sorensen <blueberrykari@gmail.com>
Sent:	Sunday, June 7, 2020 4:25 PM
To:	Kevin Overbay; Bob Bugert; Doug England; Jim Brown; Lynn Machado; RJ Lott; CDPlanning
Cc:	Kathy Blum; Kathy Branch; Cindy Smith; s lester; Beverly Peters
Subject:	[CD Planning]Letter from Kari Sorensen, Manson Community Council & Concerned Citizen
Attachments:	Tap Tap Tap is this thing even on letter to Chelan County Planning Commission.docx

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Please read my attached letter and include in the record.

Thank you.

Kari Sorensen
Blueberry Hills Farms

June 7, 2020

To: Chelan County Planning Commission

(Tap Tap Tap) Is this thing even ***ON***?

As Chair of Manson Community Council AND as a private citizen, I do not believe that our community's most important concerns or requests have been heard or even specifically addressed in the potential new STR rules that are being considered.

The Manson community has been very outspoken about the fact that our *Chelan County Growth Management Act (Section V, Policy LU 1.2) states it's goal is to* **"Protect residential neighborhoods from impacts associated with incompatible land uses through application of development standards and permit conditioning.**

Rationale: Incompatible land use located in close proximity to densely residential neighborhoods may create adverse impacts which could lead to a reduction of the high quality of life for the County residents."

Why are illegally operating commercial businesses (hotels/motels) being allowed to operate in residential neighborhoods? A vacation rental creates lots of traffic that typically would not be there. It creates parking issues, as nearly everyone has a boat and a truck that is parked WITHIN the County right of way, and not off street as current regulations state. It creates noise issues. Garbage issues. Overflowing septic tanks that run into the lake. Hostile relations between homeowners. It is a SIGNIFIGANT REDUCTION OF THE HIGH QUALITY OF LIFE" that we were promised by the GMA.

None of the STR rules that were discussed provide any immediate relief to homeowners that are surrounded by them. I have a friend surrounded by 5 STR's now. There were none when she moved there 2.5 years ago. Last weekend there were ***loud*** parties at 4 of the 5 rentals. The loudest one was a bachelorette party, located at 50 Ustah Street in Manson. There were at least 25 people counted within the home, balcony, front lawn, driveway, and swimming pool, all of whom were drunk by 9am. The occupancy on that 4-bedroom unit is 10. There were 12 cars along the county right of way that could be attributed to that home. The screaming, partying, throwing up off the balcony, balcony and pool nudity all ensued into the early hours. Three different neighbors called in complaints about this one group. The sheriff's department showed up **twice**, but to no avail. The party continued until the following morning. Happy summer to my friend. Again. And how about recording those with the County? Did they make note that it was a vacation rental? Each person that called the Sheriff's department noted to Rivercom that it was an active STR. So now what? Fines? Reports against the rental? What happens now? Likely, nothing. The renters are simply "educated" while the owners suffer zero negative impacts, while their neighbors can't live peacefully in their homes.

This is yet ONE example of how STR's are affecting local homeowners. They are being held hostage within their own homes as the outside is no place for pleasure for them. All those outdoor spaces they improved to relax during the beautiful weather? They can't use it. So the locals once again "suffer" through the winter months while looking forward to gorgeous weather – only to not be able to enjoy it.

The clusters of these STR's within neighborhoods must be broken up. There should be a neighborhood density respected, whether that is a certain number of feet between rental units or some other method. This cannot be overlooked.

As far as the suggestion that you all nearly seemed in favor of, when the property is sold (or transferred) the license will be passed along to the first sale owner and given three years of being able to operate a STR. I absolutely, as do most of the 98831 landowners, disagree with that. Why should someone be able to sell their "single family home" (as per the permit they received from the County to build) with a higher price tag, as it's an established "income property," while at the same time, the properties surrounding it are DEVALUED based on the fact **NOONE** wants to live next door to a Short Term Rental.

We are asking that the property sale does NOT include a 3-year STR transfer. Those new owners need to get in line, along with all the other folks that want to "get in on it." They should fill out the same paperwork to request to be in the lottery just like anyone else. I would even ask that people who LIVE within the 98831 zip code actually be given priority, as we all know that the unsupervised STR's use the most community resources, as opposed to local owners who can supervise their own rentals and have a vested interest in the community's success.

Please give the owners living amidst these rentals some relief. Please break up the clusters within neighborhoods. Please do not give new owners a pass for a 3-year period to run a commercial business in a residential neighborhood.

Please hear us on these issues. At this point everything being decided benefits the STR owners. Let's give some consideration to those folks that love and live here year-round.

Kari Sorensen
Manson Community Council

RJ Lott

From: Yen Lam <ylam@grlg.net>
Sent: Wednesday, June 3, 2020 2:25 PM
To: CDPlanning; Kevin Overbay; Doug England; Bob Bugert; Jim Brown
Cc: bricklin@bnd-law.com; griefen@bnd-law.com
Subject: [CD Planning]Resolution of Chiwawa Communities Association in Support of RUN
Attachments: signed rental resolution.pdf

External Email Warning! This email originated from outside of Chelan County.

Chelan County Board of County Commissioners and Planning Commission:

Please be advised that I represent the Chiwawa Communities Association ("Association"), which has been dealing with the negative and increasing effects of short-term rental operations in its community over the years. The Board of the Association has passed a resolution in support of the efforts of Residents United for Neighbors—Chelan County ("RUN"). Please see attached.

Best Regards,
Yen

Yen Lam
Attorney

Galvin Realty Law Group, P.S.
6100 219th St. SW, Suite 560
Mountlake Terrace, WA 98043
PH: 425-275-9863
www.grlg.net

CHIWAWA COMMUNTIES ASSOCIATION

RESOLUTION TO SUPPORT RUN

WHEREAS, the Board of Trustees of Chiwawa Communities Association ("Board") has reviewed the concerns of the Residents United for Neighbors - Chelan County (RUN) regarding short-term rentals (any rentals for a duration of less than 30 days);

WHEREAS, the Board agrees with RUN that the short-term rental industry is escalating the rate of loss of affordable single family homes in the housing market;

WHEREAS, the Board agrees with RUN that the operation of short-term rental properties is taking a significant toll on the quality of life in many neighborhoods;

WHEREAS, the Board agrees with RUN that Chelan County should give greater weight to the expectations of residents (values such as quality of life, peace and quiet, and sense of community) over the interests of non-resident investors in determining policy and legislation;

WHEREAS, the Board agrees with RUN that Chelan County should prohibit short-term rentals in residential districts, including the RW zone, to protect its residents;

WHEREAS, the Board agrees with RUN that if Chelan County does not prohibit short-term rentals, it should regulate short-term rentals;

WHEREAS, the Board agrees that a change in zoning to restrict use to long-term rentals is not a taking under Washington law;

NOW, THEREFORE, it is hereby resolved by the Board that the above resolutions be adopted.

BOARD OF TRUSTEES:

Mike Stanford
Date: 6-2-20

David Lowrie
Date: 6-2-20

Judy Van Eyk
Date: 6/2/20

Jim Wright
Date: 6/3/20

Art Alley
Date: 6-3-2020

Bob Barr
Date: 6-2-20

Roger Thomas
Date: 6/2/20

Ron Tilden
Date: 6/20/20

William Lockinger
Date: 6/2/2020

LAW OFFICE OF
SAMUEL A. RODABOUGH PLLC

SAMUEL A. RODABOUGH
ATTORNEY AT LAW
15405 SE 37TH ST., STE 100
BELLEVUE, WA 98006
(425) 395-4621

June 3, 2020

Via E-Mail

Chelan County Planning Commission
316 Washington St., Ste. #301
Wenatchee, WA 98801
CDPlanning@co.chelan.wa.us.

Re: Proposed Short-Term Rental Code Amendments

Dear Commissioners:

This firm and Gatens Green Weidenbach, PLLC represent the Short-Term Rental Alliance of Chelan County ("STRACC"), a coalition of homeowners, property managers, and affiliated businesses that operate short-term rentals in the greater Chelan County area. The purpose of this letter is to respond to various issues that have arisen during the Planning Commission's review of the draft short-term rental ordinance, including the memorandum provided to the Planning Commission by attorney David A. Bricklin on behalf of his client Residents United for Neighbors – Chelan County, dated May 13, 2020 ("Bricklin Letter").

The Bricklin Letter appears to be part of a disinformation campaign to persuade the Commissioners that short-term rentals are currently illegal in Chelan County. Tellingly, the Bricklin Letter omits references to several important documents confirming the legality of existing short-term rentals including, most notably, a judgment recently entered in Chelan County Superior Court that expressly reversed a Hearing Examiner decision concluding that short-term rentals were not permitted uses. The proposed code changes described in the Chelan County Draft Short-Term Rental Code, dated May 29, 2020 (the "Draft Code"), if adopted and applied to existing short-term rental operators and owners, would violate the constitutional rights of such operators and owners. Currently existing short-term rental operations are permitted outright under the Chelan County Code (the "Code") and would become legal nonconforming uses, not subject to any of the new regulations, if the Draft Code is adopted.

A. The Planning Commission's Expedited Schedule for Reviewing the Draft Code Does Not Facilitate Public Participation

As an initial matter, it appears prudent to observe that the Planning Commission's hasty and rushed process to consider the Draft Ordinance fails to comply with applicable laws and regulations. The County did not post the agenda and packet for tonight's Planning Commission meeting, including the revised version of the Draft Code under consideration, until just yesterday. Given the proximity of the release of the revised version of the Draft Code to the meeting itself, how does the Planning Commission reasonably expect to elicit and receive

feedback from affected stakeholders, especially when oral comment is currently prohibited during these proceedings that are conducted remotely? Although some provisions of the Open Public Meetings Act have currently been suspended by Governor Inslee, we are unaware of the suspension of any provisions regarding the public participation requirements under the Growth Management Act, RCW 36.70A, and the accompanying public participation plan that has been adopted by the County.

During the Planning Commission meeting held on May 27, 2020, it was apparent that several Commissioners were justifiably concerned about the aggressive timetable established by the Board of County Commissioners ("BOCC") for consideration of the Draft Code, but nonetheless felt bound by the BOCC's arbitrary timeframe edicts. Respectfully, the BOCC is not in a position to force the Planning Commission to violate applicable laws and regulations. Accordingly, the Planning Commission should exercise its independent prerogative to consider this matter on a more appropriate timetable.

B. Since 1991, the Department Has Considered Short-Term Rentals as Permitted in Any Zone in Which a Single-Family Residence is a Permitted Use.

At the Planning Commission meeting held on May 27, 2020, several members spent a considerable amout of time debating whether short-term rentals are currently permitted in Chelan County, or whether any existing short-term rentals are operating illegally. This discussion was likely prompted by the Bricklin Letter. Again, the Bricklin Letter conveniently omits references to several important documents confirming the legality of existing short-term rentals in Chelan County.

Indeed, any consideration of whether short-term rentals are permitted in Chelan County must commence with the County's original policy memorandum, dated January 23, 1991 confirming the legality of short-term rentals in any zone that allows single-family residences ("Policy Memo"). The Bricklin Letter conveniently omitted reference to this significant document. For your convenience, a copy of said Policy Memo is attached hereto as **Appendix A**.

Research reveals that the first time that the County considered the legality of short-term rentals was in the Policy Memo. Specifically, in the Policy Memo, the Chelan County Planning Department addressed the legality of renting single family residences for "over-night or week-end accommodation." In the Policy Memo, Planner Rick Simon reached the following four findings, all of which remain as true today as they were in 1991:

First, Mr. Simon concluded that "[t]he zoning resolution does not differentiate between an owner-occupied residence and a renter-occupied residence." Likewise, as currently adopted, nothing in zoning matrices under the Code distinguishes between owner-occupied and renter-occupied single-family dwellings.

Second, Mr. Simon concluded that "[t]he rental of a single-family residence as a single unit for overnight accommodation does not result in a change of land use." Again, this conclusion

remains the same today as it was in 1991. Indeed, in a 2014 decision, the Washington State Supreme Court stated as follows:

> **If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not commercial, no matter how short the rental duration. The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character.**

Wilkinson v. Chiwawa Communities Association, 180 Wn.2d 241, 252 (2014) (internal citations omitted); *accord., Ross v. Bennett*, 148 Wn. App. 40, 51 (2008). Although the Bricklin Letter predictably seeks to dismiss the import of the *Wilkinson* case, the Supreme Court's reasoning above speaks for itself. Additionally, the Court's analysis is similar to Mr. Simon's earlier conclusion in the Policy Memo that "[t]he rental of a single-family residence as a single unit for overnight accommodation does not result in a change of land use."

Third, Mr. Simon concluded that "[t]he length of a lease or rental agreement is not regulated by the County Zoning Resolution." Likewise, as currently adopted, nothing in the County's zoning matrices distinguishes between the length of leasehold interests that are, and are not, allowed for single-family dwellings.

Finally, the Department concluded that "[t]he use of a single family residence as a single unit for overnight accommodation meets the definition of a single family residence." Here, although the adopted definition of the term single-family dwelling has changed since 1991, the result remains the same. Specifically, as currently adopted, "dwelling, single-family" is defined as "a building containing one dwelling unit and that is not attached to any other dwelling by any means and is surrounded by open space or yards." CCC 14.98.620. Inasmuch as this term is defined purely in relation to the *physical nature* of the structure itself, as a matter of law, the manner in which said structure is utilized, including as a short-term or long-term rental, does not change the applicability of the definition. As such, the use of a single-family dwelling as a single unit for overnight accommodation clearly meets the definition of single-family dwelling.

C. In the Years that Followed the Policy Memo, the Board of County Commissioners Declined to Change the Status Quo, Specifically a Robust Short-Term Rental Market in Which Short-Term Rentals Were Permitted Outright in Any Zone that Allowed Single-Family Residences.

In 2005, the BOCC considered adopting legislation that would further regulate "short term home rentals" as a standalone use in the zoning matrix. For your convenience, please see the minutes of March 28-29, 2005, pgs. 7-9, attached hereto as **Appendix B**. Per the minutes, the BOCC rejected revisions to Title 11 of the Chelan County Code that would have further regulated

"short term home rentals" as a standalone use in the zoning matrix. Instead, in rejecting these legislative amendments, the BOCC made it abundantly clear that it was pleased with the status quo, namely a robust rental market in which any single-family dwelling could be utilized as either a short-term or long-term rental. Notably, the BOCC did not take the position of the Bricklin Letter, *i.e.* that short-term rentals were not allowed under the Code, unless a conditional use was obtained. Additionally, as the Planning Commission is already aware, just last year, the Planning Commission declined to recommend for adoption an ordinance that would have further regulated short-term rentals as a stand-alone use on the zoning matrix.

D. The Administrative Interpretation Relied Upon By the Bricklin Letter Was Expressly Rescinded By the Department

On August 20, 2019, the then-Director of Chelan County Community Development, Dave Kuhl, issued Administrative Interpretation 2019-001, dated August 20, 2019 ("Administrative Interpretation"), which directly contravened the Policy Memo, cases, and BOCC determinations. For your convenience, please see a copy of the Administrative Interpretation attached hereto as **Appendix C**. The Administrative Interpretation found that "short-term rentals are not defined by the Chelan County Code and a similar use is not listed within the Peshastin Urban Growth Boundary District Use Chart. Therefore, short-term rentals are not allowed with (sic.) the Peshastin Urban Growth Boundary."

The absolute absurdity of the Administrative Interpretation is demonstrated by its conclusion that short-term rentals were not akin to bed and breakfasts, but were instead most akin to a "recreation/tourist use." However, under the Code, "recreation/tourist" is not a specific use identified in the zoning matrix. Instead, the term "recreational uses" is merely a *general category* under which more specific uses are regulated as either permitted, accessory or conditional. For example, under CCC 11.22.030, the general category of "recreational uses" includes arboretums and gardens, bowling alleys, drive-in theaters, exercise facilities, golf courses, driving ranges, gun/sportsmen's clubs, miniature golf courses, mini-casinos, game/card rooms, playfields, parks and recreation facilities, recreational vehicle park or tent campgrounds, roller/ice-skating rinks, theaters, and trail systems—none of which are remotely residential in nature under any provision of the Code. In short, the Administrative Interpretation asserted that short-term rentals were more akin to golf courses and bowling alleys than to a bed and breakfast!

Please note that the Administrative Interpretation is based on the same arguments set forth in the Bricklin Letter to support his clients' position that short-term rentals are not presently authorized in Chelan County's residential zones. Notably, however, as explained in greater detail below, the Administrative Interpretation was later expressly rescinded by the Department. In that regard, the Department apparently determined that the prior argument that short-term rentals were not a permitted use was so flimsy that they were unwilling to stand by it. For your convenience, a copy of the rescission on the Administrative Interpretation is attached hereto as **Appendix D**. In that regard, the reliance in the Bricklin Letter on the validity of the Administrative Interpretation is misplaced.

The Administrative Interpretation was appealed to the Hearing Examiner, which affirmed the Administrative Interpretation by decision dated December 31, 2019 (the "Hearing Examiner Decision"). For your convenience, please see a copy of the Hearing Examiner Decision attached hereto as **Appendix E**. Again, the Hearing Examiner Decision was based on the same arguments set forth in the Bricklin Letter, and the Hearing Examiner concluded that a "short-term (vacation) rental is not defined within the [Code]" and therefore, was not allowed.

E. The Hearing Examiner Decision Was Expressly Reversed By the Superior Court—An Inconvenient Fact Tellingly Omitted by the Bricklin Letter.

The Bricklin Letter discusses the Administrative Interpretation and the Hearing Examiner Decision at length, and further claims that the rescission of the Administrative Interpretation was not a formal determination and contains flawed legal reasoning and analysis. However, the Bricklin Letter fails to reference that the Administrative Interpretation and the Hearing Examiner Decision were appealed to the Chelan County Superior Court under Cause No. 20-2-00064-04, and further fails to reference that the Chelan County Superior Court entered an Agreed Final Judgment and Order reversing the Hearing Examiner Decision. A copy of the April 2, 2020 Agreed Final Judgment and Order is attached hereto as **Appendix F** (the "Order").

Once the appeal was pending before the Chelan County Superior Court, the Department apparently realized, or was advised by the Chelan County Prosecutor's Office, that the liability exposure in connection with the Administrative Interpretation was significant and that the Administrative Interpretation was not defensible based on the record (which included the Policy Memo and the BOCC minutes referenced above). During the pendency of the appeal, the Department rescinded the Administrative Interpretation. The Order entered by the Chelan County Superior Court did not just reference the rescission and dismiss the case; but rather, the Court went a step farther, and by its clear terms, expressly reversed the Hearing Examiner Decision concluding that short-term rentals were not permitted uses. This Order was not appealed and is binding on the County in all material respects. In summary, short-term rentals are undoubtedly a permitted use in Chelan County at this time.

F. If the Draft Code Is Adopted, Existing Short-Term Rentals Would Be Considered Nonconforming Uses

If the Commissioners adopt the Draft Code, it will only legally apply to the establishment of new short-term rentals. Specifically, the Code provides that "[u]ses, lots, and structures rendered nonconforming by the adoption of this title may be continued and maintained in reasonable repair, subject to the conditions of this chapter." CCC 11.97.010. As set forth above, a short-term rental is assuredly a currently permitted "use" as intended by the Code. Thus, the pre-existing nonconforming uses, including short-term rentals, may continue under the current Code so long as they are not "enlarged, or altered in any way which increases its nonconformity." CCC 11.97.025.

Accordingly, inasmuch as all currently-existing short-term rentals would be permitted to continue to be rented as legal nonconforming uses, they would not be required to obtain a permit, register, or adhere to any of the other provisions of the Draft Code. As such, the only potential benefit that would be derived from the Draft Code would be limited to regulation of those individuals and properties seeking to begin a short-term rental.

G. Applying the Draft Code to Existing Short-Term Rentals Would Effectuate a Taking and Violate Substantive Due Process Claims.

If Chelan County attempts to remove legal nonconforming status and terminate or regulate any existing short-term rentals, it will most certainly be subject to litigation from existing short-term rental owners and operators under the takings and substantive due process doctrines of the U.S. Constitution and the Washington State Constitution. These clauses constitute the foundation for the eminent domain doctrine and regulatory takings law, which place limits on the inherent power of the government to expropriate private property: the government may take private property by regulation, but only for a public use and only upon the payment of just compensation.

In addition, if the County adopts the Draft Code, the County could be subject to takings claims from property owners that have not yet commenced short-term rental operations, but have significant investment-backed expectations in the acquisition and development of their property with the intent to start a short-term rental operation.

The Washington Supreme Court recently issued two property rights decisions, *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) ("*Yim I*"), and *Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019) ("*Yim II*"), which changed Washington law to mirror the federal approach to the regulatory takings doctrine. Although the *Yim I* and *Yim II* cases reduced and clarified the standard of review for substantive due process claims involving land use regulations to the deferential rational basis review, the cases do not eliminate exposure of a county or municipality for unfettered regulation that interferes with property owners' investment-backed expectations, as the Bricklin Letter would lead you to believe.

Notably, Washington continues to adhere to the individual takings analysis framework set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). As such, and as noted by the Washington Supreme Court, the *Penn Central* factors present a clear avenue for landowners to challenge regulatory takings, and would be utilized by existing short-term rental owners, and potentially, by property owners that have invested in their property with the intent to develop a short-term rental, if the Draft Code is adopted.

Under the basic *Penn Central* factors, courts analyze an alleged regulatory taking by considering (1) the economic impact on the owner; (2) the extent of interference with the owner's investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. The U.S. Supreme Court stated in *Penn Central* that "[t]he economic impact of the regulation ... and ... the extent to which the regulation has interfered with distinct investment-

backed expectations have particular significance" in the takings determination. *Id.* The economic impact test is intended to provide a rough measure of harm to determine regulatory burden and includes loss of income due to regulatory burden. *See Walcek v. United States*, 49 Fed. Cl. 248, 266 (2001). Conversely, the investment-backed expectation factor aims to evaluate the effect of a regulation on the owner's reasonable expectations in light of the legal and regulatory climate that existed when they purchased the property. *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999). Finally, the "character" factor may consider whether and to what extent a burdensome regulation is intended to benefit another specific property or some group less than the public as a whole. *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1370 (Fed. Cir. 2013) (noting water releases from a dam were intended to benefit the singular interests of agriculture).

Short-term rental owners and operators, and owners that have invested in their property with the intent to develop a short-term rental, could also assert takings claims under 42 U.S.C. §1983 in federal court, in which case they would have the ability to recover attorneys' fees.

H. As Currently Drafted, the Draft Ordinance is an Unconstitutional, Retroactive Law.

At the Planning Commission Meeting on May 27, 2020, the members of the Planning Commission stated their intent to significantly reduce the number of short-term rentals throughout the County. For example, they observed that the current percentage of short-term rentals in Leavenworth is 12 percent. Thereafter, the members of the Planning Commission agreed to adopt regulations that would reduce that number to 5 percent.

The overall structure and intent of the Draft Code is similar to an ordinance adopted in Austin, Texas, which was recently ruled unconstitutional in the Texas Court of Appeals. For your convenience, a copy of *Zaatari v. Austin*, Case No. 03-17-00812-CV is attached hereto as **Appendix G**. In 2016, the City of Austin adopted a new short-term rental code that categorized existing short-term rentals into three classes for purposes of new regulations: Type 1 (owner-occupied), Type 2 (not owner-occupied), and Type 3 (multi-family). Austin's new code then phased out all Type 2 short-term rentals by 2022, *i.e.*, within a period of 6 years. Austin's new code also created a permitting system and required property owners to meet certain eligibility criteria and obtain a license before being allowed to rent their property on a short-term basis.

Please note that Austin's short-term rental typing system is closely analogous to the categories proposed in the Draft Code: Tier 1 (owner occupied), Tier 2 (not owner-occupied), and Tier 3 (larger occupancies). Also, similar to the Austin short-term rental ordinance, which sought to phase out Type 2 (not owner-occupied), the Draft Code seeks to impose certain caps ranging from 1 to 5 percent of existing housing stock in some or all of the three tiers of short-term rentals. In short, in zones that significantly exceed those existing limits, such as Leavenworth zip code at 13 percent of all housing stock, the draft short-term rental code is also designed to phase out most short-term rentals over a period of a few years. Similar to the Austin short-term rental ordinance, the Draft Code also proposes to create a permitting system and requires

property owners to meet certain eligibility criteria and obtain a license before being allowed to rent their property on a short-term basis.

Opponents of Austin's short-term rental ordinance challenged the ordinance under various legal theories. In November of 2019, the Texas Court of Appeals issued a decision holding that the Austin Ordinance was "unconstitutional as a retroactive law and as an uncompensated taking of private property." In this regard, the Court stated as follows:

> A retroactive law is one that extends to matters that occurred in the past. .... A retroactive statute is one which gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute... The State contends that the ordinance provision terminating all type-2 operating licenses is retroactive because it 'tak[es] away th[e] fundamental and settled property right' to lease one's real estate under the most desirable terms. The City disagrees with the State's characterization of the ordinance's effect, but it does not dispute that the ordinance is retroactive. We agree that section 25-2-950 operates to eliminate well-established and settled property rights that existed before the ordinance's adoption.

Id. at pg. 17.

In Washington, "a retroactive law violates due process if the retroactive application of a statute deprives an individual of a vested right." *Caritas Servs., Inc. v. Department of Social & Health Servs.*, 123 Wn.2d 391, 413 (1994). A vested right entitled to protection under the due process clause "must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another." *Id.* at 414. The proper test of the constitutionality of retroactive legislation is whether a party has changed position in reliance upon the previous law or whether the retroactive law defeats the reasonable expectations of the parties. *In re Santore*, 28 Wn. App. 319, 324 (1981).

As indicated above, it has expressly been the position of the County since the 1991 Policy Memo that short-term rentals were allowed in any zone in which a single-family residence was permitted. That policy was effectively confirmed d by the Chelan County Superior Court, which reversed the Hearing Examiner decision. In short, the existing owners of short-term rentals purchased their properties in reliance on the County's longstanding policy. Most, if not all, of these owners presumably would not have purchased these properties, or even property in Chelan County for that matter, if they did not have assurances that they could be used as short-term rentals. As such, as currently drafted, the Draft Code, which uses a variety of means to eliminate existing short-term rentals is an unconstitutional, retroactive law.

CONCLUSION

Existing short-term rental operations are permitted outright under the Code and would become legal nonconforming uses, not subject to any of the new regulations, if the Draft Code is adopted. The County will most certainly be subject to litigation from existing short-term rental operators and owners if the County adopts the Draft Code and attempts to apply the Draft Code to existing short-term rentals. In addition, if the County adopts the Draft Code, the County could be subject to takings claims from property owners that have not yet commenced short-term rental operations, but have significant investment-backed expectations in the acquisition and development of their property with the intent to start a short-term rental operation.

As you evaluate the Draft Code, we urge you to consider the above background information and legal status, including specifically, that all existing short-term rentals are currently permitted and would be outside of the regulations contemplated in the Draft Code.

Sincerely,

GATENS GREEN WEIDENBACH, PLLC

Michelle A. Green

LAW OFFICE OF SAMUEL A. RODABOUGH PLLC

Samuel A. Rodabough

cc: Susan Hinkle, Chelan County Deputy Prosecuting Attorney

Appendix A

TO: Policy File

FROM: Rick Simon, Associate Planner

RE: Short Term Rentals of Single Family Dwellings

DATE: January 23, 1991

Given the recreational nature of many areas within Chelan County, there are often opportunities for the owner of a single family dwelling to rent the residential structure for overnight or weekend accommodation. This practice is not directly addressed in the county zoning resolution. However, in reviewing the definitions of various uses that are permitted and prohibited in residential zoning districts, it is possible to determine the apparent intent of the resolution in this matter.

The zoning resolution envisions a broad range of residential living arrangements that are permissible in residentially zoned areas. The term "single family dwelling" is listed as a permitted use in all residential zoning districts. This term is defined by the definitions of "family" and "dwelling". They are as follows:

"Family" means an individual, or two or more persons related by blood, marriage, adoption, or legal guardianship, living together in a dwelling unit in which meals or lodging may also be provided for not more than two additional persons excluding servants; or a group on not more than three unrelated persons living together in a dwelling unit."

"Dwelling Unit" means a building or portion thereof designed for occupancy by one family and having only one cooking facility.

The zoning resolution (Section 11.48.010(b)) also permits the renting of rooms to not more than two boarders, roomers or lodgers in most residential zoning districts. However, the resolution provides no definition of boarder, roomer or lodger.

Finally, the resolution provides for the establishment of bed and breakfast facilities through the issuance of a conditional use permit. It defines "bed and breakfast" as "A single family residential unit which provides transient lodging for compensation, by renting of up to three rooms within the primary residence."

From a review of these definitions, it is clear that the overnight rental of a single family residence does not meet the definition of a bed and breakfast and so would not require the issuance of a conditional use permit. While an overnight rental does approach a

commercial use, in fact, the land use remains unchanged. The structure continues to be used for its intended purpose - providing a dwelling for one family unit. There is no provision in the zoning resolution that regulates the length of time that a structure may be leased or rented. In fact, the provision that permits the renting of rooms to boarders, roomers or lodgers would imply that rentals of a short term nature are consistent with single family residential use.

Staff concludes that the overnight or weekend rental of a single family residence is a permitted use. These short term rentals are limited to a single dwelling unit on an individual parcel. Multiple cabins or rental units on an individual parcel in a residential zoning district would require approval through a zone change or conditional
use permit process. This interpretation is based on the following findings:

1. The zoning resolution does not differentiate between an owner-occupied residence and a renter-occupied residence.

2. The rental of a single family residence as a single unit for overnight accommodation does not result in a change of land use.

3. The length of a lease or rental agreement is not regulated by the County Zoning Resolution.

4. The use of a single family residence as a single unit for overnight accommodation meets the definition of a single family residence.

Appendix B

CHELAN COUNTY BOARD OF COMMISSIONERS
MARCH 28, 29, 2005 MINUTES

9:03 A.M. Meeting called to order by Chairman Walter. Also present for session were Commissioner Hawkins, Commissioner Goehner, County Administrator Cathy Mulhall and Clerk of the Board.

9:04 A.M. Moved by Commissioner Goehner, seconded by Commissioner Hawkins, and carried that the Board approve the March 21, 22, 2005 minutes as corrected.

9:10 A.M. Moved by Commissioner Goehner, seconded by Commissioner Hawkins, and carried that the Board approve the Consent Agenda as follows:

- Vouchers as submitted
- Payroll changes as follows:
  a) Martin Roys, Pest Control Internship Fund, Rehired for Seasonal Work
  b) David Baker, Fairgrounds, Extra Help
  c) Michael Kelly, Fairgrounds, Promotion/Employment Agreement 2005A5-96

9:10 A.M. EMPLOYEE RECOGNITION AWARDS

Chairman Walter states that the Chelan County Commissioners, as representatives of the Citizens of Chelan County, are honored in presenting an exemplar of their appreciation for meritorious, exemplary, and dedicated service to the citizens of Chelan County and for upholding the ideals of public service through the years of serving the public, to the following employees:

Marcus Harris	Sheriff's Office	10 Years (Not Present)

9:11 A.M. BOARD DISCUSSION:

- Bruce Graham Meets with Commissioners in regard to Management of Chelan County Airport. It was **consensus** of Board to allow Bruce Graham and Dan Stewart to attend Airport Management Operations Conference
- Chelan County/City of Cashmere Sewer Services Update

ADMINISTRATIVE AGENDA

County Administrator, Cathy Mulhall

10:04 A.M. DISCUSSION ITEMS:

1. Robert Knowles, Project Manager with Project Updates
   - Furnishings Change Order
   - Fairgrounds Restroom Construction
   - Costs for Sally Port Construction Changes at new 60 Bed Facility
   - Surplus of Auditorium Chairs in Auditorium Construction Contract
   - Stucco and Window Work on 316 Building
   - Entry Locks on 316 Building
2. 20-30% Increase in Construction Costs Since June of 2004 Concerns for Auditorium Remodel Project

11:33 A.M. Board Continues Discussion on Link Trolley Service

11:46 A.M. Public Works Department Bid Award

BID AWARD – Award of Removal of Freon, Compressor Oil, and Doors from Refrigeration Units

Refrigeration Services/Chris Fisher	$15 Per Unit
Salcido Connection	$200 Per Unit

Two bids were presented earlier today, March 29, 2005. After review by Public Works Department insuring that bids meet specifications, it was recommended that the Board accept the bid proposal from Refrigeration Services as low bidder at $15.00 per unit.

11:47 A.M. Moved by Commissioner Goehner, seconded by Commissioner Hawkins and carried, that the Board award the bid for the Removal of Freon, Compressor Oil, and Doors from Refrigeration Units to Refrigeration Services at a bid amount of $15.00 per unit. 2005B1-27

11:52 A.M. Board Discussion Continues:

- District Court Contract Information Technology Purchase Primary Agreement between the State of Washington Administrative Office of the Courts and Chelan County signed Monday, March 28. Contract will be routed to other court departments for comment.
- Letter to City of Cashmere regarding Sewer Services at Chelan County Fairgrounds

11:55 A.M. Moved by Commissioner Goehner, seconded by Commissioner Hawkins and carried that the Board approve the following **(added)** action item:

1. **Correspondence for Signature:**
   a). **(Added)** Letter to City of Cashmere regarding Sewer Services at Chelan County Fair 2005C8-90

11:57 A.M. Recessed until 1:30 for Public Hearing

1:30 P.M. PUBLIC HEARING - (Quad Room at the Confluence Technology Center, 285 Technology Center Way, Olds Station, Wenatchee)

1:30 P.M. Hearing Opened by Commissioner Walter to Consider Vacation Rentals and Short Term Residential Rentals. See Attendance Roster

(Public Hearing Tape 2005/1 Beginning)

Staff Report given by Planner Cliff Wavra. Planning Director Larry Angell states these proposed revisions would only apply to short term rentals of private residences, not Bed and Breakfast units, and guest inns which currently have separate regulations.

The Chelan County Planning Commission forwarded a recommendation to the Board for approval of Chelan County Resolution adding provision addressing short term home rentals in those districts that allow single family dwellings consistent with and implementing the Chelan County Comprehensive Plan.

New provisions would include definitions to Title 11, Chapter 11.04 defining local contact person, short term home rental, and vehicle. Also short term rental would be added as an administrative use in those zoning districts which allow single family dwellings. A new suggested section to Chapter 11.94 would be added named Administrative Use Permits.

New sections to 11.94 would be added for administrative uses, urban growth areas named short term rentals home rentals; rural short term home rentals adding minimum criteria for off street parking and loading, set backs, local contact person, noise, places of public/private assembly, proper notices placed adjacent to front door stating property manager, number of occupants, number of vehicles, number and location of on site parking spaces, notification for removal of occupants for non compliance.

New regulations will also state owners shall use best efforts to assure guests do not create unreasonable noise or disturbances. Owners will submit proof of registration with the Washington State Department of Revenue prior to issuance of permit.

Regulations added would also monitor garbage.

It was noted the Chelan County Board of Commissioners have the option to accept the recommendations, modify, reject or continue the hearing for further information or testimony.

Comments from members of the public follow. (See attendance roster)
(Public Hearing Tape 2005/1-end through 2005/2-64)

Commissioner Goehner thanks the Planning Commission and the Building and Planning Department staff for their hard work. Commissioner Goehner states he respectfully disagrees with the Planning Commission. He feels the County needs to maintain the quality of its neighborhoods. The issues stated are in all areas of County. He feels that too much of the use of lands have been taken now. He would suggest carrying forward these concerns to the rental owners and encouraging self discipline for these rental owners and leave the situation as it is now and take care of the noise and nuisances individually.

Commissioner Hawkins feels that we need to work collaboratively to deal with objectionable activities. He states that owners and managers need to be accountable consistent with the neighborhood and to conform to the standards as they have a self interest in the maintenance of the rental. Any property owner should be allowed to sell

for the best price allowable for the market. He also notes suggestions for possible regulations such as vacation rental certificates.

Commissioner Walter has concerns that we are trying to address a few property owners and "apply it to the masses". Commissioner Walter would like the industry to come up with a way to police themselves as neighbor to neighbor. He states this is a tough issue, but there are laws currently on the books for these problems. He does not feel our law enforcement should be worrying about garbage and noise rather than public safety.

(Public Hearing Tape 2005/2 64-750)

Moved by Commissioner Goehner, seconded by Commissioner Hawkins, that the Board not approve the proposed resolution as submitted. 2005P1-6

(Public Hearing Tape 2005/2 750-869)

Board Recessed.

Wednesday, March 30

1:00 P.M. Okanogan Commissioners Re: Joint County Issues

- Government vs. Private Land Ownership
- Farmworker Housing Issues
- Separation of Eastern Washington from Western Washington as New State
- Urban vs. Rural Issues

(Commissioner Goehner leaves for Leavenworth Land Planning Meeting)

- Juvenile Justice – Tour of Chelan County Juvenile Facility
- Possible Rental of CCJC to Okanogan County Juvenile Offenders

4:30 P.M. Moved by Commissioner Hawkins, seconded by Commissioner Walter, and carried that the Board adjourn until Monday, April 4. Board adjourned.

Filed Correspondence:

- Letter from Washington State Liquor Control Board regarding license approval for Coopers-Carrier Mercantile 2005L1-1
- Charter Communication letter regarding Digital Video Recording (DVR) 2005F8-5
- Charter Communications letter on Franchise Fee Remittance for Jan 1, 2004 to April 30, 2004 2005F8-5
- Email to Commissioners from Mountain View Lodge regarding vacation rentals 2005C8-91
- Letter from Carol Clossen on short term overnight rentals 2005C8-92
- RH2 Engineering letter regarding sewer service at Chelan County Fairgrounds 2005C8-93

- Letter from Beaman Architecture regarding 316 Building Window Systems 2005C8-94
- E mail from Karen Whitehall regarding libel award to environmentalists 2005C8-95
- Hispanic Chamber letter in reference to County support 2005C8-96
- Open letter to legislators from North Central Washington Central Labor Council 2005C8-97
- Planner Mark Botello information to Commissioners on review process for Whispering Pines Geologically Hazardous Overlay District 2005P1-7

Vouchers Approved for Payment 2005B4-55

Current Expense		$ 41,830.15
All Other Funds		331,720.84
	Total All Funds	$373,550.99

BOARD OF CHELAN COUNTY COMMISSIONERS
RON WALTER, CHAIRMAN

_____
JANET K. MERZ, Clerk of the Board

Appendix C

CHELAN COUNTY

DEPARTMENT OF COMMUNITY DEVELOPMENT

ADMINISTRATIVE MODIFICATION

To:	Dave Kuhl, Community Development Director
From:	Kirsten Larsen, Planning Manager
Date:	August 30, 2019
File Number:	AI 2019-001
Request:	Craig and Reava Davis are requesting an Administrative Interpretation of the Chelan County Code (CCC) Section 11.22.030(1) Peshastin Urban Growth Area District Use Chart as it relates to short-term (vacation) rentals as a use not listed within the district use chart.

FINDINGS OF FACT:

1. On June 28, 2019, Craig and Reava Davis submitted a request for an Administrative Interpretation of Chelan County Code Section 11.22.030(1) Peshastin Urban Growth Area District Use Chart as it relates to short-term (vacation) rentals as a use not listed within this chart.
2. Pursuant to CCC Section 14.02.020, any person may request in writing an administrative interpretation of any development regulation.
3. CCC Section 11.22.030(1) states, "a district use chart is established and contained herein as a tool for the purpose of determining the specific uses allowed in each use district. No use shall be allowed in a use district that is not listed in the use chart as either permitted, accessory or conditional use, unless the administrator determines, by a written administrative interpretation that may be appealed to the hearing examiner, that an unlisted use is similar to one that is already enumerated in the use chart and may therefore be allowed, subject to the requirements associated with that use and all other applicable provisions".
4. Short-term (vacation) rental is not listed within the CCC Section 11.22.030(2) district use chart.
5. Short-term (vacation) rental is not defined with CCC Chapter 14.98.
6. Pursuant to CCC Section 14.98.010, the purpose of this chapter is to provide a primary source for the definition of terms used in Titles 10, 11, 12, 13, 14, 15 and 16 of the Chelan County Code. The definitions herein are applicable to those titles within the context of their use. These definitions do not supersede or replace the definitions of other terms found in the enumerated titles.

If a term is not specifically defined in this section, an applicant may request from the administrator an administrative interpretation, in which the administrator shall reference the most current edition of Webster's Dictionary, Black's Law Dictionary or the New Illustrated Book of Development Regulations.

7. Short-term rental is not defined in Merriam-Webster Dictionary, Black's Law Dictionary, or the New Illustrated Book of Development Regulations.
8. The New Illustrated Book of Development Regulations does define vacation home as a second home, owned or rented, usually used seasonally, and located in an area with nearby recreational opportunities or amenities.
9. The applicant states in a narrative provided with the application that Boarding/Lodging House, Bed and Breakfast, and Single-Family Dwelling are all similar uses within the Peshastin District Use chart.
   9.1. CCC Section 14.98.265 defines "Bed and breakfast" to mean a facility in which one kitchen, a shared dining area, and not more than a total of three lodging units are available within a single-family residence providing short-term lodging for paying guests.
   9.2. CCC Section 14.98.1105 defines "Lodging facilities" to mean establishments providing transient sleeping accommodations and may also provide additional services such as restaurants, meeting rooms and banquet rooms. Such uses may include, but are not limited to, hotels, motels and lodges greater than six rooms.
   9.3. CCC Section 14.98.620 defines "Dwelling, single-family" to mean a building containing one dwelling unit and that is not attached to any other dwelling by any means and is surrounded by open space or yards.
10. The Chelan County Code Section 11.04.020 District Use Chart for Chelan County outside of the Urban Growth Areas identifies Recreation/Tourist Uses within the chart.
   10.1. CCC Section 14.98.1645 defines "Rural tourism, recreational" to mean an experience involving visits to rural settings or rural environments for the purpose of participation in or experiencing activities, events or attractions not readily available in urbanized areas. These activities are not necessarily agricultural in nature.
   10.2. CCC Section 14.98.1795 to "Small scale recreation and tourism" mean a land use that relies on a setting to provide recreational or tourist use, including recreational center and commercial facilities to serve those uses, but that does not include new residential development. It includes activities and facilities such as, but not limited to, cultural/religious camps, retreat centers, campgrounds, RV parks, lodges and cabin rentals, camping units, outdoor equipment rentals, guide services, trails and trailhead facilities, and similar uses. Small scale recreational and tourist uses are of a size or intensity which has minimal impacts on the surrounding area and which makes minimal demands on the existing infrastructure and public service.

CONCLUSIONS OF LAW:

1. The Director of Community Development is the Administrator of the Chelan County Code and has authority to render this interpretation, pursuant to Chelan County Code Section 14.02.020.
2. The application was determined complete and processed consistent with the requirements of Chelan County Code Title 11 and Title 14.

ANALYSIS:

There is no definition for a short-term (vacation) rental within the Chelan County Code. The New Illustrated Book of Development Regulations defines a vacation home as a second home, owned or rented, usually used seasonally, and located in an area with nearby recreational opportunities or amenities. The Chelan County Code does not have a use or definition for a vacation home, but the most closely related use and definition is Recreation/tourist Use. The County has internally made the interpretation that small scale recreation/tourist use is the closely related use to a short-term rental and has been processing Conditional Use Permits for short-term rentals using this interpretation and applying the applicable standards in review of those permits. The Recreation/tourist use is not listed within the Peshastin Urban Growth Area district use chart. Boarding/lodging, bed and breakfast, and single-family are all existing with the general district use chart for the County in Section 11.04.020. Boarding/lodging and bed and breakfast are defined to include food service and a manager on site which is not consistent with the use of a short-term rental. A single-family dwelling unit is a residential use within the district use chart and does not address overnight guests that are transient in nature. None of these uses would be considered similar uses to a short-term (vacation) rental.

INTERPRETATION:

According to the above analysis, based on the file of record, short-term rentals are not defined by the Chelan County Code and a similar use is not listed within the Peshastin Urban Growth Boundary District Use Chart. Therefore, short-term rentals are not allowed with the Peshastin Urban Growth Boundary.

DECISION:

☑ Concur

☐ Do not concur

8/26/19

Dave Kuhl **Date**

Director of Chelan County Community Development

Pursuant to 14.12.010 Administrative appeals, an administrative appeal to the hearing examiner shall be filed with the department within ten (10) working days of the issuance of the decision appealed, together with the applicable appeal fee. The notice of appeal shall contain a concise statement identifying: (A) The decision being appealed; (B) The name and address of the appellant and his/her interest(s) in the application or proposed development; (C) The specific reasons why the appellant believes the decision to be erroneous, including identification of each finding of fact, each conclusion, and each condition or action ordered which the appellant alleges is erroneous. The appellant shall have the burden of proving the decision is erroneous; (D) The specific relief sought by the appellant; (E) The appeal fee.

Appendix D

CHELAN COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT
316 WASHINGTON STREET, SUITE 301, WENATCHEE, WA 98801
TELEPHONE: (509) 667-6225 FAX: (509) 667-6475

MEMORANDUM
RESCISSION OF AI-2019-001

From: Deanna Walter, Director of Community Development
To: Public
Date: March 25, 2020
RE: Administrative Interpretation - AI 2019-001

Administrative Interpretation, AI 2019-001, was issued by the Chelan County Community Development Director on August 20, 2019. The decision was appealed to the Chelan County Hearing Examiner as AA 2019-005. The Hearing Examiner held a public hearing on December 4, 2019, leaving the record open for additional comments until December 18, 2019. A decision was rendered on December 31, 2019. The applicants, Craig and Reava Davis subsequently appealed the Hearing Examiner decision to Superior Court via a LUPA on January 17, 2020.

Upon further review and consideration:
The current Peshastin UGA district use chart and development regulations do not expressly address short term/vacation rentals, such as Airbnb and VRBO, as not constituting residential use of a single family residence, thus rendering AI 2019-001 unsupported and unenforceable. *See Wilkinson v. Chiwawa Community's Association* 180 Wn.2d 241(2014). *See also* Chelan County Code section 11.23.040(3) regarding vacation rentals in the Manson Urban Growth Area, and Chelan Municipal Code Chapter 5.15 regarding operating licenses for short-term rentals in the city of Chelan.

Through my authority as the Director of Community Development, I formally RESCIND AI 2019-001, effective immediately. The Department of Community Development will not enforce AI 2019-001. The Community Development Department anticipates new regulations currently being drafted regarding short term/vacation rentals to be available for review, revision and adoption by the Legislative Authority in the near future.

Deanna Walter

Deanna Walter
Director of Community Development

Appendix E

RECEIVED

JAN 0 2 2019

CHELAN COUNTY
COMMUNITY DEVELOPMENT

CHELAN COUNTY

DEPARTMENT OF HEARING EXAMINER

316 WASHINGTON STREET, SUITE 301
WENATCHEE, WASHINGTON 98801

BEFORE THE CHELAN COUNTY HEARING EXAMINER

IN THE MATTER OF:	)	**FINDINGS OF FACT**
AA 2019-005	)	**AND DECISION ON**
	)	**ADMINISTRATIVE APPEAL**

FINDINGS OF FACT

1. An Administrative Appeal was submitted by Craig and Reava Davis, regarding file number AI 2019-001 regarding an interpretation of Chelan County Code Section 11.22.030(1) Peshastin Urban Growth Area (UGA) District Use Chart as it relates to short-term vacation rentals.
2. The property owners are Craig and Reava Davis, 18610 NW Bernina Ct., Issaquah, WA 98027 and 8211 Lynn St., Peshastin, WA 98847.
3. The agent for owners is Richard Llewelyn Jones, P.S., PO Box 1548, Snohomish, WA 98291.
4. The Administrative Interpretation application was received June 28, 2019.
5. The Administrative Interpretation Decision was made August 20, 2019.
6. The Administrative Interpretation was mailed on August 20, 2019.
7. On September 3, 2019, Craig and Reava Davis filed an Administrative Appeal request.
8. The Notice of Application and Public Hearing was issued October 15, 2019.
9. After due legal notice, an open record public hearing was held on December 4, 2019.
10. Staff recommended the Hearing Examiner affirm the interpretation that short-term (vacation) rentals are not defined in the Chelan County Code and a similar use is not listed within the Peshastin UGA District Use Chart and therefore, the use is not allowed within the Peshastin UGA.
11. Due to the Appellants' attorney's misunderstanding of the Hearing Examiner's prior ruling that the Appellants would be allowed to submit evidence at this hearing, the Hearing Examiner left the record open until December 18, 2019, for the Appellants to submit whatever additional written evidence they wished to submit.
12. The record closed on December 18, 2019, with the Hearing Examiner to make his decision within 10 working days of that date.

13. At the open record public hearing, the Appellants were represented by attorney Richard Jones.

14. Admitted into the record was the Appellants' attorney's letter dated November 27, 2019, along with Exhibits A through P, attached to the letter.

15. Prior to presenting evidence, the Appellants made the motion to continue the hearing due to claimed improper notice of the hearing and their claim that they were told that public testimony from the Appellants would not be allowed.

16. The Hearing Examiner denied this motion. The Hearing Examiner made it clear that his prior rulings indicate that the Appellants would be allowed to provide whatever testimony and evidence they wish to provide. However, the Hearing Examiner ruled that general testimony from the public, separate from that testimony from the public submitted by Appellants, would not be allowed because this matter was an appeal of a decision made by the County as requested by Appellants.

17. The Appellants made a motion that the public hearing be opened up so that general public testimony could be permitted. The Hearing Examiner denied this motion for previous reasons stated. This is a matter between the Appellants and the County regarding the Appellants' request for an administrative interpretation.

18. The Appellants made a motion to allow cross examination with County staff. The Hearing Examiner denied this request. Appellants did not submit any offer of proof as to what evidence this cross examination was to reveal.

19. The Appellants made a motion to continue the hearing due to outstanding discovery requests against the County. This request was denied. This matter has been pending for several months and Appellants desire to delay this hearing further was denied. Additionally, no offer of proof was submitted by Appellants.

20. Appellants called the following witnesses at this open record public hearing:

    20.1 Sean Lynn. Mr. Lynn does not own any short-term rentals, but he owns a vacation rental management company. Mr. Lynn's opinion is that short-term vacation rental use is the same as long-term residential use. He believes that short-term vacation rentals are not regulated by the County, agreeing that short-term vacation rentals are not outright permitted in the Peshastin Urban Growth Area. Mr. Lynn believes that Mr. Simon's 1991 memorandum attached as Exhibit "K" in Appellants' materials remains applicable today.

    20.2 Reava Davis. Ms. Davis is one of the Appellants. She and her husband own two short-term vacation rental properties in Peshastin. They also own a home in Peshastin. As property owners of their home, they have demonstrated a long-term commitment as residents of Peshastin. Ms. Davis testified they are members of the local church and they have been members of the Peshastin Community Counsel, and are otherwise engaged in the Peshastin community. Ms. Davis acknowledged their use of two properties as short-term vacation rentals. Ms. Davis provided no evidence the users of these short-term vacation rentals are actively involved in any Peshastin community organization, such as members of a church, or members of local social, civil, or charitable

organizations. She testified as to the lack of complaints regarding their short-term rental clients.

20.3 Craig Davis. Mr. Davis is one of the Appellants. Mr. Davis agreed with his wife's testimony. He stated that he and his wife have lived in Peshastin for the past two year's full time. He indicated that in 2017, he received a notice of violation and letter to stop short-term rentals on their property in Peshastin. Mr. Davis testified that they disagreed, and apparently, the short-term vacation rentals of their property have continued. He testified as to the mixed community response in Peshastin to their short-term vacation rentals. He stated that their short-term vacation properties are rented by the house and not by the room. He indicated that they do not provide breakfast, or other food services, for the clients who purchase the use of these short-term vacation rentals. He testified that neither he nor his wife live on either of these short-term vacation rental properties.

20.4 Richard Llewelyn Jones. Mr. Jones is the Appellants' attorney. Mr. Jones argued that consistent with his letter dated September 27, 2019, the Appellants' primary argument is that a single family residence is the same as a short-term vacation rental.

21. The Hearing Examiner finds that the evidence before the Hearing Examiner clearly indicates that the purpose of a single family residence is materially different than the purpose of a short-term vacation rental.

22. As the Appellants clearly demonstrated by the testimony of Mr. and Mrs. Davis, they, as full time residents of Peshastin, engage in materially different and additional activities related to the Peshastin community, from those who spend one or two nights in their vacation rental properties.

23. It is important to the Hearing Examiner that Chelan County has distinguished that short-term vacation rentals of the nature of bed and breakfast use, are different from single family residential use, even though a bed and breakfast may be utilized within a single family residence. In other words, short-term rentals such as a bread and breakfast are a different use than long-term residence in a single family residence.

24. The County's primary argument is that because short-term vacation rentals are not a specifically permitted, conditional or an accessory use within the applicable zoning district in the Peshastin Urban Growth Area, where these vacation rental properties are located, that the use must be analyzed according to similar uses and if there are no similar uses then the use is not permitted.

25. The Appellants' position is that a single family residence may be used in a variety of ways, including long-term or short-term rental.

26. The Hearing Examiner specifically finds there is a material difference between the purpose and use of a short-term vacation rental and long-term occupancy of a single family residence.

26.1 Long-term occupancy in a single family residence allows, and gives, the occupier incentive to become a part of the community, to become part of the

local civic, religious and charitable organizations, as well as schools. Long-term occupants are generally employed in the area, further demonstrating their commitment to the health and vitality of the area. The Hearing Examiner takes judicial notice of these facts.

26.2 Users of a short-term, transient, vacation rental, who are in the area for a matter of two to three days, generally over a weekend, demonstrates that their purpose in visiting this house, is not to become part of the community, but instead to engage in short-term uses, such as recreational and tourist activities, activities generally associated with a vacation, or time away from their permanent residence, travelling, sight-seeing, or otherwise engaging in transient activities consistent with a short visit to a town where the vacation rentals are located.

27. In response to the Hearing Examiner's decision to keep the record open until December 18, 2019, for additional written testimony evidence from the Appellant, the following additional materials were submitted:

27.1 December 16, 2019 letter signed by multiple individuals described as "property owners, short-term rental owners, and professional managers of Chelan County."

27.2 November 22, 2019, letter from Joanne Moody and Nevile Moody to Emily Morgan, Chelan County Community Development.

27.3 Undated letter from Lisa Ravenel.

27.4 Document entitled "Public Records Request Response I" dated December 13, 2019.

27.5 Document entitled "Public Records Request Response II", dated December 13, 2019.

27.6 Email from Appellants' attorney to the Hearing Examiner, copied to Chelan County, attaching the document entitled "Public Records Response I – 12/13/19".

28. The Hearing Examiner acknowledges that Chelan County is in the process of developing specific regulations for short-term vacation rentals for countywide application. However, this is evidence that short-term vacation rentals are not defined, permitted, or accessory or conditional uses within the zoning district applicable to this application. This is evidence that short-term vacation rentals are different from long-term occupancy of a residence.

29. A bed and breakfast use is somewhat similar to a short-term vacation rental use. However, there are material differences that with the primary difference that with a bed and breakfast the owner of the house is present during the vacation rental and separate rooms may be rented to separate persons. Regarding short-term vacation rentals, the owner is not present in the same house where the rental is occurring, and the house is rented in its entirety.

30. The Chelan County Code definition of Rural Tourism, Recreational, is most similar to that of short-term vacation rentals. The definition of Rural Tourism, Recreational,

relates to uses involving visits to rural settings or rural environments for the purpose of participation in or experiencing activities, events or attractions, not readily available in urbanized areas. While this use is not exactly on point with a use of a short-term vacation rental, they are materially similar because a short-term vacation rental is primarily utilized for tourism and recreational purposes.

30. Any Finding of Fact that is more correctly a Conclusion of Law is incorporated herein as such by this reference.

CONCLUSIONS OF LAW

1. The Hearing Examiner has authority to render this Decision.
2. Chelan County 11.22.030(1) provides, in relevant part, that in relation to the District Use Chart, the purpose of this chart is to determine if specific use is allowed in each district. Further, this section provides that no use "shall" be allowed in a Use District that is not listed in a Use District and that is not listed in the Use Chart as permitted, accessory, or conditional use, unless the administrator determines that an unlisted use is similar to a use that is already enumerated in the Use Chart.
3. A short-term (vacation) rental is not listed within Chelan County Code Sec. 11.22.30(2) District Use Chart.
4. Short-term (vacation) rental is not defined within Chelan County Code Chapter 4.98.
5. The Hearing Examiner concludes that the uses in the Chelan County Code are not similar to a short-term (vacation) rental. Those are bed and breakfasts, single family residences, and boarding/lodging houses.
6. Bed and breakfast facilities are materially dissimilar from short-term (vacation) rentals because rooms may be individually rented out and the property is owner occupied.
7. The Hearing Examiner concludes that recreation/tourist use is most similar to a short-term (vacation) rental.
8. Any Conclusion of Law that is more correctly a Finding of Fact is incorporated herein as such by this reference.

DECISION

WHEREFORE, the Hearing Examiner having rendered Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the Administrative Interpretation dated August 20, 2019 is **AFFIRMED** in all respects.

Dated this 31st day of December, 2019.

CHELAN COUNTY HEARING EXAMINER

Andrew L. Kottkamp

This decision is subject to appeal pursuant to the Chelan County Code. Appeals must be timely filed. Anyone considering an appeal of this decision should seek immediate legal advice.

Appendix F

FILED
APR 02 2020
Kim Morrison
Chelan County Clerk

Ex-parte Fee $30

SUPERIOR COURT OF WASHINGTON
FOR CHELAN COUNTY

CRAIG & REAVA DAVIS, husband and wife Petitioners, v. CHELAN COUNTY, a political subdivision of the State of Washington, Respondent.	No. 20-2-00064-04 **AGREED FINAL JUDGMENT AND ORDER**

JUDGMENT AND ORDER

THIS MATTER, having come before the Court this date, and the Parties having stipulated by and through their respective attorneys, now therefore, this Court now enters final judgment in this matter and ORDERS, ADJUDGES, and DECREES, as follows:

1. Petitioners filed this action pursuant to the Land Use Petition Act, chapter 36.70C RCW. Petitioners sought review of a final decision by Chelan County, acting by and through its Hearing Examiner, file no. AA 2019-005, entitled Findings of Fact and Decision on Administrative Appeal, dated on or about December 31, 2019 ("Decision"). The Decision

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affirmed Administrative Interpretation, file no. AA 2019-001 issued by the Director of the Chelan County Department of Community Development, dated on or about August 30, 2019 ("Administrative Interpretation").

2. On March 25, 2020, the Director of the Chelan County Department of Community Development issued a Memorandum rescinding the Administrative Interpretation.

3. As a result of the rescission of the Administrative Interpretation, the Decision is hereby REVERSED.

4. No costs or fees are awarded to either party.

Dated: April 2, 2020.

HONORABLE
Chelan County Superior Court Judge

Stipulated to, presented by, and notice of presentation waived by:

LAW OFFICE OF SAMUEL A. RODABOUGH PLLC

Samuel A. Rodabough, WSBA #35347
Attorney for Petitioners Craig & Reava Davis

Marcus S. Foster, WSBA #51479
Attorney for Respondent Chelan County

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Appendix G

2019 WL 6336186
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Austin.

Ahmad ZAATARI, Marwa Zaatari, Jennifer Gibson Hebert, Joseph "Mike" Hebert, Lindsay Redwine, Ras Redwine VI, and Tim Klitch, Appellants, City of Austin, Texas; and Steve Adler, Mayor of The City of Austin, and the State of Texas, Cross-Appellants
v.
CITY OF AUSTIN, Texas; and Steve Adler, Mayor of The City of Austin, Appellees, Ahmad Zaatari, Marwa Zaatari, Jennifer Gibson Hebert, Joseph "Mike" Hebert, Lindsay Redwine, Ras Redwine VI, and Tim Klitch, Cross-Appellees

NO. 03-17-00812-CV
|
Filed: November 27, 2019

Synopsis

Background: Property owners sued city, challenging municipal ordinance amending city's regulation of short-term rental properties. The State intervened to contend that ordinance's ban on short-term rentals of non-homestead properties was unconstitutional. The 53rd District Court, Travis County, Tim Sulak, J., denied property owners' and State's traditional motions for summary judgment, overruled city's plea to the jurisdiction, granted city's motion for no-evidence summary judgment, and sustained in part State and city's evidentiary objections. All parties appealed.

Holdings: The Court of Appeals, Rose, C.J., held that:

[1] state had standing to intervene;

[2] property owner who was both operating licensee and tenant of short-term rental property had standing to challenge ordinance on behalf of tenants;

[3] dispute was ripe for adjudication;

[4] court had jurisdiction over dispute;

[5] sworn declarations from owners of short-term rental properties were admissible;

[6] Court of Appeals would take judicial notice of legislative history;

[7] retroactive city ordinance provision banning short-term rentals of single-family residences that were not owner occupied was unconstitutional infringement on settled property rights; and

[8] city ordinance provision restricting assembly in short-term rental property was unconstitutional restriction on fundamental right to assembly.

Affirmed in part, reversed in part, and remanded.

Kelly, J., filed dissenting opinion.

West Headnotes (65)

[1] **Appeal and Error** ⇨ Pleadings and Evidence

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the Court of Appeals considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do.

1 Cases that cite this headnote

[2] **Pleading** ⇨ Scope of inquiry and matters considered in general

In a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists.

1 Cases that cite this headnote

[3] **Pleading**⊜Questions of law and fact

If the evidence submitted creates a fact question regarding a jurisdictional issue, then the trial court cannot grant a plea to the jurisdiction, and the fact issue will be resolved by the fact finder.

1 Cases that cite this headnote

[4] **Action**⊜Persons entitled to sue
Pleading⊜Plea to the Jurisdiction

Standing is implicit in the concept of subject matter jurisdiction, and is therefore properly challenged in a plea to the jurisdiction.

[5] **Action**⊜Persons entitled to sue

To establish standing to seek redress for injury, a plaintiff must be personally aggrieved.

[6] **Action**⊜Persons entitled to sue

To establish standing to seek redress for injury, a plaintiff's alleged injury must be concrete and particularized, actual or imminent, not hypothetical.

[7] **Action**⊜Persons entitled to sue

A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress.

[8] **Action**⊜Persons entitled to sue

Common-law standards for standing are not dispositive if the Legislature has conferred standing by statute.

[9] **Declaratory Judgment**⊜New parties

State had standing to intervene in constitutional challenge by property owners to amendment of city ordinance regarding short-term rental property; if the plaintiffs prevailed, ordinance would be declared void, and thus suit involved validity of municipal ordinance and State was entitled to be heard under statute governing declaratory judgments. Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b).

[10] **Action**⊜Persons entitled to sue

Generally, courts must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges.

[11] **Declaratory Judgment**⊜Proper Parties
Injunction⊜Persons entitled to apply; standing

Where there are multiple plaintiffs in a case who seek injunctive or declaratory relief, the court need not analyze the standing of more than one plaintiff, so long as one plaintiff has standing to pursue as much or more relief than any of the other plaintiffs; if one plaintiff prevails on the merits, the same prospective relief will issue

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regardless of the standing of the other plaintiffs.

[12] **Constitutional Law**◇Zoning and land use

Property owner who was both operating licensee and tenant of short-term rental property had standing to challenge constitutionality of city ordinance amending regulation of short-term rental property on behalf of tenants, as she suffered actual restrictions under challenged provisions restricting short-term tenants' rights and sought greatest possible prospective relief court could afford; therefore, trial court was not required to consider whether all property owners had standing with respect to claims brought on behalf of short-term tenants. Tex. Const. art. 1, §§ 3, 9, 19, 27.

[13] **Action**◇Moot, hypothetical or abstract questions

Ripeness is a jurisdictional prerequisite to suit.

[14] **Action**◇Moot, hypothetical or abstract questions

A claim ripens upon the existence of a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.

[15] **Action**◇Moot, hypothetical or abstract questions

Ripeness requires a live, non-abstract question of law that, if decided, would have a binding effect on the parties.

[16] **Action**◇Moot, hypothetical or abstract questions

Ripeness is peculiarly a question of timing; a case is not ripe if it involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.

[17] **Constitutional Law**◇Ripeness; prematurity

Property owners' challenge to constitutionality of city ordinance regulating short-term rental property was ripe for adjudication; some ordinance provisions were already in effect and limited property owners' rights with respect to number of tenants, term of tenancy, and permissible uses of property during short-term rental tenancy, and facial abridgment of their constitutional rights was an injury for which they could seek relief. Tex. Const. art. 1, §§ 3, 9, 19, 27.

[18] **Zoning and Planning**◇Finality; ripeness

Facial challenges to ordinances governing use of property are ripe upon enactment because at that moment the permissible uses of the property are known to a reasonable degree of certainty.

[19] **Action**◇Persons entitled to sue

An aggrieved plaintiff may seek redress when a wrongful act causes some legal injury, even if

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all resulting damages have not yet occurred.

[20] **Municipal Corporations**⇔Capacity to sue or be sued in general

To overcome governmental immunity from suit and thereby establish jurisdiction, a plaintiff must plead a viable claim for which governmental immunity is waived or otherwise inapplicable.

[21] **Municipal Corporations**⇔Capacity to sue or be sued in general

Governmental immunity does not shield a city from viable claims for relief from unconstitutional acts.

[22] **Municipal Corporations**⇔Capacity to sue or be sued in general

Governmental immunity did not apply and court had jurisdiction over action brought by property owners and State against city, where property owners and state raised meritorious challenges to constitutionality of city ordinance regulating short-term rental property. Tex. Const. art. 1, §§ 3, 9, 19, 27.

[23] **Appeal and Error**⇔Admission or exclusion of evidence in general

A district court's decision to exclude evidence is reviewed for abuse of discretion.

[24] **Appeal and Error**⇔Abuse of discretion

A trial court abuses its discretion if it acts without reference to any guiding rules and principles.

[25] **Judgment**⇔Affidavits, Form, Requisites and Execution of

Sworn declarations from owners of short-term rental properties were admissible to support State's motion for summary judgment in action challenging constitutionality of city ordinance regulating short-term rental property, where declarations included relevant information regarding history, profitability, location, and occupancy of rentals, and financial impact owners anticipated from ordinance. Tex. R. Evid. 401.

[26] **Pretrial Procedure**⇔Identity and location of witnesses and others

State timely disclosed names of declarants in action against city challenging constitutionality of city ordinance regulating short-term rental property; State disclosed in its discovery responses that current holders of short-term rental permits had knowledge of relevant facts, and disclosed names of specific witnesses in supplemental disclosure six months before sworn declarations were offered as evidence at hearing. Tex. R. Civ. P. 193.1.

[27] **Evidence**⇔Official proceedings and acts

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Court of Appeals would take judicial notice of legislative history offered by city in action brought by State challenging constitutionality of amendment of city ordinance regulating short-term rental property; fact that hearing testimony and legislative history reflected that public concerns were raised by residents and other stakeholders was matter of municipal record and not subject to reasonable dispute. Tex. R. Evid. 201.

[28] **Appeal and Error**⇨Cross-motions
Appeal and Error⇨Summary judgment

When parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the others, the Court of Appeals considers the summary-judgment evidence presented by both sides and determines all questions presented.

[29] **Appeal and Error**⇨Rendition of Judgment by Reviewing Court

If the Court of Appeals determines that the trial court erred, it renders the judgment the trial court should have rendered.

[30] **Judgment**⇨Weight and sufficiency

A movant seeking traditional summary judgment on its own cause of action has the initial burden of establishing its entitlement to judgment as a matter of law by conclusively establishing each element of its cause of action. Tex. R. Civ. P. 166a(c).

[31] **Judgment**⇨Existence of defense
Judgment⇨Weight and sufficiency

To obtain traditional summary judgment on an opposing party's claims, the movant must conclusively negate at least one element of each of the claims or conclusively establish each element of an affirmative defense. Tex. R. Civ. P. 166a(c).

[32] **Appeal and Error**⇨Summary Judgment

When reviewing a no-evidence summary judgment, the Court of Appeals reviews the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. Tex. R. Civ. P. 166a(i).

[33] **Statutes**⇨Retroactivity

The prohibition against retroactive laws has two fundamental objectives: it protects the people's reasonable, settled expectations—i.e., the rules should not change after the game has been played—and it protects against abuses of legislative power. Tex. Const. art. 1, § 16.

[34] **Statutes**⇨Nature and definition of retroactive statute

A "retroactive law" is one that extends to matters that occurred in the past. Tex. Const. art. 1, § 16.

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[35] **Statutes**⇨Nature and definition of retroactive statute

A "retroactive statute" is one which gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute. Tex. Const. art. 1, § 16.

[36] **Statutes**⇨Power to enact; validity

Not all retroactive laws are unconstitutional. Tex. Const. art. 1, § 16.

[37] **Statutes**⇨Power to enact; validity

To determine whether a retroactive law violates the constitutional prohibition against retroactive laws, the Court of Appeals must consider three factors in light of the prohibition's objectives of protecting settled expectations and of preventing legislative abuses: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings, (2) the nature of the prior right impaired by the statute, and (3) the extent of the impairment. Tex. Const. art. 1, § 16.

[38] **Statutes**⇨Power to enact; validity
Statutes⇨Presumptions and inferences

The three-part test to determine whether a retroactive law is unconstitutional, which requires examination of the public interest, the prior right impaired by law, and extent of the impairment, acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption, but it also appropriately encompasses the notion that statutes are not to be set aside lightly. Tex. Const. art. 1, § 16.

[39] **Zoning and Planning**⇨Hotels, lodging, and short-term rentals

City's public interest for banning short-term rentals of single-family residences that were not owner occupied was slight, for purposes of determining whether retroactive ordinance was constitutional; purported public safety concerns were not limited to non-owner-occupied single-family residences, concerns could be addressed under existing state law and city ordinances, short-term rental properties generated fewer public complaints than other types of property, and ban would not resolve purported concerns or advance zoning interest. Tex. Const. art. 1, § 16.

1 Cases that cite this headnote

[40] **Statutes**⇨Power to enact; validity

Regarding the nature of a prior right impaired by a retroactive law, the Court of Appeals considers not whether the impaired right was "vested," but the extent to which that right was "settled" in determining whether the law is constitutional. Tex. Const. art. 1, § 16.

[41] **Constitutional Law**⇨Right to Property

Private property ownership is a fundamental right.

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[42] **Constitutional Law**⇨Right to Property

The right of property is the right to use and enjoy, or dispose of the same, in a lawful manner and for a lawful purpose.

[43] **Landlord and Tenant**⇨Creation and Existence of the Relation

The right to lease property for a profit can be subject to restriction or regulation under certain circumstances, but the right to lease is nevertheless an established one.

[44] **Zoning and Planning**⇨Hotels, lodging, and short-term rentals

Property owners' right to lease property on a short-term basis was a settled interest, for purposes of determining constitutionality of retroactive ordinance prohibiting short-term rental of non-owner-occupied single-family residences; short-term rentals were established practice and historically allowable use in city, property owners invested significant time and money into property for that purpose prior to adoption of ordinance, and ban would result in loss of income for property owners. Tex. Const. art. 1, § 16.

1 Cases that cite this headnote

[45] **Zoning and Planning**⇨Hotels, lodging, and short-term rentals

City ordinance prohibiting short-term rental of non-owner-occupied single-family residences would have significant impact on settled rights of property owners to lease property, for purposes of determining constitutionality of retroactive ordinance. Tex. Const. art. 1, § 16.

1 Cases that cite this headnote

[46] **Constitutional Law**⇨Relationship to other constitutions

While the Texas Constitution is textually different from Fourteenth Amendment due process clause in that it refers to "due course" rather than "due process," these terms are without substantive distinction unless and until a party demonstrates otherwise. U.S. Const. Amend. 14, § 1; Tex. Const. art. 1, § 19.

[47] **Constitutional Law**⇨Levels of scrutiny; strict or heightened scrutiny

Under federal and state guarantees of due process, the government may not infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. U.S. Const. Amend. 14, § 1; Tex. Const. art. 1, § 19.

[48] **Constitutional Law**⇨Right of Assembly
Constitutional Law⇨Right to Petition for Redress of Grievances
Constitutional Law⇨Freedom of Association

The Texas Constitution's assembly clause is not limited to protecting only petition-related assemblies, and the judicially created "right of association" does not subsume the Texas Constitution's assembly clause in its entirety. Tex. Const. art. 1, § 27.

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[49] **Constitutional Law**⇐Right of Assembly

Under the plain language of the Texas Constitution, citizens have the right to physically congregate, in a peaceable manner, for their shared welfare or benefit. Tex. Const. art. 1, § 27.

[50] **Constitutional Law**⇐Fundamental rights
Constitutional Law⇐Liberties and liberty interests

The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. U.S. Const. Amend. 14.

[51] **Constitutional Law**⇐Bill of Rights or Declaration of Rights

The purpose of Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. U.S. Const. Amend. 1 et seq.

[52] **Constitutional Law**⇐Bill of Rights or Declaration of Rights

Under the bill of rights, one's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. U.S. Const. Amend. 1 et seq.

[53] **Constitutional Law**⇐Right of Assembly

The right to assemble granted by the Texas Constitution is a fundamental right. Tex. Const. art. 1, § 27.

[54] **Constitutional Law**⇐Right of Assembly
Zoning and Planning⇐Hotels, lodging, and short-term rentals

City ordinance regulating short-term rental property imposed burdensome and significant restrictions on property owners' fundamental right to assembly, as protected by Texas Constitution; ordinance banned "assembly" in private rental property between certain hours without regard to peaceableness or content of assembly, and set limits on how many individuals could use rental property even if property was licensed for higher occupancy. Tex. Const. art. 1, § 27.

[55] **Constitutional Law**⇐Right of Assembly

The freedom to assemble with the permission of the owner on private property implicates both property and privacy rights. Tex. Const. art. 1, § 27.

[56] **Constitutional Law**⇐Quartering of soldiers
Searches and Seizures⇐Persons, Places and Things Protected

The Texas Constitution guarantees the sanctity

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of the individual's home and person against unreasonable intrusion. Tex. Const., art. 1, §§ 9, 25.

[57] **Constitutional Law**⇨Right to Privacy

Included in the right to privacy is the right to be free from government action that is intrusive or invasive. Tex. Const. art. 1, § 27.

[58] **Constitutional Law**⇨Right of Assembly

City's restriction of tenants' fundamental right to physically congregate on private property with permission of the owner, in a peaceable manner, for the citizens' shared welfare or benefit required strict scrutiny. Tex. Const. art. 1, § 27.

[59] **Constitutional Law**⇨Right of Assembly
Zoning and Planning⇨Hotels, lodging, and short-term rentals

City lacked compelling interest to substantially burden property owners' constitutional right to assemble on private short-term rental property through ordinance restricting use of such property; city's stated concerns of reducing likelihood that short-term rentals would serve as raucous "party houses" in otherwise quiet neighborhoods, and reducing possible strain on neighborhood infrastructure, were not supported by any evidence of serious burden on neighboring properties sufficient to justify encroachment on owners' and tenants' fundamental right to assemble. Tex. Const. art. 1, § 27.

[60] **Constitutional Law**⇨Right of Assembly
Zoning and Planning⇨Hotels, lodging, and short-term rentals

In the context of city's burden to prove ordinance regulating short-term rental property that limited right to assemble peaceably on private property was made in furtherance of compelling government interests, "compelling state interests" in the constitutional sense was limited to interests of the highest order; these interests could include reduction of crime, protection of the physical and psychological well-being of minors, parental rights, protection of elections, and tax collection. Tex. Const. art. 1, § 27.

[61] **Constitutional Law**⇨Right of Assembly
Zoning and Planning⇨Hotels, lodging, and short-term rentals

To satisfy city's burden to prove it acted in furtherance of compelling government interest when it passed ordinance substantially burdening right of property owners and tenants of short-term rental property to assemble peaceably on private property, city was required to show a compelling interest in imposing the burden on the right to assemble in the particular case at hand, not a compelling interest in general. Tex. Const. art. 1, § 27.

[62] **Constitutional Law**⇨Right of Assembly

The regulation of property use is not, in and of itself, a compelling interest justifying encroachment on the fundamental right to assemble on private property. Tex. Const. art. 1, § 27.

[63] **Constitutional Law**⚖Right of Assembly

Although the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed, courts and litigants must focus on real and serious burdens to neighboring properties when determining whether a compelling interest is at issue that might justify encroachment on the fundamental right to assemble on private property. Tex. Const. art. 1, § 27.

[64] **Constitutional Law**⚖Particular Issues and Applications

Court of Appeals must not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue in commercial zones, or incremental reduction of traffic in residential zones, is compelling, such that it might justify encroachment on the fundamental right to assemble on private property. Tex. Const. art. 1, § 27.

[65] **Constitutional Law**⚖Particular issues and applications
Zoning and Planning⚖Hotels, lodging, and short-term rentals

Even if city could demonstrate compelling interest to restrict property owners' constitutional right to assemble, ordinance limiting use of short-term rental property was not narrowly tailored and result could be achieved by less intrusive means such as enforcement of already-existing nuisance ordinances, and thus ordinance violated Texas Constitution's guarantee to due course of law. U.S. Const. Amend. 14, § 1; Tex. Const. art. 1, §§ 19, 27.

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY, NO. D-1-GN-16-002620, THE HONORABLE TIM SULAK, JUDGE PRESIDING

Attorneys and Law Firms

Chance Weldon, Austin, Robert E. Henneke, Kerrville, for Appellants.

David J. Hacker, Kyle D. Hawkins, Frank N. Ikard Jr., Austin, Meghan L. Riley, Brandon Carr, Laurie Ratliff, Austin, for Appellees.

Before Chief Justice Rose, Justices Goodwin and Kelly

OPINION

Jeff Rose, Chief Justice

*1 These cross-appeals arise from challenges to a municipal ordinance amending the City of Austin's regulation of short-term rental properties. *See* Austin, Tex., Ordinance No. 20160223-A.1 (Feb. 23, 2016) (codified in Austin City Code chapters 25-2 and 25-12). Appellants Ahmad Zaatari, Marwa Zaatari, Jennifer Gibson Hebert, Joseph "Mike" Hebert, Lindsay Redwine, Ras Redwine VI, and Tim Klitch (collectively, "Property Owners") own homes in the Austin area and sued the City and its mayor (collectively, "the City"), asserting that certain provisions in the ordinance are unconstitutional. Specifically, the Property Owners challenged the ordinance provision that bans short-term rentals of non-homestead properties, *see id.* § 25-2-950, and the ordinance provision that controls conduct and types of assembly at short-term rental properties, *see id.* § 25-2-795. The State intervened in the Property Owners' suit to contend that the ordinance's ban on short-term rentals of non-homestead properties is unconstitutional as a retroactive law and as an uncompensated taking of private property. The Property Owners and the State appeal from the district court's order granting the City's no-evidence motion for summary judgment and denying the Property Owners' and the State's traditional motions

for summary judgment. The City and the State also challenge the district court's orders excluding certain evidence from the summary-judgment record. On cross-appeal, the City challenges the district court's order overruling the City's plea to the jurisdiction.

The ordinance provision banning non-homestead short-term rentals significantly affects property owners' substantial interests in well-recognized property rights while, on the record before us, serving a minimal, if any, public interest. Therefore, the provision is unconstitutionally retroactive, and we will reverse the district court's judgment on this issue and render judgment declaring the provision void. The ordinance provision restricting assembly infringes on Texans' fundamental right to assemble because it limits peaceable assembly on private property. Therefore, because the City has not demonstrated that the provision is narrowly tailored to serve a compelling state interest, the provision violates the Texas Constitution's guarantee to due course of law, and we will reverse the district court's judgment on this issue and render judgment declaring the provision void. We will affirm the remainder of the judgment and remand the case to the district court for further proceedings consistent with this opinion.

Background

In the last decade, individuals have increasingly turned to short-term rentals—typically, privately owned homes or apartments that are leased for a few days or weeks at a time—for lodging while traveling. *See, e.g.*, Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle*, 86 U. Cin. L. Rev. 893, 894–95 (2018) (collecting sources). As short-term rentals have become more common, local governments have looked for ways to balance the rights of short-term rental property owners and tenants against the concerns of neighboring properties. In 2012, the City adopted an ordinance to regulate Austinites' ability to rent their properties through amendments to the zoning and land-development chapters of its municipal code. *See* Austin, Tex., Ordinance 20120802-122 (Aug. 2, 2012) (codified at Austin, Tex., Code Chs. 25-2 and 25-12). That ordinance defined short-term rental use as "the rental 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." *Id.* § 25-2-3(10). The 2012 ordinance also required property owners to satisfy eligibility criteria and obtain a license before being allowed to rent their property on a short-term basis. *Id.* §§ 25-2-788(B), 25-2-789(B).

*2 In 2016, after conducting several studies and holding hearings regarding short-term rentals and their role in the community, the City adopted an ordinance amending its regulations of short-term rentals. *See* Austin, Tex., Ordinance 20160223-A.1. As amended by the 2016 ordinance, the City Code created three classes of short-term rentals:

- Type 1—single-family residence that is "owner-occupied or is associated with an owner-occupied principal residential unit," Austin, Tex., Code § 25-2-788(A);
- Type 2—single-family residence that "is not owner-occupied and is not associated with an owner-occupied principal residential unit," *id.* § 25-2-789(A); and
- Type 3—residence that is "part of a multi-family residential use," *id.* § 25-2-790(A).[1]

The ordinance immediately suspended the licensing of any new type-2 short-term rentals and established April 1, 2022, as the termination date for all type-2 rentals. *See id.* § 25-2-950.

The 2016 ordinance also imposed several restrictions on properties operated as short-term rentals, including:

- banning all assemblies, including "a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping," whether inside or outside, after 10:00 p.m.;
- banning outdoor assemblies of more than six adults at any time;
- prohibiting more than six unrelated adults or ten related adults from using the property at any time; and
- giving City officials authority to "enter, examine, and survey" the short-term rentals to ensure compliance with applicable provisions of Code.

See id. §§ 25-2-795(D)–(G), 25-12-213-1301. Failure to comply with these provisions is punishable by a fine of up to $2,000 and possible revocation of the operating license. *See id.* § 25-1-462.

In response to the ordinance, the Property Owners sued the City for declaratory and injunctive relief, alleging that section 25-2-795's assembly and occupancy restrictions

and section 25-2-950's ban on type-2 short-term rentals violate, facially and as applied, constitutional rights to privacy, freedom of assembly and association, due course of law, equal protection, and freedom from unwarranted searches. *See* Tex. Const. art. I, §§ 3 (equal protection), 9 (searches), 19 (due course of law), 27 (assembly); *Texas State Emps. Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (individual privacy).[2] The Property Owners also sought attorney fees. *See* Tex. Civ. Prac. & Rem. Code § 37.009. The State of Texas intervened in the Property Owners' case, arguing that section 25-2-950's termination of type-2 operating licenses by 2022 is unconstitutional as a retroactive law and an uncompensated taking of private property. *See* Tex. Const. art. I, §§ 16 (retroactive laws), 17 (takings).

The Property Owners and the State moved for summary judgment on their constitutional challenges to the ordinance, providing evidentiary exhibits in support of those motions.[3] The City filed a plea to the jurisdiction and a no-evidence motion for summary judgment. The State and the City each filed objections to certain aspects of the evidentiary record. The district court denied the traditional motions for summary judgment, overruled the City's plea to the jurisdiction, granted the City's motion for no-evidence summary judgment, and sustained in part the State's and the City's respective evidentiary objections. The Property Owners and the State appeal from the district court's order denying their motions for summary judgment and granting the City's motion for summary judgment. The State also appeals from the district court's order sustaining the City's evidentiary objections. The City cross-appeals from the district court's order overruling its plea to the jurisdiction and from the order sustaining the State's evidentiary challenges.

Jurisdiction

*3 [1] [2] [3]Because it implicates our authority to reach the merits of this dispute, we begin by addressing the district court's order overruling the City's plea to the jurisdiction. *See Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (noting that jurisdictional questions must be addressed before merits). A trial court's jurisdiction is a question of law we review de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "[I]f a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Id.* at 227 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)). "[I]n a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action"—as is the case here—"and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Id.* "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." *Id.* at 227–28.

The City's plea to the jurisdiction challenges the State's standing to intervene in this dispute, the Property Owners' standing to bring claims on behalf of tenants, and the ripeness of the underlying claims. The plea also invokes governmental immunity, arguing that the Property Owners and the State have not pleaded any claim for which the City's immunity is waived or otherwise inapplicable. We address these arguments in turn.

A. Standing

[4] [5] [6] [7] [8]The City contests the State's standing to intervene in this matter and the Property Owners' standing to bring claims on behalf of their tenants. "Standing is implicit in the concept of subject matter jurisdiction," and is therefore properly challenged in a plea to the jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). In general, to establish standing to seek redress for injury, "a plaintiff must be personally aggrieved." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (citing *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). In addition, "his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." *Id.* at 304–05 (citing *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001); *Texas Ass'n of Bus.*, 852 S.W.2d at 444. "A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress." *Inman*, 252 S.W.3d at 305. These common-law standards, however, are not dispositive if the Legislature has conferred standing by statute. *See In re Sullivan*, 157 S.W.3d 911, 915 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding) (considering standing under certain provisions of Texas Family Code); *but see Grossman v.*

Wolfe, 578 S.W.3d 250, 257 n.4 (Tex. App.—Austin 2019, pet. denied) (noting that U.S. Supreme Court has rejected statutorily created standing).

[9]The State's standing to intervene in this matter is unambiguously conferred by the Uniform Declaratory Judgment Act, which provides:

> In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is 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). The Property Owners filed suit in 2016, raising a constitutional challenge to the amendments enacted by ordinance 20160223-A.1. If they prevail, the unconstitutional provisions will be declared void. The suit therefore "involves the validity of a municipal ordinance" such that the State is "entitled to be heard" in this proceeding. *Id.*; *see Texas Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 433–34 (Tex. App.—Austin 2018, pet. filed) (explaining State's right to intervene in constitutional challenge to municipal ordinance).

*4 [10] [11] [12]The City also contests the Property Owners' right to raise constitutional claims on behalf of their tenants. "Generally, courts must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (citing *Heckman v. Williamson County*, 369 S.W.3d 137, 152 (Tex. 2012)). "However, 'where there are multiple plaintiffs in a case who seek injunctive or declaratory relief ... the court need not analyze the standing of more than one plaintiff—so long as [one] plaintiff has standing to pursue as much or more relief than any of the other plaintiffs.' " *Id.* (quoting *Heckman*, 369 S.W.3d at 152 n.64). "The reasoning is fairly simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs." *Id.* (citations omitted). Here, at least one of the Property Owners is both an operating licensee and a tenant of short-term rentals. That property owner asks the court to enjoin enforcement of the ordinance and to declare it void in part due to allegedly unconstitutional provisions restricting short-term tenants' rights to association, assembly, freedom of movement, and privacy. As a tenant, she herself "ha[s] suffered some actual restriction" under the challenged provisions, and she seeks the greatest possible prospective relief the court might afford. *See id.* She therefore has standing to pursue these claims, and "we need not analyze the standing" of the remaining Property Owners with respect to claims brought on behalf of short-term tenants. *See id.*

B. Ripeness

The City contends that because parts of the ordinance do not take effect until 2022 and because—in the City's view—the Property Owners have not yet suffered any concrete injury, any challenge to the ordinance is not yet ripe. We disagree.

[13] [14] [15] [16]Ripeness is a jurisdictional prerequisite to suit. *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442–43 (Tex. 1998). A claim ripens upon the existence of "a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (quoting *Bexar–Medina–Atascosa Ctys. Water Control & Improvement Dist. No. 1 v. Medina Lake Prot. Ass'n*, 640 S.W.2d 778, 779–80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e)). Ripeness requires "a live, non-abstract question of law that, if decided, would have a binding effect on the parties." *Heckman*, 369 S.W.3d at 147 (citing *Brown*, 53 S.W.3d at 305). Ripeness is "peculiarly a question of timing." *Perry v. Del Rio*, 66 S.W.3d 239, 249–51 (Tex. 2001) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)). A case is not ripe if it involves "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Patterson*, 971 S.W.2d at 442 (quoting 13A Charles A. Wright et al., *Federal Practice & Procedure* § 3532, at 112 (2d ed. 1984)).

[17] [18]This controversy is ripe for adjudication. The Property Owners raise a facial challenge to an ordinance adopted in February of 2016. Some provisions took effect immediately, others were retroactively applied to certain license applications filed in 2015, and others will take effect beginning April 1, 2022. It is undisputed that these provisions limit the Property Owners' rights with respect to their properties, including restricting the number of tenants, the term of tenancy, and the permissible uses of

the property during short-term rental tenancy. The ordinance is already in effect, so there is no risk that its impact "may not occur at all." *Id.* at 442. Facial challenges to ordinances are "ripe upon enactment because at that moment the 'permissible uses of the property [were] known to a reasonable degree of certainty.' " *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 60 (Tex. 2006) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)) (alteration in original).

[19]And while the City argues the Property Owners have not yet "suffered economic harm" from the provision terminating type-2 operation in 2022, that fact would not forestall adjudication of this dispute even assuming, for the sake of argument, it is an accurate characterization of the circumstances. As a general matter, courts have long recognized that an aggrieved plaintiff may seek redress "when a wrongful act causes some legal injury ... even if all resulting damages have not yet occurred." *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994); *Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438, 440 (1940)). But more specifically, because the plaintiffs and intervenors allege a facial abridgment of their most fundamental rights under the United States and Texas Constitutions, the City's alleged constitutional overreach itself is an injury from which the Property Owners and the State seek relief. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392–93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (finding jurisdiction over facial challenge where statute had not yet been enforced and no injury in fact had yet occurred); *City of Laredo v. Laredo Merchants Assoc.*, 550 S.W.3d 586, 590 (Tex. 2018) (allowing constitutional challenge to ordinance where suit filed before effective date); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626–27 (Tex. 1996) (rejecting State's argument that plaintiffs "must actually be deprived of their property before they can maintain a [facial] challenge to this statute"). The district court did not err in rejecting the City's ripeness arguments.

C. Jurisdiction over the Subject Matter

*5 [20] [21] [22]In its final challenge to jurisdiction, the City invokes its immunity from suit. To overcome governmental immunity from suit and thereby establish jurisdiction over this case, the Property Owners must plead a viable claim for which governmental immunity is waived or otherwise inapplicable. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 475 (Tex. 2012). Governmental immunity does not shield the City from viable claims for relief from unconstitutional acts. *See General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001) ("[T]he doctrine does not shield the State from an action for compensation under the takings clause." (citations omitted)); *Board of Trustees v. O'Rourke*, 405 S.W.3d 228, 237 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Generally, governmental immunity does not shield a governmental entity from a suit for declaratory relief based on alleged constitutional violations." (citations omitted)). Here, both the Property Owners and the State have raised constitutional challenges to the City's ordinance. As discussed in further detail in our analysis of summary judgment, two of these claims are meritorious—and thus viable—challenges to the constitutionality of the ordinance. Accordingly, the parties have successfully established the district court's jurisdiction over the controversy, and the court did not err in overruling the City's plea to the jurisdiction.

We overrule the City's jurisdictional issues.

Evidentiary Rulings

[23] [24]Before turning to the district court's orders granting the City's no-evidence motion for summary judgment and denying the two traditional motions, we must determine which evidence is properly before the court. *See Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009) (explaining importance of evidentiary rulings in context of no-evidence summary judgment). The State and the City filed objections to evidence offered on the cross-motions. The district court sustained these objections in part, and two evidentiary exhibits remain at issue on appeal. The State appeals from the district court's order excluding sworn declarations obtained from several owners of short-term rentals in the Austin area, and the City challenges the exclusion of thousands of pages documenting the legislative history of the ordinance, which the district court excluded as unnecessarily voluminous. A district court's decision to exclude evidence is reviewed for abuse of discretion. *Capital Metro. Transp. Auth v. Central of Tenn. Ry. & Nav. Co.*, 114 S.W.3d 573, 583 (Tex. App.—Austin 2003, pet. denied). "A trial court abuses its discretion if it acts without reference to any guiding rules and principles." *Id.* (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

A. Exclusion of State's Affidavits

[25]The district court excluded several sworn declarations the State had obtained from owners of short-term rentals, accepting the City's argument that the declarations are irrelevant and that the names of the declarants were not timely disclosed by the State. We agree with the State that the district court abused its discretion in sustaining the objection.

To begin with, this evidence is relevant. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Tex. R. Evid. 401. Relevant evidence must be admitted unless admission is otherwise prohibited by state or federal law. *Id.* R. 402. The disputed declarations include, for example, evidence of how long short-term rentals have existed in Austin, what makes them profitable, where they are located, how often they are occupied, and the financial impact the owners anticipate from the ordinance. This information is critical to "determining the action"—that is, determining whether the ordinance violates any constitutional rights—and is therefore relevant.

[26]This relevant evidence was not rendered inadmissible by the State's allegedly untimely disclosure of the names of the declarants. "A party must respond to written discovery in writing within the time provided by court order or these rules." Tex. R. Civ. P. 193.1. "When responding to written discovery, a party must make a complete response, based on all information reasonably available to the responding party or its attorney at the time the response is made." *Id.* "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...." *Id.* R. 193.5. "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 ... 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." *Id.* R. 193.6.

*6 Under the circumstances of this case, the State timely disclosed its intent to rely on testimony from these owners. In mid-March 2017, before the close of discovery, the State explained in its response to the City's request for disclosure that "individuals who currently hold, or were previously granted, Short-Term Rental (STR) permits by [the City], and the individuals who testified at any public hearing on short-term rental regulations" were persons who had knowledge of facts relevant to its case. *See id.* R. 194.2(e) (authorizing party to request disclosure of names "of persons having knowledge of relevant facts"). When the State made this general disclosure, the City had recently—mid-February—provided discovery responses listing the names of all the short-term rental licensees, but the State had not yet had time to identify from that list the specific witnesses that it intended to rely on and the evidence those witnesses would provide. The State's response to the City's request was therefore complete "based on all information reasonably available to [the State] or its attorney at the time the response [wa]s made." *Id.* R. 193.1.

Once the State identified its witnesses and the evidence those witnesses would provide, it disclosed that information to the City in a supplemental disclosure. *See id.* R. 193.5(a) (requiring responding party to amend or supplement incomplete or incorrect discovery responses "reasonably promptly"). This supplementation occurred in mid-May 2017; three months after the State had received the evidentiary information from the City and approximately six months before the hearing at which the declarations were offered as evidence. As such, the State's supplementation was reasonably prompt. *See id.*; *see also id.* R. 193.5(b) (amended or supplemental responses made less than 30 days before trial are presumed to not be reasonably prompt). Thus, the district court abused its discretion in sustaining the City's objection and excluding the declarations of Carole Price, Cary Reynolds, Pete Gilcrease, Gregory Cribbs, Rachel Nation, and Travis Sommerville. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (noting that failure to analyze or apply law correctly constitutes abuse of discretion).

We sustain the State's evidentiary issue.

B. Exclusion of City's Legislative History

[27]The City complains of the district court's exclusion of its proffered legislative history, which the State had argued was "too voluminous" to be useful. We find it unnecessary to decide whether the exclusion was erroneous, as we may take judicial notice of this history. "The court may judicially notice a fact that is not subject

to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be question." Tex. R. Evid. 201. The City offers this history primarily as evidence of its need to address public concerns regarding the presence of short-term rentals in certain parts of Austin. Setting aside the question of whether the hearing testimony and other legislative history accurately characterize the impact of short-term rentals, the fact that these concerns were previously raised by residents and other stakeholders is a matter of municipal record and "is not subject to reasonable dispute." *Id.* We therefore will incorporate the aspects of this history that the City relies on in our analysis of the merits of this dispute.

Summary Judgment

[28] [29]The district court granted the City's no-evidence motion for summary judgment and denied the traditional motions filed by the Property Owners and the State. "When ... parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other[s], we consider the summary-judgment evidence presented by both sides and determine all questions presented." *Texas Ass'n of Acupuncture & Oriental Med. v. Texas Bd. of Chiropractic Exam'rs*, 524 S.W.3d 734, 738 (Tex. App.—Austin 2017) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). "If we determine that the trial court erred, we render the judgment the trial court should have rendered." *Id.* We make this determination de novo. *Id.*

*7 [30] [31]The State and the Property Owners filed traditional motions for summary judgment on their claims regarding the constitutionality of the ordinance. The City filed a cross-motion for summary judgment challenging those constitutionality claims on no-evidence grounds. "Summary judgment is proper when the summary-judgment evidence shows that there are no disputed issues of material fact and that the movant is entitled to judgment as a matter of law." *Texas Ass'n of Acupuncture*, 524 S.W.3d at 738 (citing Tex. R. Civ. P. 166a(c)). "A movant seeking traditional summary judgment on its own cause of action has the initial burden of establishing its entitlement to judgment as a matter of law by conclusively establishing each element of its cause of action." *Id.* (citing *Trudy's Tex. Star, Inc. v. City of Austin*, 307 S.W.3d 894, 905 (Tex. App.—Austin 2010, no pet.)). "To obtain traditional summary judgment on an opposing party's claims, the movant must conclusively negate at least one element of each of the claims or conclusively establish each element of an affirmative defense." *Id.* (citing *Lakey v. Taylor*, 435 S.W.3d 309, 316 (Tex. App.—Austin 2014, no pet.)).

[32]A party may move for no-evidence summary judgment when, "[a]fter adequate time for discovery[,] ... there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Tex. R. Civ. P. 166a(i). "The motion must state the elements as to which there is no evidence." *Id.* "The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Id.* When reviewing a no-evidence summary judgment, we "review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (citing *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581–82 (Tex. 2006)).

A. The State's Retroactivity Claim

The State argues that section 25-2-950 of the Austin City Code, which terminates all type-2 rentals by 2022, is unconstitutionally retroactive. We agree.

[33]The Texas Constitution prohibits the creation of retroactive laws. *See* Tex. Const., art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."). The prohibition against retroactive laws has two fundamental objectives: "[I]t protects the people's reasonable, settled expectations"—i.e., "the rules should not change after the game has been played"—and it "protects against abuses of legislative power." *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)).

[34] [35]A retroactive law is one that extends to matters that occurred in the past. *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 707 (Tex. 2014) (citing *Robinson*, 335 S.W.3d at 138). "A retroactive statute is one which gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute." *Union Carbide Corp. v. Synatzske*, 438 S.W.3d

39, 60 (Tex. 2014) (quoting Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960)). The State contends that the ordinance provision terminating all type-2 operating licenses is retroactive because it "tak[es] away th[e] fundamental and settled property right" to lease one's real estate under the most desirable terms. The City disagrees with the State's characterization of the ordinance's effect, but it does not dispute that the ordinance is retroactive. We agree that section 25-2-950 operates to eliminate well-established and settled property rights that existed before the ordinance's adoption. *See Robinson*, 335 S.W.3d at 139 (noting that "[m]ost statutes operate to change existing conditions"); Hochman, 73 Harv. L. Rev. at 692.

*8 [36] [37] [38]But not all retroactive laws are unconstitutional. *Robinson*, 335 S.W.3d at 139. ("Mere retroactivity is not sufficient to invalidate a statute."). To determine whether a retroactive law violates the Texas Constitution's prohibition against retroactive laws, we must consider three factors in light of the prohibition's objectives of protecting settled expectations and of preventing legislative abuses: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings;" (2) "the nature of the prior right impaired by the statute;" and (3) "the extent of the impairment." *Id.* at 145. This three-part test acknowledges the heavy presumption against retroactive laws by requiring a compelling public interest to overcome the presumption. *Tenet*, 445 S.W.3d at 707 (citing *Robinson*, 335 S.W.3d at 145). But it also appropriately encompasses the notion that "statutes are not to be set aside lightly." *Id.*

[39]We begin by considering the first *Robinson* factor, "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings," to determine if there is a compelling public interest. *Robinson*, 335 S.W.3d at 145; *see Tenet*, 445 S.W.3d at 707. Here, as was the case regarding the statute deemed unconstitutionally retroactive in *Robinson*, the City made no findings to justify the ordinance's ban on type-2 rentals. Based on the legislative record before us and the other facts relevant to determining the reasons for the City's actions, *see Robinson*, 335 S.W.3d at 145 (considering entire legislative record and additional related information in applying its three-prong test), the City's purported public interest for banning type-2 rentals is slight. The City contends that it enacted short-term rental regulations to address the following public-interest issues relating to short-term rentals:

- Public-health concerns about over-occupancy affecting the sewage system and creating fire hazards and about "bad actor" tenants who dump trash in the neighborhood and urinate in public;
- public-safety concerns regarding strangers to neighborhoods, public intoxication, and open drug use;
- general-welfare concerns about noise, loud music, vulgarity, and illegal parking; and
- the negative impact on historic Austin neighborhoods, specifically concerns of residents that that short-term rentals alter a neighborhood's quality of life and affect housing affordability.

The City does not explain which of these public-interest issues supports a ban on type-2 short-term rentals, and notably, there is nothing in the record before us to show that any of these stated concerns is specific or limited to type-2 short-term rentals. Type-2 short-term rentals are simply single-family residences that are not owner-occupied or associated with an owner-occupied principal residential unit—i.e., they are not designated as the owner's homestead for tax purposes. *See* Austin, Tex., Code § 25-2-789(A).

More importantly, nothing in the record supports a conclusion that a ban on type-2 rentals would resolve or prevent the stated concerns. In fact, many of the concerns cited by the City are the types of problems that can be and already are prohibited by state law or by City ordinances banning such practices. *See* Tex. Penal Code §§ 42.01 (disorderly conduct), 49.02 (public intoxication); Austin, Tex., Code §§ 9-2-1–9-2-65 (noise ordinance), 9-4-15 (prohibiting public urination and defecation), 10-5-42–10-5-45 (littering ordinance), 12-5-1–12-2-44 (parking ordinance). Relatedly, nothing in the record shows that these issues have been problems with or specific to short-term rentals in the past. To the contrary, the record shows that, in the four years preceding the adoption of the ordinance, the City did not issue a single citation to a licensed short-term rental owner or guest for violating the City's noise, trash, or parking ordinances. And during this same four-year period, the City issued notices of violations—not citations—to licensed short-term rentals only ten times: seven for alleged overoccupancy, two for failure to remove trash receptacles from the curb in a timely manner, one for debris in the yard, and none for noise or parking issues. And the City has not initiated a single proceeding to remove a property owner's short-term rental license in response to complaints about parties. Further, the record shows that short-term rentals do not receive a disproportionate number of complaints from neighbors. In fact, as the City acknowledges, "short-term rental

properties have significantly fewer 311 calls and significantly fewer 911 calls than other single-family properties."

*9 We also note that a ban on type-2 short-term rentals does not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature. *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 291 (Tex. 2018) (declining to interpret "residential" as prohibiting short-term rentals). And, in fact, the City treats short-term rentals as residential for purposes of its own laws. *See* Austin, Tex., Code § 25-2-4(B).

In sum, based on the record before us, we conclude that the purported public interest served by the ordinance's ban on type-2 short-term rentals cannot be considered compelling. The City did not make express findings as to the ordinance. Nothing in the record before us suggests that the City's reasons for banning type-2 rentals address concerns that are particular to type-2 rentals or that the ban itself would actually resolve any purported concerns. *See Tenet*, 445 S.W.3d at 707 (holding that retroactive provision of legislation that "was a comprehensive overhaul of Texas medical malpractice law" served compelling public interest); *Synatzske*, 438 S.W.3d at 58 (holding that retroactive legislation aimed at resolving asbestos-related litigation crisis and supported by legislative fact findings served compelling public interest); *Robinson*, 335 S.W.3d at 143–44 (holding that retroactive legislation ostensibly enacted for sole benefit of one entity and not supported by legislative fact findings did not serve compelling public interest).

[40]But even if we were to determine that the City's ban on type-2 rentals advances a compelling interest, our consideration of the remaining *Robinson* factors, which require that we balance the purpose against the nature of the prior right and the extent to which the statute impairs that right, would still require us to conclude that the ban is unconstitutionally retroactive. *See Robinson*, 335 S.W.3d at 147–48. Regarding the nature of the prior right, we consider not whether the impaired right was "vested," but the extent to which that right was "settled." *Id.* 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, the supreme court held in *Synatzke* 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.".

[41] [42] [43]Private property ownership is a fundamental right. *Hearts Bluff*, 381 S.W.3d at 476 (citing *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012)). "The right of property is the right to use and enjoy, or dispose of the same, in a lawful manner and for a lawful purpose." *Id.*; *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (noting that property owners have "rights to possess, use and dispose of" their property). The ability to lease property is a fundamental privilege of property ownership. *See Terrace v. Thompson*, 263 U.S. 197, 215, 44 S.Ct. 15, 68 L.Ed. 255 (1923) (noting that "essential attributes of property" include "the right to use, lease and dispose of it for lawful purposes"); *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454 (1890) ("The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership."); *see also* Ross, Thomas, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053, 1056 (1989) (noting that "rights to sell, lease, give, and possess" property "are the sticks which together constitute" the metaphorical bundle). Granted, the right to lease property for a profit can be subject to restriction or regulation under certain circumstances, *see Loretto*, 458 U.S. at 436, 102 S.Ct. 3164 (noting in physical-takings case that "deprivation of the right to use and obtain a profit from company is not, in every case, independently sufficient to establish a taking"); *Severance*, 370 S.W.3d at 709–10 (noting few limitations on property rights), but the right to lease is nevertheless plainly an established one, *see Tenet*, 445 S.W.3d at 708 (analyzing whether claim was established).

*10 [44]And as for the specific right at issue here—i.e., to lease one's property on a short-term basis—the City acknowledges that Austinites have long exercised their right to lease their property by housing short-term tenants. In fact, the City admits, and the record establishes, that short-term rentals are an "established practice" and a "historically ... allowable use." The record also shows that property owners, including some of the appellants here, who rented their individual properties as type-2 short-term rentals before the City's adoption of the provision eliminating those types of rentals did so after investing significant time and money into the property for that purpose. The record also shows that the City's ban on type-2 short-term rentals will result in a loss of income for the property owners.

Accordingly, based on the record before us and the nature of real property rights, we conclude that owners of type-2

rental properties have a settled interest in their right to lease their property short term.

The City emphasizes that the ban does not go into effect until 2022, suggesting that the grace period would allow property owners to adjust their investment strategy to prepare for the discontinuance of type-2 short-term rentals. *See Tenet*, 445 S.W.3d at 708–09 (discussing grace period afforded by retroactive legislation); *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (determining that applying immunity provisions of Texas Tort Claims Act was not unconstitutionally retroactive when the plaintiff had two months to sue before it became effective). But the issue here is not about property owners' right to use their property in a certain way—it is about owners of type-2 short-term rentals retaining their well-settled right to lease their property.

[45]We now turn to the third *Robinson* factor, which directs us to consider the extent of the ordinance's impairment to these settled rights. *See Robinson*, 335 S.W.3d at 145. The effect of the ordinance on the property right at issue here is clear—the City's ordinance eliminates the right to rent property short term if the property owner does not occupy the property. The elimination of a right plainly has a significant impact on that right. *See id.* at 148 (concluding that statute that extinguished plaintiff's claim in Texas had a "significant[ ] impact[ ]").

Because the record before us shows that the ordinance serves a minimal, if any, public interest while having a significant impact on property owners' substantial interest in a well-recognized property right, we hold that section 25-2-950's elimination of type-2 short-term rentals is unconstitutionally retroactive. *See id.* at 150; *see also Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (noting that preservation of property rights is "one of the most important purposes"—in fact, "[t]he great and chief end"—of government). Accordingly, we affirm the State's first issue on appeal. And having determined that section 25-2-950 is unconstitutionally retroactive, we need not address the State's and the Property Owners' remaining constitutional challenges to that same section. *See* Tex. R. App. P. 47.1 (requiring appellate court to hand down "opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal").

B. Property Owner's Assembly Clause Claim

[46] [47]The Property Owners assert that section 25-2-795 of the Austin City Code, which bans types of conduct and assembly at short-term rental properties, violates the Texas Constitution's due-course-of-law provision. *See* Tex. Const. art. I, § 19 (due course of law); Austin, Tex., Code § 25-2-795 (forbidding property owner or tenant from using short-term rental for assemblies of any kind between 10pm and 7am and for outside assemblies of more than six adults between 7am and 10pm; and banning more than six unrelated adults (or ten related adults) from being present on the property at any time). The Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19. Similarly, the federal due-process clause provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1. While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," Texas courts regard these terms as without substantive distinction unless and until a party demonstrates otherwise. *See University of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (citing *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252–53 (1887)). Under federal and state guarantees of due process, the government may not infringe certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301–02, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The Property Owners contend that section 25-2-795 is subject to this strict-scrutiny review because it infringes on and limits short-term rental tenants' fundamental, constitutionally secured rights to freedom of assembly, association, movement, and privacy. *See id.* We conclude that section 25-2-795 fails to pass muster under strict-scrutiny review for violation of the Property Owners' freedom of assembly.[5]

1. The "Assembly" Clause

***11** Both the U.S. and Texas constitutions contain assembly clauses as follows, respectively:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

> The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Tex. Const. art. 1, § 27. The Texas assembly clause differs from its federal counterpart in that it includes a "common good" requirement. The First Congress of 1789 considered including a requirement that the assembly be for "the" or "their" "common good"—e.g., James Madison offered "The people shall not be restrained from peaceably assembling and consulting for their common good."—but it ultimately rejected such text. *See* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 22 (2012) (citing *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 140 (Neil H. Cogan ed., 1997)).

2. History of the Federal Assembly Clause

In the nineteenth century, the United States Supreme Court concluded that the First Amendment did not protect the right to assemble unless "the purpose of the assembly was to petition the government for a redress of grievances." *Presser v. Illinois*, 116 U.S. 252, 267, 6 S.Ct. 580, 29 L.Ed. 615 (1886) (relying on dicta in *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875)). *Presser* is the only Supreme Court opinion that has limited the right of assembly in this way, and commentators suggest that the limitation was the result of a judicial misreading of the text of the First Amendment's assembly language. *See* Inazu, at 22. Otherwise, the right to assemble featured prominently in the Supreme Court's First Amendment jurisprudence. For example, in his concurrence in *Whitney v. California*, Justice Brandeis treated free speech and assembly rights as coequal for the purposes of First Amendment analysis:

> Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Soon thereafter, the Assembly Clause was incorporated against the states via the Due Process Clause of the Fourteenth Amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937). And in more than one hundred subsequent opinions, the Court continued to recognize the assembly clause as a right related to, but nonetheless independent from, free speech. *See* Inazu, 26, 50 ("The Court had linked these two freedoms [speech and assembly] only once before; after *Whitney*, the nexus occurs in more than one hundred of its opinions."); *see, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance." (citation omitted)).

***12** Commentators have indicated that the federal right to assemble has since fallen to the wayside. In the 1950s, the Supreme Court introduced an atextual right of the First Amendment, the "freedom of association." Nicholas S. Brod, *Rethinking a Reinvigorated Right to Assemble* 63 Duke L. J. 155, 159 (2013) (citing *e.g.*, *American Commc'ns Ass'n v. Douds*, 339 U.S. 382, 409, 70 S.Ct. 674, 94 L.Ed. 925 (1950)). At first, the "freedom of association" only sporadically replaced the right to

assemble. *See id.* at 159 (*comparing Douds*, 339 U.S. at 400, 70 S.Ct. 674 ("In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly...."), with *Douds*, 339 U.S. at 409, 70 S.Ct. 674 ("[T]he effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts...."). But eventually the right to association generally displaced the right to assemble. *Id.* (noting that Supreme Court has identified as "indispensable liberties" the rights of "speech, press, [and] association") (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)). And, for better or worse, both assembly and association came to be treated by the Supreme Court as secondary rights enabling speech rather than coequal rights independent of speech. *See id.* (citing *NAACP*, 357 U.S. at 460, 78 S.Ct. 1163 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.")).

Nevertheless, the United States Supreme Court case law continued to affirm the independence and importance of the federal right to assemble. In *Coates v. City of Cincinnati*, the high court considered an ordinance making it a criminal offense for "three or more persons to assemble" on sidewalks "in a manner annoying to persons passing by." 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). The Supreme Court held that the word "annoying" is unconstitutionally vague and that "[t]he ordinance also violates the constitutional right of free assembly and association" because "[o]ur decisions establish that mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms." *Id.* at 615, 91 S.Ct. 1686. In support of its holding, the Supreme Court quoted a municipal court decision striking down a similar ordinance:

> "Under the [ordinance provisions], arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoyance of Governor Dunsmore and his colonial constables."

Id. (quoting *City of Toledo v. Sims*, 169 N.E.2d 516, 520 (Toledo Mun. Ct. 1960)).

In *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court noted that "[f]rom the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment Rights with which it was deliberately linked by the draftsmen." 448 U.S. 555, 577, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). The Court also noted that the First Congress debated whether there was a "need separately to assert the right of assembly because it was subsumed in freedom of speech," but that the motion to strike "assembly" was defeated. *Id.* at n.13. The Supreme Court quoted Mr. Page of Virginia as asserting during the debate:

> [A]t times "such rights have been opposed," and that "people have ... been prevented from assembling together on their lawful occasions":
>
> "[T]herefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."

Id. (quoting 1 Annals of Cong. 731 (1789)). Thus, notwithstanding some outside commentary, the U.S. Supreme Court's case law supports a vibrant and historically grounded constitutional right to assemble.

3. Texas's Right to Assemble

In Texas, so far, the right to assemble has received little attention. The few cases that involve assembly claims under Texas's constitution recognize the existence and importance of the right; however, as far as we have found, none address the scope of the right to assemble. *See, e.g., City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147 (Tex. 1995) (holding that there is no private right of action for damages arising under free speech and assembly sections of Texas Constitution because "anything done in violation of [Texas's bill of rights] is void"); *Bell v. Hill*, 123 Tex. 531, 74 S.W.2d 113, 119–20 (1934) (recognizing that citizens' right to form political associations is protected by the U.S. Constitution's First Amendment and by Texas Constitution's assembly clause); *Faulk v. State*, 608 S.W.2d 625, 630–31 (Tex. Crim. App. 1980) (holding that Texas's riot statute did not violate right to assemble because it prohibited participation in "unlawful" assembly); *Ferguson v. State*, 610 S.W.2d 468, 470 (Tex. Crim. App. 1979) (holding that Texas riot statute did not violate right to assemble because right is limited to

"peaceable assembly"); *Young v. State*, 776 S.W.2d 673, 679 (Tex. App.—Amarillo 1989, no pet.) (noting that state's ability to prohibit assemblies "must be limited in nature, be strictly construed, and must concern only assemblies ... which, beyond cavil, threaten public peace and well being," and holding that Texas's organized-crime statute did not violate right to assemble because that right protects "the right of association for peaceful purpose" and organized-crime statute prohibits conduct that harms or disrupts the common good).

*13 [48]Possibly accounting for the lack of assembly-clause cases in Texas, the Texas Supreme Court has adopted the judicially created "right of association" as a right that is "instrumental to the First Amendment's free speech, assembly, and petition guarantees." *Osterberg v. Peca*, 12 S.W.3d 31, 46 (Tex. 2000). But, in contrast to the U.S. Supreme Court, the Texas Supreme Court has never limited the application of Texas's assembly clause to situations where the purpose of the assembly was to petition the government for a redress of grievances. *See Presser*, 116 U.S. at 267, 6 S.Ct. 580. Nor has the Texas Supreme Court expressly held, or even considered whether, the judicially created "right of association" has subsumed the text of Texas's assembly clause, as some commentators have indicated has occurred with the federal assembly clause. We therefore rely on the plain text of the Texas Constitution to conclude that its assembly clause is not limited to protecting only petition-related assemblies and the judicially created "right of association" does not subsume the Texas Constitution's assembly clause in its entirety.

Our conclusion is also supported by significant textual differences in the two assembly clauses. First, the Texas Constitution grants an affirmative right to its citizens: "The citizens shall have the right...." Tex. Const. art. I, § 27. The federal constitution, on the other hand, is prohibitive: "Congress shall make no law...." U.S. Const. amend. I. Further, unlike the First Amendment's grouping of rights regarding religion, speech, the press, assembly, and petition, *see id.*, the Texas Constitution separates these and other rights across several sections in its Bill of Rights. *See* Tex. Const. art. I, §§ 1–34 ("Bill of Rights"). And while the grammatical structure of the First Amendment arguably tethers the right to assemble to the right to petition, Texas's assembly clause plainly creates two distinct rights by using a semicolon to separate the right to assemble from the right to petition: "The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance." Tex. Const. art. I, § 27; *see* U.S. Const. amend. I (prohibiting the abridgment of "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *Cruikshank*, 92 U.S. at 552 (concluding that First Amendment protected " 'the right of the people to assemble and to petition the government for a redress of grievances' " (misquoting U.S. Const. amend. I)); Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639, 713 (2002) (arguing that grammatical structure of First Amendment means that assembly right can be exercised only insofar as it is used to petition the government); *cf.* Inazu, at 23 (criticizing Mazzone and arguing "the comma preceding the phrase 'and to petition' is residual from the earlier text that had described the 'right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances' ").

[49]But what rights does the Texas assembly clause grant? Using the common and ordinary meaning of the text of the clause, it affirmatively grants the right to "meet together" or "to congregate" for "their" "shared or joint" "welfare or benefit." *American Heritage Dictionary of the English Language* 107, 372, 757 (5th ed. 2011) (defining "assemble," "common," and "good" respectively); *Assemble*, *The Compact Edition of the Oxford English Dictionary* (1994) (establishing that since at least the fourteenth century, "assemble" has meant "to come together into one place or company, to gather together, congregate, meet"); *see Assembly*, *The Compact Edition of the Oxford English Dictionary* (establishing that since at least the sixteenth century, "assembly" has included "gathering of persons for purposes of social entertainment"); *see also Bouillion*, 896 S.W.2d at 148 ("To interpret [the Texas] Constitution, we give effect to its plain language. We presume the language of the Constitution was carefully selected, and we interpret words as they are generally understood."). The use of "their" versus "the" to modify "common good" implies that the assembly must be for the common good of the citizens who assemble rather than the common good of the state. *See American Heritage Dictionary* at 1803–04 (defining "the" and "their" respectively); Inazu, at 22–23.[6] In other words, under the plain language of the Texas Constitution, citizens have the right to physically congregate, in a peaceable manner, for their shared welfare or benefit.

*14 [50]We must also determine whether the right granted in the Texas assembly clause is fundamental. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (noting that due-process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"); *Reno*, 507 U.S. at 301–02, 113

S.Ct. 1439 (noting that U.S. Constitution's substantive due-process guarantee "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"). The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington*, 521 U.S. at 720–21, 117 S.Ct. 2258 (citing *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), and *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934)), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937); *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 560 (Tex. 1985) ("Fundamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions.").

[51] [52]The Texas Constitution's Bill of Rights, as discussed above, expressly recognizes and protects the right of assembly. It also provides, "To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto ... shall be void." Tex. Const. art. I, § 29. Relying on section 29, the Texas Supreme Court has held:

> The privileges guaranteed by the Bill of Rights, however, cannot be destroyed by legislation under the guise of police control. Wherever the Constitution makes a declaration of political privileges or rights or powers to be exercised by the people or the individual, it is placed beyond legislative control or interference, as much so as if the instrument had expressly declared that the individual citizen should not be deprived of those powers, privileges, and rights: and the Legislature is powerless to deprive him of those powers and privileges.

Bell, 74 S.W.2d at 120 (holding that First Amendment and Texas's assembly clause protect right to form political associations); *cf. Douds*, 339 U.S. at 399, 70 S.Ct. 674 ("The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms."). Similarly, the Texas Supreme court has held that other rights found in the Texas Bill of Rights are fundamental rights for purposes of constitutional analysis. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 1998) (orig. proceeding) ("Freedom of association for the purpose of advancing ideas and airing grievances is a fundamental liberty guaranteed by the First Amendment.") (citing *NAACP*, 357 U.S. at 460, 78 S.Ct. 1163); *Stamos*, 695 S.W.2d at 560 (noting that "right to free speech [and] free exercise of religion ... have long been recognized as fundamental rights under our state and federal constitutions"). And the United States Supreme Court has explicitly described the peaceable right to assemble, along with other First Amendment rights, as a fundamental right:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and *assembly, and other fundamental rights* may not be submitted to vote; they depend on the outcome of no elections.

***15** *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis added); *see De Jonge*, 299 U.S. at 364, 57 S.Ct. 255 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); *Whitney*, 274 U.S. at 375–76, 47 S.Ct. 641 (J. Brandeis, concurring) ("But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.").

[53]Based on its prominence in the Texas Bill of Rights, its history in the founding of our country, and its early, and

still valid, treatment by the U.S. Supreme Court, we hold that the right to assemble granted by the Texas Constitution is a fundamental right.[7]

4. *Texas's Right to Assemble and the City of Austin's Ordinances*

What is at stake, then, is the authority of the City, through its ordinances, to prohibit or restrict the peaceable assembly of citizens on private property with respect to the purpose, time, and number of people. The Property Owners here argue that review of the alleged violation of their fundamental right to assemble by Austin's City Code must be examined under strict scrutiny. We agree.

[54]Section 25-2-795 of Austin's short-term rental regulations provides that:

> (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.
>
> ***16** (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.[8]
>
> (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.

Austin, Tex., Code, § 25-2-795 (emphases added). This section plainly restricts the right to assemble and does so without regard to the peaceableness or content of the assembly—as emphasized above, the word "assembly" is used to describe what is being banned or severely restricted temporally, quantitatively, and qualitatively. Even if it the ordinance did not expressly use the word "assembly," section 25-2-795 represents a significant abridgment of the fundamental right to peaceably assemble—i.e., to get together or congregate peacefully. It forbids owners (i.e., "licensees" in the ordinance) and tenants from gathering outdoors with more than six persons, at any time of day, even if the property is licensed for occupancy of six or more. And it prohibits use by two or more persons for any activity "other than sleeping" after 10:00 p.m. *Id.*

[55] [56] [57]Moreover, in contrast to traditional cases that invoke the right to assemble on *public* property, here the right concerns the freedom to assemble with the permission of the owner on *private* property, implicating both property and privacy rights.[9] *Cf. Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 811, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) ("So here, the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment."); *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); *Texas State Emps. Union*, 746 S.W.2d at 205 ("While the Texas Constitution contains no express guarantee of a right of privacy, it contains several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected 'zones of privacy.' "); *Koppolow Dev. Inc. v. City of San Antonio*, 399 S.W.3d 532, 535 (Tex. 2013) ("One of the most important purposes of our government is to protect private property rights."); *Spann v. City of Dallas*, 111 Tex. 350, 235 S.W. 513, 515 (1921) ("To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.").

***17** [58]Surely the right to assemble is just as strong, if not stronger, when it is exercised on private property with the permission of the owner, thereby creating a nexus with property and privacy rights. *Cf. Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) ("First Amendment protections, furthermore, are especially strong where an

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individual engages in speech activity from his or her own private property.") (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 58, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994)). But if Thomas Jefferson, Patrick Henry, and other revolutionary patriots had lived in this modern day and chosen a short-term rental instead of the Raleigh Tavern—as they may well have given the nature of modern society—to assemble and discuss concepts of freedom and liberty, the City of Austin's ordinance would impose burdensome and significant restrictions on their abilities to do so. The City of Austin's restriction of this fundamental right to physically congregate on private property, in a peaceable manner, for the citizens' shared welfare or benefit requires strict scrutiny. *See Washington*, 521 U.S. at 720, 117 S.Ct. 2258 (explaining that due-process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"); *Reno*, 507 U.S. at 301–02, 113 S.Ct. 1439 (same); *cf. Barnette*, 319 U.S. at 639, 63 S.Ct. 1178 ("The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."); *De Jonge*, 299 U.S. at 365, 57 S.Ct. 255 ("If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.").

[59] [60] [61]We do not suggest that the City of Austin is powerless to regulate short-term rentals or to address the possible negative effects of short-term rentals—in fact, it already does so with various nuisance ordinances. *See, e.g.*, Austin, Tex., Code §§ 9-2-1–9-2-65 (noise ordinance), 9-4-15 (prohibiting public urination and defecation), 10-5-42–10-5-45 (littering ordinance), 12-5-1–12-2-44 (parking ordinance); *see also* Tex. Penal Code §§ 42.01 (disorderly conduct), 49.02 (public intoxication). But here the City has not identified a compelling interest that might justify section 25-2-795's restrictions on the right to peaceably assemble on private property. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 71, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("[W]hen the government intrudes on one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, 'this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.' " (quoting *Moore*, 431 U.S. at 499, 97 S.Ct. 1932)). The City's stated concerns in enacting this section were to reduce the likelihood that short-term rentals would serve as raucous "party houses" in otherwise quiet neighborhoods and to reduce possible strain on neighborhood infrastructure. These are certainly valid concerns, but compelling interests in the constitutional sense are limited to " 'interests of the highest order.' " *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)). These interests may include, for example, reduction of crime, protection of the physical and psychological well-being of minors, parental rights, protection of elections, and tax collection. *See, e.g., Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763–64, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (public safety and order); *Burson v. Freeman*, 504 U.S. 191, 198–99, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (integrity of elections); *Ginsberg v. New York*, 390 U.S. 629, 639–640, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (protecting minors). Further, the City must show a compelling interest in imposing the burden on the right to assemble in the particular case at hand, not a compelling interest in general. *See Westchester Day Sch.*, 504 F.3d at 353 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006)).

[62] [63] [64]The regulation of property use is not, in and of itself, a compelling interest. *See Barr v. City of Sinton*, 295 S.W.3d 287, 305 (Tex. 2009). As the Texas Supreme Court has explained, "Although the government's interest in the public welfare in general, and in preserving a common character of land areas and use in particular, is certainly legitimate when properly motivated and appropriately directed ... courts and litigants must focus on real and serious burdens to neighboring properties" when determining whether a compelling interest is at issue. *Id.* at 305–07; *see Bell*, 74 S.W.2d at 120 (noting that "police or governmental powers may be exerted where the object of legislation is within the police power," but "the privileges guaranteed by the Bill of Rights ... cannot be destroyed by legislation under the guise of police control"). We must "not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling." *Barr*, 295 S.W.3d at 307. Here, the City has not provided any evidence of a serious burden on neighboring properties sufficient to justify section 25-2-795's encroachment on owners' and their tenants' fundamental right to assemble on private property.

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*18 [65]Additionally, the City's restrictions on the right to assemble would still fail strict scrutiny because the ordinance is not narrowly tailored and can be achieved by less intrusive, more reasonable means, such as enforcement of the already-existing ordinances regulating noise, parking, building codes, and disorderly conduct that we discuss above in our analysis of the State's retroactivity claim. *See Reno*, 507 U.S. at 302, 113 S.Ct. 1439 (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

In sum, we hold that section 25-2-795 infringes on short-term rental owners' and their tenants' constitutionally secured right to assembly because it limits assembly on private property without regard to the peacefulness of or reasons for the assembly. And because the infringement of the fundamental right to assemble is not narrowly tailored to serve a compelling government interest, it violates the Texas Constitution's guarantee to due course of law. *See id.* Accordingly, it was error for the district court to grant the City's no-evidence motion for summary judgment and to deny the Property Owners' motion for summary judgment on the Property Owners' constitutional challenge to this provision.

C. Unreasonable Search and Seizure

The Property Owners contend that another provision of the short-term rental ordinance place owners and tenants of short-term rentals at risk of unconstitutional search and seizure. Specifically, they challenge the provision that added short-term rentals to the enumerated list of types of property that officials must inspect "to ensure compliance with this chapter and other applicable laws." Austin, Tex., Code § 25-12-213(1301). That provision, however, was modified to allow the licensee or occupant to deny the inspector's entry and to seek pre-search administrative review. *See* Austin, Tex., Ordinance No. 20171012-SPEC001 (Oct. 12, 2017). Thus, although the parties have not briefed this Court on the repeal of the more onerous inspection provisions, we take judicial notice of the ordinance repealing this section and conclude this claim is now moot. *See* Tex. R. Evid. 204 (allowing judicial notice of municipal law); *Trulock v. City of Duncanville*, 277 S.W.3d 920, 929 (Tex. App.—Dallas 2009, no pet.) (dismissing case as moot where challenged provisions of ordinance had been repealed).

Conclusion

Because Austin City Code sections 25-2-795 (restricting assembly) and 25-2-950 (banning type-2 rentals) are unconstitutional, we reverse that part of the district court's judgment granting the City's no-evidence motion for summary judgment and denying the Property Owners' and the State's motions for summary judgment. We render judgment declaring sections 25-2-795 and 25-2-950 of the City Code void. We affirm the remainder of the judgment and remand the case to the district court for further proceedings consistent with this opinion.

Concurring and Dissenting Opinion by Justice Kelly

DISSENTING OPINION

Chari L. Kelly, Justice, dissenting.

The majority opinion expands fundamental-rights jurisprudence to strike down policy decisions properly left to Austin's City Council under their zoning power. Its approach leads to a misapplication of Retroactivity Clause precedent, creating tension with opinions of our sister courts of appeals; disregards Texas and U.S. history; and is an atextual expansion of the Assembly Clause. I respectfully dissent.

I. The Retroactivity Clause

The Texas Constitution provides that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Tex. Const. art. I, § 16. The Property Owners' retroactivity challenge to Section 25-2-950—the ban on non-homestead short-term rentals that would go into

effect in April 2022—is a facial constitutional challenge instead of an as-applied one. They "cannot ... assert that the [ordinance] is unconstitutional 'as applied' because [it] has never been applied to anyone." *See Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996). Therefore, they "must establish that the [ordinance], by its terms, always operates unconstitutionally." *Id.* at 627. And we must interpret the ordinance "to avoid constitutional infirmities" under the Retroactivity Clause. *See id.* at 629; *see also Union Carbide Corp. v. Synatzske*, 386 S.W.3d 278, 313, 317 (Tex. App.—Houston [1st Dist.] 2012) (en banc) (Bland, J., dissenting from retroactivity reasoning) ("A court must not hold a legislative enactment to be unconstitutional unless it is absolutely necessary to so hold. ... If a statutory reading ... springs constitutional doubt, and another reasonable interpretation exists, then it is not the interpretation that the legislature intended."), *rev'd*, 438 S.W.3d 39 (Tex. 2014).

***19** " 'Mere retroactivity is not sufficient to invalidate a statute.... Most statutes operate to change existing conditions, and it is not every retroactive law that is unconstitutional.' ... [N]ot all retroactive legislation is bad." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 139 (Tex. 2010) (quoting *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971)).

In its entire history, the Supreme Court of Texas has held a law unconstitutionally retroactive only four times. *See Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014). Those four instances involved amendments to statutes of limitations and a new choice-of-law rule that extinguished a mature tort claim. *Id.* at 708 & n.34 (citing *Robinson*, 335 S.W.3d at 148–49; *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Wilson v. Work*, 122 Tex. 545, 62 S.W.2d 490, 490–91 (1933) (per curiam) (orig. proceeding); *Mellinger v. City of Hous.*, 68 Tex. 37, 3 S.W. 249, 254–55 (1887)).

Since 2014, the Court has addressed only two retroactivity challenges and has upheld the challenged law both times. In one instance, the Court concluded that "a charter school's charter is not a vested property right to which the ... prohibition on retrospective laws appl[ies]." *See Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54, 68 (Tex. 2018). In the other, the Court concluded that "a statute authorizing property owners to petition [the Supreme Court] directly to determine which county is owed the [ad valorem] taxes" imposed on the owners by multiple counties was "not constitutionally retroactive." *See In re Occidental Chem. Corp.*, 561 S.W.3d 146, 150, 162 (Tex. 2018) (orig. proceeding).

Never has the Court struck down a zoning or property-use law as unconstitutionally retroactive, though Texas municipalities have been zoning and regulating property for decades.

A. Section 25-2-950 (type-2 rentals) is not retroactive.

A statute is not retroactive merely because it is applied in a case arising from conduct that existed before the statute's enactment or if it "upsets expectations based in prior law." *Mbogo v. City of Dall.*, No. 05-17-00879-CV, 2018 WL 3198398, at *4 (Tex. App.—Dallas June 29, 2018, pet. denied) (mem. op.) (applying and quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). This is true particularly in the area of zoning regulations, for, there, "strong policy arguments and a demonstrable public need" support municipalities' "fair and reasonable termination of nonconforming property uses." *Mbogo*, 2018 WL 3198398, at *4 (quoting *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972)).

The majority opinion asserts that Section 25-2-950 "does not advance a zoning interest because both short-term rentals and owner-occupied homes are residential in nature." *See ante* at ——. However, ordinances differentiating one type of residential property from another are just as much exercises of the zoning power as are ordinances differentiating between residential property and commercial property. *See, e.g., Barr v. City of Sinton*, 295 S.W.3d 287, 289–91, 296–308 (Tex. 2009) (addressing ordinance that differentiated solely within "residential area" category and nevertheless treating it as zoning-related); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 674–81 (Tex. 2004) (treating ordinance that restricted number of residences that could be built on undeveloped property as zoning ordinance even though it applied only to residential property).

***20** Section 25-2-950 is a zoning ordinance. It is found in the Code of Ordinances chapter titled "Zoning." *See* Austin, Tex., Code of Ordinances ch. 25-2. The majority opinion's conclusion that Section 25-2-950 is retroactive therefore creates tension with the Fifth Court of Appeals' opinion in *Mbogo*. In that case, when the City of Dallas rezoned a portion of Ross Avenue to prohibit automobile-related businesses from operating there, the rezoning was not "retroactive" even though an affected business owner, who would have to discontinue his chosen business, had been operating his

automobile-related business in the area since before the rezoning. *Mbogo*, 2018 WL 3198398, at *1, *4. "The ordinance did not change any use in the property thereby attaching a new legal consequence or upset any expectations based in prior law. Rather, it *prospectively* altered a property owner's future use of the property by setting a date by which to come into compliance." *Id.* at *4 (emphasis added).

So too here. But the majority opinion holds otherwise, leaping from the fundamental right of property ownership to what it deems within the "fundamental privilege[s] of property ownership"—"leas[ing] one's property on a short-term basis." *See ante* at ——. Surely the *Mbogo* business owner's use of his own property is no less important than a tenant's use of a short-term-rental owner's property. But, by expanding the scope of fundamental property rights to include a tenant's use of a non-homestead property for a lease term of less than 30 days, the majority opinion wields fundamental-rights jurisprudence in a way that cannot comport with what the Fifth Court of Appeals held in *Mbogo*. And it finds no support in Texas Supreme Court jurisprudence or that of this Court's 127 year history.

B. Even if retroactive, Section 25-2-950 (type-2 rentals) is not unconstitutionally retroactive, under Robinson.

Even if Section 25-2-950 is retroactive, it is not unconstitutionally so. Retroactive laws may still be constitutional under the *Robinson* three-factor test. *See* 335 S.W.3d at 145–50. Under that test, a retroactive law is unconstitutionally retroactive only so long as three factors weigh against the challenged law: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings," (2) "the nature of the prior right impaired by the statute," and (3) "the extent of the impairment." *Id.* at 145.

1. Section 25-2-950 serves a strong public interest.

Zoning is a sufficiently strong public interest under the Retroactivity Clause: "strong policy arguments and a demonstrable public need" support "the fair and reasonable termination of nonconforming property uses," and "[m]unicipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of the police power." *Benners*, 485 S.W.2d at 778, *cited in Mbogo*, 2018 WL 3198398, at *6; *accord Caruthers v. Board of Adjustment of the City of Bunker Hill Vill.*, 290 S.W.2d 340, 350 (Tex. App.—Galveston 1956, no writ). "[T]he supreme court has not overruled *Benners*, and ... we are bound to follow supreme court precedent." *Mbogo*, 2018 WL 3198398, at *6.

More broadly, efforts to "safeguard the public safety and welfare" are sufficiently strong public interests under the Retroactivity Clause. *See Barshop*, 925 S.W.2d at 634; *Texas State Teachers Ass'n v. State*, 711 S.W.2d 421, 424 (Tex. App.—Austin 1986, writ ref'd n.r.e.). In addition to zoning, public-welfare interests as varied as property-tax relief and testing teacher competence are sufficiently strong public interests under the Clause. *See White Deer Indep. Sch. Dist. v. Martin*, No. 07-18-00193-CV, —— S.W.3d ——, ——, 2019 WL 5850378, at *7 (Tex. App.—Amarillo Nov. 5, 2019, no pet. h.) (op., designated for publication); *Texas State Teachers Ass'n*, 711 S.W.2d at 422, 424–25.

The City of Austin's stated interests in enacting Section 25-2-950 are within the wide zone of strong public interests. The City says that short-term rentals are particularly susceptible to over-occupancy, which affects "fire safety" and "overwhelm[s] existing wastewater systems," and to tenants' "dump[ing] trash in the neighborhood"; "engag[ing] in public urination" and public intoxication; and "open drug use." The City also heard complaints about illegal parking, "noise, loud music, vulgarity, and other negative impacts of having a 'party house' " environment at short-term rentals.

***21** The majority opinion faults the City for issuing notices of violation "to licensed short-term rentals only ten times." *Ante* at ——. Why is ten not enough? The majority opinion questions whether the ordinance is necessary to respond to ten notices of violation, "[b]ut the necessity and appropriateness of legislation are generally not matters the judiciary is able to assess." *Robinson*, 335 S.W.3d at 146. We need not determine whether the law is "the only, the best, or even a good way" to achieve the stated public interest. *See id.* If the public interest is sufficiently strong, we need go no further—the "nature and strength of the public interest" is enough under *Robinson*. *See id.* at 145. Section 25-2-950 rests on strong, public-welfare interests.

2. The right that Section 25-2-950 impairs is narrow.

The strength of a municipality's zoning interest is mirrored by the weakness of property owners' rights in zoning-burdened property: "an individual has no protected property interest in the continued use of his property for a particular purpose just because such use has commenced or a zoning classification has been made." *Mbogo*, 2018 WL 3198398, at *5 (citing *Benners*, 485 S.W.2d at 778); *accord City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (also citing *Benners*). The majority opinion's distinction between using property and leasing it is, for these purposes, of no material difference. An owner's lease of his or her property is a use of the property, and the tenant is leasing the property so he or she can use it. In fact, the Assembly Clause portion of the majority opinion bears this out when it considers the tenant-affecting ordinance to be "[t]he regulation of property use." *See ante* at —— ("The regulation of property use is not, in and of itself, a compelling interest.").

But even if the two uses are distinct, it is possible to interpret Section 25-2-950 as constitutional under this factor. Under Section 25-2-950 property owners may still lease their property. They must simply lease it for 30 days or more or make it their homestead. Therefore, the right that Section 25-2-950 impairs is narrow.

3. Section 25-2-950 only lightly impairs the short-term-rental right because of the grace period until 2022.

"[I]mpairment of ... a right may be lessened when a statute affords a plaintiff a grace period," *Tenet Hospitals*, 445 S.W.3d at 708, "or a reasonable time to protect his investment," *Mbogo*, 2018 WL 3198398, at *7. The Fifth Court of Appeals resolved this third factor against unconstitutionality because, though the business owner "did not believe that he could get a fair price" in selling his business, "despite *never* listing his property on the market," that did not equate to an "abus[e of] legislative power" by the city. *Id.* (emphasis in original).

In contrast here, the majority opinion relies simply on "a loss of income for the property owners." *See ante* at ——. Though no doubt important, loss of income is not enough under *Robinson*. Loss of investment is the touchstone. *See Mbogo*, 2018 WL 3198398, at *7; *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (lack of "avenue for recoupment" of "existing investment" was relevant). There is no showing that the Property Owners cannot recoup their investments in their rental properties before April 2022. Also, even shorter grace periods than three years have been sufficient elsewhere. *See Tenet Hosps.*, 445 S.W.3d at 708. Time allowed to mitigate investment loss makes any impairment "slight." *See White Deer Indep. Sch. Dist.*, —— S.W.3d at ——, 2019 WL 5850378, at *8. Just because the property owners are not making as much profit as they could with unfettered rights to short-term rentals does not mean their property right has been unconstitutionally impaired.

***22** In sum, under *Robinson*, Section 25-2-950 is not a retroactive law, and, even if it were, it is constitutional under the three-factor test.

II. The Assembly Clause

I also disagree with the majority opinion's holding that Section 25-2-795—the ordinance establishing certain occupancy limits for short-term rentals—must withstand heightened due-process scrutiny, instead of simply rational-basis review. It purports to reach this holding based on the Assembly Clause in the Texas Bill of Rights, which says: "The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance." Tex. Const. art. I, § 27.

A. The text-informing history of the Assembly Clause

The majority opinion formulates the rights granted by the Assembly Clause by importing dictionary definitions of "assemble," "common," and "good." It uses those definitions to conclude that the Assembly Clause protects citizens' "right to physically congregate, in a peaceable manner, for their shared welfare or benefit." *Ante* at ——.

"When identifying fundamental rights, ... an exacting

historical and textual analysis" is required. *In re J.W.T.*, 872 S.W.2d 189, 211 (Tex. 1994) (Cornyn, J., dissenting from denial of reh'g) (emphasis added). And when we seek to understand constitutional history, "it is important to get that history right before engaging in the complex and separate task of judging how such insights might or might not be applied to contemporary legal problems." Saul Cornell, *"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 Fordham L. Rev. 915, 934 (2015).

Historically, Texas is not the only state whose constitution has a bill of rights like that of the U.S. Constitution. And Texas's Assembly Clause is not the only one to limit its state constitutional right of assembly to the purpose of furthering the "common good." Such language was common in many of the early state constitutions. Similar language can be found in the constitutions of Pennsylvania (1776), Vermont (1777), North Carolina (1776), Massachusetts (1780), and New Hampshire (1783). *See id.* at 931–32. Although individuals are the holders of the right to assemble, its exercise is framed as a civic enterprise. *Id.* at 932. Hence, there is a historical difference between the right to gather to "inflame passions" and the right to gather to "promote reasoned discourse." *See id.*

It is also important to note that a limitation of the right to assemble to matters involving "the common good" was initially included in the U.S. Constitution's Bill of Rights. *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tulane L. Rev. 565, 571–72 (2010). During House debates, there was much discussion over whether the right to assemble should be limited to matters involving "the common good." As one representative told another, if he "supposed that the people had a right to consult for the common good" but "could not consult unless they met for the purpose," he was in fact "contend[ing] for nothing." *Id.* at 572 (quoting 1 *Annals of Cong.* 760–61 (Joseph Gales ed., 1834)). In other words, though there was concern that the state would interpret the "common good" limitation to oppress minority or dissenting political viewpoints, none disputed that the right of assembly was focused on promoting open, civic discourse and deliberations on matters of public welfare. *See* Cornell, *"To Assemble Together for Their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech, supra* at 932 & n.154. While the language limiting the right to assemble was initially retained by both the House and the Senate, it ultimately was removed before passage. Inazu, *The Forgotten Freedom of Assembly, supra* at 573 (citing S. Journal, 1st Cong., 77 (Sept. 9, 1789)).

***23** The Texas Constitution was established in 1876 with this wealth of history to draw upon. It did not recognize an unfettered right to assemble for whatever purpose and in whatever manner at whatever time of day, as the majority opinion suggests. It instead limited that right to assemble in two important ways: it must be peaceable, and it must be for the citizens' common good. The majority opinion distinguishes *"their* common good" from "*the* common good" but ignores that the assembly right is granted to "citizens" rather than to "people" more broadly. *Compare* Tex. Const. art. I, § 27 (assembly right for "citizens"), *with id.* §§ 9 (protecting "people" from unreasonable searches and seizures), 34 (granting "[t]he people" certain rights to hunt, fish, and harvest wildlife). The drafters' specific use of "citizens" implies a link to public discourse that using "people" does not.[1]

Historically and textually, the Assembly Clause assures Texans the fundamental right to peaceably gather for purposes of meaningful civic discourse without fear of retribution. The Clause goes hand in hand with freedom of speech; it ensures that those who speak may have an audience. This is why, as the majority opinion recognizes, the Supreme Court of the United States regularly addresses speech and assembly jointly. *See* Inazu, *The Forgotten Freedom of Assembly*, *supra* at 597.

The City of Austin has passed limitations on certain short-term rentals that on their face have nothing to do with assembling for the common good to participate in civic discourse. The City believes it has evidence to support that short-term rentals give rise to non-peaceable assemblies disconnected from citizens' common good. The City's restrictions, then, are assembly-neutral zoning regulations that have a rational basis. To reach a contrary conclusion could lead to a challenge to every statute or ordinance regulating conduct that involves people "assembling" together, including trespass and anti-camping statutes. Instead, such enactments should be susceptible to assembly challenge only as enactments targeting non-"common good," non-peaceable assemblies.

The majority opinion also does not give due weight to the phrase "in a peaceable manner" in its analysis. As the Court of Criminal Appeals recognized, the Assembly Clause "specifically limits its protection to 'peaceable assembly.' " *Ferguson v. State*, 610 S.W.2d 468, 470 (Tex. Crim. App. 1979).[2] This matters because the City relies on evidence of (i) short-term rentals' harms to "public health, public safety, the general welfare, and preservation of historic neighborhoods" and (ii) "concerns ... about short-term rental properties that were poorly maintained, that had code violations, and that generated

police and fire reports." The City says that it uncovered evidence of over-occupancy in short-term rentals, which affects "fire safety" and "overwhelm[s] existing wastewater systems." It heard complaints about short-term tenants' "dump[ing] trash in the neighborhood"; "engag[ing] in public urination"; public intoxication; and "open drug use, including at one rental next door to a home with a five-year old child." It heard complaints about illegal parking, "noise, loud music, vulgarity, and other negative impacts of having a 'party house' " environment. And even when City code personnel have cited short-term tenants for misconduct, the misconduct often continues because "[s]ome short-term rental operators completely ignore the concerns of neighbors, and do not regulate tenant misconduct."

***24** All this and more may bear on an inquiry into peaceable assembly for citizens' common good. But the majority opinion never undertakes such an inquiry, despite the plain constitutional text. Instead, it sets up the strawman that the City's concerns are limited to "reduc[ing] the likelihood that short-term rentals would serve as raucous 'party houses' ... and ... reduc[ing] possible strain on neighborhood infrastructure," overlooking the City's other public-health and public-safety concerns. *See ante* at ——. In doing so, it considers Section 25-2-795 to be mere "regulation of property use." *See ante* at ——.

Analyzing peaceableness requires a broader view. The concept's role in Texas jurisprudence suggests why. The Court of Criminal Appeals once struck down as unconstitutional a statute proscribing "any collection of more than two picketers either within fifty feet of any entrance to picketed premises or within fifty feet of each other" in part because the statute failed to consider "the peacefulness of the group, the lack of obstruction to the flow of traffic, or the level of noise, if any, generated by the picketers." *Olvera v. State*, 806 S.W.2d 546, 552 (Tex. Crim. App. 1991); *cf. De Jonge v. Oregon*, 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937) ("[C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime."). Relatedly, driving while intoxicated is "a breach of the peace," for purposes of a warrantless arrest. *See Banda v. State*, 317 S.W.3d 903, 912 n.4 (Tex. App.—Houston [14th Dist.] 2010, no pet.). And so is "curs[ing] and creat[ing] a disturbance" when a peace officer is investigating a complaint. *See Johnson v. State*, 481 S.W.2d 864, 865–66 (Tex. Crim. App. 1972).

Loud noise. Obstructing infrastructure. Flouting law enforcement. Public disturbances. Threats to public safety. All these may make an assembly non-peaceable and have nothing to do with civic discourse. And the City believes that it has evidence of short-term rentals causing all these. To determine whether the City is right, we should examine what ties all these examples together as breaches of the peace disconnected from the common good. The majority opinion eschews a full peaceableness or "common good" analysis, however, sidestepping what the plain constitutional text requires.

B. Texas courts conceive of fundamental rights much more narrowly.

The majority opinion is also out of step with Texas "fundamental right" precedent. When litigants plead constitutional violations of allegedly fundamental rights, Texas courts are typically more circumspect than the majority opinion is in defining the scope of the right at issue. By not giving due weight to the concepts of peaceableness and citizens' common good in its holding that "the right to assemble granted by the Texas Constitution is a fundamental right," thereby requiring strict scrutiny, the majority opinion sweeps too broadly. *See ante* at ——.

It has no limiting principle. The effect of the majority opinion's view is that any regulation affecting any activity, anywhere in Texas, is subject to strict-scrutiny review so long as more than one person is involved. This view will have exactly the kind of far-reaching effects that the Retroactivity Clause would have had if the Supreme Court had not prevented it from being interpreted overly literally. *Cf. Robinson*, 335 S.W.3d at 138–39 (quoting *Texas Water Rights Comm'n*, 464 S.W.2d at 648).

Consider how the majority opinion's sweeping approach might undermine other common-sense results. When a student's parent challenged a statute prohibiting students from participating in extracurricular activities, no matter where they take place, unless the student maintained a 70% grade average, the Supreme Court of Texas considered the right at issue to be "the right to participate in extracurricular activities." *See Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 557–60 (Tex. 1985). But what if the Court, like the majority opinion here, couched the right more generally as the right "to get together or congregate"? That would encompass extracurricular activities on campus or elsewhere. The Supreme Court then would have analyzed the parent's challenge under

heightened scrutiny. Instead, it disposed of the challenge on rational-basis review. *See id.*

***25** Elsewhere, this Court upheld a Travis County park rule restricting access to a park known for nude sunbathing to people over 18 years old. *See Central Tex. Nudists v. County of Travis*, No. 03-00-00024-CV, 2000 WL 1784344, at *1, *4, *8 (Tex. App.—Austin Dec. 7, 2000, pet. denied) (not designated for publication). Nudist parents who wanted to bring their children to the park challenged the rule, but this Court held that the rule did not infringe on any fundamental right and did not "affect the ability of the [parents] or other naturist parents to associate with their children, but regulate[d] only where such associations may occur." *See id.* at *3–4, *6. The parents could not congregate with their children anywhere they pleased. But, here, the majority opinion seems to say that assembly rights are fundamental no matter where they are exercised.[3]

The majority opinion is inconsistent with "fundamental right" precedent because it couches the right at issue far more broadly than Texas courts traditionally would.

C. Neither of Texas's high courts have taken the novel step that the majority opinion takes today.

Finally, the majority opinion oversteps our Court's role as an intermediate court by declaring a fundamental right to congregate without fully analyzing peaceableness or the advocacy of a matter of public welfare. We should instead leave this function to our state's two high courts.

Declaring rights fundamental, and thus beyond ordinary democratic give-and-take, is a weighty matter. *See, e.g.*, *Obergefell v. Hodges*, —— U.S. ——, 135 S. Ct. 2584, 2604–06, 192 L.Ed.2d 609 (2015) (holding that federal Due Process and Equal Protection Clauses forbid denying fundamental right to marry to same-sex couples and noting that that holding places right "beyond the reach of majorities and officials"). Declaring fundamental the right to congregate, without any real qualification, is a novel and big step into this weighty area because "[e]conomic regulations, including zoning decisions, have traditionally been afforded only rational relation scrutiny." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 939 (Tex. 1998).[4]

***26** The majority opinion recognizes that neither the Supreme Court of Texas nor the Court of Criminal Appeals of Texas has declared an unbounded right to congregate to be fundamental. As noted above, the Court of Criminal Appeals considers the Assembly Clause to be "specifically limit[ed] ... to 'peaceable assembly.' " *Ferguson*, 610 S.W.2d at 470. And history provides the important context that peaceable assemblies are only protected to the extent they implicate the common good, whether advocating majority or minority viewpoints.

Because the high courts have not yet taken this step, we should refrain from doing so. *Cf. Ex parte Morales*, 212 S.W.3d 483, 490–93 (Tex. App.—Austin 2006, pet. ref'd) (refusing to declare "adult consensual sexual activity" to be fundamental right); *In re Living Ctrs. of Am., Inc.*, 10 S.W.3d 1, 6 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding [mand. denied]) (refusing to declare "the fair administration of justice" to be fundamental right). We should refrain even more because the two interpretations of assembly rights advanced by the majority opinion—that "the purposes of assembly" are not limited "to the common good" or to "petitioning the government"—have not "been readily acknowledged in legal and political discourse." *See* Inazu, *The Forgotten Freedom of Assembly, supra* at 576–77. Indeed, the majority opinion's view is called into question by hundreds of years of historical and legal precedent.

For these reasons, I dissent from the majority opinion regarding due process. I would review Section 25-2-795 under the rational-basis test because it is a zoning law supported by the City of Austin's inherent police powers, is supported by a lengthy record, and does not impinge upon any citizen's right to peaceably assemble to advocate for the common good.

I would affirm the trial court's grant of the City's no-evidence motion for summary judgment.

All Citations

--- S.W.3d ----, 2019 WL 6336186

Footnotes

1 The parties agree that, as a practical matter, type-1 status is determined based on whether the owner claims the property as a homestead for tax purposes. *See* Austin, Tex., Code § 25-2-788.

2 The Property Owners bring their privacy, assembly, and association claims within the framework of the due-course-of-law and equal-protection clauses of the Texas Constitution.

3 The Property Owners' motion for summary judgment did not include their request for attorney fees.

4 Ignoring recent precedent from our high court, the City incorrectly engages in a vested-rights analysis to determine whether the ordinance is unconstitutionally retroactive. *See Robinson*, 335 S.W.3d at 143 ("What constitutes an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity.").

5 We therefore do not address the Property Owners' remaining challenges to this provision.

6 The dissent argues that the Assembly Clause's use of the word "citizen" limits the right to matters of public discourse. *See post* at ——. But the word "citizen," as it is used in this clause and in thirteen other clauses of the Texas Constitution, simply describes the class of persons to whom the right applies; it does not delineate the substantive scope of the right itself. *See* Tex. Const. art. I, §§ 19 (due course of law), 20 (outlawry), 23 (right to bear arms), 25 (quartering of soldiers), 27 (assembly and petition); art. 3, §§ 6–7 (qualifications for senators and representatives), 49-b (veterans' land board); art. 4, § 4 (qualifications for governor); art. 5, §§ 1-a (state commission on judicial conduct), 2, 7 (qualifications for judiciary); art. 5, § 2 (voter qualification); art. 9, § 9 (hospital districts); *American Heritage Dictionary* at 339 (defining "citizen" as "person owing loyalty to and entitled ... to the protection of a state or nation").

7 The dissent suggests that we have overstepped our role as an intermediate court "by declaring a fundamental right to congregate without fully analyzing peaceableness or the advocacy of a matter of public welfare." *See post* at ——. But the fact that we have rejected the dissent's view that the Texas Assembly Clause is limited to advocacy of a matter of public welfare does not mean that we have not taken that argument into account—to the contrary, we address the matter at length. And we note that even if Texas' assembly clause is so limited, the City's ordinance bans assemblies without regard to their content or purpose. We likewise acknowledge that non-peaceable assemblies are not protected by the Assembly Clause, but the City's short-term rental ordinance forbids assemblies whether peaceable or not. Finally, the dissent states that we should leave the determination of fundamental rights to Texas's high courts because doing so is "a novel and big step into [a] weighty area." *Post* at ——. But our duty as a court requires us to address those matters that are properly before us, including the identification and protection of fundamental constitutional rights. *See* Tex. R. App. P. 47.1 (requiring appellate courts to "hand down a written opinion that ... addresses every issue raised and necessary to final disposition"); *Obergefell v. Hodges*, — U.S. ——, 135 S. Ct. 2584, 2598, 192 L.Ed.2d 609 (2015) ("The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.").

8 Because the word "including" is a term of enlargement and not of limitation or exclusive enumeration, the ordinance applies to assemblies other than "wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity." *See Republic Ins. Co. v. Silverton Elevators Inc.*, 493 S.W.2d 748, 752 (Tex. 1973) (reasoning that it is a "well settled rule that the words 'include,' 'including,' and 'shall include' are generally employed as terms of enlargement rather than limitation or restriction").

9 Because we conclude that section 25-2-795 violates the constitutional right to assemble, we do not reach the challenges based on the constitutional rights of association, movement, and privacy. But here privacy rights are implicated in our right-of-assembly analysis. The Texas Constitution "guarantee[s] the sanctity of the individual's home and person against unreasonable intrusion." *Texas State Emps. Union*, 746 S.W.2d at 205; *see* Tex. Const., art. I, §§ 9 (prohibiting unreasonable searches and seizures), 25 (prohibiting quartering of soldiers in houses). State and federal courts have consistently held that the right to privacy within the home extends to temporary lodging, including hotels, motels, and boarding houses. *See, e.g., Minnesota v. Olson*, 495 U.S. 91, 96–97, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (holding that overnight guest had expectation of privacy); *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) (concluding that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures"); *State v. Rendon*, 477 S.W.3d 805, 810–11 (Tex. Crim. App. 2015) (noting that Fourth Amendment protections against warrantless searches extend to "other dwelling place, including apartment"); *Luna v. State*, 268 S. W.3d 594, 603 (Tex. Crim. App. 2008) ("An 'overnight guest' has a legitimate expectation of privacy in his host's home."). Included in the right to privacy is the right to be free from "government action that is intrusive or invasive." *City of Sherman v. Henry*, 928 S. W.2d 464, 468 (Tex. 1996). A violation of this privacy interest turns not on the conduct undertaken by the individual, but on whether the "government impermissibly intruded on [his] right to be let alone," as the Property Owners allege here. *Id.* As the city concedes, enforcement of section 25-2-795 requires visual monitoring by the City or its agents of private activities to detect whether the property owners or tenants are violating the restrictions on how many people are in a bedroom or whether there is a prohibited assembly. *See*

Austin. Tex., Code § 25-2-792 (requiring City to notify neighbors in writing of short-term rental's operation and to provide contact information to report any violations).

1 The majority opinion's response on this point—that only "citizens" are granted the Texas Assembly Clause's rights—introduces another problem. *See ante* at —— n.7. The majority opinion's position *must* be that the "citizens" protected by the Texas Constitution are unlimited—citizens of Texas; of Oklahoma; of Virginia, like Messrs. Jefferson and Henry in the majority opinion's hypothetical, *see ante* at ——; etc. For if only Texans are clothed with the Texas Constitution's assembly rights, then Section 25-2-795 is not unconstitutional in every respect as is required to sustain a facial constitutional challenge. The City of Austin could still constitutionally apply the ordinance to short-term rentals made to non-holders of Texas assembly rights—non-Texans. In this way, the majority opinion's holding reaches beyond what its reasoning supports: either it invalidates Section 25-2-795 even for people who have not been shown to be holders of Texas assembly rights, or it atextually conflates the constitution's use of the distinct terms "citizens" and "people," despite the drafters' considered choice to use the two different terms.

2 Inazu, whom the majority opinion relies on, recognizes the peaceableness limitation. He describes the First Amendment "text handed down to us" as "convey[ing] a broad notion of assembly in two ways. First, it does not limit the purposes of assembly to the common good, thereby implicitly allowing assembly for purposes that might be antithetical to that good (although constraining assembly to peaceable means)." *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tulane L. Rev. 565, 576 (2010).

3 The majority opinion relegates to a footnote the "privacy rights [that] are implicated in [its] right-of-assembly analysis." *See ante* at —— n.9. The majority opinion does not divine a difference between federal and state privacy rights and relies on opinions from the Supreme Court of the United States. *See id.* But the footnote fails to consider the similar ordinance upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). There, the ordinance

> restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "(o)ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Id. at 2, 94 S.Ct. 1536. The Court upheld the ordinance, holding that the suit "involve[d] no 'fundamental' right guaranteed by the Constitution, such as ... the right of association ... or any rights of privacy." *Id.* at 7, 94 S.Ct. 1536 (internal citations omitted). The majority opinion's footnote does not attempt to distinguish *Village of Belle Terre*.

4 The majority opinion considers Section 25-2-795 to be a zoning ordinance because, in holding Section 25-2-795 unconstitutional, it relies on authority instructing that "[w]e must 'not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling.' " *See ante* at —— (quoting *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009)). *Barr* involved the fundamental right of free exercise of religion, which is not at issue here. *See* 295 S.W.3d at 305–06. The majority opinion does not explain how Section 25-2-795 can be a zoning ordinance while Section 25-2-950 "does not advance a zoning interest." *Compare ante* at —— (no zoning interest), *with ante* at —— (zoning).

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RJ Lott

From: Jim Brown
Sent: Tuesday, June 2, 2020 12:41 PM
To: CDPlanning
Cc: CD Director; Lisa Grueter
Subject: [CD Planning]FW: Comments to be added for the record concerning Short-Term Rentals in Chelan County
Attachments: Commissioners 6_1_2020.docx

Jim Brown
Director
Chelan County Community Development
316 Washington Street, Suite 301
Wenatchee, WA 98801
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From: Stan Winters <winterss1@me.com>
Sent: Tuesday, June 2, 2020 12:34 PM
To: CD Director <CD.Director@CO.CHELAN.WA.US>; Jim Brown <Jim.Brown@CO.CHELAN.WA.US>; Lisa@berkconsulting.com; Bob Bugert <Bob.Bugert@CO.CHELAN.WA.US>; Doug England <Doug.England@CO.CHELAN.WA.US>; Kevin Overbay <Kevin.Overbay@CO.CHELAN.WA.US>; Prosecuting Attorney <Prosecuting.Attorney@CO.CHELAN.WA.US>
Cc: communitycouncil@peshastin.org; brossing@lstc.edu
Subject: Comments to be added for the record concerning Short-Term Rentals in Chelan County

External Email Warning! This email originated from outside of Chelan County.

Hello,

Please see attached document with comments on short-term rentals in Chelan County.

Stan and Vania Winters
8200 Riverview Rd
Peshastin, WA 98847
509 293-0457

To: June 2, 2020
Chelan County Commissioners
Chelan County Planning Commission
Chelan County Community Development
Chelan County Prosecutor

I would like to add additional comments for the record, following the Planning Commission meeting last week (5/27).

I heard some strong feelings from planning commissioners about protecting the investment that short-term rental owners had made. For example:

1. One or two commissioners commented that STR owners should be able to transfer a STR license in a sale of their property. They discussed how many times the license could or should be transferrable and seemed to settle on "at least once".
2. There seemed to be quite a lot of concern about "fairness" to STR owners who had made an investment based on their ability to use a house as a Short Term Rental.

For responsible Residential Zone residents, this stings a bit. If there is such a thing as a "reasonable person" test, you have to believe that anyone looking at the county zoning charts knew that Short Term Rentals were not and are still not allowed in Residential Zones. The language is clear beyond any doubt:

"No use shall be allowed in a use district that is not listed in the use chart as either permitted, accessory or conditional use, unless the administrator determines, by a written administrative interpretation that may be appealed to the hearing examiner, than an unlisted use is similar to one that is already enumerated tin the use chart and may therefore be allowed."

I live in Peshastin where, to make it even more clear, there were two Administrative Determinations made, plus one Hearing Examiner decision supporting this.

People who purchased a home with the intent of using it as an STR, or converting a home to STR use, had access to this code on the County website, on the Peshastin Community webpage, at the County Community Development office, and several other places.

- If they didn't know short-term rentals weren't allowed, that doesn't constitute an excuse. That is negligence on their part.
- If they did know, they decided to ignore Chelan County Code. I don't know what they were thinking but maybe they thought they could get away with it, that the county wouldn't apply the $750/day fine that is outlined in the code, that since others were doing it they could to? It wasn't an investment they were making, it was a gamble.

I don't understand the interest in focusing on protecting the investment of people who were either negligent or disrespectful of Chelan County Code.

Others in our community didn't purchase property and open short-term rentals because they knew it wasn't allowed. What do you say to those people who followed the rules?

The idea of allowing a short-term rental owner to transfer a license upon sale of the building is wrong. How can someone transfer a license for a short-term rental that was never legal?

The people who have been injured in all of this are not the short-term rental operators who, again, were either negligent in not checking Chelan County code, or who made the conscious decision to ignore the code because it didn't fit their needs. They took a gamble.

The people who have been injured are the neighbors around those short-term rentals who have had to deal with the loss of their neighborhood/community, put up with living next to a mini-hotel with revolving sets of strangers presenting themselves weekly, endure trespassers, noise pollution, and tourists driving up and down their narrow residential streets where their children ride bikes and play basketball.

And the other group who may have been injured are those responsible citizens of Chelan County who abide by the law and refrained from joining the STR commercial industry. How do those people look now? Don't they look like people who did the right thing, causing them to lose out on an opportunity that others (illegally) took advantage of? And now

I think the commissioners are concerned about protecting the wrong people.

I am asking you to protect the families who purchased homes in our residential zones and who have acted in good faith through all of this debate. The code should remain as it is with no Short Term Rentals in Residential zones.

Sincerely,

Stan

Stan and Vania Winters
8200 River View Rd
Peshastin, WA
98847

RJ Lott

From: Kirvil Skinnarland <runofchelancnty@gmail.com>
Sent: Monday, June 1, 2020 8:59 AM
To: Prosecuting Attorney; Kevin Overbay; Bob Bugert; Doug England; CDPlanning; Jim Brown; CD Director
Cc: lisa@berkconsulting.com
Subject: [CD Planning]RUN Comments on Draft STR Code
Attachments: RUN Comments on STR Code 6.1.2020.pdf

External Email Warning! This email originated from outside of Chelan County.

Attached are the comments from Residents United for Neighbors of Chelan County on the revised draft of the STR code released on May 21st 2020. These comments replace those submitted on May 5th, 2020.

Steering Committee for Run

Residents United for Neighbors
runofchelancnty@gmail.com

June 1, 2020

Chelan County Planning Commission
316 Washington Street, Suite #301
Wenatchee, WA 98801

RE: Revised Chelan County Draft Short-term Rental Code

Dear Commissioners,

We are revising our previously submitted comments (on May 5th) with the release of the new draft code on May 21st, 2020.

We make these line-by-line comments while also underscoring our legal position, argued in the Bricklin and Newman Legal Memorandum (submitted on 5/13/2020), that since STRs are not listed in the current District Use Chart, they are currently not allowed. Only B & Bs, where the property is the principal residence of the owner or operator, with owner on site during rentals, are currently permitted in residential zones. Guest inns are permitted with a CUP but the owner/operator must live on site. All other homes with absentee-owners must be sunsetted; they could be legal as long-term rentals, but not short-term rentals.

We also would like to emphasize the following policy guidance from the County's Comprehensive Plan:
Policy LU 1.2: *Protect residential neighborhoods from impacts associated with incompatible land uses through application of development standards and permit conditioning. Rationale: Incompatible land uses located in close proximity to residential neighborhoods may create adverse impacts which could lead to a reduction of the high quality of life for the County residents.* LUE Pg 15/29

Chapter 11.04 District Use Chart
Section 11.04.200 –
Only Tier 1 homes should be allowed in residential neighborhoods. Tier 2 and Tier 3 should not be allowed in residential areas, even with a CUP.

Rationale:

1. Tier 2 homes are commercial uses and are not compatible in a residential setting. Even if the County were to require CUPs and adherence to standards, it is unlikely that the County would have adequate staff to administer the CUPs and ensure enforcement. Moreover, the conversion of single family homes into investment property by absentee owners is having a significant adverse impact on the supply and affordability of housing for full time residents of the County.
2. Tier 3 homes should not be allowed at all in residential zones even with a CUP. These are homes which exceed the proposed occupancy limit and are the ones that turn into party houses. They are

unacceptable at any time in residential neighborhoods. This type of use is clearly commercial and should be restricted to commercial zones.

3. Tier 1 STRs, along with the currently allowed Bed and Breakfasts and Guest Inns (with a CUP) provide adequate opportunity for accommodating visitors in residential zones while ensuring the protection of the quality of life of full time residents as required by policy in the Comprehensive Plan.

Section 1: Purpose – We would like to see a third purpose added which addresses the need to protect the supply of housing for purchase and long-term rental by full time residents of Chelan County.

Section 2: Type, Number and Location –

(A) Type

Tier 1 – Units in this tier must be the principal residence of the owner, meeting the same requirement as Bed & Breakfasts today. The dwelling unit may not be rented when the owner is absent from the property. We think it is unworkable to set a limit on the number of absentee nights as it is impossible to monitor and enforce a provision like this.

(B) Number

We favor only Tier 1 Units in residential areas.

Tier 1 STRs must be included in both the 1% growth rate and in the 5% calculation.

(C) Zones Allowed

See Comments above on where Tier 1, 2 and 3 STRs can be allowed.

(D) Leavenworth-Lake Wenatchee Overlay

We support the establishment of this overlay district and the subareas.

(E) Density Limits

The section is confusing, particularly ii "Exceptions" and iii "Nonconforming."

iii Grandfathering—

- The draft code suggests a criterion of allowing "nonconforming" uses that are "similar" to what was allowed in the subject area at the time the STR was established. The only remotely similar uses allowed prior to this code revision are **owner-occupied** bed and breakfasts (3 or fewer bedrooms rented). One indicator that this is the proper criterion is that Planning Commissioners have stated repeatedly that they have not received complaints regarding owner-occupied B&B's -- which illustrates that such uses are compatible in residential neighborhoods as long as standards are met.
- We agree with allowing existing STRs which are nonconforming as to location (zoning district) to continue use for 2 years, <u>but</u> even during those two years of operation they must come into compliance with all of the Section 3 Short Term Rental Standards.

No STR should receive the benefit of a grandfathering/2-year amortization clause unless it has been granted an occupancy permit as of January 1, 2020. There are too many STRs already in existence without grandfathering units "in the pipeline" and not yet built. Owners can rent these homes as long-term rentals.

Section 3: Short Term Rental Standards

(B) Occupancy

We strongly support limiting overnight occupancy to 10 people including children.

We are opposed to iii—Exceeding Nighttime of Daytime Occupancy. Again, these are the party houses and they should be restricted to Commercial Zones.

(C) Parking

We support Option 2, one off-street parking space per bedroom.

(E) Noise—Amplified music must be prohibited at all times.

Section 4: Land Use Permits

(I) Single Transfer of Ownership—No transfer of ownership should be allowed and this needs to apply to LLCs as well. Many STR's are owned by an LLC. If ownership of the LLC changes in any way, that counts as transfer of ownership.

Thank you for the opportunity to comment.

Barbara Rossing, Kirvil Skinnarland, Bruce Williams, Greg Steeber, George Wilson, Jerry Jennings, Mara Bohman, Stan Winters, Bob Fallon, Pat Thirlby, and Tracie Smith

Steering Committee for Residents United for Neighbors (RUN)