

NO. D-1-GN-17-002142

ROBERT ANDING and ROBERTA	§	IN THE DISTRICT COURT
ANDING	§	
<i>Plaintiffs,</i>	§	
	§	
V.	§	<u>126TH</u> DISTRICT
	§	
CITY OF AUSTIN, TEXAS and	§	
STEVE ADLER, MAYOR OF THE	§	
CITY OF AUSTIN,		
<i>Defendants.</i>	§	OF TRAVIS COUNTY, TEXAS

**PLAINTIFFS’ VERIFIED ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY INJUNCTION AND
WRIT OF MANDAMUS**

I. SUMMARY

A City of Austin ordinance exempts home rentals of 30 days or more from the requirement of a short-term rental (STR) license. Plaintiffs the Andings rent out their home for *30 days or more* and therefore, according to the facial meaning of the ordinance, did not need to obtain an STR license. Yet the City repeatedly investigates and cites them for violating the ordinance requiring an STR license, even when no one is occupying the home or else when the Andings *themselves* are occupying the home. The bone of contention is that the Andings’ sometimes lease to several tenants at a time. Some tenants enter into a written agreement solely amongst themselves as to who will physically occupy the home at a given time. The landlord does not interfere with the tenants’ movements, and despite what the tenants may agree as amongst themselves, every tenant remains liable for the full rent and all other obligations.

The City’s ordinance does not give fair notice that leases to multiple persons violate the ordinance if some or all of those persons do not actually stay at the home for a continuous 30 days. That vagueness renders the ordinance unconstitutional, either

facially or as applied to the Andings. In any event, the City has abused its discretion by applying its own ordinance incorrectly, for which mandamus relief is required.

II. DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff intends to employ Discovery Level 2.

III. PARTIES AND SERVICE

2. Plaintiffs Robert and Roberta Anding are married individuals who reside at 50 Mott Lane, Houston, Texas 77024.

3. Defendants City of Austin (“City”) is a home-rule municipality headquartered in Travis County, Texas. Defendant Steve Adler (“Mayor”) is the duly-elected Mayor of the City. **These defendants may be served upon the Mayor, clerk, secretary, or treasurer at 301 W. 2d Street, Austin, Texas 78701.** Tex. Civ. Prac. & Rem. Code § 17.024(b).

4. The Attorney General of Texas must also be served with the petition and is entitled to be heard because this is a constitutional challenge to an ordinance. Tex. Civ. Prac. & Rem. Code § 37.006(b). **Service of process upon the Attorney General may be made at 300 W. 15th Street, Austin, Texas 78701.**

5. The court has subject-matter jurisdiction because the Andings seek to declare their rights pursuant to the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ch. 37 and to obtain an injunction under Tex. Civ. Prac. & Rem. Code Ch. 65. The Andings seek to vindicate vested property rights under the United States and Texas Constitutions’ due process and due course of law provisions. U.S. Const. amend. V, IX; Tex. Const. art. I, § 19. The Andings do not seek damages, so sovereign immunity

is inapplicable. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 75 (Tex. 2015).

IV. RULE 47 ALLEGATION

6. For purposes of the mandatory allegations of Tex. R. Civ. P. 47, this suit seeks monetary relief of \$100,000 or less and non-monetary relief.

V. VENUE

7. Venue in Travis County is proper in this cause under Sections 15.002(a)(3) and 65.023 of the Civil Practice and Remedies Code.

VI. FACTS

A. The Andings' Austin Vacation Home

8. The Andings, who live in Houston, bought a second home in Austin in 2014. That home, 2105 Big Horn Drive, is a roomy, 5000-square foot home with six bedrooms and six baths. It overlooks the Colorado River below Lake Travis and has a boathouse and dock. The home looks like this:



9. The Andings themselves use the home. When they are not using it, they rent it out.

10. The Andings employ an agent and property manager, Turnkey Vacation Rentals, to manage and lease the home. The Andings' lease discloses this arrangement to the tenants.

11. The Andings rent out the home using a written residential lease. The minimum lease term is 30 days. The lease sometimes has more than one signatory tenant. The lease expressly grants every tenant full possession for the entire lease term but concomitantly obligates every tenant to fulfill all obligations under the lease. The same provision setting out those rights and obligations also states that it is not a default if the tenants under a given lease "enter into their own separate agreement for the sharing of the Property, including agreed upon periods of occupancy." The full rent

is due before the end of the lease term regardless of any such separate agreements that the tenants may enter into amongst themselves.

12. Turnkey has a “Co-Tenant Agreement” form that it provides as a convenience to the tenants when a lease has more than one signatory tenant. Neither the Andings nor Turnkey dictates to the tenants whether the tenants must agree upon co-occupancy terms, much less use the Turnkey form or any other form. The lease stands on its own and can be executed without any Co-Tenant Agreement. The Andings do not care whether all the tenants, none, or some actually occupy the property at any given time during the term of the lease; they demand that the rent will be paid in full and that every tenant is fully obligated to them, the Andings, for all tenant obligations.

B. The Austin Ordinances Allow Multiple-Tenant Occupancy

13. The City requires an STR license if a home “is rented for periods of less than 30 consecutive days.” Austin, Tex. Code of Ordinances § 25-2-788, 789 (owner-occupied and non-owner-occupied homes) (“Ordinances”). The STR ordinance does not provide further details what the quoted language means or otherwise require specific lease language, forms, or co-occupancy requirements.

14. In other ordinances, however, the City affirmatively blesses multiple-occupancy leases. The City allows up to six unrelated adults or ten unrelated seniors over 60 “to reside in a dwelling.” Ordinances § 25-2-511.

15. In addition, a state statute allows up to three adult tenants per bedroom. Tex. Prop. Code § 92.010. The Andings are thus legally entitled to rent out their home to up to 18 adults.

16. The Andings have not rented their home for periods of less than 30 consecutive days. Therefore, they have not obtained an Austin STR license.

C. The City Notices the Andings for Violations

17. In mid-2016, the City began sending code enforcement officers to the Andings' home on a regular basis. The officers began issuing warnings, administrative citations, and notices of violation for renting for short terms without an Austin STR license.

18. The City's notices threatened criminal charges, civil penalties of up to \$1,000 per violation, fees, suspension or cancellation of the certificate of occupancy, utility disconnection, civil injunctions or penalties, and demolition of the home.

D. Administrative Procedures Were Exhausted

19. Rather than bringing charges in municipal court, the City held an administrative hearing on October 14, 2016, for two notices of violation involving separate leases with similar facts. *See* Tex. Local Gov't Code §§ 54.043, 54.044 (authorizing a municipality to adopt an alternative method for administrative adjudication). The administrative hearing, conducted by a hearing officer hired by the City, was an evidentiary hearing with witnesses testifying for both sides and the submission of documentary evidence. The Andings and Turnkey were present and represented by counsel.

20. The Andings argued that their home was not rented for less than 30 days as evidenced by the lease terms and that the STR ordinance does not apply to such leases. The City took the position that if an individual on the lease did not stay for 30 days or more, then the property is rented for less than 30 days.

21. The hearing officer issued a decision on October 21, 2016. The hearing officer determined that the Andings' leases were a "subterfuge" because Turnkey is "involved" in "administering" the side agreement between the tenants. The hearing officer determined that "the totality of the agreements and documents and Turnkey's admitted business plan . . . is to rent the Property to individuals and groups for less than 30 days." The hearing officer fined the Andings \$600.00.

22. The Andings perfected an appeal of the hearing officer's decision under Ordinances § 2-13-31, as authorized by Tex. Local Gov't Code § 54.044(k). Perfection of the appeal included putting up a cash bond of \$600, which remains on deposit with the City. Appeal was to the City of Austin Municipal Court. Review comprised review of the record and oral arguments of counsel. Ordinances § 2-13-31(C)-(G). The Municipal Court affirmed the administrative hearing officer in an order of April 12, 2017, whereupon the Andings filed a motion for new trial. That motion was denied in an order dated May 3, 2017.

23. The administrative hearing and the subsequent appeal to the municipal court exhausted the Andings' express administrative remedies under Texas Local Gov't Code §§ 54.043-044. The City, by contrast, is expressly entitled under Texas Local Gov't Code § 54.044(j) to file a civil suit for penalties and an injunction.

E. The Andings Have Vested Property Rights That Are Threatened

24. As owners of a residential home in Austin, the Andings have a vested property right in the home, its potential rental income stream, and its actual rental income.

25. The Andings have a vested property right in renting to as many occupants as local ordinances and state law allow.

26. The Andings' Austin home is a second home and not their principal residence or homestead; their principal residence and homestead is in Houston.

27. The City forbids homes that are not "owner-occupied"¹ from obtaining an STR license; such owners are now effectively barred from renting out their homes for less than 30 days. Ordinance § 25-2-791(G). The City defines "owner-occupied" as a principal residence or designated homestead.

28. Accordingly, since the Andings may not rent out their home for less than 30 days, their sole rental income potential is from leases of 30 days or more. If they lose the ability to rent for 30 days or more, they will be harmed by the loss of all rental income and the concomitant loss of the ability to keep ownership of their home.

F. The City Continues to Investigate and Cite the Andings

29. The City has continued to enter the Andings' property, investigate and quiz the occupants or persons present, and issue notices of violation.

30. The City has investigated and quizzed the Andings themselves when they stay at their property. The City has investigated and quizzed persons who provide home maintenance services at the Andings' home.

31. The City issued new administrative citations for renting for short terms without a license on April 1, 2017 and April 7, 2017.

¹ Though not the subject of this suit, the term is presumptively unconstitutionally vague. Multiple persons and even entities are legally entitled to own homes. What does "owner-occupied" mean if 15 people or LLC members all own a home? The City offers no guidance.

32. The City’s continuing citations and investigations directly threaten the Andings with complete dispossession or even demolition of their home owing to the escalating penalties authorized by the Austin ordinances.

VII. CLAIMS FOR RELIEF

A. Declaratory Judgment That The Austin Ordinance Is Unconstitutionally Vague

33. The foregoing paragraphs are realleged and incorporated herein by reference.

34. The court should declare that Austin STR ordinance’s requirement of an STR license if a property “is rented” for less than 30 days is unconstitutionally vague either facially or, in the alternative, as applied to the Andings.

35. The United States and Texas Constitutions forbid the State from depriving any person of life, liberty, or property without due process of law or due course of law. U.S. Const. amend. V, IX; Tex. Const. art. I, § 19.

36. A law that forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess at its meaning lacks the first essential of due process because people cannot conform their conduct to the requirements of the law. *See Lynn v. Bd. of Law Examiners*, 03-97-00478-CV, 1999 WL 46683, at *4 (Tex. App. – Austin 1999, no pet.).

37. The STR ordinance gives no guidance what “is rented for periods of less than 30 consecutive days” means. It does not, for example, make clear whether any tenant must physically occupy a property the tenant rents for the entire 30 consecutive days. It does not make clear whether multiple occupancy is permissible, though other ordinances plainly allow such. It does not make clear whether “is rented” refers to an

express lease period or some other parameter or metric by which a tenant's possessory right is measured. Any property owner under any lease of 30 days or more is subject to enforcement for violations of the STR ordinance merely because a tenant under a lease of 30-days or more does not actually stay at the property for the full lease term that the tenant is obligated by the lease to pay for.

38. The STR ordinance is facially vague because a person of common intelligence cannot determine whether a lease of 30 days or more is valid if one or more tenants do not actually reside in the property continuously for 30 days or more. Can one tenant rent for 30 days but only stay for one weekend? Can 13 tenants pool their funds to rent for a year and then divide up their time by an agreement solely amongst themselves?

39. In addition or in the alternative, the STR ordinance is vague as applied to the Andings. Other Austin ordinances affirmatively allow multiple persons to occupy a residence. Nevertheless, when the Andings rent to multiple persons for 30 days or more, the City applies the STR ordinance to the Andings. The Andings' leases are for 30 days or more, and to one or several tenants. The Andings do not dictate to their tenants any physical occupancy requirements, and tenants are always free to determine their own movements. Whether tenants, solely amongst themselves, agree to divvy up their possessory interests does not diminish any single tenant's obligations under the lease with the Andings.

40. Given that leases of 30 days or more are presumptively valid under the ordinance, and that leases to multiple persons are likewise presumptively valid, the Andings will never be free from the threats of prosecution and escalating fines and

property dispossession if any tenant does not physically reside at the property for the full possessory term for which that tenant contracts with the Andings.

41. Worse, if the Andings were required by the ordinance to limit or dictate their tenants' movements, then the ordinance would have other United States and Texas Constitutional infirmities, such as a violation of substantive due process.

42. Accordingly, the Court should declare that Ordinances §§ 788-789 are unconstitutionally vague, either facially or as applied to the Andings.

B. Application For Temporary Injunction

43. The foregoing paragraphs are realleged and incorporated herein by reference.

44. The Andings' seek an injunction under Tex. Civ. Prac. & Rem. Code §65.011(1), (3), and (5).

45. Plaintiff asks the Court to enjoin the City from:

- a. enforcing the existing administrative law judgment;
- b. enforcing any other municipal court judgment or administrative law judgment that may occur before a temporary injunction gets issued;
- c. prosecuting outstanding City of Austin notices of violation of the Austin STR ordinance against the Andings where the alleged violation stems from the Andings renting under a lease with a term of 30 days or more;
- d. continuing to issue notices of violation against the Andings where the alleged violation stems from the Andings renting under a lease with a term of 30 days or more.

46. It is probable that the Andings will prevail against defendant after a trial on the merits because the alleged Constitutional violations are either facial or presumptive as applied to the Andings based on undisputed evidence that the Andings lease for 30 days or more and are not party to any private, separate arrangements between and amongst the tenants as to the divvying-up of the tenants' possessory interests.

47. If the Andings' application is not granted, harm is imminent because the City continues to enforce, notice, and prosecute violations against the Andings, which will result in escalating and severe penalties, property dispossession through revocation of the property's certificate of occupancy, and outright property demolition.

48. Denial of a constitutional right inflicts irreparable injury as a matter of law. *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 368 (Tex. Civ. App. – Amarillo 1979, no writ)

49. The Andings have no adequate remedy at law because money cannot compensate for the denial of constitutional rights.

50. The Andings are willing to post bond.

51. The Andings ask the Court to set their application for temporary injunction for a hearing and, after the hearing, issue a temporary injunction against defendant.

52. The Andings have joined all indispensable parties under Texas Rule of Civil Procedure 39.

C. Request For Permanent Injunction

53. The foregoing paragraphs are realleged and incorporated herein by reference.

54. The Andings ask the Court to set their request for a permanent injunction for a full trial on the merits and, after the trial, issue a permanent injunction against defendant.

D. Original Writ of Mandamus

55. The foregoing paragraphs are realleged and incorporated herein by reference.

56. In addition or in the alternative to an injunction, the Andings request a writ of mandamus to obtain relief from the abuse of discretion by the City and Mayor. They should be ordered to correct a clear abuse of discretion by City officials.

57. The City's administrative proceedings were pursuant to Texas Local Gov't Code §§ 54.043-044, which expressly afford the City further enforcement rights in the district court but do not provide a property owner aggrieved by a City's decision with further judicial review.

58. However, Texas common law allows a party with a right dependent on the act of an official to seek a writ of mandamus from a trial court of competent jurisdiction to compel the official to correct a clear abuse of his discretion. *See Hughes v. McDonald*, 122 S.W.2d 366, 370-72 (Tex.Civ.App. – Austin 1938), rev'd on other grounds, 137 Tex. 21, 152 S.W.2d 327 (1941); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). The failure to analyze or apply the law correctly constitutes such an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The meaning of a

contracts such as a lease is a pure issue of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Only in the case of ambiguity does an issue of fact arise, but the threshold issue of ambiguity is also a matter of law. *Id.*

59. The Andings lease their property expressly for 30 days or more, whether to one or multiple tenants, and the lease provides that every tenant has full possessory rights. Separate agreements between the tenants divvying up their possession are irrelevant to the lease under which each tenant has full possession. The Andings' leases are clear and unambiguous as to these points. It was an abuse of discretion for the City or Mayor to determine otherwise and to enforce the STR ordinance against the Andings.

60. Accordingly, a writ of mandamus should be granted wherein the City and Mayor are ordered to correct their abuse of discretion and apply their own ordinances correctly.

VIII. ATTORNEY'S FEES

61. For their declaratory judgment claim, Plaintiffs the Andings seek such reasonable and necessary attorney's fees as are equitable and just under Tex. Civ. Prac. & Rem. Code § 37.009.

IX. CONDITIONS PRECEDENT

62. All conditions precedent to the Andings' claims for relief have been performed or have occurred.

X. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Robert Anding and Roberta Anding respectfully pray that the Defendant City of Austin be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Andings against Defendant for declaratory judgment as set forth more fully at Section V(A) of this Petition; temporary and permanent injunctions; the grant of a writ of mandamus or certiorari as may apply; attorney's fees; post-judgment interest at the legal rate; costs of court; and such other and further relief to which the Andings may be entitled at law or in equity.

Respectfully submitted,
/s/ J. Patrick Sutton
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ROBERT ANDING and ROBERTA
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Plaintiffs,

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IN THE DISTRICT COURT

V.

_____ DISTRICT

CITY OF AUSTIN, TEXAS and STEVE
ADLER, MAYOR OF THE CITY OF
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§

OF TRAVIS COUNTY, TEXAS

DECLARATION OF ROBERT ANDING UNDER PENALTY OF PERJURY

1. "My name is Robert Anding, a Plaintiff in the captioned case. My date of birth is
JANUARY 10, 1953. I am over 18 years of age, of sound mind, and capable
of making this Declaration. I am a citizen of Texas residing at 50 Mott Lane, Houston, Texas
77024.

2. I declare under penalty of perjury that facts stated in the foregoing Plaintiffs'
Verified Original Petition And Application For Temporary Injunction Or Writs Of Mandamus
Or Certiorari are true and correct."

Robert Anding 5-15-17
Robert Anding date